

Panel: Law and Geography

*Hari Osofsky, Moderator**

Welcome to the Roundtable on Law, Society, and Geography. I am absolutely thrilled to have the opportunity to engage in dialogue with such a terrific group of people about an interdisciplinary intersection that I think is critical to the future of international law.

This is the second of a series of such roundtables I'm putting on, each with a somewhat different set of participants and questions, through collaboration with a group of people interested in the development of this still nascent interdisciplinary intersection. The underlying goal animating these roundtables is a desire to introduce international law scholars and practitioners to the possibilities that interdisciplinary interchange with geography represents.

Such a preliminary discussion is necessary in part because people who have been educated in elite U.S. universities in the last forty years, a group that overlaps a great deal with people who are law professors or prominent law practitioners, often have had minimal exposure to the discipline of geography. Starting with Harvard in 1948, many of the elite universities in this country expelled their geography departments. By the turn of the last century, the only Ivy League school that still had a geography department was Dartmouth, and that department was not even granting Ph.D.s. Despite this purge, geography is critical to, and has already started to play a very important role in, analysis of international law. I am interested in the development of this interdisciplinary work.

In the past year, there has been an important moment of reversal, though it is not quite clear how much of a reversal it is yet. In 2006, Harvard established a

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new Center for Geographical Analysis. In the launch of the Center, its president, Lawrence Summers, explicitly acknowledged this step as a reversal of the 1948 decision and an embracing of the new geography.

Now, I should say that I exemplify this problem of lack of educational exposure, and that is part of why I am so passionate about it. I was only introduced to geography a year and a half ago by Keith Aoki, and I was an instant convert. I am now doing a Ph.D. in geography in addition to my law teaching.

Moreover, whenever I present on law and geography, I constantly get feedback from my international law peers that people want the basic introduction, and so that is part of what this panel is about. The two questions that we are going to address are: (1) What is the discipline of geography? and (2) How might a law and geography approach improve the analysis of social and legal problems with international and transnational dimensions? As we engage these questions, a core set of issues will animate our conversation. The first issue concerns how legal institutions can most effectively address multi-scalar, cross-cutting problems. The second issue involves the challenges of navigating concerns of culture, identity and equity in such institutional responses.

So our first question—What is the discipline of geography?—might seem quite basic, but given the problems of educational exposure, it is a rather important starting point for us to engage in this conversation. Geography's ancient origins have been traced to Greece, Rome, and Southwest Asia. The growth of geographical thinking during the fifteen and sixteenth centuries in Europe built upon those traditions, but also was deeply interconnected with colonialism. Three key Enlightenment figures — Immanuel Kant, Alexander von Humboldt and Carl Ritter — helped to establish geography as a science of space, which helped ensure its inclusion in the modern disciplinary matrix in the late nineteenth and early twentieth centuries.¹

By the mid-1960s, four main conceptual streams had emerged in the discipline: (1) spatiality; (2) area studies; (3) the human-environment interaction; and (4) earth science.² In the last fifty years, the discipline has evolved radically, in part due to

1. For a discussion of this history, see Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT'L L. ___ (forthcoming 2007). See also DAVID N. LIVINGSTONE, *THE GEOGRAPHICAL TRADITION 1580-1620* (1992); GEOFFREY J. MARTIN, *ALL POSSIBLE WORLDS: A HISTORY OF GEOGRAPHICAL IDEAS* (2005); JAMES O. THOMSON, *HISTORY OF ANCIENT GEOGRAPHY* (1948); NAFIS AHMAN, *MUSLIM CONTRIBUTIONS TO GEOGRAPHY* (1947); Hari M. Osofsky, Alexander Murphy & Keith Aoki, *Why International Law Needs Geography* (draft article on file with author).
2. See William D. Pattison, *The Four Traditions of Geography*, 63 JOURNAL OF GEOGRAPHY 211 (1964); Osofsky, Murphy & Aoki, *supra* note 1.

postmodernism. Although it still engages those topics, its central concerns have moved from mapping and describing to an engagement of how and why geographical context matters. These shifts relate in part to the crisis that the discipline faced in the United States, but it also has to do with large-scale shifts in technology and with intellectual developments that often get lumped under the heading of postmodernism.³

So the elevator definition of geography (that is, the definition you could give while taking an elevator ride of moderate length with someone)⁴ is that geography in its current incarnation is the study of the interrelationship between place and space over time. It thus complements the discipline of history, which focuses predominantly on the dimension of time. Because space has multiple meanings from politico-legal categories to lived experiences, to physical representations, geography must span several of the traditional disciplinary divisions; in particular, it engages problems that cross the hard sciences, the social sciences, and the humanities, and so has physical, political, and cultural dimensions.⁵

*Reginald Oh, Panelist**

Before I begin, I want to disclose that, although I have been engaged in the discipline of law and geography for some time now, today's panel represents my first foray into international law. The concepts that I have explored in my scholarship, however, are relevant to many different levels of legal analysis, whether domestic or international. I want to start by examining the first question posed by Professor Osofsky: what is law and geography? As Professor Osofsky suggests, a geographical analysis of law entails an examination into the spatiality of social processes. More specifically, the discipline of geography entails a study

3. See R. J. JOHNSON & J.D. SIDAWAY, *GEOGRAPHY & GEOGRAPHERS: ANGLO-AMERICAN HUMAN GEOGRAPHY SINCE 1945* (2004); Osofsky, Murphy & Aoki, *supra* note 1.

4. Developing an elevator definition of geography was one of the first tasks we were given in the first-year graduate students' geography seminar.

5. See Alexander B. Murphy, *Geography's Place in Higher Education in the United States*, 31 *J. GEOGRAPHY IN HIGHER EDUC.* 21, 122–23 (2007).

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of spaces and places, of the relationship between spaces and places, and of people who inhabit those spaces and places.

So, a geographical analysis of law and of international law would entail an examination into the spatial and geographical dimensions of law and its spatial consequences and its spatial effects. What does that mean? On a very general level, a geographical analysis requires, obviously, a careful attention to spaces and places. It means, as Professor Osofsky has suggested, paying attention to the spatial context in which legal, political, social, cultural, economic processes occur. Critical geographers — in explaining the importance of examining the spatial context of legal, political, and social processes — argue that we need to pay attention to space and place, because our perceptions of social reality are actually spatially or geographically constructed. Thus, critical geographer Derek Gregory contends that space is not merely an arena in which social life unfolds, but it is a medium through which social life is actually produced and reproduced.⁶ As legal geographer Richard Ford has argued in the legal context, spaces and places are not really the neutral containers in which activities and events take place.⁷ Instead, activities are constantly shaped and structured by the places and spaces in which they occur. And just as space and place structure, influence, affect and shape social processes, the reverse is true as well. Social processes themselves structure, shape, and are reflected in and through spaces and places.

I want to quote a passage by social theorist John Berger, who argues that, if we really want to understand how law operates in society, we must seriously consider and examine the geographical nature of social reality. He contends that we cannot only look to history and time to understand what is going on in the present, but that we also have to look to geography and space. He writes that “prophecy now involves a geographical, rather than a historical, projection. It is space, not time, that hides consequences from us. Any contemporary narrative which ignores the urgency of this dimension is incomplete and acquires the oversimplified character of a fable.”

I want to reiterate one of his key points: that “it is space, not time, that hides consequences from us.” I understand that statement to mean that we cannot really understand the social processes related to the marginalization of social groups if we fail to examine the spatial or geographical context in which marginalization

6. Derek Gregory is Professor of Geography at the University of British Columbia, and author of *GEOGRAPHICAL IMAGININGS* (1994) which presented this theme.

7. Richard T. Ford, Professor of Law, Stanford University, is author of *RACIAL CULTURE: A CRITIQUE* (2005).

takes place. To modify Berger's statement slightly, it is not that space hides consequences from us; but, rather it is our *inattention to space* that hides consequences from us. The task of geographical analysis, therefore, is to better understand the social and legal phenomena and processes that are taking place within the spaces and places of society. Now, with that understanding, I want to engage in a geographic analysis of law by examining the relationship between geography, space, and human rights.

One simple way to conduct a geographical analysis of law is to ask the "where" question. When confronted with a problem or issue, ask such questions as: where are the relevant events taking place? Where are the relevant actors located? Where have they been? Where are they now? Where are they going? In examining the "where" question, what patterns or generalizations can we identify? As critical legal geographer Keith Aoki contends, to understand the impact of law on the poor, we need to ask where the poor and working people go, where are their spaces, what is their lived experience of place in the brave new world of the new world economic order.⁸ The "where" question is especially applicable to international law because international law, probably more so than any other legal discipline, implicates issues of location, placement, and movement. International actors and entities are always in motion and are being affected by processes in motion.

Now, I want to provide a concrete example of what we can learn by asking the "where" question. The issue I will examine is domestic in nature, but I believe a geographical analysis of the issue has implications for how we understand international legal issues. I want to examine the meaningfulness of the right to terminate one's pregnancy under the Fourteenth Amendment Due Process Clause of the U.S. Constitution. Under the dominant liberal, abstract, non-geographical understanding of rights, all women in the United States are presumed to possess this right to terminate a pregnancy.

However, for certain classes of women in the United States, how truly meaningful is the right? Does this right empower all women? Or, does it empower certain groups of women while not truly empowering others? To answer these questions, we can ask the "where" question. Specifically, in the United States, where are reproductive health facilities located? For a woman to want to exercise her right to terminate a pregnancy, she has to go to a facility where that

8. Keith Aoki, Philip H. Knight Professor of Law, University of Oregon School of Law. For a list of Professor Aoki's publications, see <http://www.law.uoregon.edu/faculty/Kaoki/site/article.php>.

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right can be exercised. So, where does a woman need to go in order to exercise her right? If you conduct a geography assessment of reproductive facilities, what you will discover is that reproductive health facilities are unevenly distributed throughout the nation. In several states, only one facility is located there. In other states, even if there is more than one reproductive facility, they are not evenly distributed within a particular state. For example, in the state of Texas, about a dozen reproductive facilities are located throughout the state. However, nine of them are located in the Dallas/Fort Worth metropolitan area, and the other two are located in the San Antonio and Houston metropolitan areas. Those metropolitan areas are concentrated in the eastern part of Texas. Thus, for women living in rural areas and in western parts of Texas, their ability to exercise their right to terminate a pregnancy is obstructed by their personal geographies.

The uneven distribution of reproductive health facilities means that the right to terminate a pregnancy is itself unevenly distributed. It is easier for women to be able to exercise that right in some places rather than in others. Moreover, in asking the where question, new questions about abortion and abortion rights are raised. What factors are affecting the geography of reproductive health facilities? Why are reproductive facilities concentrated in urban areas? What do women in rural areas, especially poor women, do if they want to obtain an abortion? Are rates of unwanted pregnancy higher in rural areas than in urban areas? Are areas without reproductive health care facilities more likely to have women and children living in poverty? What could be done to provide women in areas without reproductive health facilities the ability to exercise their right?

To think about rights geographically helps us not only to better understand how a particular right is unevenly distributed, but it also helps us to re-think our understanding of the enforcement of human rights. If we examine the right to an abortion, the right to an education, or the right to health care from a geographical perspective, we come to better understand how issues of location and placement affect the meaningfulness of the right to certain classes of people. The right to health care may not be meaningful to many if they do not have the means to transport themselves to a doctor or a hospital, because medical services are located in faraway locations. In enforcing human rights, therefore, a geographical analysis shows that other complementary rights, such as the right to transportation, must be protected in order to effectuate substantive human rights.

Tayyab Mahmud, Panelist

Professor Mahmud also participated as a panelist. His article, which precedes this discussion represents the presentation he made at the panel.

*Jonathan Greenberg, Panelist**

My primary interest is how new cutting edge ideas about international law relate to a practitioner's perspective in the field. In my view, even though "law and geography" is not one of the interdisciplinary fields that we are most familiar with, I would argue that it is far more than the latest academic subspecialty, but rather an analytical framework that is fundamental and essential. Indeed, we cannot possibly solve the core international issues that we are trying to address without a geographical perspective.

Just an hour ago, before coming in, I went onto the Associated Press website to read the latest news. Earlier today the National Intelligence Estimate on Iraq was published by the National Intelligence Council, presenting the "coordinated judgments of the Intelligence Community." The report is called "Prospects for Iraq's Stability," and unfortunately for everyone, but it is no surprise, that those prospects do not look very good. A geographic perspective is essential to addressing the problem of Iraq. Let me give you an example to start with. One of my students this semester is a former Marine intelligence officer who served in the first wave of forces in the 2003 invasion of Iraq. He told me that he and his fellow American soldiers were embraced by Iraqi Shi'a communities when they initially came into their villages and towns. Iraqis in Sunni towns were wary of them, and people avoided eye contact with the Americans. But they were respectful, because they were impressed by U.S. power, and they believed that the Americans could deliver stability and reconstruction. However, both Sunni and Shi'a communities found out, in a very short amount of time, that this was not the case.

My student said that within one month, everything began to unravel from his perspective, because it became clear to everyone that there was no security. He was sent to a Shi'a town, supposedly under U.S. control, to find out what was

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going on there. My student reported back to his commander that a local Shi'a militia was now running that town. The commander said, "Who are these people? What is going on?" So my student explained to him about the Shi'a and Sunni in Iraq, where the Shi'a live, where the Sunnis live, the political significance of these communities, and the relationship to groups outside the boundaries of Iraq, particularly Shi'a leaders in Iran. The commander said: "What are we supposed to do about this?" You know, I think we should go home, because we removed Saddam. We did our job." This was one month after the invasion, and now we know, in retrospect, that the war had just begun.

I do not blame this commander because he was given marching orders on which he delivered. But I blame the architects of the war, because obviously they did not adequately deal with the geographic reality, the ethnic geography, the religious geography, and the political geography within Iraq and in the immediate region. We all know the consequences of that profound error.

Then in the AP news there is an announcement from the Chinese president, an announcement delivered from Khartoum, Sudan; some joint agreements with the government of Sudan to build schools, a new presidential palace, and to provide Sudan's government with a major new loan, among other things. What is going on here? Why is the president of the most powerful nation in Asia making a state visit to one of the weakest and most vilified states in Africa and the world? For the president of Sudan, it is like having the Chinese emperor come across the world to pay homage to you.

You cannot explain this without understanding the local geology and the global geopolitics of natural resources. China gets a huge amount of oil from Africa, and they are buying up the oil there. All of the major international oil companies are bidding, but China is winning many of the largest bids. How are they doing it? Maybe we are trying to regulate the oil industry, but how are we regulating side deals like the ones announced today? How are we going to maintain energy security in the world?

In turn, these questions relate to another major AP news item, the publication of the first installment of the UN Intergovernmental Panel on Climate Change fourth assessment report. As Professor Osofsky's work powerfully illuminates, you cannot even begin to deal with global warming without looking at the geography of climate change structure in a way that is sophisticated, both at the level of local communities (remember, for example, the New Orleans levies) and the level of global climate change regimes.

And you can keep on going. Today an important announcement was made by

the U.N. representative responsible for mediating the final status of Kosovo, a process that has been conducted for two years. Today's announcement sets the stage for a, quasi-partition. In this context I would like to follow up on Tayyab Mahmud's discussion about law, geography and the history of empire, and how it relates to this idea of partition.

At the end of World War II, there were new international structures of law. The United Nations, the Bretton Woods Agreement,⁹ the international regime that the United States was very involved in building. We also had the deterioration of empire throughout the world. The collapse of empires presented enormous problems. Geography is about place, territory, land; law is about governance, regulation, and who is going to control this land. So when an empire collapses, what is going to happen?

In the case of the British Empire, the withdrawal suddenly from the Indian subcontinent and from Palestine created enormous ethnic and political and legal problems, and they were solved at that time through partition. At the same period of history, with the sudden collapse of the Japanese Empire, something similar happened. You had Korea. Some mid-level officers in the Pentagon who had no clue about Korean political or cultural geography or history sat down and made a line on the map, a line that divided the Korean peninsula into an American-backed South and a Soviet-backed North. This division was intended to be for a transitional period, not the permanent boundary of two enemy states.

Even though Taiwan is not a partition of the type I am mentioning, there was a political partition, and so we are still dealing with the legacy of the empire in each of these cases because in each case a war erupted that never officially ended, to this day. In each of these cases we have nuclear weapons pointed on both sides. So geographical problems of that time have now metamorphosed into all of the security problems that we are dealing with in each of these regions.

Shifting to the practitioner perspective, if you are going to be practicing international law in any field, public or private, I would argue that virtually every type of practice is going to require you to deal with maps. And not only maps; in the last twenty years there has been an enormous revolution in technology in the field of geography.

We have all kinds of new tools, such as geographic information systems (GIS). On the one hand, anyone who has a computer can go onto Google Earth, and it is

9. The Bretton Woods Agreements (July 22, 1944) established the International Bank for Reconstruction and Development and specified that shares in the Bank would be based on the U.S. Dollar, *available at* <http://www.yale.edu/lawweb/avalon/decade/decad047.htm>.

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amazing what you can do. On the other hand, these advances require highly specialized expertise and capacity, so one thing international lawyers have to do is work with technical specialists who understand a wide range of cutting edge technologies such as remote sensing and aerial surveillance; in the human rights field, for example, these tools enable advocates to understand where ethnic cleansing has happened within and across borders. These technologies enhance the ability to assess and evaluate environmental impacts of infrastructure projects, refugee flows, drug regulation, where the opium poppies are being grown, etcetera. So there is a need to work with geographers and related technical specialists, but there is also a need to understand the basic concepts.

For example, one of the areas that we are working on at Heenan Blaikie is maritime delimitation negotiation. Under the Law of the Sea, new rights were created. These include the right to claim an exclusive economic zone, or EEZ, up to 200 nautical miles from the relevant baselines of each coastal state.¹⁰ If you look at maps of the world, you are going to know that that decision of the Law of the Sea was thus guaranteed to generate a large number of significant disputes. These EEZ claims are bound to overlap, especially when highly valuable natural resources are located in offshore areas arguably subject to two or more states' competing EEZs .

Now some of these boundary disputes do not matter very much. A small number of others get resolved in the International Court of Justice (ICJ), and of course international lawyers are involved in arguing these cases, and have to work through complex issues of legal doctrine, historical usage, hydrography, and other technical issues. In most cases, the countries are stumbling along, trying to negotiate solutions, with incomplete hydrographic data, or maps and other data that does not match, and the international system as it exists does not offer much assistance to states in solving these kinds of problems. So negotiations often get stuck, but there are pragmatic, creative solutions available. For example, to create joint development areas for an agreed amount of time without prejudice to either state's sovereignty claims. These emerging forms of joint or mixed or deferred sovereignty suggest further evidence that we are in this very fascinating and difficult time where issues of local geography and global geography and national geography are completely intersected in new ways.

So, going back to Iraq, this AP news report identifies some of the problems going on today in Kirkuk. This article says that the Kurds are moving

10. U.N. Convention on the Law of the Sea Pt. 5, Dec. 10, 1982, 1833 U.N.T.S. 397.
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systematically to increase their population in this part of Iraq. What does that mean? Well, Saddam Hussein ethnically cleansed Kirkuk of Kurds and forcibly moved in Arab Sunnis to take their neighborhoods. Now the Kurds want them back. There is a lot of oil in this region, and ethnic turmoil there signals the threat of a very bitter, bloody fight. If the Kurds end up taking Kirkuk and controlling it, how will Turkey respond? The Turks do not want the Kurds on the eastern provinces of Turkey to become further agitated, rebelling, and aligning themselves with a resurgent Kurdistan. What would happen if fear and instability led the Turkish government to use more repressive measures to contain this internal threat? If that happens, what is going to happen to Turkey's application for admission into the European Union? Looking forward, if Turkey in the end is not admitted to the E.U., what is going to happen to global terrorism generally, and the global threat of a Muslim-Western "clash of civilizations"?

We are looking at the connections between the local, the national, and the regional, and the global in each one of these cases, and without a geographic point of view, we cannot deal with them.

*Anupam Chander, Panelist**

I would suggest that there are two sets of antinomies at play here: the first is international law and geography, and the second is the Internet and geography. An exploration of both antinomies puts pressure on the application of geography to international law.

Professor Osofsky suggested that geography played a major role in the founding of the modern nation-state. The modern nation-state is of course also associated with the rise of international law. But unlike geography, international law aspires to the universal. It aspires to establish a law for all states. It is not context-sensitive. It is not a law for Chad, or Libya, or Iraq, or the United States; it is a law for all of us, every state.

In that sense, international law is indifferent to the identities of the parties—to place. That is at least its aspiration; the aspiration of the universal. A geographic approach, as I understand it, would suggest much more attention to the particular,

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to the context. This would require us to comprehend exactly the situation of the various persons and their role in context. Thus, the international project and the geographic project seem to be at odds—at least at first glance. This is a tension I think that needs to be reconciled and understood as we explore this further. And perhaps one of the other panelists will have some answers for us as we think about this further.

With respect to geography and the Internet, they too seem to be concepts wholly alien to each other, right? After all, an event in cyberspace is both everywhere and nowhere. A cartography of cyberspace would seem quite odd and would not conform to the cartographies to which we are accustomed.

Yet, given these kinds of incoherencies between these concepts, we might still fruitfully take the geographic approach. I am not rejecting Professor Osofsky's challenge to us this afternoon, but rather trying to illustrate that it presents a very complicated task.

Let me do so through a few examples. I am concerned, in my own writing, about the impact on democracy of the emergence of the Internet. You might think democracy hardly seems to be threatened by the Internet. Let me suggest a few cases that might help you understand my concern.

In early 2005, it appeared that the fortunes of Canada's then-ruling Liberal Party might be endangered by a blogger just south of the border. At that time, the Canadian court had barred disclosures and revelations regarding an ongoing trial of corruption allegations in the Liberal Party, concerning the Canadian Mounties. However, this man from Minnesota published these allegations and claims.¹¹ Canadians easily accessed this blog through online links, newspaper stories, and web searches.

Now to take an example even closer to home, Google offers various services around the world. Google's recent controversial moves in China are quite familiar but I want to talk about a different example, Google's Orkut social networking service. Orkut allows you to build online communities and network with each other. It has proven very popular in Brazil, but it has proven popular for lots of good and bad things, as any human construction will, including communities and networks for racism, anti-Semitic messages and child pornography. All of these types of messages are illegal under Brazilian law. However, when Brazilian prosecutors sought information about the identities of the people posting this information, Google's Brazilian subsidiary refused to give such information. The

11. Captain's Quarters, <http://www.captainsquartersblog.com/mt/archives> (follow hyperlink to "Canada," then "Archives").

Brazilian subsidiary said that it could not give the prosecutors this information because the parent company sits in Mountain View, California, and the subsidiary could not control the parent.

A Brazilian judge reproached Google for evincing a “profound disrespect for national sovereignty.” Google, the *Financial Times* tells us, maintains a policy of keeping data about its users in the U.S. to protect it from disclosure to foreign governments.¹² This is their concerted policy. Ultimately, the Brazilian authorities received compliance. They re-addressed their demand to Mountain View, California (Google’s corporate headquarters) and Google complied quickly. By the way, in contrast, Google has resisted a subpoena from the United States government directed to Google’s headquarters, where the U.S. wanted essentially all of the search records that Google had. So Google rejected the American subpoena but complied with the Brazilian subpoena. Google explained that the request from the Brazilian Government was a much narrower search request—not a fishing expedition.

These cases demonstrate the complications in using an offshore site to deliver content into countries where it is illegal. Through that mechanism, the Internet could threaten the ability of a country to enforce its democratically enacted laws. Interestingly, both of these cases involve the U.S. as that offshore site.

Let us take a third case. The website PartyGaming runs its business from its headquarters in Gibraltar, with its servers on a Mohawk reservation in Canada, a London marketing office, and a workforce in Hyderabad, India. PartyGaming allows anyone across the globe to gamble on its website. Such gambling is illegal in the United States. However, PartyGaming, which is a publicly listed company on the London Stock Exchange, makes most of its money from users in the United States.

So these examples demonstrate that the Internet does pose a threat, the threat that I suggested earlier. But what I want to suggest here, from the geographic perspective, is that this threat can actually appear very different in different contexts. Canadians are not about to send the Mounties to the United States. Indeed, the Canadian judge later rescinded the gag order. The cat was already out of the bag. The Canadians effectively conceded the point.

But the United States may have more arrows in its quiver than Canada. I want to take yet another example to show you that geography does matter. The example is AllOfMP3.com, a website popular in Britain. It is a Russian website, in English,

12. Richard Waters, *Brazil Lawyers Lean on Google*, FINANCIAL TIMES, Aug 24, 2006.

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which says that you can download MP3s fully licensed under Russian law for cents on the dollar or the pound in comparison to what iTunes would charge. It offers a much larger catalog than iTunes could ever hope to have because it does not bother with licensing in the first place. For example, the complete Beatles catalog is available on AllOfMP3, but not on iTunes (though iTunes has just recently licensed the Beatles catalog). AllOfMP3 states on its site that users should check to see if it is legal to download songs from their website in one's own jurisdiction, and that they only guarantee its legality in Russia. Amazingly, it actually suggests that it might be legal in the United States under U.S. law. Of course, it is not very confident of its legal position. It lists no contact person. There is no physical address listed for AllOfMP3. I searched through the site and found nothing. The *New York Times* tracked down a responsible party through a domain name registration.¹³ So who owns AllOfMP3.com? A resident of Moscow.

When the recording industry recently filed suit against AllOfMP3, in New York City, they sought billions of dollars in copyright damages. Of course, the recording industry will never get this sum. But here's the rub: they also sought the company's domain name. While the RIAA¹⁴ may find it difficult to enforce any award of monetary damages, it is likely that VeriSign, the company in charge of the domain name registry, will comply readily with any court order with respect to the domain name. VeriSign will listen to a New York federal court. It might be more difficult for everyone else around the world to seek such an easy resolution. Of course, AllOfMP3's owner could migrate to another domain name. This creates a cat and mouse game between the recording industry and AllOfMP3's content. However, if it is difficult for the recording industry to find the migrated site, it will be difficult for users to find as well. And in order for AllOfMP3 to flourish, they need a static and permanent address.

I do not want to suggest that America can control the Internet through the domain name system. But I do mean to suggest that place does matter when one examines the question of how the Internet affects democracy. If you look at the issue from an American perspective, you may find reason to hope. If you look at it from perhaps a Canadian perspective or a Taiwanese perspective, or some other perspective, you might find reason for some concern. I do not mean for us to throw up our hands but rather to work together to solve these disputes.

Hari Osofsky: I was eager to respond to a couple of things that have been said.

13. Jeff Leeds, *Music Labels' Lawsuit Seeks Shutdown of Russian Online Service*, N.Y. TIMES, Dec. 22, 2006 at C3.

14. Recording Industry Association of America.

In particular I think one of the complications is this: At what point in time do we look at geography? If you look at geography in Kantian times, you would be looking at a quite different discipline than if you look at geography today. This is especially significant because geography in the United States had this crisis period in the middle of this past century. Edward Soja has this wonderful quote which describes that period as an intellectually dead one for geography.¹⁵ Then in the early seventies, suddenly you see a rolling out of ideas and the beginning of a real interrogation of the relationship between space and place and of what scale means. In some ways, that transformation in the discipline of geography perhaps mirrors a question we need to ask about international law. The traditional Westphalian model with its search for universality, notion of the nation-states as its primary subject and object, and idea that we can have consenting sovereign equal states provides a very limited version of what international law is all about.

In some ways, it feels like today we need to ask the question: What should we regard as international law? Judith Resnick's piece last summer, with its concept of multiple ports of entry, really pushed the dialogue forward; it suggested that the fight that we have been having regarding how courts can use foreign and international law ignores some of the real ways in which international legal discourse actually happens.¹⁶

For me, that example is embodied in California and in its role in climate change litigation. California does not count in our traditional international law model in a meaningful way. It counts only in that it is working with the rest of the nation-state, the United States. However, many signs exist of evolution away from this traditional model. With regard to climate change, now you actually have cities signing on to the Kyoto Protocol. California is really pushing the boundaries through both its own legislation and its role in a lot of different kinds of climate change litigation, as the plaintiff and defendant. Additionally, it is pushing the boundaries in the way in which its representatives in the House and the Senate are engaging climate policy and through its cities' linkages to international and transnational governmental networks.

And that account does not even begin to engage the role of non-state actors; all of those interconnections came from looking at governmental dynamics. It seems like there is something going on here that international law must deal with; it must

15. EDWARD W. SOJA, *POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY* 16 (1989).

16. Judith Resnick, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 *YALE L.J.* 1564 (2006).

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either find that these issues are all outside the box of international law, or must find that international law is really a broader concept. If one takes the latter view, if one pushes against universalism, questions arise about the scale on which international law actually happens. Is international law increasingly becoming a multi-scalar phenomenon? What does that mean for our traditional Westphalian model? What are we going to do about it?

It seems like geography has developed so significantly since the early 1970's that it forces us to interrogate what we mean when we glibly refer to "place." What do we mean when we refer to "scale"? What do we mean when we refer to "space"? So, it seems like how one interprets these interconnections represented in climate change litigation depends on what one means when referring to "geography" or "international law."

Jonathan Greenberg: I very much like Professor Oh's simple and direct advice: if you're not sure how to locate the geographic perspective is, just remember to ask the "where" question. Where are the problems or transformations at issue occurring? In this context, Professor Osofsky asks "where does international law take place?" It's a very complicated question. To what extent is the world fundamentally different from this Westphalian model?

A couple days ago Luis Moreno-Ocampo, chief prosecutor for the International Criminal Court (ICC) spoke at our law school. He is trying to build a new international regime from scratch, during a very short term of office – only six years. How do you do that? The first question is the one we have been asking together here: where does international law take place? We know where the legal authority comes from. It comes from the Treaty of Rome.¹⁷ But we also know where the ICC court is located — in The Hague. But we do not have an international system yet. We still have nation states. And the crimes are taking place in Sudan and Uganda and Congo and other states. We don't have a system of international criminal law enforcement. So the ICC prosecutor has to work with national governments and leaders, step by step, through a sophisticated use of the current nation-state system to get the leverage he needs. Slowly, in this way, we can build a new international regime to hold state leaders accountable for the worst crimes.

Anupam Chander: So I think this is a very difficult question. The ICC example is a very important one to reflect upon. The ICC's seems to offer an attempt at the universal but what it achieves is actually far from that. The statute does not claim

17. Treaty of Rome, March 25, 1957, 298 U.N.T.S 11 (formed the European Economic Community).

to be universal. It says that it can prosecute crimes committed by member states, by citizens of member states or on member state territory. But the United States, of course, is not a member state. The U.S. has sought to even make sure, by agreements with other parties, that crimes committed on member state territory but done by Americans will not be prosecuted. Essentially, the agreements state that the U.S. can claim that this is the price, from our perspective, of our doing whatever you would like us to do, acting as a policeman for the world. There, again, the aspiration to the universal falters.

There is something valuable in the aspiration to the universal. It would be nice to be able to say that the same law applies to rich and poor, and the same law applies to the mighty and the weak. That is not the case here, which is unfortunate. However, perhaps there is Zion, the place where the geography becomes forgotten, where the particular does not matter and where understanding and enforcing law is not about context but rather about what the parties have done regardless of context.

Reginald Oh: I want to respond to the question posed: where does international law take place? It is a very good question, but a difficult one to answer. International law is very difficult to locate. To try to answer the question, it may be helpful to ask a similar question about U.S. constitutional law. Where does U.S. constitutional law take place? This question is relatively easy to answer. We can easily point to many formal institutions where constitutional law is created and performed. Constitutional law takes place in our federal and state court systems. It takes place in Congress and in the White House. It also takes place in law schools, in colleges, and even in elementary and secondary schools, where children are taught to internalize the values underlying the U.S. Constitution. It is in these places that constitutional law moves from abstract theory to being part of peoples' lived experiences.

The question about where law takes place illustrates a provocative point made by social theorist Henri Lefebvre, who argues that any ideology or belief system, whether that belief system is religion or law, needs social spaces in order to flourish.¹⁸ He contends that Christianity would not be the powerful moral and social force if it did not have the spaces and places in which it could take place. Thus, Lefebvre states, "what would Christianity be if not for its churches, without the confessional, the altar, the sanctuary, the tabernacles?" Lefebvre believes that Christianity is a powerful religion or ideology in part because it has created the spaces in which it is produced and reproduced.¹⁹ The same point can be made

18. Henry Lefebvre, *THE PRODUCTION OF SPACE* (1991).

19. *Id.*

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about U.S. constitutional law. It has produced the spaces and places necessary for constitutional law to thrive.

So, back to the original question: where does international law take place? Where are its spaces and places? At least with respect to the United States, those formal places and spaces of international law do not exist. We cannot easily point to those places and institutions where international law takes place. And because international law has not produced the spaces essential for its production, international legal norms and values have little power and force in the United States.

California's attempt to get involved in international climate change litigation is an attempt by one part of the United States nation-state to create a domestic sub-national space in which international law can take place. The state of California fully understands that for international legal norms regarding climate change to affect and change American attitudes and behaviors regarding the environment, it must have a space and place where they can operate and flourish.