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Introduction

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When this project was first conceived in early 2015, international law and politics seemed quite different than they do now. Although the liberal cosmopolitan certainties of the 1990s had been shattered sometime between the occupation of Baghdad and the collapse of Lehman Brothers, a certain confidence that the basic structures of global law and politics would remain unaltered still prevailed. Things could not be more different now, as we sit down to pen the introduction to this book. Indeed, few events other than the election of Donald Trump illustrate more powerfully that the sovereign, though still "able to kill, starve, exploit, imprison and subordinate" those within and beyond its territory, is a "smaller, more absurd and ridiculous figure" than often imagined by lawyers and theorists.[1] It is at this juncture, when prevailing notions of global law, order, and sovereignty are challenged in nearly every quarter, that this book revisits the question of extraterritoriality.

Defined in its most familiar form, legal extraterritoriality is the assertion and exercise of jurisdictional powers beyond a specific territorial framework. Yet how are we to understand the distinction between regimes that are expressly designed to operate "outside" a specific territory and regimes that are applied extraterritorially without necessarily being constructed for that purpose? Is there a difference, for instance, between the kind of extraterritoriality at work in those forms of international law that are directed toward the promotion of human rights and those forms of international law that are designed to formalise and legitimate the interests of foreign investors? If so, how exactly are we to conceptualise that difference? What are we to make of the fact that the very idea of extraterritoriality seems to presuppose the authority and legitimacy of territoriality—perhaps as an objective, even "natural", framework of organisation and engagement? In prioritising that which exceeds or transgresses a given set of "territorial" frontiers, are we not backhandedly—and for the most part surreptitiously—reinforcing the very state system that so many have struggled to destabilise, both practically and conceptually?

Some have sought to broach such questions as matters of pure theory, unpacking the concept of extraterritoriality (however it may be construed) in the name of an ostensibly ahistorical and apolitical philosophical analysis. Others have adopted more socio-historically contextualised approaches, training their lens on the complex processes through which extraterritorial regimes are instituted, developed, and transformed. These two bodies of literature often seem engaged in a series of monologues, talking past each other and concerned chiefly with sub- or intra-disciplinary disputes, each of comparatively little interest to those working or thinking with different frameworks. For every historically oriented scholar intrigued by the extraterritorial powers that were enshrined in the Ottoman capitulations or the Chinese "unequal treaties", there is a theoretically minded scholar dedicated to disaggregating the concept of extraterritoriality into its constituent elements and clarifying our understanding of their

[1] Orford 2006, p. 8.

content. Only rarely—and even then typically somewhat tangentially—are they put into conversation with each other.

This book brings together thirteen scholars of law, history, and politics in order to reconsider extraterritoriality. It examines the different historical and geographical contexts in which extraterritorial regimes have developed, the myriad political and economic pressures in response to which such regimes have grown, the highly uneven distributions of extraterritorial privilege that have resulted from these processes, and the complex theoretical quandaries to which this type of privilege has given rise. Rethinking the spatial and temporal frameworks of past and present modes of extraterritoriality through a host of innovative studies that interrogate the place of law in global assemblages of power, the book demonstrates that assertions of legal authority "beyond" territorial frontiers have always played a central role in the constitution and consolidation of sovereignty.[2] Its objective is neither to develop a definitive, all-encompassing explanation of legal extraterritoriality nor to provide an exhaustive catalogue of its different forms and functions, but rather to historicise and theorise different modes of legal extraterritoriality with a view to furthering our understanding of the mutually constitutive relations between sovereignty, jurisdiction, and territoriality.

Questions of extraterritoriality figure prominently in a large number of different debates, among others those pertaining to global legal pluralism,[3] international economic law,[4] international human rights law,[5] and the history of international and transnational law.[6] Yet the legal histories and theoretical architectures of extraterritoriality are rarely analysed as part of a coordinated effort. This book situates questions of legal extraterritoriality in a set of broader accounts of state-building, imperialist rivalry, capitalist expansion, tracking its multiple uses and meanings—and the complex jurisdictional disputes with which it has always been affiliated—in different contexts.

The book is divided into three substantive sections. In the first section, we pose the question of extraterritoriality's meaning. Our three contributors broach extraterritoriality as a mode of academic production, as an analytically unsustainable means of categorising juridical relations, and as a seductive but fundamentally inadequate concept in the Anthropocene. Despite their different preoccupations, all three aim to demystify extraterritoriality, encouraging more rigorous engagement with its content, scope of application, and the merits and drawbacks of its usage.

John Haskell inaugurates this first section with a wide-reaching review of the epistemological landscape of contemporary academic work on extraterritorial jurisdiction. His concern is with extraterritoriality as a particular mode of academic scholarship—as a particular "style" that legal scholars adopt.[7] Haskell identifies three modes of engagement with the topic: technique, history, and theory. Technicians ignore or bracket theoretical or straightforwardly political questions, according themselves the task of bringing order to chaos and making law coherent and functional in response to concrete policy questions. By contrast, those prioritising historical context seek to situate concrete practices of extraterritoriality, retrieve appreciation for the agency of marginalised groups and the consequences of forgotten events, and demonstrate that legal history mobilises existing protocols of transmission in legal

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2 For an earlier theoretical exposition that makes this point convincingly and that we have found to be helpful, see Malley, Manas, and Nix 1990.

3 See, e.g., Michaels 2009; Zumbansen 2010; Berman 2012.

4 See, e.g., Francioni 2009; Sornarajah 2010; Hofmann 2012.

5 See, e.g., Lubell 2010; Milanovic 2011; Langford et al. 2013; Bhuta 2016.

6 See, e.g., Sassen 2008; Raustiala 2009; Kayaoğlu 2010; Ruskola 2013; Benton and Ross 2013; Dorsett and McLaren 2014.

7 For related work on the idea of jurisprudential style see Desautels-Stein 2018.

thought. Finally, for those who adopt a fundamentally theoretical stance, underscoring complexity is precisely the goal. In their hands, extraterritoriality emerges as one of the many ways of explaining and contextualising the de-territorialising effects of contemporary global governance. Scholars writing in this genre embrace interdisciplinarity and generally display sensitivity to the role of new technologies in reshaping social relations. All three approaches, Haskell laments, tend to lack "conscious attention to the managerial environment and institutional tactics of scholarship".

Péter Szigeti challenges attempts to conceptualise extraterritoriality as if we know with certainty what we are examining. Reviewing various domestic contexts in which extraterritoriality has recently been applied and focusing on how the "territorial/extraterritorial divide is constructed in different branches of the law", Szigeti argues that it is impossible to produce a fully consistent and uncontroversial set of criteria for distinguishing territoriality from extraterritoriality. Four domains are explored: transnational criminal law, antitrust law, human rights law, and cases involving "intangible assets" and "hypermobile entities". As Szigeti shows, transnational criminal lawyers have long tackled questions of extraterritorial jurisdiction directly, but a close examination of different jurisdictions reveals stark differences in the conclusions that they have reached. Similarly, while the mobilisation of extraterritoriality by US antitrust lawyers in the first half of the twentieth century engendered bitter protests from their European counterparts, the European Community adopted a similar approach to antitrust enforcement a few decades later (while arguing that it was nevertheless exercising territorial jurisdiction). Importantly, though, Szigeti argues that accepting the reality of legal pluralism enables us to decentre territoriality as the supposed default rule of jurisdiction, while also necessitating a certain self-restraint in the usage of the language of extraterritoriality. He proposes the term "ascriptive jurisdiction" for certain forms of jurisdiction that cannot be captured by the territoriality/extraterritoriality binary.

Sara Seck's chapter is similarly concerned with the limitations of thinking about legal obligations through the prism of extraterritoriality. Seck focuses on the idea of the Anthropocene and the urgent need to tackle contemporary environmental disasters. In her view, the Anthropocene highlights the profound interpenetration of human activity and non-human ecological processes. She observes that human influence over such processes depends upon patterns of inequality between North and South, and ultimately upon patterns of capital accumulation and unsustainable production and consumption. It is this attentiveness to the political and economic dimensions of the Anthropocene that leads Seck to examine different "soft law" instruments and the way in which they conceive state obligations about harmful transnational corporate activity. In particular, Seck considers the UN Guiding Principles on Business and Human Rights, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights, reports prepared by special rapporteurs for human rights issues arising from toxic substances, and other documents. Ultimately, Seck argues that extraterritoriality only reinforces the idea of territoriality by positioning the former as an exception to the latter. Instead of being trapped within the dyad of territoriality and extraterritoriality, we should embrace, she argues, the fundamental interconnectedness of human and non-human and develop legal obligations that address this interconnectedness.

Moving from the present to the past, the book's second section revisits the history of extraterritoriality. Our contributors demonstrate that the projection of legal authority has never been an innocent technical exercise, or a means of disseminating "universal values" such as freedom of religion. Instead, it has been a core feature of capitalist expansion and imperialist domination. Ranging from the early modern period of European history to the mid-twentieth century, they highlight the multiple sites in which legal struggles over extraterritoriality have unfolded, as well as the diverse range of actors that have articulated their claims by reference to it.

Maïa Pal begins this second section by challenging orthodox perceptions of extraterritoriality in the field of international relations. Adopting a Marxist framework of analysis, and drawing from the tradition of "political Marxism" inaugurated by Robert Brenner and Ellen Meiksins Wood, she redevelops a substantive argument with strong methodological implications. First, Pal insists that our understanding of the emergence of extraterritorial ambassadorial privileges in early modern Europe ought to be enriched through consideration of the period's social property relations. Second, she argues that this approach poses a challenge to Eurocentrism, even if Europe is placed at the centre of the inquiry, since it is by constructing a non-elitist history of European extraterritoriality that we may be able to dislodge the privileging of the European continent as a space of progress and enlightenment. Pal challenges the argument that embassy chapels became "ground zero" for the transition from personal to territorial models of jurisdiction owing to religious conflicts in Europe and the gradual acceptance of religious freedom as a means of ordering cross-border elite interactions. Disturbing this image of linear progress toward religious tolerance and ambassadorial immunities, Pal argues that the diplomatic practices of England and the Dutch Republic differed significantly from those of France and Spain. In fact, it was the Dutch and English that led the way toward the legalisation of extraterritorial ambassadorial privileges—a development that Pal links to the non-aristocratic class composition of their ambassadors, which was, in turn, linked to profound transformations in their social property relations.

Kate Miles shares with Pal a focus on the early modern period, as well as an emphasis on questions of political economy. Her contribution enriches legal histories of extraterritoriality in three important ways. First, Miles emphasises the role of trading companies as early practitioners and advocates of extraterritorial practices, thereby challenging state-centric accounts of extraterritoriality and accounting for the role of private actors as subjects of jurisdictional claims and agents of empire.[8] She traces the legal experimentations of the Dutch East India Company, the British East India Company, and the Levant Company in a variety of extra-European territories, from the Ottoman Empire in the west to China, Siam, and Batavia in the east. The picture that emerges is one of "messy" contestation and compromise. Indeed, here lies Miles' second intervention: extra-European states were not passive sites for the deployment of extraterritorial jurisdiction, but active challengers and interpreters of the legal claims of chartered companies, generating an uneven legal and political landscape. Third, by extending her account into the nineteenth century, Miles captures a dual shift in regard to extraterritoriality. On the one hand, during the course of the nineteenth century, European imperial metropoles assumed for themselves the authority to manage extraterritoriality. On the other hand, a transition was effected from systems of legal pluralism to the "standard of civilisation" as the primary method of organising inter-communal legal affairs, at least in the view of European actors. Within this new framework, the legal systems of different Asian polities were portrayed as cruel and primitive, or simply denied existence, thereby reinforcing the growing tendency to view extraterritoriality as a well-defined treaty right as opposed to a revocable privilege.

Richard Horowitz is equally interested in transitions. His chapter offers a revisionist history of extraterritoriality in China that challenges the view that Chinese authorities were unconcerned with Western consular jurisdiction until the first decades of the twentieth century. While acknowledging that extraterritoriality did not assume during the nineteenth century the kind of political urgency and significance that it later did, Horowitz invites us to pay closer attention to the decades following the 1860s. During the 1860s and 1870s, one of the

[8] For the need to pay increased attention to private legal authority in the history of international law, see especially Koskenniemi 2016.

main points of contestation was the right of foreigners to travel, as well as their rights to reside and buy land, in the Chinese interior. This was naturally of concern to Western merchants and Christian missionaries alike. Interestingly, it was the question of conversion to Christianity that became a particularly pressing matter for Qing officials. Chinese subjects who had converted to Christianity along with Western missionaries and officials advanced claims that they enjoyed *protégé* status and were therefore exempt from Chinese jurisdiction. Qing officials were understandably determined to limit the expansion of foreign investment and missionary activity beyond specifically designated treaty ports. As Horowitz notes, "it was clear by the late 1860s that the treaty system as practiced established no clear limits on extraterritoriality, and the jurisdiction of consular courts"—a fact that troubled many Chinese officials.

Mai Taha picks up the theme of uncertainty about the boundary between "domestic" and "international" in her account of the Mixed Courts of Egypt. Taha situates the jurisprudence of these courts within the broader framework of Egypt's transition to capitalism and the class struggles in which it was anchored. She does so by underscoring the central role of these courts in facilitating the transformation of drinking water into a commodity to be bought and sold on the market, subject to the rules and rationalities of liberal contract law. Taha examines the legal theory of "mixed interest" that enabled the courts to claim jurisdiction over an ever wider range of cases, even those arising from disputes between Egyptian subjects alone. This theory turned out to be of crucial importance when a dispute arose between the Alexandria Water Company and the Alexandria municipality over the manner in which water was allocated and paid for. On the basis of a close reading of the complex case law engendered by this dispute, Taha demonstrates that the Mixed Courts were keen to position themselves as colonial regulators of Egypt's transition to capitalism as part of a process that subordinated the basic needs of Egypt's poorer classes into the sphere of private ownership and control.

The transition to capitalism and the commodification of nature is also a central concern of Ntina Tzouvala's intervention. This chapter focuses on legal struggles surrounding treaty-based extraterritoriality in nineteenth-century Siam and their relevance to processes of state transformation, territorialisation of relations of power, and Siam's transition to capitalism. Tzouvala emphasises the centrality of the "standard of civilisation" for the justification of Western practices, the close association between the concept of "civilisation" and externally induced legal reform, and the ways in which Siamese ruling classes internalised these imperatives and mobilised extraterritoriality to promote their own interests. She argues that the incorporation of the former vassal state of Lanna into Siamese territory was enabled by treaties between Siam and Britain that extended both states' authorities in the region. Crucially, these processes were overdetermined by the interests of British capital and the lucrative teak industry. The transformation of trees and forests into natural resources to be managed and exploited necessitated the existence of a powerful sovereign, and Siamese authorities positioned themselves as the guarantors of British capitalism through extraterritoriality treaties. In sum, Tzouvala argues that the history of extraterritoriality in Siam is useful for understanding how state sovereignty in the global South has often been conditional upon the protection of Western capital.

Daniel Margolies concludes the book's historical section by examining extraterritorial jurisdiction in the legal strategies and "state spaces" of US empire, both before and after the Second World War. Foregrounding the importance of economic relations, Margolies pays attention to the expansive application of US antitrust laws, and also the tolerance of exporting cartels enshrined in the 1918 Export Trade Act. He analyses the blurring of the distinction between "foreign" and "domestic" through the establishment of Foreign Trade Zones that suspended the application of US custom laws in specific ports with a view to promoting foreign

trade. Margolies explains that the 1950s witnessed the further expansion of this system with legislation for subzones and inverted tariffs that encouraged the assembling and processing of products within the United States. However, as Margolies notes, the co-existence of these subzones with US overseas territorial possessions, including major territorial possessions like Guam and Samoa and largely forgotten ones like the Swan Islands, created uncertainty about tariffs for imports, as US legal practices increasingly fused the state's interior and exterior. In the post-1945 period of US hegemony, the US federal government applied the spatial logic and legal techniques of extraterritoriality in a judicial and political struggle to wrest control of the offshore continental shelf and its resources.

The book's third and final section addresses four contemporary cases of extraterritoriality. While the United States plays a prominent role, both as a globally dominant power and as a pioneer in the extraterritorial projection of legal authority, our contributors also discuss cases involving the occupied Palestinian territories and various military interventions by European states in the Middle East and beyond.

Austen Parrish begins this final section with a compelling critique of those strands of US legal scholarship that advocate unilateral projection of US legal authority for the purpose of promoting liberal and cosmopolitan values. Parrish juxtaposes this tendency with the traditional view of international law as a force that constrains sovereigns by restricting most state legal authority to their territorial boundaries. However, Parrish radicalises this view not by grounding it in some kind of abstract faith in state sovereignty, but by presenting it as a precondition for the exercise of self-determination and democratic self-government. He argues that during the course of the last two decades a new consensus has emerged among prominent US lawyers who view this system as ineffective, anachronistic, and morally dubious, choosing instead to throw their weight behind the unilateral institution and enforcement of norms. Parrish maintains that both the projection of US domestic law abroad and the unilateral use of force in Kosovo, Iraq, and elsewhere ought to be understood as part of this broad trend. Importantly, he contends that recent judicial restraint in regard to extraterritorial jurisdiction is best understood as a means of ensuring immunity for US citizens and corporations, not as an acknowledgment of the significance of multilateralism. Crucially, Parrish stresses that these cosmopolitan defences of US unilateralism have strengthened neo-realist and sovereigntist models of US power, a point that merits close attention in the age of President Trump.

Ellen Gutterman is no less concerned with the expansive reach of domestic legislation. Emphasising the importance of the domestic politics of powerful states for the creation and operation of international law, Gutterman argues that contemporary extraterritoriality signals not the end of the state but rather the continuing efforts of global hegemons to retain territorially differentiated modes of authority. She examines the transnational enforcement of US bribery and corruption laws and the way that such enforcement diffuses US norms and practices. Gutterman pays particular attention to the enforcement of the 1977 Foreign Corrupt Practices Act, arguing that the judiciary's retreat from extraterritoriality has not necessarily been followed by other branches of government. Gutterman stresses that US anti-corruption policies have led to the reform of criminal law and corporate governance protocols along US-specific lines throughout the world, highlighting the profound systemic effects of US extraterritorial power. Importantly, Gutterman is interested in the way that such assertions of jurisdiction internationalise specifically US conceptions of bribery and corruption. Noting the current revival and amplification of multipolar political rivalry, Gutterman concludes her chapter by inviting us to rethink extraterritoriality as a specific mode of analysing global governance and world order.

Alice Panepinto's chapter examines the jurisdictional landscape of the post-Oslo occupied Palestinian territories and the way it challenges the distinction between (unlawful)

conquest and (prolonged) occupation. Panepinto is attentive to both the restrictive and permissive aspects of the international law of occupation, particularly the ways in which the Oslo Accords ratified the extension of Israel's legal authority over "Area C" (the West Bank). Focusing on the concept of settler colonialism as a specifically juridical phenomenon that involves the replacement of indigenous law by the law of settler populations, this chapter examines the expansion of the jurisdiction of the Israeli Supreme Court (sitting as the High Court of Justice) to review Israeli military actions in the occupied territories. Panepinto shows that the court occasionally rules favourably toward Palestinian parties. However, she argues, the price for individual justice is high. The court's operation makes the occupation palatable to much of Israeli society, reinforcing the fact that it is Israeli—not Palestinian—institutions who are authorised to "speak the law" and pushing the occupation ever closer toward outright conquest and annexation.[9] Examining the tension between individual claims to justice and collective goals of self-determination, Panepinto underscores the importance of considering broader issues of annexation, conquest, and colonialism when rendering Israeli institutions the arbiters of legality in the occupied territories.

Ezgi Yildiz concludes this section, and the book as a whole, by exploring the question of the extraterritorial application of the European Convention of Human Rights, one of the most controversial issues faced by the Strasbourg court. Yildiz reminds us that during the drafting of the convention, France and Britain were colonial powers and therefore invested in restricting its territorial application to European territories. Yildiz argues that the tension between European states' extraterritorial projection of power and their attempts to restrict the territorial reach of their human rights obligations resurfaced in the context of their participation in military interventions after the conclusion of the Cold War. She explores the evolution of the European Court of Human Rights' jurisprudence from the *Bankovic* case to later cases such as *Al-Skeini* and *Jaloud*. Ultimately, she proposes the concept of "functional boundaries" in order to explain extraterritorial human rights obligations. For Yildiz, such boundaries do not coincide with the physical borders of the state but instead register the fact that authority is divisible and flexible while ensuring that powerful states do not project power free of legal constraints.

To conclude, this volume contributes to the growing interest in the phenomenon of legal extraterritoriality. It contributes to our understanding of the increased diversification of legal actors arguing for and against extraterritorial claims, and it does so from a range of different theoretical standpoints. Further, it reinforces our appreciation of the historical underpinnings of contemporary claims of extraterritorial jurisdiction with a rich set of case studies. Ultimately, its degree of resonance will be determined by the range of questions it raises among its readers about the past, present, and future of extraterritorial authority—a pivotal reference-point for broader debates about statehood, sovereignty, jurisdiction, and territoriality.

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[9] "At its broadest, the question of jurisdiction engages with the fact that there is law, and with the power and authority to speak in the name of the law. It encompasses the authorisation and ordering of law as such as well as determinations of authority within a legal regime." Dorsett and McVeigh 2007, p. 3.

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