Sovereignty, Human Rights and the Regulation of Transnational Corporations: A Critical Spatial Analysis of Civil Society Proposals for a Binding Treaty

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Abstract

This article develops a critical spatial analysis of contemporary proposals to regulate transnational corporations (TNCs). Following an analysis of the existing topology of international regulatory space, the article develops a model of alternative spatial orders which would enable TNC regulation and uses this model to critically assess the different spatial orders implicit in the major proposals being tabled by two civil society groupings in the current treaty negotiations at the UN Human Rights Council. It shows that the proposals of the Human Rights NGOs would elaborate an 'imperial sovereignty', with the horizontal extension of the sovereignty of Northern states into the territory of Southern states, while the proposals of the Global Campaign would elaborate a 'global sovereignty' through the vertical dispersing of sovereignty, both upwards and downwards, to elaborate a more emancipatory universal spatial order. Understanding these implicit spatialities enables a deeper assessment of the implications of the different proposals.

Keywords: binding treaty, sovereignty, transnational corporation, human rights, spatiality

Contemporary processes of globalisation have stimulated an interest in questions of spatiality and the transformations of spatial orders. While early accounts of globalisation often portrayed it as a spatial transformation from a patchwork of separate states whose borders were then over-run by multiple 'flows' (of migrants, capital etc), leading to a new homogenous and borderless globality (Albrow 1996), it soon became clear that both the presumed past of separate sovereign states and the newly emerging global spatial order were actually far more complex than represented in that narrative. In order to better understand past and present configurations of both sovereignty and globality a new approach based on a fundamental re-thinking of the 'politics of space' (Lefevre 2009) and the 'topologies of power' (Collier 2009) would be required.

The resulting 'spatial turn' in IR, history, and many other social sciences has recognised that it is impossible to understand the social and political practices of a society without also attending to its spatial categories (Foucault 2000:356, Shah 2012: 60). Spatial analyses recognise that space is socially constructed and that there are often multiple competing spatial frameworks at any given time (Middell and Naumann 2010). Spatial orders are often highly contested because they configure political power in novel ways that serve the interests of particular actors or social groups (Liste 2016). As Santos has argued, the production of space goes hand-in-hand with the expression of particular interests and with particular forms of suppression (Santos 1987: 297).

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One way that particular spatial orders come into being is through legal discourse. When new law is created it configures a certain regulatory space. The topology of this regulatory space determines what is to be regulated and how. A spatial approach to international law therefore sees law as a practice of 'world-making' in that it creates a particular topology of regulatory space that serves the interests of certain actors while undermining the protections of others. Contemporary contestations and negotiations about international law should thus be seen as political struggles regarding the spatial ordering of globality.

The production of international law to regulate transnational corporations (TNCs) is an example of a highly contested political process to elaborate an appropriate topology of regulatory space in the global age. As will be discussed below, attempts to create international law to regulate the social, environmental and economic behaviour of TNCs, particularly as they operate in the global South, have taken place at the United Nations since the 1960s, but to date no such law has come into being.

In this article I build on Hudson's typology of regulatory landscapes (1998) to develop a critical spatial analysis of the proposals to regulate TNCs in international law that are currently being put forward by two civil society groupings (the Human Rights NGOs and the Global Campaign) in the context of the UN Human Rights Council's Open-Ended Inter-Government Working Group on a binding instrument to regulate TNCs with respect to human rights. My approach builds on the understanding that as different actors devise specific legal formulations to try to solve particular problems, they are, intentionally or unintentionally, elaborating an implicit regulatory landscape or spatial ordering of globality. This article seeks to elucidate and critically assess these implicit spatial orders.

The article thus has three main aims. Firstly, it seeks to develop a theoretical framework that will enable us to make sense of the various proposals currently being tabled and to organise them in a conceptually coherent manner. Secondly, by applying that framework, it seeks to understand the spatialities of the different proposals, the processes of their emergence and the broader implications of the suggested spatial re-ordering implicit in each approach. Thirdly, it aims to make a theoretical contribution regarding the potential spatial (re)configurations of sovereignty required to enable TNC regulation.

My argument in brief is as follows. Starting from critical spatial histories of international law that argue that Northern states use international law to facilitate global capital accumulation by diminishing sovereignty beyond their borders and intentionally *not* extending their sovereignty over capital operating in these non- or low-sovereign spaces, I argue that considering ways to reconfigure spatial patternings of sovereignty is fundamental to devising ways to regulate contemporary TNCs. I show that the two main civil society groupings active in the current UN negotiations make proposals that elaborate spatial orderings of sovereignty in significantly different ways and that would lead to vastly different global spatial orders if implemented. The Human Rights NGOs would elaborate what I call 'imperial sovereignty', in which Northern states would extend their sovereignty into the spaces where they had previously sought to keep sovereignty diminished. This imperial sovereignty might limit capital accumulation and enable TNC regulation but it would also further an imperial spatial order. The Global Campaign, in contrast, seek to elaborate what I call 'global sovereignty', in which sovereignty is vertically dispersed upwards to a global level and downwards to the people. This formulation, I argue, would both enable TNC regulation and also promote an emancipatory global spatial order. Understanding these implicit spatialities thus enables a deeper critical assessment of the potential and implications of the different proposals.

The rest of the article proceeds as follows. The next section offers a critical historical analysis of the emergence of the current spatial order of TNC deregulation and elaborates the complex spatial configuration of sovereignty, TNCs and international law which characterises the present moment. Section II introduces Hudson's model of geo-regulatory landscapes and presents a re-working of it which enables the elucidation of various potential spatial reconfigurations of sovereignty. Section III then introduces the current negotiations taking place at the UN Human Rights Council to try to create

a treaty to regulate TNCs under international human rights law and the two major civil society groupings, the Human Rights NGOs and the Global Campaign, that are active in this process. Section IV looks at the Human Rights NGOs and tracks the evolution of their thinking about how to regulate TNCs, highlighting the reconfigurations of sovereignty and the spatiality implicit in their formulations. Section V then looks at the Global Campaign and tracks the very different evolution of their thinking regarding TNCs and the contrasting formulations of sovereignty and spatiality in their proposals. The final section returns to Hudson's typology and reflects on the implications of these two contrasting reconfigurations of sovereignty and the potential spatial orders which they would engender.[1]

I: The Spatiality of Sovereignty, TNCs and International Law

The traditional understanding of why TNCs are difficult to regulate is similar to the early view of globalisation presented above. In this narrative corporations used to operate mainly within the confines of state borders and were straightforwardly regulated by national governments. But when these corporations started to expand their business activities beyond the borders of the state in the 1980s a new regulatory challenge emerged as these corporations escaped the regulatory reach of their home states and yet were not brought under the regulatory control of the host state. In this narrative the traditional spatial model of state sovereignty is taken for granted as unchanging, unchangeable and applied equally to all states everywhere, and the regulatory 'escape' of TNCs is presented as an unintended consequence of processes of contemporary globalisation. From this point of view the task of regulating TNCs requires filling this unintentional regulatory gap. However, several recent critical spatial histories of the development of international law reveal a rather different picture. They help us to better understand the precise contours of the current spatial order, how it came into being and what work it does.

Antony Anghie (2004, 2006, 2009) has argued that international law first emerged in the context of the colonial encounter and that colonialism was central to the resulting spatiality of international law. He argues that the doctrine of sovereignty should not be understood as simply having emerged out of the Westphalian moment in Europe, but that its elaboration must also be placed in the context of the European imperial project. One of its main purposes, he argues, was to create a legal system that could justify European conquest, colonisation and government over non-European peoples. Combined with international laws such as the 'Standard of Civilisation,' it divided the world into 'civilised' and 'non civilised' peoples and constituted an order in which "uncivilized states were not properly sovereign; [and] as such, they lacked rights under international law and could thus be legally attacked and conquered" (Anghie 2009: 293).

Through detailed analyses of how the League of Nations and then the Bretton Woods institutions structured legal engagements with non-European peoples, Anghie argues that international law retained this basic imperial spatiality throughout the twentieth century, serving to create a diminished form of sovereignty for post-colonial Southern states (Anghie 2006:747). In other words, rather than being neutral and creating a topologically 'flat' world, Anghie shows how international law and the sovereignty doctrine itself bring into being an international spatiality of variegated sovereignty between the states of the global North and the global South.

Joshua Barkan's (2013) critical spatial history of the development of international economic law, sovereignty and the corporate form in the context of eighteenth and nineteenth century imperialism further explicates the purpose of this diminished sovereignty that was constructed in the global South. Barkan argues that Northern states developed particular forms of international economic law, and not others, with the specific aim of creating a global spatial order in which transnational corporations operating beyond their territorial borders were 'outside' of sovereign control. As he writes, "understanding sovereignty as a practice, we can see that sometimes sovereignty is best characterized not by the space of the nation-state but by what the nation-state leaves out" (Barkan 2013: 108).

Drawing on Carl Schmitt's definition of the sovereign as 'he who decides on the exception' and Giorgio Agamben's (1998, 2005) argument that the ability to make such exceptions is fundamental to the structure of sovereign power, Barkan focusses on the 'exceptions' that Northern states made for their TNCs by locating them outside of sovereign control. Most fundamentally, TNCs were not subject to any form of restrictive regulation which might limit flows of European and American capital overseas.

He shows that instead of elaborating a global sovereign and recognising corporations as persons in international law – an option that was discussed several times in the nineteenth and twentieth centuries - Northern states instead created a spatial order in which the regulation of corporations was intentionally left to a patchwork of bilateral treaties and national laws such that in practice who regulated corporations and how was subject to the geopolitical relations that governed the international sphere at the time. In this way corporations were not consistently regulated in an agreed manner, but were able to operate in practice when they were backed by the force of a strong state. And if this strong state decided not to regulate its corporations by theoretically deferring to the host state, this enabled corporations working transnationally to avoid regulation and in effect be "cloaked … in sovereign immunity" (Barkan 2013: 102).

His analysis thus suggests that sovereign power and corporate power are ontologically linked. Sovereigns create corporations through law and then give them powers by granting them exceptions to the law. From the sixteenth century when states first granted royal charters which gave corporations legal standing and established corporate immunities and privileges, up to the present, he argues, states have granted corporations a form of sovereignty by granting them exceptions from the law.

Barkan's analysis thus challenges the traditional narrative that corporations emerged from within the confines of the nation-state in the 1980s, and instead shows how corporations have been operating across borders since the very time that they were adopted to the business form. It also shows that TNCs do not 'challenge' (Northern) state sovereignty, but are in fact co-constituted by it. Specifically, Northern states have sought to facilitate their TNCs' overseas activities by creating a very particular spatial order – what he calls the "pockmarked international regulatory structure for transnational corporations" (Barkan 2013:17) - consisting of numerous 'holes' or 'exceptions' within which sovereignty is effectively transferred from states to these corporations.

Taken together, the analyses of Anghie and Barkan enable us to critically re-think the historical development of both the sovereignty doctrine and (the lack of) international law to regulate transnational corporations and to see the connections between the two. Their analyses show how colonial states used international law to create a particular spatial order conducive to global capital accumulation through the diminishment of sovereignty outside of their borders and the transfer of de facto sovereignty in these areas to their overseas corporations. Both scholars argue that this basic structure remained in place even after the formal end of colonialism, as global North states found new ways to use international law to diminish the sovereignty of the states of the global South in order to create deregulatory zones for their TNCs (Anghie 2006:748, Barkan 2013:111).

This spatial order was first challenged in the 1960s and 70s when the newly-independent states of the global South came together as the G77 and tried to establish a topologically 'flat' world of truly equal sovereign states in a democratic international space through what they called the New International Economic Order (Freeman 2024). A key element of this initiative was the call for the development of new international law to regulate TNCs. The approach taken by the global South states at this time was to try to use international law to strengthen their sovereignty so that they would have full economic sovereignty, including over both natural resources and economic actors operating within their borders (Bair 2015). However, even though a Commission on Transnational Corporations was established at the United Nations and an inter-governmental working group set to work on negotiating a Code of Conduct for TNCs, the Northern states refused to accept any significant changes and eventually the Working Group was terminated in 1993, the Commission on Transnational Corporations was abolished in 1994, and the spatial order remained largely unchanged.

By the 1990s most global South states had given up resistance and started instead to try to elaborate strategies for economic growth within this uneven spatial order. In the desire to attract foreign capital into their territories, (partly in order to make sovereign debt repayments) a number of these host states began to adopt a modified version of the strategy used by the Northern states. They started creating a landscape of variegated sovereignty *within their own borders*.

Aihwa Ong (2006) has shown how many Asian states started to create "areas of exception", such as special economic zones and growth triangles within their territories. In these zones many state laws were suspended and neoliberal policies were implemented that were radically different from those in the rest of the country. Laws regarding workers protections and citizen rights were notably suspended in order to enable capital accumulation by TNCs. While de jure sovereignty remains, de facto sovereignty is partially 'given away' to foreign corporations in these new pockmarked zones of exception, such that sovereignty becomes variegated or graduated within state territory. Further studies by other scholars have shown that similar dynamics are at work across much of the global South today (eg. Emel et al 2011, Keshavarzian 2010, Plets 2019, Roux 2019).

Bringing together the analyses of Anghie, Barkan and Ong suggests that the spatiality of contemporary globalisation manifests as an extremely complex topology. Fundamental to this spatiality is a highly intentional patterning of sovereignty, such that sovereignty is variegated both across states and within states and riddled with 'holes' in which it is effectively exercised not by states but by TNCs. This spatiality is seen to be the result of a centuries-long process by Northern states, recently joined by Southern states, to construct a world order conducive to capitalist accumulation by demarcating 'low-sovereignty zones of deregulation' where capital, through the TNC form, can engage in accumulation processes outside the purview of state or society.

This analysis thus suggests that they key to creating a world order in which TNCs *can* be regulated is to challenge and change the existing global pattern of variegated sovereignty. The next section develops models of how this might be done.

II: Sovereignty and Geo-Regulatory Landscapes

A good starting point for developing models of how to reconfigure sovereignty in order to regulate TNCs is Hudson's typology of 'regulatory landscapes' (Hudson 1998). This approach focusses on the spatiality of rules and the activities which these rules seek to regulate. It thus offers a spatial approach to international regulation that can be put to work to address the spatial order of global capital accumulation discussed in the previous section.

Hudson proposes that regulatory landscapes are socially constructed spatial configurations which embody particular spatialities of power and social relations. He suggests that they can be differentiated in terms of the ways in which scales of economic accumulation and political regulation are combined. Thus in a globalising world economic activity can be regulated through one of four potential broad brush regulatory landscapes, which he organises in a matrix according to the degree of boundedness of the economic activity on one axis and the degree of boundedness of political regulation on the other. When economic activity and political regulation take place within state borders we have the regulatory landscape of 'sovereignty and autonomy'; when they both take place across borders we have the regulatory landscape that he calls 'borderless world'; when economic activity takes place within national borders and political regulation takes place across borders we have the regulatory landscape of 'extra-territoriality', and when economic activity takes place across borders but political regulation takes place only within borders we have the regulatory landscape of 'competitive deregulation'.

Building on this approach it is possible to develop a slightly revised formulation which enables a conceptual re-thinking of different possible models of sovereignty which would allow the effective regulation of TNCs. Using the same axes of degrees of economic and political boundedness, it is

possible to conceive of four potential spatial reconfigurations of sovereignty, as shown in figure 1 alongside Hudson's regulatory landscapes model.

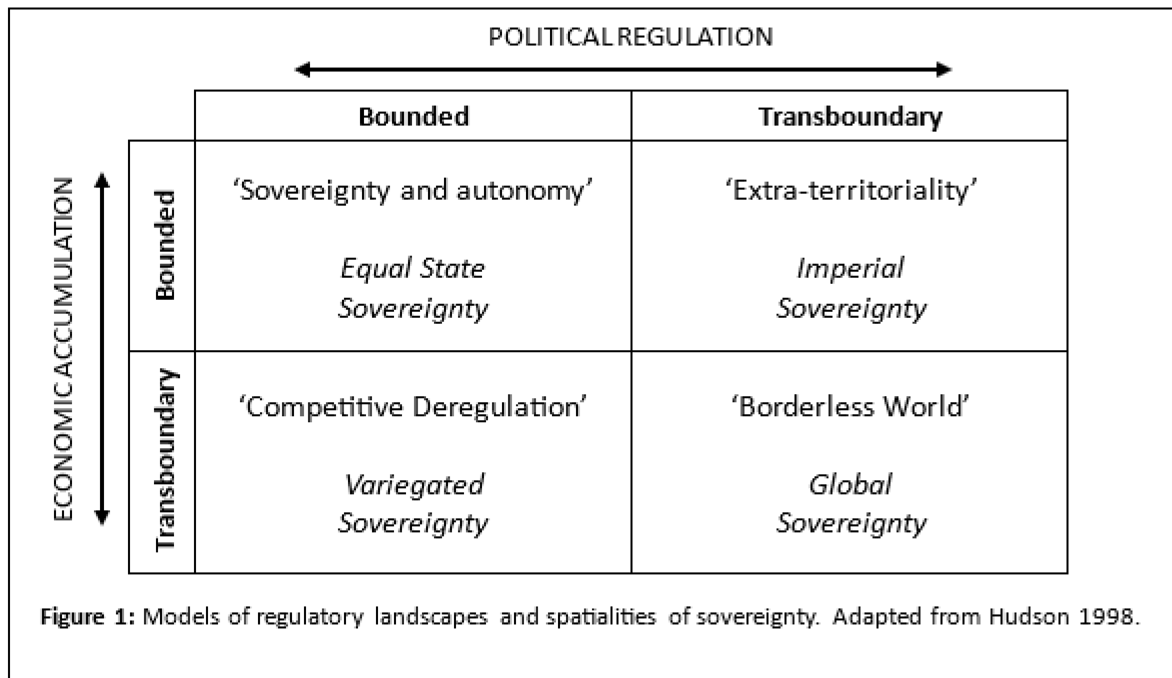

Figure 1: Models of regulatory landscapes and spatialities of sovereignty. Adapted from Hudson 1998.

The existing spatial order of 'variegated sovereignty' with large areas of diminished sovereignty would be located in the lower-left quadrant, where economic action is unbounded but political regulatory power is bounded and limited. The other three quadrants offer potentials for alternative formulations of sovereignty with regard to the regulation of TNCs. The upper-left quadrant is the model of 'equal state sovereignty' – a re-balanced type of Westphalian sovereignty in which both economic activity and political regulation take place within territorial boundaries for *all* states, North and South. The upper-right quadrant represents what we can call 'imperial sovereignty', in which the sovereignty of some (Northern) states is horizontally extended into the territory of (Southern) states through the application of *their* regulatory practices and jurisdiction across borders. The lower-right quadrant represents a 'global sovereignty' in which sovereignty is dispersed vertically to create a new universal jurisdiction and universal regulation such that TNCs would be regulated everywhere by a universally agreed set of universal rules.

Using this framework it is possible to characterise the proposal by global South states in the 1970s to develop a New International Economic Order and a Code of Conduct for TNCs as an attempt to shift the regulatory landscape from 'competitive deregulation' to 'sovereignty and autonomy' by strengthening their sovereignty and thus shifting the international patterning of sovereignty from 'variegated sovereignty' to 'equal state sovereignty'.

Whilst that attempt failed, this model suggests that there are two other broad-brush regulatory landscapes and associated spatialities of sovereignty that could also serve to enable the regulation of TNCs. These options do not seek to strengthen the sovereignty of global South states, and this perhaps helps to explain why global South states have not taken strong positions around either of these options. Instead, as will be shown below, two different civil society groupings have emerged as vigorous promoters of each of these options.

Since the 1990s human rights NGOs and local social movements have been increasingly concerned with the negative impacts of TNCs on people and communities in the global South. Debates and discussions on the issue have taken place in many different forums and several new ideas and

proposals have emerged. Following determined calls from these civil society actors, in 2013 states finally agreed to return once again to discuss the matter at the UN. The next section introduces the contemporary process which is currently unfolding in the UN Human Rights Council, while the following sections analyse the major proposals in light of the theoretical framework developed above.

III: The Current Treaty Negotiations

In 2015 the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG) started work with the remit to create a binding instrument to regulate TNCs under international human rights law. This Working Group is the latest iteration in a long series of attempts to devise international law to regulate TNCs, and the first inter-governmental process to try to achieve this goal using international human rights law. It was initiated by Ecuador, then under the leftist government of Rafael Correa and in the midst of its own protracted legal case against Chevron-Texaco regarding environmental damage due to its oil exploration in the Ecuadorian Amazon (Kimmerling 2013), working alongside South Africa and, most importantly, a large network of civil society organisations known as The Treaty Alliance. To date there have been nine sessions of the Working Group, during which it has moved from elaborating basic elements of the potential approach to slowly negotiating treaty drafts.

The Treaty Alliance was formed in 2012 by a large number of civil society organisations who had been involved in earlier attempts at the UN to create international law to regulate TNCs, and was soon joined by many other NGOs and social movements sharing the same goal. Today it includes over a thousand individuals and civil society organizations (https://www.treatymovement.com/about-us). In the current process they are in many respects the actors that are mainly pushing the process forward. They are carrying out legal analysis, writing policy papers, suggesting elements to go into the treaty and proposing legal formulations.

While the Treaty Alliance is firmly united in pushing for a binding treaty which will effectively bring TNCs under legal control and enable victims of human rights abuses to seek redress, member organisations have different ideas about how this should be achieved and what form the treaty should take. Very broadly speaking, there are two main groupings within the Treaty Alliance. One group consists mainly of professional human rights and social justice NGOs and the other group consists of a more integrated group of NGOs and social movements that are part of the *Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Corporate Power and End Impunity*. In this article I will refer to these two groupings as the Human Rights NGOs and the Global Campaign respectively. These two groupings come to the shared goal of creating binding international law to regulate TNCs from quite different backgrounds and perspectives. As such, despite many areas of overlap their proposals and vision for a treaty contain some interesting and important differences. The next section will look at the Human Rights NGOs, while the following section will look at the Global Campaign.[2]

IV: The Human Rights NGOs

The grouping that I call the Human Rights NGOs is a loose network of a large number of human rights and social justice NGOs. Notable members of this grouping include FIDH, ESCR-Net, the International Commission of Jurists (ICJ), CIDSE, Global Policy Forum (GPF), the European Coalition for Corporate Justice (ECCJ) and the Centre for Research on Multinational Corporations (SOMO). Most of these organisations are headquartered in a major city in the global North and are staffed predominantly by paid, professional staff coming from the global North. While several of them are federations or networks which stretch down to include members and beneficiaries in many countries of the global South, their origin, structure and funding indicates that most of these organisations can be considered to be 'Northern-driven'. Many receive significant proportions of their funding from Northern governments and from the EU and work within the accepted constraints of funding proposals, project evaluations and a focus on producing donor reports with measurable

outcomes. Discussions of how best to achieve these desired outcomes are dominated by international lawyers and framed in legal terms. Argumentation often builds on precedence, drawing on a rich body of case law dealing with TNCs in various countries and in different national and regional courts. Their approach seeks to be 'realistic' and 'achievable', based on considerable knowledge of both the legal issues and politics of international law-making.

During the 1990s these NGOs began to frame the adverse impacts of TNCs as a human rights issue and started to develop the idea that the worldwide actions of transnational corporations could be regulated under international human rights law (Backer 2006: 321). Sam Moyn (2010) has argued that sovereignty and human rights can be seen as two alternative 'schemes of justice' which each offer different understandings of justice and different routes to achieve it. In the sovereignty scheme of justice, questions of rights mainly take the form of questions over the form of the sovereign state and the meaning of citizenship within it, while in the human rights scheme questions of rights are framed as a universal matter based in an international law that, in theory, can transcend and discipline states. He argues that starting in the 1970s there was a shift in the way in which struggles over rights were conceptualised, moving from the particularity of the sovereignty scheme to the universalism of the human rights scheme. However, he also shows that the move from sovereignty to human rights shifted the way in which struggles for rights were practiced. While previous struggles for rights had been led by those seeking rights themselves, the new human rights model was not driven by those in the global South, but rather by international human rights NGOs such as Amnesty International and Human Rights Watch who set up offices in London and New York and produced a team of concerned allies in the North struggling to protect the rights of those suffering in the South. Putting these elements together suggests that the spatial framework of the contemporary international human rights system is both universalising and imperial at the same time.

In what follows I argue that when the Human Rights NGOs started to address questions regarding the impacts of TNCs in the 1990s they brought this dual 'universal / imperial' spatiality with them, and that this has shaped all of their proposals regarding how to regulate TNCs.

The first set of proposals following the re-framing of TNC regulation as a human rights issue emerged in the late 1990s when the Human Rights NGOs started to push the Sub-Commission on the Promotion and Protection of Human Rights, a body of independent experts advising the UN Commission on Human Rights, to set up a Working Group to draft a Code of Conduct for Transnational Corporations. This Working Group, which was established in 1998 and consisted of five legal experts, was heavily influenced by the advocacy and argumentation of these NGOs. Several international human rights NGOs, including Amnesty International, Human Rights Watch, the International Federation for Human Rights (FIDH), the American Association of Jurists (AAJ) and the Europe-Third World Centre (CETIM), working alongside other NGOs such as FIAN International, Friends of the Earth International, SOMO, and the Transnational Institute (TNI), drafted detailed proposals for legal measures to regulate TNCs and many of these proposals found their way into the resulting Code of Conduct, which was finalised in 2003 and called *The Norms on the Responsibilities of Transnational Corporations and Other Business Entities with regard to Human Rights* (Amnesty International 2004, CETIM 2005)

The *Norms* sought to bring about a major paradigm shift in international human rights law. As Bair has argued, the *Norms* attempted to reconcile the universalist framework of human rights with the reality of the purely international framework of the contemporary world order by proposing a kind of 'sovereignty-sharing' between states and TNCs, with both having the obligation to uphold human rights (Bair 2015:169). Instead of obliging states to protect the human rights of people in their territory against potential abuses by companies, the *Norms* sought to place <u>direct obligations</u> on TNCs to respect international human rights law, so that they could be held directly liable under that law, and then to spread this down the supply chain by making it a legal requirement that all TNCs include the obligation to respect all international human rights laws in their private contracts with their subsidiary companies. In this way the parent company of the TNC would regulate its subsidiary companies with regards to human rights. In the event that one of its subsidiary companies operated in the territory of a

state that had not ratified a certain international human rights treaty or was not enforcing it through its domestic legislation, then the subsidiary company would still have to respect those human rights because of the private law clauses in its contract with the parent company. The *Norms* thus sought to focus on those pockmarked zones of deregulation that exist within the territories of states in the global South and to regulate them through a combined Northern state-TNC legal mechanism. Alongside the novel proposed sovereignty-sharing between states and TNCs, it can also be seen that the *Norms* elaborated an imperial spatiality by finding solutions in the global North and then seeking to spread them down to the global South.

However, when states read the *Norms* a major storm broke out. The vast majority were strongly against this new approach and a growing business lobby, represented by the International Organisation of Employers (IOE) and the International Chamber of Commerce (ICC), argued fiercely against it. The Commission effectively killed the *Norms*, and instead appointed Harvard Professor John Ruggie as the 'Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises' to look afresh into the issue of TNCs and human rights (Backer 2006).

Ruggie quickly returned the discussion about TNC regulation to the traditional paradigm of state sovereignty in international law with his 'Protect, Respect, Remedy' framework, which asserted that states, and only states, had the obligation to protect human rights. Alongside this, his framework proposed that companies had the rather weak and undefined 'responsibility' to 'respect' human rights, and that access to remedy for victims should be available. This framework was operationalised in 2011 in a new code of conduct called the *United Nations Guiding Principles on Business and Human Rights (UNGPs),* which proposed that states 'should consider' a smart mix of measures – national and international, mandatory and voluntary – to 'foster' business respect for human rights, while companies should make a policy commitment to respect human rights and instigate a process of 'human rights due diligence' in order to identify, prevent, mitigate and account for how they address their impacts on human rights (UN 2011).

The UNGPs thus lost any notion of the universalist framework of human rights and instead firmly embraced the purely international framework of the contemporary world order. At the same time, however, it retained the imperial spatiality of the *Norms* through its elaboration of company-driven 'human rights due diligence' which would 'encourage' Northern-owned corporations 'to try to ensure' that they and their subsidiaries 'respected' human rights when operating in the global South. While the *Norms* sought to fix this process in binding contractual law, the UNGPs instead elaborated a voluntary process in the framework of 'corporate social responsibility' (CSR). In this neutered form the UNGPs were adopted by states in consensus and also met the approval of the business community.

Most of the Human Rights NGOs, however, were not satisfied and they decided that they would try again to formulate new ideas for how TNCs could be made to respect human rights in a binding and enforceable way. As it became clear that any 'acceptable' future framework would have to be anchored in traditional notions of state sovereignty, the Human Rights NGOs began to develop two new approaches, both based on the notion of home-state regulation. These two approaches have now become their central proposals in the current treaty negotiations.

One approach was to strengthen the UNGPs by developing international law *requiring* states to adopt legislation requiring companies to carry out human rights due diligence. The other was to argue that states' obligations regarding human rights do not end at their borders, but rather that states also have extra-territorial obligations to protect human rights. As I will show, both of these approaches retain the imperial spatiality of the traditional human rights regime and seek to put the emphasis on Northern states to hold accountable 'their' TNCs for human rights violations that occur in the territories of other states. In terms of our conceptual framework, they can be seen as attempts to shift the regulatory landscape to one of 'extra-territoriality' and to reconfigure the spatiality of sovereignty from 'variegated sovereignty' to 'imperial sovereignty' as they implicitly propose horizontally extending the sovereignty of Northern states into the territory of Southern states.

Human Rights Due Diligence (HRDD) Legislation

In response to the UNGPs some of the Human Rights NGOs started to work at the national level to push Northern states to enact domestic laws that would make human rights due diligence in the global supply chain a legal requirement rather than a voluntary activity. In legal terms this is generally domestic civil (tort) legislation with extraterritorial effects. They proposed that human rights due diligence laws should be legislated requiring companies domiciled within a state's jurisdiction to identify, assess and mitigate the risk of human rights violations throughout its global supply chain. And they called for the creation of civil liability regimes that would then enable foreign victims to sue the parent company in the home state.

Their efforts met with significant, if partial, success. The French Duty of Vigilance Law was adopted in 2017, and imposes due diligence obligations on large companies registered in France regarding human rights, fundamental freedoms, health and safety, and the environment throughout their operations and supply chains; the Norwegian Supply Chain Transparency Act was adopted in 2022 and imposes due diligence obligations on larger companies to identify, prevent and mitigate possible adverse impacts on fundamental human rights in their operations and their supply chains and to account for how they address any adverse impacts; and the German Supply Chain Due Diligence Act was adopted in 2023 and imposes human rights and environmental due diligence obligations on companies with regard to their direct suppliers (Augenstein 2022: 290-3). However, very few of these laws establish a civil liability regime that would enable foreign victims to sue the parent company in the home state and thus they fail to offer any strong framework for enforcement.[3] Without such a regime, companies can try to evade liability for any human rights violations discovered in their supply chains by arguing that they did the necessary due diligence.

Nonetheless, many Human Rights NGOs see a great potential in developing, standardising and internationalising this type of legal regime in international law through a new international human rights treaty. This would in effect make it a legal requirement on all companies, everywhere, (or at least in states that ratify the treaty), to assess the risks of human violations in their subsidiaries and supply chains and to mitigate against them, and (ideally) for states to establish civil liability regimes that would enable foreign victims to sue the parent company in the home state. Thus in the current negotiations one of their central proposals for the treaty is to create international law making such domestic due diligence legislation a legal requirement on all states (eg. ESCR-Net and FIDH 2016:55-61).

Extra-Territorial Obligations' (ETOs)

Another approach to establishing home-state regulation of TNCs in international law was to develop the legal argumentation that states already have human rights obligations *beyond* their borders. If the notion of 'extra-territorial obligations' (ETOs) were to be accepted, then states would be able to use their existing domestic human rights law to regulate the activities of 'their' TNCs both within and beyond the borders of the home state. In other words, the recognition of extra-territorial human rights obligations would effectively lead to the recognition of an extra-territorial jurisdiction of the home state with regard to human rights.

In 2007 several legal scholars joined forces with many of the NGOs, including FIDH, ICJ, ESCR-Net, the Transnational Institute (TNI), FIAN International, the Center for International Environmental Law (CIEL), and others, to form the ETO Consortium. The aim of the group was to develop the legal basis for extra-territorial obligations, or 'human rights beyond borders.' In 2011 they issued the 'Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social, and Cultural Rights' (ETO Consortium 2011) - a detailed list of principles drawn up by international law experts that sets out their understanding of the extraterritorial human rights obligations that they consider already exist under present international law (Saloman & Seiderman 2012). However, to date, no state has been willing to publicly acknowledge having extra-territorial human rights obligations (Gibney 2022:22).

Many Human Rights NGOs therefore call for extra-territorial obligations to be clearly elaborated in the current proposed treaty, such that they would become universally acknowledged and enforceable under international human rights law (eg. ESCR-Net and FIDH 2016:63-71). This would clarify that states have the obligation to enforce the respect of human rights by TNCs that are headquartered in their territory even when they act in the territory of another state. And most importantly, it would enable persons who suffered human rights abuses by a TNC to seek remedy in a court in the country of its headquarters.

These two proposals form the cornerstone of the Human Rights NGOs current ideas about how to regulate TNCs under international human rights law and thus take a central place in the current treaty negotiations. The appeal to both HRDD and to ETOs is effectively an appeal to horizontally extend the sovereignty of Northern states – through their TNCs - into the territory of Southern states, with regard to human rights. As such, both proposals exhibit the imperial spatiality of the traditional human rights regime and can be characterised as models of 'imperial sovereignty'.

The Human Rights NGOs and their supporters justify this proposed extension of Northern states' sovereignty as a kind of 'sovereignty sharing' between states in the global North and South, whereby Northern states would help to strengthen Southern states' sovereignty with regard to the sovereignty-challenging practices of TNCs. For example, Olivier de Shutter, an academic supportive of the Human Rights NGOs and their approach, argues that the enforcement of extra-territorial human rights obligations would not challenge the sovereignty of the host state, but would rather lead to a new form of 'sovereignty-plus', in which Northern states support Southern states in the common goal of ensuring that the actions of TNCs contribute to human development and benefit local communities (De Schutter 2010).

Other scholars working in the perspective of Third World Approaches to International Law (TWAIL), however, have criticised the various proposals of unilateral home-state regulation of TNCs precisely because of this implicit imperial spatiality and because these laws would be formed without the voice or representation of the people in the global South whom they purport to protect (Lichuma 2021). While some TWAIL scholars are open to the possible effectiveness of this type of legislation, they also express some scepticism at an approach that puts "the trust of the majority of the world population into the benevolence of those who had colonised the planet and retain hegemonic interests" (Bose 2023:41).

V: The Global Campaign

The Global Campaign is a very different civil society grouping, made up predominantly of Southern-based NGOs and grassroots social movements. Members include some NGOs that had been involved in the UN processes leading to the *Norms* and UNGPs, such as CETIM, the Transnational Institute (TNI), Friends of the Earth International and FIAN International, but also includes some 250 local NGOs, trade unions and grassroots community movements of peoples affected by the actions of TNCs, including for example, *Movimento dos Atingidos por Barragens* (Movement of People Affected by Dams), Brazil; *Unión de Afectados y Afectadas por la Operaciones de Texaco* (Union of Men and Women Affected by Texaco Operations), Ecuador; *Philippine Rural Reconstruction Movement*; *Indonesia for Global Justice*; *Indian Social Action Forum*; *National Garment Workers Federation, Bangladesh*; *Eastern and Southern Africa Farmers Forum, Zambia*, amongst many others. Most of these smaller organisations had never set foot inside the UN prior to the current treaty negotiations, but they had taken part in a different set of processes through which they had elaborated their own understandings of the impacts of TNCs on their lives and the possible approaches to bringing them under legal control.

In the early 1990s, as neoliberal globalisation moved into full gear, many social movements began to form in Latin America seeking to resist free trade agreements and what they saw as increasing corporate rule. In 1997 several of these movements came together to form the Hemispheric Social

Alliance (HSA), a transnational network which sought to oppose the proposed Free Trade Area for the Americas and unite movements around an alternative model in which peoples' rights would take priority over the interests of business (Doucet 2005). The HSA started to organise Peoples' Summits in parallel to official inter-governmental meetings in order to pressure governments to alter the course of the negotiations. In 2004, after trade negotiations had started between the European Union and several Latin American countries, the HSA joined with several European movements to form the *Enlazando Alternativas* (Linking Alternatives) network and together they organised Peoples' Summits in parallel to the official EU-Latin America Bi-Regional Trade Summits. In this process connections were established between the grassroots Latin America movements and some of the more radical NGOs that had been involved in the work on the *Norms*, including FIAN, FOEI and TNI (Global Campaign 2022).

At the discussions at the Peoples' Summits many of the grassroots movements raised the issue of European TNCs and how they were adversely affecting their lives. In response, the Linking Alternatives network asked the Permanent Peoples' Tribunal (PPT) for an investigation into how the policies of transnational corporations, and the specific role of the European Union in its relations with Latin American countries, gave rise to violations of human rights and the peoples' right to self-determination (Brennan & Berron 2020).

The PPT is an organisation that holds Peoples' Tribunals on a range of human rights issues in a variety of different countries and contexts. It was established in Rome in 1979 by left-wing Italian parliamentarian Lelio Basso, as a successor to the Russell Tribunals. Both the Russell Tribunals and the PPT were established out of the recognition that there was 'no effective international jurisdiction' for international human rights laws and that they were thus not enforceable. In order to highlight that international human rights law was a voluntary system and that there were no courts to which people could bring cases and get remedy, Peoples' Tribunals were established in which eminent people and international law experts would hear cases and bring judgements. While these judgements had no legal force, they had a strong moral power and served to raise awareness about the lack of response to many human rights violations at the national or international level (Moita 2015).

The work of the PPT is based on a particular understanding of human rights that arose in the context of decolonisation and concerns about ongoing neo-colonialism and imperialism. It thus gave great emphasis to the collective rights of 'peoples', rather than just individuals, including the right to self-determination, economic rights, the right to the environment and common resources, and freedom from foreign interference. This was codified in the *Universal Declaration of the Rights of Peoples* which was drafted in 1976 at a conference in Algiers organised by Basso and his supporters and then became the formal statute of the PPT. According to the Declaration, peoples are not 'beneficiaries' of rights given by states, but rather are active agents who formulate and affirm their own rights. And in this formulation 'peoples' are considered to have the inherent and inalienable right of self-determination (Universal Declaration of the Rights of Peoples 1976, Fraudatario and Tognoni 2018:138). The notion of 'peoples' rights' has since developed into "a body of law that claims its validity grounded in the sovereignty of peoples that exists outside and independently of the Westphalian system" (Byrnes and Simm 2018:14). As such it does not attach much importance to the notion of state sovereignty, and indeed explicitly rejects the doctrine that peoples can be represented only by states, and instead places great emphasis on the concept of 'peoples' sovereignty' (Fraudatario and Tognoni 2018:143).

In the late 1990s and early 2000s, at the same time as the *Norms* were being discussed in the UN, the PPT had held several sessions on TNCs. Early sessions were dedicated to hearing people's testimonies about human rights abuses by TNCs, including sessions on workers and consumers in the garment industry in 1998, sessions on the activities and impacts of oil company Elf Aquitaine in Africa in 1999 and a general session on global corporations in 2000. Later sessions investigated the structures of national and international legal systems that seemed to make it impossible for people to seek legal redress for these abuses. Together, these sessions, began to build up a body of testimonies that documented the consequences of the activities of TNCs in the daily life of peoples in the global

South and began to develop an analysis which framed these events as the illegitimate imposition of Northern extra-territorial economic power and the erosion of Southern state sovereignty in an international context which granted TNCs 'impunity' (Fraudatario and Tognoni 2018:145-7).

This body of testimonies and analysis formed the conceptual starting point for three PPTs which were organised by the Linking Alternatives network in 2006, 2008 and 2010 with the specific aim of looking at how the policies of both European TNCs and European states gave rise to human rights violations in Latin America (Enlazando Alternativas 2010). The three PPTs heard over 40 cases concerning the impacts of European TNCs in various different sectors on local communities across Latin America. Peoples affected by the actions of TNCs made oral statements and presented supporting documents. A jury composed of academics, experts and public intellectuals heard the cases and at the end issued a judgement. The indictment of the jury at the first of these PPTs in 2006 was damning:

> We have been presented with overwhelming evidence concerning European TNCs abuses of human, social, cultural and workers' rights, their irresponsible and sometimes irreversible actions towards the environment and their complete disregard for the welfare of local communities…. [And] We have heard, in particular, of the complicity of European governments that aid and abet their own TNCs (TNI 2006).

One of the conclusions that arose from the PPT process was that both home and host states were failing to control TNCs and that therefore some kind of binding international legal framework with direct human rights obligations on TNCs was necessary to hold them to account and ensure peoples' sovereignty (PPT 2010: 18-19). The jury of the 2010 PPT concluded by calling for the UN to create this legal instrument:

> [The tribunal decides] … to call on the United Nations Human Rights Council to draw up a compulsory code of conduct for transnational corporations … Likewise, to request the provision of an appropriate international mechanism to monitor compliance, which could take the form of an International Economic Court that deals with human rights violations in any shape or form and awards reparations for these by determining liability; and, when relevant, criminal liability. A body, in short, before which individual or collective victims could bring their claims and demands for justice (PPT 2010: 24).

Over the next few years the movements that had taken part in these PPTs reached out to similar movements in Africa and Asia with the aim of creating a global campaign to challenge TNCs and corporate power. And in June 2012 the *Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Corporate Power and End Impunity* was launched.

The campaign has four main goals: (1) to strengthen the struggles of affected communities resisting corporate power and build a global movement against corporate power and impunity; (2) to work towards the development of a treaty and international legal framework that can impose binding obligations and sanction TNCs; (3) to start the process of dismantling TNCs' political, economic and legal power; and (4) to build an alternative political and economic paradigm rooted in the dignity and well-being of people and nature.

In 2012 the Global Campaign joined with the Human Rights NGOs to form the Treaty Alliance in order to work together at the UN towards creating binding international law to regulate TNCs. However, as will now be apparent, the Global Campaign's analysis of the problem at hand is quite different from the analysis of the Human Rights NGOs. While the NGOs situate themselves clearly within the framework of existing international law, have an understanding of human rights based on the Universal Declaration of Human Rights, uphold the notion of state sovereignty, and implicitly see Northern states as part of the solution, the Global Campaign critiques the ineffectiveness of existing international law and seeks to change it, has an understanding of human rights based on the Universal

Declaration of the Rights of Peoples, challenges the notion of state sovereignty and instead promotes the notion of people's sovereignty, and explicitly sees Northern states as part of the problem.

The Global Campaign's vision for the treaty can be understood most clearly by looking at their own proposal for a draft treaty, which they published in 2017 as the *Treaty on Transnational Corporations and their Supply Chains with Regard to Human Rights* (Global Campaign 2017). There are four key elements to their approach, all of which clearly emerge out of the PPT process.

Firstly, they propose to create a global legal order that will apply to *all* TNCs and which will place specific direct human rights obligations *on* TNCs. In this way it will be possible to hold TNCs directly accountable for their human rights violations in an appropriate court, whether or not states take action. Second, to close the loopholes that exist because TNCs are currently considered to be networks of legally separate entities, they propose that TNCs and their supply chains be treated as unified global entities and thus that the headquarters can be held liable for human rights violations carried out by any part of the entire entity. Third, they still expect states to be actively involved in regulating TNCs and seek to strengthen the rights of states, individually and collectively, to regulate TNCs, including through the recognition of extra-territorial human rights obligations. And finally, they seek to make international human rights law enforceable by creating an international court in which victims will be able to seek access to remedy. As such their treaty seeks to create a universal spatiality in which a supra-national legal framework would enable TNCs to be held liable for human rights violations even when states either cannot or will not take action.

In contrast to the Human Rights NGOs' horizontalist approach which would extend the sovereignty of Northern states into the territories of Southern states, the Global Campaign's approach seeks to vertically disperse sovereignty, both upwards and downwards, to form a multi-level system in which people's sovereignty would be guaranteed by a supra-national global sovereignty. While the Human Rights NGOs' proposals would create an uneven imperial spatiality in which the human rights of people in the global South would be protected by states in the global North, the Global Campaign's proposals seek to elaborate a truly universal spatial order in which the human rights of all people and peoples would be effectively protected by a form of cosmopolitan sovereignty. Emerging out of a grassroots discursive process which explicitly sought to confront and undermine the imperial structures of international law, their proposal fits in the fourth category of our conceptual framework and can be seen as a model of 'global sovereignty'. It would both enable TNC regulation and also promote an emancipatory global spatial order.

VI: Conclusion

The regulation of TNCs in international law is a highly contentious matter in which competing interests and ideologies are brought into dynamic interaction as different actors seek to transform (or maintain) the geo-regulatory landscape in order to institutionalise different power relations and different value systems. I have argued that central to this are attempts to reconfigure the spatiality of sovereignty and, using a modified version of Hudson's typology of regulatory landscapes, I have developed the concepts of 'equal state sovereignty', 'imperial sovereignty' and 'global sovereignty' to outline potential alternative spatialities.

Applying this framework, this article has shown how the attempts by different actors from the 1960s to the present day have tried to shift the existing 'deregulatory' landscape with its spatiality of 'variegated sovereignty' to each of the three other possible spatial orders that emerge from this model: in the 1970s the states of the global South tried to shift it to 'autonomy and sovereignty' by attempting to equalise state sovereignty; from the 1990s to the present the Human Rights NGOs have tried to shift it, in various ways, to 'extra-territoriality' by proposing to horizontally extend the sovereignty of Northern states into the states of the global South, in a way which would create an imperial sovereignty; and from 2015 onwards the Global Campaign have tried to shift it towards 'borderless world' by proposing a vertical dispersal of sovereignty, upwards and downwards, in order to manifest

an emancipatory global sovereignty. As I have shown, each proposal would configure political power in a different manner, serve the interests of different social groups and construct vastly different spatial orders.

Analysing the various proposals for TNC regulation from the spatialised critical political economy perspective developed here brings clarity regarding the implications of the different proposals and enables a broader appreciation of what is at stake in these negotiations. The analysis suggests that attempts to create international law to regulate TNCs should not be understood solely in technical and legal terms, but seen as political struggles regarding the spatial ordering of globality.

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Notes

[1] This research is based on ethnographic fieldwork at six sessions of the Open-Ended Intergovernmental Working Group, interviews with activists and an in-depth analysis of written statements and publications produced by the Treaty Alliance and several of their member organisations.

[2] The Human Rights NGOs and the Global Campaign agree on many issues which I do not discuss in this article, including proposals for ways to protect human rights defenders, suggestions of ways to make it easier for victims to bring cases, ideas for improving information sharing, suggestions of how to better take gender issues into account, the proposal that human rights should have priority over any other rights, and so on.

[3] The French Duty of Vigilance Law (2017) is the notable exception here, as it does indeed establish a civil liability regime.