

# 11 Extraterritoriality as an analytic lens

## Examining the global governance of transnational bribery and corruption

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### Introduction

Since the end of the Cold War, scholars of international relations have debated the appropriate analytic lens through which to identify, understand, and explain permutations in world order and how best to address an ever-expanding catalogue of governance crises beyond the state.<sup>1</sup> The empirical challenges of globalisation – including complex transnational flows of people, money, and goods (both licit and illicit) and emergent catastrophic crises in human security wrought by poverty, disease, environmental degradation, terrorism, and nuclear proliferation – defy unilateral resolution by even the most powerful states. How do these evolving patterns and problems of globalisation shape our basic concepts of the state, prospects for global governance, and our understanding of world order?

Thinking about these questions twenty-five years ago, in reaction to what then seemed the shifting grounds of economic globalisation, John Ruggie invited a conversation about the prospects of systemic transformation in our time. In his now seminal article ‘Territoriality and Beyond’, Ruggie prompted his readers to think about the relationship between authority and territoriality and how we might go ‘beyond territory’ to consider the ways in which authority functions in the new era of globalisation.<sup>2</sup> In startling new trends – the emergence of new institutional forms of governance in Europe, the tremendous growth in offshore markets and production facilities, and new developments in transnational micro-economic links, trade in services, and in global finance – Ruggie identified the unbundling of the territorially bound state. Jumping into an emerging debate about the withering of the state in the face of such global and transnational forces, Ruggie lamented the paucity of available vocabularies for exploring the implications of this unbundling, even the possibility of a ‘fundamental institutional discontinuity in the system of states’.<sup>3</sup> For a useful start, he suggested the

1 See, e.g., Acharya 2018; Buzan and Lawson 2015; Cerny 2010; Cox and Sinclair 1996; Ikenberry 2001; Ikenberry 2011; Keohane and Nye 2012; Mearsheimer 2001; Tickner 1992; Wendt 1999.

2 Ruggie 1993.

3 Ibid. p. 143.

concept of territoriality. Ruggie averred, 'it is truly astonishing that the concept of territoriality has been so little studied by students of international politics; its neglect is akin to never looking at the ground that one is walking on'.<sup>4</sup>

Inspired by Ruggie, and going beyond his suggestion to think about 'territoriality and beyond', this chapter invites consideration of *extraterritoriality* as a useful starting point for thinking about world order, today. The notion of extraterritoriality – a newly emerging focus of interdisciplinary scholarship in international relations and international law – refers to the application of a sovereign state's law outside the juridical bounds of its territory, or the 'unilateral projection of domestic rules into the international arena'.<sup>5</sup> It is the exercise of jurisdiction by governments and domestic courts over matters beyond the territorial and juridical boundaries of the state's sovereignty.

As Austen Parrish and others have noted, extraterritoriality became widespread in US law and other jurisdictions in the 1990s, amidst the complex interdependence of financial and industrial globalisation – a convenient substitute for more traditional international law making and multilateralism.<sup>6</sup> Until quite recently, however, and despite a globalising trend towards its use, interdisciplinary scholarship in international relations and international law has largely ignored this trend.<sup>7</sup> International relations scholars, for the most part, have tended to conceive of law in a limited sense as a functional regulatory mechanism.<sup>8</sup> David Kennedy and other critical scholarship on international law, in contrast, identifies law itself as a practice of articulative power, with important distributive effects.<sup>9</sup> In this frame, law is a medium through which inequalities between regions either develop or reduce, an effective distributor of power and authority. Similarly, Michael Zürn's theory of global governance situates states and other actors of world politics within a global normative and institutional structure of hierarchy and inequality that itself is endogenously productive of contestation, resistance, and distributional struggles.<sup>10</sup>

Building on these scholars' insights about the power of law (and law as power),<sup>11</sup> this chapter takes extraterritoriality as a focus of analysis through which to evaluate and understand recent trends in global governance. The purpose is to consider to what extent it might be useful to deploy extraterritoriality as a central concept for reasoning about global governance. If we foreground practices and

4 Ibid. p. 174.

5 Buenger 2016, p. 268; Raustiala 2009; Putnam 2016; Parrish 2013; Parrish 2008.

6 Parrish 2013, pp. 221–26; Arnell 2012; Putnam 2016; Gutterman 2016a. On complex interdependence, see Keohane and Nye 2012.

7 For example, Slaughter, Tulumello, and Wood 1998; Abbott and Snidal 2000; Goldstein et al. 2001; Raustiala and Slaughter 2002; Dunoff and Pollack 2013. Key exceptions are Raustiala 2009; Putnam 2016; Kaczmarek and Newman 2011. On other limitations of international relations/international law scholarship, see also Howse and Teitel 2010. For a most recent review of the literature, see Whytock 2018.

8 Abbott and Snidal 2000; Finnemore and Toope 2001.

9 Kennedy 2016. See also Koskeniemi 1990; Anghie 2005; Koskeniemi 2017.

10 Zürn 2018.

11 See also Rajkovic, Aalberts, and Gammeltoft-Hansen 2016; Krisch 2005.

patterns of extraterritoriality in our analyses of global governance, what insights or observations might this reveal?

As an analytic lens, a focus on extraterritoriality entails attention to particular ways in which the international sphere is shaped by the national, domestic politics of certain states, especially powerful ones. Both directly through the application of national laws outside the boundaries of the sovereign state and indirectly through the emanation of legal norms and practices from one sovereign jurisdiction to others, patterns and practices of extraterritoriality extend domestic political norms and practices into the global sphere. An analytic focus on extraterritoriality, then, highlights the impact of domestic politics – including domestic regulative and social norms, values, and identities – on the processes and outcomes of global governance. Especially when it comes to legal extraterritoriality employed by powerful states, this analytic approach emphasises how the extension of national law and regulation into the international sphere can promote certain kinds of world order. In contrast to multilateral institution-building, extraterritoriality is a unilateral approach to domesticating the international sphere. One of the implications of this is the following: to the extent that powerful states with the capacity to do so employ various strategies of extraterritoriality in order to shape global politics in accordance with their own interests, this may mitigate against the kind of systemic transformation scholars like Ruggie have contemplated in the age of globalisation. Extraterritoriality represents not so much a transformation of political authority beyond the state as a conservative effort to retain territorially differentiated authority and to extend it through transnational political processes within the complex infrastructures of the global economy.<sup>12</sup>

To illustrate, the next section foregrounds extraterritoriality in an analysis of one area of global governance where it has been especially prominent: global efforts to control transnational bribery and corruption. Viewed through the lens of extraterritoriality, the global regime of anti-corruption is revealed as a domain that is shaped definitively by the extraterritorial impact of American legal norms and practices – as opposed to the direct role of courts,<sup>13</sup> of US coercive power,<sup>14</sup> or the promotion of US interests and legitimacy through international institutions.<sup>15</sup> This emphasis makes explicit the considerable influence of specifically American legal norms and practices on what is nominally a multilateral, global regime. The extraterritorial lens thus accentuates the point that transnational politics ‘do not float freely’;<sup>16</sup> they are grounded – socially, legally, politically, and economically – in specific national contexts. The analysis suggests that – in contrast to Ruggie’s perhaps hopeful expectation that going ‘beyond territoriality’ might open possibilities for thinking about transformation – extraterritoriality in

12 Cerny 2014.

13 Putnam 2016.

14 Mearsheimer 2001.

15 Ikenberry 2001.

16 Risse-Kappen 1994.

the global governance of corruption in fact functions as a conservative brake on meaningful and effective control of corruption.

### **Extraterritoriality in the global governance of transnational bribery and corruption**

Bribery and corruption – alongside cronyism, extortion, influence-peddling, fraud, and kleptocracy – are age-old, universal phenomena.<sup>17</sup> The treatment of corruption as a problem in international relations, however, is relatively recent. Corruption first became a subject of global governance in the 1990s, prompted by a number of factors. The end of the Cold War reduced strategic and geopolitical incentives for powerful countries in the West to tolerate corruption in their allies.<sup>18</sup> An ‘eruption’ of major corruption scandals in democratic, industrialised states also revealed that the problem did not belong to the ‘Third World’ alone.<sup>19</sup> New research presented mounting evidence of corruption’s harmful effects on, among other things, economic growth, trade, investment, and political stability in a globalised liberal economy. The World Bank identified corruption as ‘the single greatest obstacle to economic and social development’ and committed to fight against it. The Organisation of American States (OAS), the Organisation for Economic Cooperation and Development (OECD), the Council of Europe, the IMF, and the UN, together with an array of private-sector and non-governmental organisations, produced treaties, policy recommendations, codes of conduct, and advocacy strategies focused on curbing corruption.<sup>20</sup> Today widespread public acceptance, a high degree of institutionalisation, and extensive treaty ratifications – more than 180 states are party to at least one international anti-corruption treaty, and dozens have obligated themselves under multiple and overlapping such agreements – indicate that ‘anti-corruption’ is a relatively robust global norm, embedded in a thick regime complex of international rule and regulation.<sup>21</sup>

Corruption nevertheless remains difficult to pin down, conceptually and in practice. A complex and multifarious phenomenon, it is a major challenge for transnational governance. Whether identified generally as ‘the abuse of entrusted power for private gain’,<sup>22</sup> associated specifically with transactional bribery or kleptocratic regime practices,<sup>23</sup> or regarded as encompassing a wider range of behaviour within ‘illicit globalization’,<sup>24</sup> corruption evades easy definition, measurement, explanation, and control. In addition to illicit financial practices and transactions, the notion of corruption also evokes normative ideas about

17 Noonan 1984.

18 Rose-Ackerman and Palifka 2016, p. 5; Theobald 1999.

19 Naím 1995; Glynn, Kobrin, and Naím 1997.

20 Gutterman 2016b; Heckel and McCoy 2001.

21 Gutterman and Lohaus 2018.

22 Transparency International (n.d.).

23 Gutterman 2016b, 2016a; Sharman 2017.

24 Andreas 2011.

justice and fairness, and (in modern times) the appropriateness of markets versus bureaucracies as distributive mechanisms in society. By prescribing norms about how government officials, politicians, members of the judiciary, and business actors ought to behave, international rules against corruption affect domestic legal frameworks and policymaking in ways that some states find intrusive and contrary to the principles of regulatory autonomy and sovereignty.<sup>25</sup> Yet in a globalised economy where both licit and illicit transactions transgress the bounds of national jurisdiction, corruption remains an urgent problem to address. Corruption enables multiple patterns (and harms) of illicit globalisation to flourish, including human trafficking, drug trafficking, money laundering, and terrorist financing.<sup>26</sup> Corruption exacerbates deeply immiserating trends, domestically and transnationally.

Plenty of research on corruption tackles these problems, from a variety of theoretical and empirical approaches. Important contributions include anthropological studies,<sup>27</sup> studies from the perspective of global security,<sup>28</sup> comparative political investigations,<sup>29</sup> rational-institutional analyses of formal anti-corruption institutions in different national governance contexts,<sup>30</sup> and studies that focus on corruption norms and informal institutions.<sup>31</sup> Several journalistic and anecdotal studies of global corruption have also been important.<sup>32</sup>

Fewer studies have examined the global governance of bribery and corruption in theoretically explicit ways. Drawing on sociological institutionalism in international relations, Anja Jakobi has analysed the anti-corruption regime – and the emergence of global crime governance more generally – through the lens of world society theory, a perspective in which international organisations ‘disseminate world cultural principles and cause policy change in national politics and society’.<sup>33</sup> Global governance, in this frame, ‘assembles a set of diverse actors that strive for a common regulation in a selected issue area’.<sup>34</sup> In his account of the emergence of the global norm against kleptocracy, on the other hand, J. C. Sharman emphasises structural trends and a more decentralised, undirected, and coincidental process of change amidst the confluence of the end of the Cold War and the need to account for development policy failures.<sup>35</sup>

In contrast to these existing studies, the analytic lens of extraterritoriality introduces a different perspective on the global governance of transnational bribery and corruption: a focus on the United States as a source of legal norms

25 Gutterman and Lohaus 2018, p. 252.

26 Andreas 2011; Allum and Gilmour 2012.

27 Haller and Shore 2005.

28 Rotberg 2009.

29 Johnston 2005.

30 Mungiu-Pippidi et al. 2011; Mungiu-Pippidi 2015.

31 Kubbe and Engelbert 2018.

32 Vogl 2012; Cockcroft 2012; Chayes 2015; Cockcroft and Wegener 2016.

33 Jakobi 2013, p. 17.

34 Ibid. See also Avant, Finnemore, and Sell 2010.

35 Sharman 2017.

and practices, directly and indirectly driving anti-corruption enforcement and shaping the global regime. Although it did not unilaterally create the global regime, the United States is the chief enforcer of international rules against transnational bribery, primarily through its extraterritorial enforcement of the US Foreign Corrupt Practices Act (FCPA). First enacted in 1977 in the aftermath of the Watergate scandal – at a time when transnational business bribery was routine, expected, and in many jurisdictions tax-deductible as an ordinary business expense – the FCPA prohibits corrupt payments by individuals and companies to foreign government officials for the purpose of ‘securing any improper advantage’ in obtaining or retaining business abroad.<sup>36</sup> It is jointly enforced by the criminal division of the Department of Justice (DOJ) and the enforcement division of the Securities Exchange Commission (SEC), and it applies to any US person (individual or entity) and any non-US person with securities registered in the US (‘non-US issuers’) and their employees engaged in proscribed acts outside the territory of the United States. In short, the FCPA bans bribery abroad by US persons and some non-US persons alike.<sup>37</sup>

US enforcement of the FCPA has surged, especially over the past decade. Since 2008 the DOJ and the SEC have collected over \$9 billion in monetary sanctions in hundreds of enforcement actions against both US and non-US companies and individuals.<sup>38</sup> Among these some especially notable enforcement actions stand out. In 2008 German multinational Siemens paid \$1.6 billion to American and European authorities to settle charges that it routinely used bribes and slush funds to secure huge public works contracts around the world.<sup>39</sup> Siemens’ \$800 million payout to US authorities in this case was the largest anti-bribery enforcement in history. Sweden’s Telia Company AB broke that record in 2017 with \$965 million in total penalties to resolve FCPA violations in Uzbekistan.<sup>40</sup> In 2016 Dutch company VimpelCom Limited, the world’s sixth largest telecommunications company, and its Uzbek subsidiary, Unitel LLC, paid \$795 million to settle an enforcement action for paying \$114 million in bribes to government officials in Uzbekistan between 2006 and 2012.<sup>41</sup> To date eight of the ten largest FCPA enforcement actions have been against non-US based companies.<sup>42</sup>

36 Gutterman 2015. From the outset, American companies complained that the FCPA unfairly disadvantaged them in international business while foreign competitors won contracts by paying bribes. The US government’s response was to pursue a policy of internationalisation. This was not successful until 1997, when the OECD countries finally created an international convention modelled on the FCPA, to criminalise transnational bribery. Despite widespread adoption of national laws in compliance with the Convention, however, the United States remains the most active enforcer of anti-bribery law in global commerce.

37 Bartle, Chamberlain, and Wohlberg 2014; Gutterman 2016a.

38 For up-to-date information on FCPA enforcement data and trends, see generally <http://fcpa.stanford.edu/index.html/>; [www.fcpablog.com/](http://www.fcpablog.com/); and <http://fcpaprofessor.com/>.

39 Lichtblau and Dougherty 2008; Schubert and Miller 2008.

40 Cassin 2017; Schoenberg and Dolmetsch 2017.

41 Cassin 2016; Raymond and Deutsch 2016.

42 Cassin 2018.

These and other actions indicate the evolving and expanding bases upon which the US government enforces the FCPA, on an extraterritorial basis.<sup>43</sup> The United States, it seems, has set itself up as the ‘ultimate arbiter’ of anti-bribery enforcement around the world.<sup>44</sup> When France did not do so, for example, US agencies proceeded with cases against French companies Alcatel-Lucent (\$137 million in 2010), Total S.A. (\$398 million in 2013), and Alstom S.A. (\$722 million in 2014). France eventually passed new domestic legislation to enhance their international anti-bribery enforcement and has since coordinated with the US agencies in one of the biggest actions of all time, against Société Générale S.A. (\$585 million in 2018). This pattern seems to confirm Sarah Kaczmarek and Abraham Newman’s findings that foreign jurisdictions in which the United States pursued FCPA enforcements are significantly more likely to enforce their own national rules.<sup>45</sup> In sum, the United States has been leading the way in enforcing international anti-corruption efforts globally – and this trend appears set to continue.<sup>46</sup>

On what basis do US agencies enforce the FCPA abroad? US citizens and domestic concerns are subject to the FCPA regardless of where they act, by virtue of citizenship and nationality. By the terms of the statute, SEC issuers, regardless of nationality, are also subject to FCPA enforcement for actions taken outside the United States. Foreign entities, on the other hand, may be subject to the FCPA according to the territoriality principle; that is, for acts committed in the United States in furtherance of a violation. However, since 2012 the DOJ and SEC have also asserted jurisdiction over any foreign national or company that ‘aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the U.S.’.<sup>47</sup> While this jurisdictional claim may exceed what the language of the statute actually allows,<sup>48</sup> contentions of overreach have not stopped the DOJ nor the SEC from continuing to expand the jurisdictional reach of their claims to assert authority over bribery committed by foreign nationals outside the territory of the United States.<sup>49</sup>

For example, the DOJ has proceeded on the basis that even ‘fleeting contact’ with US territory over bribery committed by foreign nationals in furtherance of a bribery scheme may constitute a sufficient basis upon which to assert jurisdiction over foreign entities and individuals for conduct that occurred outside the United States.<sup>50</sup> They have done so even when the money or correspondence is not knowingly or intentionally routed to the United States, and does not remain in the United States for a significant length of time.<sup>51</sup> The agencies have also

43 Coleman 2017; Koehler 2017; Koehler 2018.

44 Davis 2016, p. 342.

45 Kaczmarek and Newman 2011.

46 Anello and Janowski 2017; Simidjiyska and Fuller 2017.

47 US Department of Justice and US Securities and Exchange Commission 2012, p. 21.

48 Casino and Maberry 2013.

49 Ashe 2005; Koehler 2014; Wilson 2014.

50 Hecker and Laporte 2013.

51 Ross 2012.



invoked accomplice theories of liability to prosecute foreign defendants who did not act within the United States, as in 2012 actions against Japanese and European companies Marubeni, JGC, and Snamprogetti, charged with conspiring with and aiding and abetting a domestic concern's FCPA violations. The SEC, for its part, has also 'aggressively stretched agency principles to impute parent liability for subsidiary conduct' that takes place abroad.<sup>52</sup>

This expanding ambit of extraterritoriality in FCPA enforcement has been happening without the explicit endorsement of US courts. To the contrary, in recent cases such as *Morrison v. Australia National Bank, Ltd.* in 2009 and *Kiobel v. Royal Dutch Shell Co.* in 2013, US courts up to and including the Supreme Court have been limiting the extraterritorial application of US law.<sup>53</sup> With respect to the FCPA, however, the trend has been quite the opposite – US anti-corruption law is reaching farther and farther into global regulatory environments and into other sovereign jurisdictions. This pattern has developed in tandem with a particularly American aspect of anti-corruption enforcement: the use of negotiated settlement agreements. Since at least 2008 the DOJ and the SEC have relied to an unprecedented extent on deferred-prosecution agreements (DPAs) and non-prosecution agreements (NPAs) – known as 'diversion agreements' – in FCPA enforcement.

Diversion agreements permit corporations implicated in FCPA violations to avoid criminal prosecution when they admit wrongdoing and accept various other stipulations related to anti-corruption reform. For example, they may be required to undertake comprehensive compliance systems, hire compliance advisors, and pay significant financial penalties and restitution.<sup>54</sup> To date, diversion agreements are the primary legal mechanism employed by the enforcement agencies to conclude FCPA enforcement actions against corporate defendants.<sup>55</sup> And they are exempt from judicial scrutiny. It may be that in extending its jurisdiction abroad, the government expects that companies will choose to settle with diversion agreements rather than test the limits of the government's jurisdiction in court.<sup>56</sup> In sum, neither courts nor Congress have been endorsing the extraterritorial application of the FCPA. Rather, it is US agencies deploying particular legal practices.

Another particularly American legal practice that has shaped anti-corruption efforts abroad is the use of plea agreements in criminal enforcement. With plea agreements, prosecutors press lesser charges or ask for a lighter sentence in return for a defendant pleading guilty or offering evidence to incriminate others. Plea agreements have long been a cause of suspicion in other jurisdictions, as well as a worry for anti-corruption activists, who argue that, like diversion agreements, plea deals allow violators to pay a fine and not face further punishment.<sup>57</sup> Nevertheless, the practice is spreading. Whereas in 1990 just nineteen of ninety

52 Volkov 2016.

53 Bright 2013; Stephan 2013; Putnam 2016.

54 Urofsky 2014; Thomas 2009; Wirz 2013.

55 Since 2016 they have also added a pre-trial programme of 'declinations and disgorgements'. See Woody 2018.

56 Casino and Maberry 2013.

57 Fortado 2016.



surveyed countries used plea agreements in criminal procedure, by 2017 that number was sixty-six.<sup>58</sup> The trend is particularly pronounced in the realm of anti-corruption enforcement. In France, for example, the reaction to US enforcement against iconic French companies accused of foreign corporate bribery prompted the adoption of US-style plea agreements in new anti-corruption legal provisions known as Sapin II. Since US enforcement against the French company Alstom netted the United States a \$772 million fine in 2014, ‘there has been a new push for changes in a French judicial system that has historically preferred convictions to negotiated deals’.<sup>59</sup> The turn to negotiated agreements and plea deals in France under Sapin II represents a significant shift from the criminal procedure that has prevailed in France for centuries, based on the investigating magistrate status of prosecutors, where the magistrate is the key player in gathering evidence.

The impact of US-style plea agreements has perhaps been most pronounced in the case of Brazil. Brazil’s recent experience with *Operation Car Wash* – the biggest anti-corruption scandal, not just in Brazil, but possibly ‘in history’<sup>60</sup> – has unfolded in a manner consonant with the United States’ approach to anti-corruption enforcement. Particularly in its acceptance of plea bargaining within a legal-institutional approach to investigation and prosecution, Operation Car Wash has been presented as a model of anti-corruption and integrity by the global anti-corruption movement.<sup>61</sup> Launched in March 2014, the investigation code-named ‘lava jato’ initially targeted black-market money dealers (*doleiros*) who used small businesses such as gas stations and car washes to launder the proceeds of crime. Among the *doleiros*’ clients, however, investigators discovered a man named Paulo Roberto Costa – the director of refining and supply at Petrobras, the largest corporation in Latin America.<sup>62</sup> Through an unprecedented series of US-style plea bargains, a succession of arrested officials revealed account after account of corruption, bribery, and other illicit payments throughout Brazil’s political system. Costa and other Petrobras directors, it turned out, had been deliberately overpaying on contracts with various suppliers for office construction, drilling rigs, refineries, and exploration vessels. In exchange for guaranteed business on ‘excessively lucrative terms’, the companies agreed to funnel between one to five percent of every such contract into secret slush funds.<sup>63</sup> Petrobras directors then allocated money from secret funds to the politicians who had appointed them in the first place, and to their political parties. The scheme, rife with bribery and outright

58 *The Economist* 2017.

59 Bohlen 2015.

60 Watts 2017.

61 Transparency International 2016.

62 Watts 2017. A ‘flagship’ for Brazil’s emerging economy amidst the biggest oil discovery of the twenty-first century in huge new oil fields in deep waters off the coast of Rio de Janeiro, Petrobras accounts for more than an eighth of all investments in Brazil, provides hundreds of thousands of jobs in construction firms, shipyards, and refineries, and has business ties with all kinds of international suppliers, including Rolls-Royce and Samsung Heavy Industries.

63 Watts 2017.

theft of billions of dollars from shareholders and taxpayers, funded personal accounts as well as election campaigns to keep the governing coalition in power.

Operation Car Wash eventually discovered illegal payments of more than \$5 billion to company executives and political parties of all stripes. Prosecutors put billionaires in jail and questioned the finances and reputations of some of the world's biggest companies. There have been more than 240 criminal charges and 118 convictions, including high-level politicians and business people 'previously considered untouchable'.<sup>64</sup> The investigation exposed a culture of systemic graft in Brazilian politics, and provoked 'a backlash from the establishment fierce enough to bring down one government and leave another on the brink of collapse'.<sup>65</sup>

Although this anti-corruption drive has received widespread popular support in Brazil, its impact on Brazilian democracy over the long run remains in question. Critics have noted that the episode has elevated the role of lawyers in the Brazilian political system to an unwarranted degree, particularly those trained in the United States and following US-dominant norms concerning the use of plea bargaining and litigation as a political tool.<sup>66</sup> To the extent that Operation Car Wash has elevated judges and prosecutors to the level of folk hero status with some untouchable power resources, 'lawyers may have found and seized those opportunities to convert their social and cultural capital into political capital'.<sup>67</sup> This episode may be likely to reinforce the global norm of anti-corruption while – perhaps ironically – potentially eroding representative democracy at home.

Viewed through the lens of extraterritoriality, the spread and impact of US-style plea deals and negotiated settlements in cases such as Brazil and France reveal the extent to which the global regime of anti-corruption is tightly bound with US-driven styles and patterns of enforcement. It is through both direct extraterritorial enforcement and the informal diffusion of legal rules and practices – as in the diffusion of plea bargaining – that a dominant state such as the United States may extend its legal authority on an extraterritorial basis. On another note, the emergence of the global regulatory norm of anti-corruption in the first place can be understood as a facet of extraterritoriality. The spread of anti-corruption norms in the context of a broader agenda of 'good governance', aid conditionality, and rankings of states according to their levels of corruption may be viewed as reminiscent of an earlier period of colonial expansion in which foreign polities were required to capitulate to the extraterritorial jurisdiction of Western powers.<sup>68</sup>

The extraterritorial application of US law and practice in the global governance of corruption has not increased the effectiveness of global anti-corruption efforts. Nor has it led to demonstrably lower levels of corruption in the global economy. To the contrary, US extraterritoriality acts as a brake on global anti-corruption

64 Transparency International 2016.

65 Watts 2017.

66 de Sa e Silva 2017.

67 de Sa e Silva 2017, p. 378.

68 Hindess 2005.

efforts in a broader sense. The FCPA itself comprises a narrow conception of corruption as transactional bribery, focused on discrete incidents of bribery. FCPA enforcement therefore tends to single out specific actors and instances of corrupt transactions rather than tackling the embedded networks and practices in which opportunities for corruption are cultivated in the global economy. Corruption in international commercial activity entails multiple sets of connected transactions, processes, and relationships that unfold within a variety of transnational networks – both licit and illicit – and they are rarely isolated instances.<sup>69</sup> For all its vigour, US enforcement of the FCPA challenges none of the practices of such transnational corruption networks. Rather, it ‘stovepipes’<sup>70</sup> anti-corruption resources towards a narrow focus on transnational business bribery, ignores the broader, networked practices in which bribery transactions are embedded and in which US actors often are complicit, and prevents the emergence of a global approach to curbing corruption in its many forms.<sup>71</sup> The United States also resists the enactment of corporate transparency laws, which advocates promote as a means of revealing the true beneficial ownership of shell companies and overseas trusts. These laws could expose the ill-gotten gains of the corrupt and the secretly held wealth of tax evaders who otherwise benefit from a system that rewards anonymity.<sup>72</sup> In sum, the extraterritorial impact of US norms both promotes a specific kind of anti-corruption enforcement and obstructs a broader, potentially more meaningful and effective control of corruption in the global economy.

## Conclusion

The global governance of transnational bribery and corruption unfolds within an American-dominated regime of extraterritoriality. Although the general emergence of the anti-corruption regime in some respects has been diffuse, non-directed, and contingent,<sup>73</sup> it is also fundamentally grounded in US-based social, legal, and political conceptions of corruption and anti-corruption.<sup>74</sup> These are expressed directly through extraterritorial enforcement of the FCPA, as well as indirectly through the diffusion of negotiated settlements and plea agreements in anti-corruption enforcement. While this informal diffusion of rules and legal practices relies on the free acceptance of norms by foreign jurisdictions – whether due to a self-interested adoption of the rules of a dominant state or a belief in their superiority – this kind of indirect extraterritoriality in global governance may conceal the ‘pervasive processes of normalisation of a hegemonic ideology’.<sup>75</sup>

In this analysis, the concept of extraterritoriality provides a distinct opening for identifying the extent to which an ostensibly multilateral governance

69 Cooley and Sharman 2013.

70 Garrett 2007.

71 Gutterman 2018.

72 Bohlen 2016.

73 Sharman 2017.

74 Gutterman 2018.

75 Krisch 2005, p. 404; Hindess 2005.

arrangement is in fact grounded in the domestic norms, politics, and particular interests of a dominant state. The upshot is to shift international law and international relations inquiry out of a limited focus on problems of compliance and effectiveness,<sup>76</sup> and towards questions about the fundamental legitimacy and appropriateness of international norms and rules themselves. As an analytic lens, extraterritoriality can bridge theoretical developments occurring across the study of international law and global governance. Notwithstanding Ruggie's expectation that going 'beyond territory' may open vistas for the transformative potential of globalisation, contemporary patterns and processes of globalisation may seem less transformative to systems of inequality that are sustained by corruption when conceived as extraterritorial manifestations of dominant state power.

At a moment when power politics seems to be reasserting itself in international relations, this may be an opportune time for conventional approaches to foreground power in accounts of international law and international relations. Thinking of extraterritoriality as a conceptual lens for the analysis of global governance and world order is a start in that direction.

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