Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?

Eric Engle
ARTICLE

EXTRATERRITORIAL CORPORATE CRIMINAL LIABILITY: A REMEDY FOR HUMAN RIGHTS VIOLATIONS?

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INTRODUCTION

Many business opportunities in the third world are of questionable legality (e.g. child labor) or are formally illegal (e.g., bribery).\(^1\) Political instability often implicates corporations with

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\(^1\) See Lena Ayoub, Note, Nike Just Does It – and Why the United States Shouldn’t: The United States International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad, 11 DEPAUL BUS. L.J. 395, 400–01 (1999) (chronicling unfair labor practices perpetrated abroad by United States based multinational corporations); see also Barbara Crutchfield George & Kathleen A. Lacey, A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives, 33 CORNELL
brutal regimes and even illegal acts. When can a corporation be implicated as a criminal for such acts? This article examines the criminal liability of the corporation itself for violations of international law and of U.S. law outside of U.S. territory. It also examines the history of the rise of corporate criminal liability in the common law and civil law as well as theories of imputed liability in order to show the existence of corporate criminal liability under customary international law. The conclusion is that U.S. companies are subject to the law of their host, U.S. law, and international law. To reach this conclusion, this article makes some novel arguments about international and domestic law.

Domestic U.S. laws which this paper examines include the Racketeering Influenced and Corrupt Organizations Act (RICO), the Foreign Corrupt Practices Act (FCPA), as well as Securities and Exchange Commission (SEC) regulations and laws. These are the principal domestic criminal laws whose application to overseas transactions heard before U.S. courts are likely to involve corporations. This paper argues that these laws have extraterritorial effects and that they can be applied not only to the persons representing or constituting the corporation but also to the corporation itself.

I. HISTORY AND THEORY OF CORPORATE CRIMINAL LIABILITY

A. History of Corporate Criminal Liability

1. Corporations as Criminals in the Common Law and Civil Law

Historically a corporation could not be criminally liable in national law because the corporation was a legal fiction with no


independent will.\(^3\) In Anglo-American common law Blackstone wrote that a corporation cannot commit "treason, or felony, or other crime, in its corporate capacity."\(^4\) In continental civil law this was also true\(^5\) following the maxim "societas delinquere non-potest."\(^6\) One must distinguish between the two different legal systems.\(^7\) However both the civil law (e.g., France, Sweden, Denmark, Germany\(^8\)) and the common law independently evolved from a principle of no corporate liability toward a principle that recognizes that corporations can be guilty of committing crimes\(^9\) in national and international law.\(^10\)

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\(^3\) See Michael B. Metzger, Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects, 73 Geo. L. J. 1, 47–48 (1984) (recounting early common law view that, inasmuch as a corporation lacked a mind with which to formulate requisite intent, and a physical form to perpetrate actus reus, a corporation could not be held criminally liable).


\(^5\) See Orland, supra note 4, at 114–17 (explaining traditional French model’s rejection of vicarious imputation of criminal responsibility to corporations because culpability was viewed as unique to the individual and the model’s influence on Western European nations such as Belgium and the Netherlands).

\(^6\) Literally, “corporations cannot commit crimes.” Orland, supra note 4, at 115 n.23. This maxim is the genesis of the traditional French model. Inasmuch as the corporation lacks a mind with which to formulate a criminal intent, imputation of criminal liability to corporations was viewed as anathema to the principle that the guilty mind formed the basis for criminal law. Nor could a corporation commit the actus reus warranting criminal sanction. See Orland, supra, note 4, at 115–16. Interestingly, the ancien regime did recognize penal responsibility of corporations. However the bourgeois revolutions’ individualist ideal abolished collective responsibility (e.g. ‘corruption of the blood’, the idea that descendants of a criminal are implicated in the ascendant’s crime are unconstitutional in the U.S.). Orland notes that “before the French Revolution... criminal sanctioning of corporations was generally accepted on the continent” and the “the French Grande Ordonnance Criminelle of 1670 mentioned the subject in great detail;” however, “the French Revolution ideal of individualism... did away with the concept.” Orland, supra note 4, at 115 (quoting Guy Stessens, Corporate Criminal Liability: A Comparative Perspective, 43 Int’l & Comp. L.Q. 493, 494 (1994)).

\(^7\) For an extensive discussion of corporate criminal liability in French law, see Orland, supra note 4 at 114–17. The authors note that beginning in the early 20th century the American model imputed criminal liability vicariously to the corporate entity for the culpable acts or omissions of its employees and contrasts this with the French model, which did not assign corporate liability for crime. Id. at 114–15. Each model respectively influenced the common law and the civil law. However, the U.S. model has since prevailed even in France. Id. at 115.

\(^8\) See Orland, supra note 4, at 116 (noting that German legal system has not recognized corporate criminal liability per se, but has implemented a system wherein administrative bodies may impose fines on corporations).

Corporate criminal liability in both the common law and in civil law evolved from recognizing individual criminal liability for wrongful acts of the corporation (first recognizing liability of directors, then of officers and finally of employees) until finally recognizing the criminal liability of the corporation itself. This is an example of the contemporary trend toward a convergence of the common law and civil law.

This evolution may have occurred because until the twentieth century the principle remedy for crime was imprisonment, corporal punishment or execution. Obviously such punishments could not be applied in any meaningful sense to a corporation. However, punishment for crime now includes lesser penalties such as fines, public service, and other non-carceral remedies. Corporations can also be punished for crimes by being denied the right to do business with the government or even by revocation of the company’s articles of incorporation. Thus, as criminal punishment evolved, the principle of “no criminal liability” also evolved dialectically into its opposite. In principle, corporations today are subject to criminal law in the common law, in civilian legal systems, and by extension in international law. Although it is widely acknowledged that corporations are non-state actors (and for this reason too were not subject to international criminal law like individuals), they can now be liable for crimes under

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12 See Beale, supra note 10, at 158–59 (noting that European advocates of corporate criminal liability posit that modern criminal sanctions are more apt to circumscribe the corporations’ potential for harm); Metzger, supra note 3, at 47–48 (noting corporation’s inability to be subjected to imprisonment as contributing to common law’s rejection of corporate criminal liability).

13 See generally Beale, supra note 10, at 159 (detailing alternative European corporate criminal sanctions, including forced dissolution); Brent Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution Fault, and Sanctions, 56 S. CAL. L. REV. 1141, 1163 n.96 (1983) (enumerating corporate criminal sanctions provided for pursuant to United States federal law, including dissolution).

14 See Diane Marie Amann, Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights, 24 HASTINGS INT’L & COMP. L. REV. 327, 332 (2001). Amann also notes the possibility of criminal liability of a corporation in Sweden and Denmark. Id.

15 See Jordan J. Paust, The Other Side of Right: Private Duties Under Human Rights Law, 5 HARV. HUM. RTS. J. 51, 58 (1992) (noting that “individuals can be punished for human rights violations during times of war” and specifying that prior to and after
Recognized customary international crimes include piracy, slave trading, war crimes, crimes against humanity (that are part of systematic conduct), genocide, and torture. At least those crimes are subject to universal jurisdiction — meaning any state may punish them. The United Nations Convention Against Transnational Organized Crime defines further international crimes: participation in an organized criminal group, money laundering, corruption, and obstruction of justice. State parties must establish criminal, civil, or administrative liability for legal persons (including corporations) who commit these crimes. Environmental crimes and air piracy may be in the midst of becoming crimes under customary international law.

2. Corporate Criminals at the Nuremberg Tribunal

The evolution, from a principle of "no criminal liability" to a principle where corporations are capable of committing crimes under international law is revealed in the war crimes trials at Nuremberg. In the Krupp trial it is clear that the corporation
was implicated in the crimes of its directors.\textsuperscript{25} Because of the Krupp firm's desire to employ compulsory labor\textsuperscript{26} the tribunal imputed criminal intent to the corporation - although the court did not actually declare the Krupp Corporation a criminal organization.\textsuperscript{27}

The \textit{Farben} trial\textsuperscript{28} also implicated corporations as criminal instrumentalities. In \textit{Farben} the court refers to corporate obligations\textsuperscript{29} and treats the corporation as a criminal instrument.\textsuperscript{30} Moreover, Nuremberg also recognized that a corporate body - the state security service (the SD) could be guilty of a crime.\textsuperscript{31} Thus the Nuremberg trials mark a shift from a principle of "no criminal liability" of corporations to the view that corporations may be culpable\textsuperscript{32} due to the actions (in historical order of recognition in domestic law) of their board of directors or of their officers or even, most recently, of their employees.\textsuperscript{33}

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\textsuperscript{24} United States v. Krupp, IX TRIALS OF WAR CRIMINALS BEFORE THE NUERMBERG MILITARY TRIBUNALS, at 1327 (1948).

\textsuperscript{25} See Ramasastry, supra note 9, at 108 (noting lengthy discussion of firm's involvement in and perpetration of war crimes and crimes against humanity in tribunal's decision).

\textsuperscript{26} See United States v. Krupp, IX TRIALS OF WAR CRIMINALS BEFORE THE NUEREMBERG MILITARY TRIBUNALS, at 1412, 1416.

\textsuperscript{27} See Ramasastry, supra note 9, at 112 (citing Krupp as an exemplar of judicial attribution of criminal liability to corporations).

\textsuperscript{28} United States v. Krauch, et. al, [The I.G. Farben Case], VIII TRIALS OF WAR CRIMINALS BEFORE THE NUEREMBERG MILITARY TRIBUNALS NO. 10 (1952).


\textsuperscript{30} See Ramasastry, supra note 10, at 106 (commenting on corporation in \textit{Farber} being used as instrument of individual actors).

\textsuperscript{31} See Amann, supra note 24, at 331–32 (highlighting that International Military Tribunal at Nuremberg found several Nazi security services criminally liable).


\textsuperscript{33} JOACHIM VOGEL, \textit{ELEMENTE DER STRAFTAT: BEMERKUNGEN ZUR FRANZÖSISCHEN STRAFTATLEHRE UND ZUR STRAFTATLEHRE DES COMMON LAW}, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 127 (1998), (concluding that numerous criminal law systems hold directors and managers of corporations criminally liable for subordinates' actions).
B. Legal Bases of Corporate Criminal Liability

1. *Mens Rea* as a Basis of Corporate Criminal Liability?

Though customary international law is a reflection of state practice, common law jurists cannot presume that international law contains common law concepts because the structure and sources of international law are radically different from the common law. International law, in its sources and structures, parallels the civilian legal systems. *Mens rea, actus reus,* and *ultra vires* are basic concepts of common law. Because they are Latin terms we might be tempted to presume that they are also found in civilian legal systems and, by extension, in international law. Surprisingly, this does not seem to be the case! Thus, we explore these concepts comparatively to see whether they apply to international law and how they might be found in international law.

In the common law crimes are defined as the union of *mens rea* (a criminal intent) and *actus reus* (a criminal act) in one legal person. The burden of proof in criminal law lies with the prosecution. However, knowledge of criminality may be imputed via a “knew or should have known” standard. In criminal law it is common to impute criminal knowledge to a

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34 Some Anglophone commentators think that the common law rule that a criminal must have both criminal intent (mens rea) and have undertaken a criminal act (actus reus) is also a principle of international law. See, e.g., Jeanne L. Bakker, The Defense of Obedience to Superior Orders: The Mens Rea Requirement, 17 AM. J. CRIM. L. 55, 66 (1989).

35 International Council on Human Rights Policy, supra note 32, at 55 (clarifying that “international law is traditionally made by states and for states” and that “[i]t aims above all to bring some order to inter-state relations”).


37 The two elements of all common law crimes are actus reus (an act) and mens rea (culpable intent). Some are willing to impose those concepts on international criminal law. While mens rea is a general principle of common law and thus is evidence of international practice, civil law criminal theory could be very different and must at least be consulted before making such pronouncements. See, e.g., Bakker, supra note 34, at 56.

38 See id. (explaining both war crimes and other crimes require act forbidden by law as well as guilty or culpable condition of mind).

39 See Ramasastry, supra note 10, at 153 (emphasizing higher burden of proof imposed on prosecution in criminal cases).

40 See United States v. Parness, 408 F.Supp. 440, 442 (1975) (arguing for new trial because “government's attorney knew or should have known about material evidence... [and] the government's attorney had failed to disclose or make such evidence available to them”).
defendant in cases of their willful blindness as to wrongful activity. This is because subjective states of mind are impossible to prove and can only be inferred from objective manifestations. In the corporate context, if the costs of labor or goods are so low as to indicate to the corporation that it should have exercised due diligence to determine that the goods were not in fact the product of slave or child labor then liability can be imposed. Knowledge will likewise be imputed in cases of complicity and is defined as actual or constructive knowledge; that is, the accomplice knew or had reason to know that their act would assist the perpetrator in the commission of the crime.

Historically, one argument against corporate criminal liability was that the corporation was only a legal person and thus incapable of forming mens rea for the corporation has no will independent of its employees and shareholders. Today, however, most jurisdictions now attribute mens rea to a corporation via its employees, directors or shareholders. But one can doubt whether there is a requirement of mens rea in international law at all. Although the concept of mens rea does exist in Quebec law (a civil law jurisdiction like Louisiana and France), criminal law in Canada is federal and thus much more

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41 See, e.g., Bakker, supra note 34, at 66 (explaining that obedience to orders can manifest illegality when action is so obviously illegal).
42 See, e.g., United States v. Lee, 937 F.2d 1388, 1394 (1991) (holding that importation of fish from Taiwan, illegal under Taiwanese law, was basis of U.S. conviction because defendant knew or should have known that activity, illegal in Taiwan, would also be illegal in the U.S.).
45 See id. at 58 (commenting on need for corporate liability in today's society); see also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 421(2)(e) (1987) (theorizing that "in general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time of jurisdiction is asserted: . . . the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state").
46 The maxim "actus non facit reum, nisi mens sit rea" was introduced into French Canadian law by the English. See Wallace Schwab & Roch Pagé, Locutions Latines Utilisées En Droit Positif Québécois, http://www.obiter2.ca/B109AH.html (last visited Jan. 18, 2006). The text reads "cette maxime provient du Common law où on dit que l'intention et l'acte doivent être en concordance pour constituer un crime, (this maxim comes from Common law where it is said that the intention and the act must be in agreement to constitute a crime)." Id. Because Canadian criminal law is federal and essentially modeled on the common law, the appearance of mens rea and actus reus in Quebec case law is not especially strong evidence that these principles exist in civilian law and by extension international law. Id.
influenced by common law than civil law.\textsuperscript{47} One finds the term \textit{mens rea} only rarely in French and German continental jurisprudence and usually only in comparative analysis\textsuperscript{48} of domestic law and the common law\textsuperscript{49} and in fact not at all in criminal law or corporate criminal law. The concept of \textit{mens rea}, however, is entering into the legal thought of the European Union\textsuperscript{50} and into international practice\textsuperscript{51} largely due to international criminal tribunals. Thus \textit{mens rea} in international law may be \textit{de lege ferenda} – but it is probably not \textit{lex lata}.\textsuperscript{52}

The common law and civil law did independently evolve from the position that corporations cannot be liable as criminals toward a common position that they can.\textsuperscript{53} So the more logical argument for international corporate criminal liability is based not in a common concept of \textit{mens rea} but in customary international law: almost all states recognize a domestic criminal


\textsuperscript{48} See, e.g., Vogel, supra note 33 (comparing when mens rea is a requirement as oppose to exceptions where vicarious liability of superiors does not require liability in French and German criminal law systems).

\textsuperscript{49} For example, the term "mens rea" does not appear at all in monolingual French or German dictionaries of law. In a bi-lingual English-German law dictionary suggested translations of "mens rea" are "subjecktiver Tatbestand", and "Schuldbewusstsein." DORA VON BESELER & BARBARA JACOBS-WUSTEFELD, LAW DICTIONARY: TECHNICAL DICTIONARY OF THE ANGLO-AMERICAN LEGAL TERMINOLOGY INCLUDING COMMERCIAL & POLITICAL TERMS: GERMAN-ENGLISH 1056 (1st ed. 1986).


\textsuperscript{52} See BLACK'S LAW DICTIONARY 459 (8th ed. 2004) (defining "de lege ferenda," a latin phrase meaning "from law to be passed" as "a proposed principle that might be applied to a given situation instead or in the absence of a legal principle that is in force"); BECK'S LAW DICTIONARY: A COMPRENDIUM OF INTERNATIONAL LAW, http://www.people.virginia.edu/~rjb3v/latin.html (last visited Jan. 18, 2006) (defining "lex lata" as "what the law is (as opposed to what the law should be)").

\textsuperscript{53} See generally Presbyterian Church of Sudan, 244 F. Supp. 2d at 315 (noting that Nuremburg trials were root in common law for imposing criminal liability against corporations).}
liability of corporations\textsuperscript{54} – and that can be seen as the state practice and \textit{opinio juris} needed to form an international custom. A similar evolution may be occurring as to the concept of \textit{mens rea}. However it is questionable whether such an evolution has occurred with the concept of \textit{ultra vires}.

2. Imputed Liability

Any criminal act imputed to the corporation will in fact have been done by a natural person or persons. If the corporation is to be liable as a criminal then the wrongful act of a human must somehow be attributed to the corporation. Criminal liability can be imputed to a corporation based on a theory of \textit{agency}, or on a theory of \textit{identity}, or through \textit{accomplice liability} (complicity).\textsuperscript{55}

The theory of \textit{agency}\textsuperscript{56} imposes liability on the company for the wrongful acts of its employees. This is also known as vicarious liability\textsuperscript{57} or attribution theory.\textsuperscript{58} This theory permits the corporation to be sued for \textit{mala prohibita}.\textsuperscript{59} Alternatively, the theory of identification\textsuperscript{60} imputes liability on the corporation for blameful conduct of an officer or director, thereby allowing


\textsuperscript{55}See Mirjan Damaska, \textit{The Shadow Side of Command Responsibility}, 49 AM. J. COP. L. 455, 456 (2001) (commenting that international criminal law is more hospitable when it comes to the doctrine of complicity and other forms of vicarious liability); see also Kendel Drew and Kyle A. Clark, \textit{Twentieth Survey of White Collar Crime}, 42 AM. CRIM. L. REV. 277, 280 (2005) (clarifying that the agency relationship is established for criminal liability purposes when employee acts within scope of employment).

\textsuperscript{56}See \textit{The American Law Institute, Restatement of the Law (Second) Agency}, § 1 (1958) (defining agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act").

\textsuperscript{57}See Ramasastry, supra note 10, at 155 n.267 (describing how some common law systems have resolved issue of "imputing the acts of a natural person to a corporation" by "adopting vicarious liability").

\textsuperscript{58}See id. (defining attribution as "identification of the acts of those representing the corporate 'mind' or 'will' as acts of the corporation").

\textsuperscript{59}Mala prohibita are acts that are "crime[s] merely because [they are] prohibited by statute, although the act[s] [themselves are] not necessarily immoral." \textit{Black's Law Dictionary} 971 (7th ed. 1999). Mala prohibita have also been defined as acts which are "made offenses by positive laws, and prohibited as such." \textit{Black's Law Dictionary} 856 (6th ed. 1990).

\textsuperscript{60}See Ramasastry, supra note 10, at 155 n.267 (referencing H.L. Bolton (Eng'g.) Co. Ltd. v. Graham & Sons Ltd., 1 Q.B. (1957), for the United Kingdom's version of the identification principle known as "the directing mind doctrine").
prosecution for \textit{mala in se}.\footnote{See \textit{id.} (describing how acts and mens rea of employee can become acts and mens rea of corporation).} In a theory of identification the corporate veil is pierced. This means the distinction between the corporation and its officers, directors and even shareholders may be ignored. In civilian jurisdictions as well, criminal liability can be imputed to corporations under various statutes for criminal acts which are \textit{mala in se}.\footnote{See \textit{id.} (explaining that civil law jurisdictions have enacted legislation providing for application of "specific penal laws to legal persons").}

A corporation, just like a natural person, may be liable directly (via the agency and identity theories) or as an accomplice for violations of international law,\footnote{See \textit{Ramasastry, supra} note 10, at 100 (including accomplice liability as one of three ways in which a corporation could be liable for violating international guidelines).} as expressed in custom, treaty, or \textit{jus cogens}.\footnote{See \textit{Partin, supra} note 16, at ¶ 1 (declaring international criminal law as being derived from general principles of international law, customary law, and treaties).} The theory of complicity is more complex than the agency or identity theory, and I will therefore explore it more thoroughly in the following paragraphs.

3. Accomplice Liability

Corporations can be criminally liable as an accomplice to criminal acts of others (aiding and abetting the commission of a crime).\footnote{See Andrew Clapham & Scott Jerbi, \textit{Categories of Corporate Complicity in Human Rights Abuses}, 24 \textit{HASTINGS INT'L \& COMP. L. REV.} 399, 342–43 (2001) (positing that corporation could be accomplice in human rights violation if it violates customary international law principles).} Culpable actions may range from indirect complicity to direct complicity to actual commission of wrongful acts.\footnote{See \textit{id.} at 342 (noting that it is not necessary for accomplice to intend eventual, criminal result).} Accomplice liability will arise out of "practical assistance, encouragement, or moral support"\footnote{\textit{Id.} at 345.} in obtaining the criminal
object. There are three types of complicity under which a corporation can be held liable. In descending order of likelihood of criminal conviction these are: 1) direct corporate complicity, 2) beneficial complicity, and 3) silent complicity. Direct corporate complicity occurs when a corporation directly participates in illegal acts that involve intentional participation—the intent to commit the act, but not necessarily the consequences of the act. In beneficial complicity, corporations may also be liable as accomplices merely due to benefiting from the principal's acts. Corporations could even be liable for merely passively, but knowingly, benefiting from a regime that systematically violates human rights. Finally, silent complicity occurs where a corporation does not verify complaints of human rights abuses or protest against human rights abuses. Of the three forms of complicity, silent complicity is least likely to support a criminal conviction. Active complicity will be more culpable than passive complicity when endeavouring to find criminal liability. Although assistance does not need to be the causae sine qua non of the principal's criminal act, the accomplice must have had a substantial effect on the commission of the crime.

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69 See Ramasastry, supra note 10, at 101 (denoting the three types of complicity for which multi-national corporations might be held liable).
70 See Clapham & Jerbi, supra note 66, at 342 (noting direct participation requires “intentional participation”).
71 See id. at 342 (saying that “only knowledge of the foreseeable harmful effects” is required to be a direct participant).
72 See id. at 346 (identifying situations where complicity found by business receiving benefit from “human rights abuses” of another).
73 See id. at 347–48 (explaining that notion of silent complicity stems from expectation that companies alert proper authorities to known human rights abuses based on principle that “[s]ilence is not neutrality”).
74 See id. at 348 (viewing silent complicity more as moral issue than as issue likely to be pursued and penalized by respective governing authority).
75 See generally Clapham & Jerbi, supra note 66, at 341 (working from premise that levels of complicity mirror levels of complicity likely to be attributed to offending corporation).
76 A causae sine qua non is a “[a] necessary cause; the cause without which the thing cannot be or the event could not have occurred.” BLACK'S LAW DICTIONARY 211 (7th ed. 1999). It has also been described as “[a]n indispensable requisite or condition.” BLACK'S LAW DICTIONARY 1385 (6th ed. 1990).
Corporate accomplice liability also arises in the context of intentional torts. In *Doe v. Unocal*, the court held that a corporation could be liable in tort under the Alien Tort Claims Act for aiding and abetting a government's use of forced labor. Active participation was not necessary for guilt to be imputed to the corporation. A prosecutor could argue by analogy that this holding should apply to a criminal case against a corporation.

a. Criminal Principals

Guilt as an accomplice necessarily implies a principal perpetrator. However, a corporation can be held liable as an accomplice to crime even where the identity of the principal perpetrator is unknown. This is true in both common law and civilian legal systems and will therefore likely be true in international law as well.

b. Limitations of Accomplice Liability

There are however, limitations on corporate accomplice liability. Not every immoral action will give rise to guilt as an accomplice. For example, a banker lending money to a criminal will not necessarily be liable as an accomplice for the crimes of his debtor. This was demonstrated at Nuremberg and has been affirmed more recently in litigation over dormant Swiss bank accounts held by victims of the National Socialist

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79 John Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), vacated by 395 F.3d 978 (9th Cir. 2003). The court in John Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003), later determined that this case would be reheard by the 9th Circuit en banc, and that the earlier decision will only be cited to the extent consistent with the en banc rehearing. Id.
80 See Unocal, 395 F.3d at 948 (finding that District Court “erred” in applying “active participation” standard).
81 See Clapham & Jerbi, supra note 66, at 342 (clarifying that neither identity of principal perpetrator nor proven guilt of principal perpetrator need be proven for corporation to be found criminally liable under theory of direct complicity).
82 See id. at 343 (noting crime itself need not be known to accomplice in order to be criminally liable).
84 See United States v. von Weizsaecker [The Ministries Case], XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 621–22 (1949).
In both cases, the creditor was exonerated from criminal responsibility.

4. Corporate Groups

The distinctive regulatory problem posed by MNCs [Multi-National Corporations] is their ability to operate an integrated command and control system through two disaggregated institutional structures. The first of these structures is the collection of discrete corporate units - parent, subsidiary, sister, and cousin companies - that make up the MNC group. The second disaggregated structure housing the MNC is the global system of separate nation-states in which those corporations are registered and do business.\(^8^6\)

Corporate entities often try to structure their operations to disguise the fact that they profit from human rights abuses\(^8^7\) by using subsidiary business associations or by sub-contracting illegal acts. However, courts are willing to pierce the corporate veil\(^8^8\) and impute legal responsibility to a holding company or its managers, directors, and employees for the acts of its subsidiaries\(^8^9\) either in crime, tort, or both. The problem of outsourcing crime through sub-contracting can be addressed through a theory of accomplice liability. Head office liability for acts of subsidiaries and subcontractors is fair because "many MNCs [Multi-National Corporations] can and do operate their many parts with a coherence . . . that resembles a single entity . . . controlled neither by international law nor the legal norms of

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85 See Ramasastry, supra note 10, at 112–13 (holding that "the mere act of providing credit to finance criminal activities does not constitute a violation of customary international law, even where the bank had knowledge of the purpose for such financing").


any single state." Thus, it is not a case of multiple theories of liability imposed on one entity (tort/human rights; respondeat superior/complicity); rather, it is a case of imposing liability where otherwise none would exist, namely over multinational enterprises.

In sum, U.S. corporations can be criminally liable before a U.S. court for its illegal acts overseas. However, criminal liability of head offices for crimes committed in the underdeveloped world by their partners, subsidiaries, or host governments is in practice the exception. This may be because prosecutors are unaware of just how far the long arm of the law reaches.

C. Ultra Vires as a Basis of Corporate Criminal Liability under International Law?

1. Theoretical Arguments for Corporate Criminal Liability

a. The Contract and Delegation Theories

One theory to justify imposing criminal liability on corporations is the theory of delegation or contract. The delegation theory argues that because the state delegates its authority to the corporation, the corporation must not act contrary to the norms that bind the state. As a creation of the state, the corporation is bound by at least those norms that bind its creator. The essence of this theory is that a state may not accomplish indirectly what it is forbidden to do directly.

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90 Anderson, supra note 86, at 402.
91 See Berthold Goldman, Multinational Enterprises, JUSTITIA ET PACE INSTITUT DE DROIT INTERNATIONAL, Sept. 7, 1977, http://www.idi-iil.org/idiE/resolutionsE/1977_oslo_02_en.pdf (clarifying that "enterprises which consist of a decision-making centre located in one country and of operating centres, with or without the legal personality, situated in one or more countries should, in law, be considered as multinational enterprises").
92 See, e.g., Amann, supra note 14, at 333 (commenting that Chevron and Unocal were never prosecuted by the U.S. government or the State of California for human rights abuse in the third world).
94 See Greenfield, supra note 93, at 1329–30 (acknowledging that corporation's power is derived from the state).
95 See id. at 1329–30 (noting "a state has no authority to authorize anyone, including a corporation, to engage in acts that are illegal in another jurisdiction").
Similarly, the contractual theory argues that corporations make a contract with the state: In exchange for limited liability, the corporation agrees to act legally and to serve the public interest which includes the protection of human rights.96

b. Ultra Vires as a Contract Theory

Ultra vires97 is an expression of a contractual theory of the corporation. Literally, it means the corporation may not act beyond its powers. That is, ultra vires is a principle of common law in which a corporation may not undertake any acts not authorized by its articles of incorporation or any acts that are illegal98 because the corporation’s privileges (legal personality, and limited liability) were granted by the state the corporation may not violate the laws of the state,99 including the states’ obligations under international law.100 From this perspective the corporation has a duty to act lawfully even outside the jurisdiction where it is incorporated101 and thus can be held liable within its jurisdiction of incorporation for its unlawful foreign acts.

2. Problems with Ultra Vires in International Law

a. The Contract and Delegation Theories Invert the Historical Argument against Corporate Criminal Liability

One possible argument against basing corporate liability on a theory of ultra vires (that the corporation could not commit the act that was beyond the scope of its powers) is that historically, the legal concept of ultra vires was exactly the justification for finding that the corporation would not be liable. The logic was

96 See id. at 1326–28 (concluding that interests of both the state and the corporation are better served by compliance with the law).

97 See BLACK’S LAW DICTIONARY 1525 (7th ed. 1999) (defining ultra vires as “unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law”).

98 See Greenfield, supra note 93, at 1280–81 (stating corporations are not authorized under charters to act unlawfully).

99 See id. at 1281–83 (noting that corporations are bound to act in accordance with, not only laws of the corporation, but with laws of the state).

100 See id. at 1282–83 (arguing that obligation to abide by law extends beyond jurisdiction of incorporation to foreign jurisdictions).

101 See id. at 1373 (interpreting doctrine of ultra vires as meaning “corporations have the duty, as a matter of domestic corporate law, to act lawfully even in foreign nations”).
that the corporation could not even commit an act for which it was not empowered and thus the criminal act could not be imputed to the corporation. The result was that liability would only be found among the natural persons. Contemporary law has inverted this proposition, so the argument, though logical, will not likely be accepted.

b. Common Law Concepts are not an Integral Part of International Law

The problem with arguing for *ultra vires* as a basis of criminal liability in international law is that though *ultra vires* is an integral part of the common law it is not part of the civilian legal system. International law parallels civilian legal systems, not the common law. The hierarchy of norms in international law—the sources and weights of legal authority—is very different than in domestic U.S. law. General principles of law, which exist only vestigially, if at all, in equity's legal maxims, are a key element of international law where they are a source of law. Legal scholarship is also a source of international law. There is no doctrine of *stare decisis* in international law. Each case in international law addresses only the parties before it. At best, international case law is merely evidence of international custom or treaty. If *ultra vires* is not found in the civilian legal systems then that is a strong argument that it does not exist in international law either.

102 See Ramasastry, supra note 10, at 155 n.267 (discussing difficulties in finding requisite mens rea to commit crime for fictional entity).

103 See id. at 155 n.267 (stating that some jurisdictions attribute mens rea of employee to corporation).

104 See Christopher A. Whytock, Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law, 36 GEO. J. INT'L L. 155, 193 n.5 (2004) (acknowledging domestic laws generally arise from constitutions and legislation while international law is from treaties and international custom).


106 See 1945 I.C.J. Acts & Docs 59, available at http://www.yale.edu/lawweb/avalon/decade/decad026.htm#art59 (clarifying “the decision of the Court has no binding force except between the parties and in respect of that particular case”).
3. Arguing for Ultra Vires in International Law

The best ways to find a rule in international law that corporations must obey the laws of their chartering states wherever they operate would be to argue from the general principles of law, specifically the duty of good faith and fair dealing and the principle of legality. Alternatively or additionally one could argue by analogies from the common law. These arguments follow.

a. Arguing for Ultra Vires from General Principles of International Law

The general principles of law are a source of law in public international law (jus gentium\textsuperscript{107}) and the civilian legal system. A plausible argument could be made that a common law proposition is an expression of some general principle of law though not articulated as such in the common law. By linking the common law concept to a general principle of international law a common law concept not found in civilian law systems could be found to exist in international law.\textsuperscript{108} This creative argument is not made because the general principles of law are not a source of law in the domestic legal order of the common law jurisdictions and so common law lawyers are unfamiliar with the general principles of law as a source of law.

b. Arguing for Ultra Vires as a Part of Customary Law

Another argument for finding a common law concept in international law would be to look at the common law as evidence of international customary law. Customary international law consists of two elements: practice (what states actually do) and opinio juris (what states believe they ought to do).\textsuperscript{109} Domestic law is evidence of both opinio juris and state

\textsuperscript{107} BLACK'S LAW DICTIONARY 865 (7th ed. 1999) (defining jus gentium as "the law of nations").

\textsuperscript{108} 1945 I.C.J. 38, available at http://www.yale.edu/lawweb/avalon/decade/decad026.htm#art38 (stating "the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . the general principles of law recognized by civilized nations").

\textsuperscript{109} See George E. Edwards, International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy, 26 YALE J. INT'L L. 323, 388–89 (2001) (stating "two elements must be present for a principle or rule of
If an overwhelming majority of states recognize corporate criminal liability in their domestic law (and they do), then a very good argument can be made that corporations can also be criminally liable under customary international law.

4. Conclusions

a. The Status of Ultra Vires in International Law is Unresolved

The status of ultra vires in international law is not resolved and is still being discussed in comparative law literature. Ultra vires is not a principle of German corporate law. The idea of “ultra vires” has only been recognized in German law for public law entities. Moreover, ultra vires does not appear to exist in French law (the maxim “ultra vires hereditatis” exists in customary international law to exist: (1) state practice as proof of custom; and (2) opinio juris vel necessitatis (opinio juris)).

The problem of ultra vires in international law is complicated by the fact that ultra vires is both a common law principle of corporations and of public entities. The indifferent application of a legal theory to a private artificial legal person and a public one is essentially contrary to civilian legal theory, which sees a strict split between interpretations of private and public laws and definitive attributions of powers and limitations to artificial persons based on their status as public or private. Under classic international law, a corporation would not be recognized as having any legal personality because states are the only subjects of international law. Thus, in the corporate sense, ultra vires could have no application in the international arena. Furthermore, international law has long recognized that a state is liable internationally for its acts regardless of its internal legal order and will be held responsible for its wrongs even if those wrongful acts were also, in the internal order, legal and constitutional. Therefore, ultra vires really had no place in the international system. For an example of a common law lawyer who, citing to the Inter-American Court of Human Rights, reaches the correct result — that ultra vires, as to states, is irrelevant to the question of state liability to other states see Theodor Meron, State Responsibility for Violations of Human Rights, 83 AM. SOCY INT'L L. PROC., 372, 375–76 (1989). To read Mizushima Tomonori, a Japanese civil law legal scholar’s view that ultra vires does not apply to states because a state can be liable internationally even for those acts which it undertakes in violation of its own laws see Mizushima Tomonori, Holland and Hart Private International Law Award: The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct, 29 DENV. J. INT'L L. & POLY 261, 277–78 (2001).


See Michael Grunson & Uwe H. Schneider, The German Landesbanken, 1995 COLUM. BUS. L. REV. 337, 376 (1995) (noting while ultra vires is not recognized for German corporations, the German Supreme Court has applied the doctrine twice when certain public law entities acted outside their function as defined by law).
French law), and unlike legal maxims in common law, which only have legal weight before a court of equity, the legal maxims in French law are evidence of the law. The French legal maxim, however, refers not to a principle of corporate or municipal law, but rather to the principle that an heir or corporate associate will be liable for the debts of their legator or other shareholders. Although ultra vires may not exist in international law, the "general principle of legality" (principe généraux de la légalité) does exist as a general principle of law in French law and in international law. The general principle of legality under international law applies to corporations.

The legal concept of ultra vires forces a corporation chartered under the common law to obey domestic and customary international law outside of U.S. territory, and even the law of the host jurisdiction and international treaties. One cannot presume, however, that a similar rule exists in other states. One must prove it through painstaking comparative scholarship through the examination of state practice, as well as case law and the works of scholars secondarily. One would have to ask whether, for example, an AG or a SARL operating outside of

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116 The general principles of law are like axioms and postulates of the law. They are true of any civil law jurisdiction. Thus, for example, the principle of legality implies nul crimen sine lege (there can be no crime where there is no law); the principle of equality implies that all persons are equal before the law; the principle of self defense means that one has the right to an attorney. Aside from international law and vestigial through the maxims of equity, general principles of law simply do not exist as a source of law in the common law. The nearest parallel in the U.S. is the idea of "fundamental rights;" however, the overlap between "fundamental rights" and "general principles of law" is only partial. For comparison, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (4) (1987), which allows common general principles of law to be invoked to supplement the rules of international law.
118 See Greenfield, supra note 93, at 1373 (proposing that if ultra vires were applied, a shareholder could sue a corporation for breaking the law of a foreign country).
119 The German Aktiengesellschaft (AG) is similar to a corporation or to the French SNC (Société en nom Collectif). The AG and SNC find their equivalent in the archaic but still existing "joint stock company." They are partnerships with limited liability, but alienable shares. For a discussion on AG see David J. Berger, Guidelines for Mergers and Acquisitions in France, NW. J. INT'L L. & BUS. 484, 500-01 (1991). For an explanation of the nature of the AG and tracing its origins to early British joint stock companies see Ingrid Lynn Lenhardt, Eighth Annual Corporate Law Symposium: Limited Liability Companies: The Corporate And Tax Advantages of Limited Liability Company: A German Perspective, 64 U. CIN. L. REV. 551, 551 (1996).
Germany or France, respectively, must obey the laws of its chartering jurisdiction, its host jurisdiction, or both. Multinational corporations often include parent companies in, say, the U.S. and a subsidiary in Germany so this question is not merely of theoretical interest.

It would be desirable, of course, to find a principle like *ultra vires* in the general principle of legality. Requiring corporations to obey the laws of both its host jurisdiction and domestic jurisdiction (ignoring, for the moment, collisions of those rules) would serve the best interest of the shareholders\(^\text{121}\) and the public because the corporation would no longer be free to abuse the law. Finding *ultra vires* internationally through the general principle of legality would increase the security of transactions and reduce abuses of human rights.\(^\text{122}\) However, the existence of *ultra vires* (or *mens rea*) as legal concepts in international law cannot simply be presumed because that would ignore: 1) whether other national legal orders even have such a principle; 2) whether a state applies the principle outside of its own territory; and, 3) if so, whether, in determining an act to be *ultra vires* or finding *mens rea*, the state in question uses its own law, the law of the corporation’s state of incorporation, or the law of the place of the transaction or international law.

b. *Ultra Vires* in International Law is at Best *de Lege Ferenda*

Internationally, *ultra vires* and *mens rea* are probably *de lege ferenda\(^\text{123}\)* and not *de lege lata*.\(^\text{124}\) Without specific proof of such a principle existing in the national legal orders of civil law

\(^{120}\) *Société Anonyme avec Responsabilité Limitée* (SARL), an anonymous association with limited liability, is, in other words, a corporation. The SARL is one French equivalent of the corporation. For further explanation of the nature of a SARL see Berger, *supra* note 119, at 495–96.

\(^{121}\) See Greenfield, *supra* note 93, at 1372–73 (explaining application of *ultra vires* in international sense would allow shareholder to hold corporation to contractual obligation even if the host government was unwilling to do so).

\(^{122}\) See Greenfield, *supra* note 93, at 1373–74 (suggesting *ultra vires* would offer remedy against corporations who violate international customary law, decreasing abuses of human rights).

\(^{123}\) “A principle created to apply to a given situation, rather than from existing precedents; law created for changing circumstances.” BLACK'S LAW DICTIONARY 438 (7th ed. 1999).

\(^{124}\) “Existing law. The principle that a court should decide based on actual law and not on how it thinks the law ought to be.” *Id.*
jurisdictions or existing under international law, these principles would only be persuasive arguments of what the law should be as opposed to what it actually is. The better argument is to rely directly on the general principles of international law.

D. Arguments Against Corporate Criminal Liability

Theoretical objections to transnational corporate liability can be found. These objections include economic and moral arguments. Neither are they particularly persuasive.

1. Economic Arguments

The common law has not encouraged the idea that a corporation owes any duty to society, other than to maximize profit of its shareholders. Milton Friedman agrees with this early view of general corporate immunity and argues that in a world of competition and self-interest, there is one and only one social responsibility of business, which is to increase profits. The corporation, however, must act legally. Further, in Herald Co. v. Seawell, the federal appellate court held that among a court’s discretionary powers is the power to act in the public interest, even if that negatively impacts shareholder distributions. This demonstrates that courts impute legal duties to corporations beyond that of profit maximization.

A more sophisticated view looks beyond Friedman’s neo-classical theory and empirically examines what businesses do in practice. An examination of business practice reveals that


126 See Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (positing that business corporation is organized and carried on primarily for profit of stockholders).

127 MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (Univ. of Chicago Press 1971) (1962) (advancing notion that corporation has sole responsibility of increasing profits of shareholders).

128 See id. at 133 (stating corporations must “stay within the rules of the game” when seeking to increase its profits); see also Greenfield, supra note 93, at 1281-82 (emphasizing often overlooked requirement that articles of incorporation require charter corporations only for lawful purposes).

129 Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

130 See id. at 1095 (acknowledging that defendant corporation, not unlike other corporations, has duty to its employees over and above maximizing profit).
corporations are increasingly socially conscious. However social policy is ambiguous and verifying whether directors are implementing these policies in the public interest is difficult. The extreme view of Professor Milton Friedman is that corporations have only one duty of profit maximization, which is empirically untrue. Corporations do not only exist to make money; they also exist to produce goods, to pay their employees and even, shockingly, to do charitable works (particularly where those are compensated by tax advantages). Friedman's view simply ignores the social functions of a corporation and wrongly ascribes a single-minded purpose to what is obviously a multifaceted phenomenon.

In practice, corporate liability exists and is expanding. This can be seen in imputed liability of a corporation for the acts of its employees via respondeat superior, in the nullification of the fellow servant rule (wherein an employee victim of a tort would have no remedy against the employer where the tort-feasor was a "fellow servant"), and in strict products liability in tort. Just as formalistic procedural obstacles, such as sovereign immunity and the act of state doctrine, have been increasingly qualified or even abandoned in national and even international law, so also

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133 See id. at 1432 (noting that, in actual behavior, corporations are moving beyond the classic model of limited social responsibility and that "[a]s a matter of conduct, multinationals recognize the rights of persons other than shareholders").

134 "The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1313 (7th ed. 1999).

135 See id. at 632 (defining rule).

136 See V.S. Khanna, Corporate Liability Standards: When Should Corporations be Held Criminally Liable?, 37 A. CRIM. L. REV. 1239, 1246 (2000) (explaining strict liability imposes liability on corporation for acts or omissions of its agents, whenever these acts or omissions result in harm); see also Symeon C. Symeonides, Choice of Law in the American Courts in 2001, 50 AM. J. COMP. L. 1, 78 (2002) (holding that through adoption of strict liability laws, Texas has expressed interest in protecting its consumers while simultaneously regulating products in stream of commerce).
has the scope of legal protection of human rights broadened by
the recognition of corporate criminal liability.\textsuperscript{137}

Economic arguments cut both ways. Corporate criminal
liability can be justified for reasons of economic efficiency.
Criminal liability forces corporations to internalize external
costs, which they would otherwise externalize on third parties.\textsuperscript{138}
However, this is inefficient for the market as a whole.\textsuperscript{139} If the
only moral duty of a corporation is to make a profit, then there
would be no need for legal regulation at all. Because
corporations have legal duties other than profit maximization,
Professor Friedman's extreme theory of corporate irresponsibility
does not correspond to empirical reality and must be rejected.
The very fact that corporations seriously argue for no regulation
whatsoever should raise suspicions.

2. Moral Arguments

More sophisticated arguments against corporate criminal
liability adopt positions that are more or less consciously based
on moral relativism. The least self-conscious relativist argument,
like Friedman's, states that corporations lack the resources or
expertise needed to make moral judgements.\textsuperscript{140} Another
relativist argument is that the corporation should remain neutral
in the political and cultural affairs of its host state, except in as
far as they directly affect business.\textsuperscript{141} An extreme and

\textsuperscript{137} See Kyle Rex Jacobson, Doing Business with the Devil: The Challenges of
Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and
Crimes Against Humanity, 56 A.F. L. REV. 167, 214 (2005) (noting that recognition of
corporate criminal and civil liability, has allowed victims of human rights abuses to better
vindicate rights).

\textsuperscript{138} See Michael K. Block, Optimal Penalties, Criminal Law and the Control of
corporate criminal liability set at level which reflects costs to society forces economic
agents to internalize total cost of activities rather than force society to bear costs of
harm).

\textsuperscript{139} See id. at 398 (stating that calculating fines based on harm to society promotes
the most efficient result).

\textsuperscript{140} See Jeffrey Nesteruk, Bellotti and the Question of Corporate Moral Agency, 1988
COLUM. BUS. L. REV. 683, 687–89 (1988) (positing that corporations are incapable of
exercising moral freedom because they are ultimately controlled by their structures).

\textsuperscript{141} See Demian Betz, Holding Multinational Corporations Responsible for Human
Rights Abuses Committed by Security Forces in Conflict Ridden Nations: An Argument
Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behaviour
Abroad, 14 DEPAUL BUS. L.J. 163, 164 (2001) (advancing theory that investments of
multinational corporations are politically neutral and should not influence behavior of
sovereign nations).
duplicitous argument is that corporations' interference in their host states internal politics would be cultural imperialism. That concern only seems to arise when the "interference" would be unprofitable; in other words, when such "interference" is profitable no one complains. None of these arguments are particularly persuasive because corporations have plenty of resources and are not blind or run by idiots with no moral compass. Corporations regularly intervene in domestic affairs of host nations.\textsuperscript{142}

E. Theoretical and Practical Explanations for the Rise of Corporate Criminal Liability

1. Theories Justifying Corporate Criminal Liability

The usual justifications for corporate criminal liability, whether in national or international law, are generally referred to as retribution, deterrence,\textsuperscript{143} and sometimes restitution or compensation;\textsuperscript{144} although, these last two justifications occur more often in tort law.\textsuperscript{145} The significance of these categories is that in civilian legal systems criminal laws do not generally have a compensatory function and tort laws (delicts) do not generally have a punitive function.\textsuperscript{146} Because international law parallels civilian legal systems it also assigns tort law a compensatory function and criminal law a punitive function and applies a strict

\textsuperscript{142} See generally Dickerson, supra note 132, at 1432–33 (noting both Nike and Wal-Mart have adopted codes of conduct to articulate concern and regulate the working conditions of developing country workers); Ramasastry, supra note 10, at 93–94 (examining history of corporate liability for forced labor and arguing that MNCs should be either criminally or tortuously liable for egregious abuses of human rights).

\textsuperscript{143} See Ratner, supra note 29, at 464–65 (explaining deterrence rationale, as applied to corporate criminal liability, places incentives to curb human rights violations on party with greatest ability and interest in addressing corporate conduct).

\textsuperscript{144} See Lawrence Friedman, In Defense of Corporate Criminal Liability, 23 HARV. J. L. & PUB. POL'y 833, 840–41 (2000) (citing Kant for proposition that "the state must punish individuals who violate the law because they have violated the law and only because they have violated the law -- without regard, that is, for the consequences that might flow from the imposition of punishment").

\textsuperscript{145} See Deana A. Pollard, Wrongful Analysis in Wrongful Life Jurisprudence, 55 ALA. L. REV. 327, 340 (2004) (referring to Restatement of Torts for the proposition that main purposes of tort litigation is giving compensation, indemnity, or restitution for harm, determining rights, deterring wrongful conduct and vindicating parties).

\textsuperscript{146} See John C. Coffee, Jr., Does "Unlawful" Mean "Criminal?": Reflections on the Disappearing Tort/Crime Distinction in America Law, 71 B.U.L REV. 193, 231 (1991) (stating traditional concept that tort law serves to compensate while criminal law serves to punish and positing that perhaps distinction can be correlated with decline in private enforcement of criminal law).
dogmatic separation between the rules and interpretations of tort and criminal law.147

2. Practical Justifications for the Rise of Criminal Liability of the Corporation

The previous discussion explains that there are several theoretical and practical justifications for imposing criminal and civil liability on non-state actors under transnational law. There are also practical explanations for the rise of corporate criminal liability. The expansion of corporate liability may be primarily due to globalization. The world is growing smaller and international civil and criminal liability is expanding. Criminal liability for corporations is justified on a practical level because, while holding directors and managers liable may punish the individual, the corporate entity remains free to continue with profitable misfeasance.148 Criminal sanctions are also justified because they are a more effective deterrent than civil sanctions, as well as being reprehensible to potential wrongdoers.149 Moreover, there are several advantages to imposing criminal liability on a corporation from the plaintiff’s perspective: 1) Criminal jurisdiction is easier to obtain than a civil action;150 2) Corporate liability is also more likely to adequately compensate victims than liability of individuals because the corporate defendant may have greater assets than an individual;151 3) Criminal prosecution is less expensive for plaintiffs. While U.S. civil discovery is perhaps the broadest in the world, its costs may


148 See Friedman, supra note 144, at 852 (discussing modern corporation’s unique position as entity separate from its managers and employees and arguing that corporation can therefore be held criminally responsible for its conduct in same manner as individual wrongdoer).

149 See Ramasastry, supra note 10, at 153 (explaining that criminal sanctions are greater deterrent than civil sanctions for corporate criminal liability because criminal sanctions have much more stigmatizing side effects than do civil sanctions).

150 Id. at 153 (advancing universality principle as granting jurisdiction to national court regardless of where offense occurred or of the nationality of defendant).

151 See Joseph F.C. DiMento, Gilbert Geis and Julia M. Gelfand, Corporate Criminal Liability: A Bibliography, 28 W. ST. U.L. REV. 1, 2 (2000) (noting that corporations almost always have more assets than individuals and therefore from a restitution perspective are better able to compensate victims).
be born by the litigant.\textsuperscript{152} For poor plaintiffs, criminal prosecution may be in practice the only solution—especially internationally where "winner takes all" is the rule, and the losing side pays the winner's costs.\textsuperscript{153} Finally, it may be difficult to identify the proper individual defendants in a case of corporate wrongdoing. For these reasons, corporate criminal liability serves a complementary role to private liability and corporate self-regulation.\textsuperscript{154}

II. EXTRATERRITORIAL CRIMINAL JURISDICTION OVER CRIMINAL ENTERPRISES IN U.S. LAW

Several U.S. criminal laws also include implied civil causes of action—remedies similar to torts but arising out of criminal law violations.\textsuperscript{155} But applying civil causes of action to overseas conduct is somewhat problematic since foreign legal systems generally do not recognize punitive damages. While private claims for compensation arising out of crimes exist in France, Belgium and Germany (respectively, the \textit{action civile} and \textit{adhäsionsverfahren}) punitive damages do not.\textsuperscript{156} Punitive damages are not allowed in the civil law because they result in overcompensation of plaintiffs.\textsuperscript{157}


\textsuperscript{153} See Beth Stephens, \textit{Corporate Liability: Enforcing Human Rights Through Domestic Litigation}, 24 HASTINGS INT’L & COMP. L. REV. 401, 411 (2001) (noting that most countries have “loser pays” policy in that prevailing party can be compensated for legal fees by the loser).

\textsuperscript{154} See Eric Engle, \textit{Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?}, 40 WILLAMETTE L. REV. 103, 120–21 (2004) (commenting that while codes of conduct or corporate self-regulation alone will not spur reform of corporate human rights abuses, when combined with binding civil or criminal law they can be used to promote higher standards of conduct).


\textsuperscript{157} See Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 18 (Tex. 1994) (explaining that tort law recognizes compensation and not punishment as its objective and therefore, punitive damages are reserved only for most exceptional cases).
A. The Racketeering Influenced and Corrupt Organizations Act (RICO)\textsuperscript{158}

RICO is a U.S. law crafted to fight organized crime which offers litigants a claim against international tortfeasors.\textsuperscript{159} It also offers both criminal and civil remedies, including treble damages for criminal enterprises.\textsuperscript{160} It is an open question whether and to what extent RICO has extraterritorial jurisdiction. But, if there is extraterritorial jurisdiction for RICO, then it may be used to vindicate human rights. A brief analysis of RICO is required to determine the jurisdictional question of whether the private right to compensation applies extraterritorially and if so, under what circumstances.

1. Substantive Law: Definition of a RICO Offense

RICO, like the FCPA and SEC Rule 10b-5, is a legal platypus; it has some features that make it resemble a tort and others that make it resemble a criminal statute. Whether and when these statutes have extraterritorial application adds to the confusion. All three of these statutes offer both criminal and civil remedies.\textsuperscript{161}

The legislative purpose of RICO is to fight organized criminal enterprises.\textsuperscript{162} Title 18 U.S.C. § 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a

\textsuperscript{159} See Wiwa v. Royal Dutch Petroleum, No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293, at *66-67 (S.D.N.Y Feb. 22, 2002) (holding that even though RICO is silent on extraterritorial application, it is clear that foreign corporation is not shielded from liability merely because of location).
\textsuperscript{162} See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (proclaiming that it is "the purpose of this act to seek the eradication of organized crime in the United States . .").
pattern of racketeering activity." Thus, to make a claim in RICO, one must prove a pattern of racketeering in furtherance of a criminal conspiracy. Specifically, the plaintiff under § 1962(c) has the burden of proving: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." 

a. "Conduct of an Enterprise"

An enterprise, for RICO purposes, is "a group of persons associated together for a common purpose of engaging in a course of conduct." A person is an "individual or entity capable of holding a legal or beneficial interest in property." Further, a RICO enterprise "includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 

Governmental entities can be enterprises for RICO. The enterprise, however, must be distinct from the "person" conducting the racketeering activities. "[A]lleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on regular affairs of the defendant" will not satisfy RICO's definition of enterprise. A parent corporation and two subsidiary corporations constitute a RICO "enterprise" if the predicate acts were committed within the scope of the agency relationship. Although a RICO "enterprise" cannot generally be comprised of a

165 See Sedima, 473 U.S. at 496 (noting that plaintiff must allege each of these elements in order to state a claim).
169 See United States v. Angelilli, 660 F.2d 23, 30–33 (2d Cir. 1981) (discussing broad definition of "enterprise" as encompassing governmental entity due to lack of contrary legislative intent).
170 See 18 U.S.C. § 1962(c) (2000). The act prohibits racketeering activities by "any person employed by or associated with any enterprise . . . " Id.
corporation and its employees or subsidiaries, it is possible for two entities in a principal-agent relationship to constitute "persons" if the agent-subsidiary is not acting in the scope of the agency relationship.173

b. "Through a Pattern"

To prove a RICO claim, the plaintiff must show "a pattern of racketeering activity" or a conspiracy to commit racketeering activity.174 A "pattern of racketeering activity" is formed by two or more acts of racketeering, such as extortion, occurring within ten years of each other.175 These two or more predicate crimes must be related to each other, present some level of continuity, and present a threat of future criminality.176 That is, the plaintiff must prove "a series of allegedly criminal acts" independent of the enterprise.177 To prove the existence of a "pattern" of "racketeering activity" plaintiffs must prove "that each defendant . . . committed . . . at least two RICO predicate acts, and that the alleged predicate acts relate to each other and 'amount to, or . . . otherwise constitute a threat of, continuing racketeering activity.'"178

c. "Of Racketeering Activity"

Racketeering activities are broadly defined as one of several substantive criminal offenses in Title 18 of the U.S. Code.179 RICO predicate acts are essentially varieties of extortion whether by murder, robbery, or threats of violence.180 These are

174 See 18 U.S.C. § 1962(c)-(d) (2000). Subsection (d) makes it unlawful to conspire to violate the other provisions of the section. Id.
176 See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237-39 (1989) (noting "it is not the number of predicates but the relationship that they bear to each other or to some external organization" that is relevant for RICO purposes).
180 See 18 U.S.C. 1951(b)(2) (2005). Extortion is defined by the act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened
specifically defined in the following provisions: 1) the Hobbs Act,\textsuperscript{181} 2) Title 18 U.S.C. § 1962(a); 3) 18 U.S.C. § 1962(d); and, 4) state law claims. The exercise of federal jurisdiction must be justified since RICO is a federal statute; therefore, the RICO offense must also obstruct interstate or international commerce.\textsuperscript{182} We now look at the elements of each of these four claims.

First, RICO predicate acts are specifically defined in the Hobbs Act and include interference with commerce, robbery extortion, and conspiracy to commit these substantive crimes.\textsuperscript{183} Second, 18 U.S.C. § 1962(c) imposes liability in crime and in tort for any person or group “associated with any enterprise, engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity,”\textsuperscript{184} for example, criminal enterprises. Third, Under 18 U.S.C. § 1962(d), defendants can be liable for conspiracy to commit a substantive offense, such as an agreement between defendant and others, to facilitate commission of a violation of § 1962(d),\textsuperscript{185} although no overt act in furtherance of the conspiracy must be proven to demonstrate its existence.\textsuperscript{186} Conspirators do not have to know each other to be liable for conspiracy under 18 U.S.C. § 1962(d).\textsuperscript{187} Finally, in addition to the various federal claims (the Hobbs Act and the provisions of 18 U.S.C. § 1962), a RICO case can also be based on substantive state law, and

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\textsuperscript{183} Id. Specifically, “whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.” Id.
\textsuperscript{185} 18 U.S.C. § 1962(d) (2000). This conspiracy provision applies to all of the provisions of subsections (a), (b), or (c). Id.
\textsuperscript{187} See United States v. Zichettello, 208 F.3d 72, 99 (2d Cir. 2000) (holding that it is not necessary that conspirator knows of all acts done in furtherance of conspiracy for RICO charge).
foreign laws as well. For example, crimes in Illinois that are not federal offenses can be the basis for RICO action where there is a pattern of activity affecting interstate or international commerce.

When using state laws as a basis for a RICO action, however, the federal courts look to the substance of the state law and not its procedure. United States v. Bagaric provides, "under RICO . . . state offenses are included by generic designation, . . . references to state law serve [merely] a definitional purpose, to identify generally the kind of activity made illegal by the federal statute." Thus, state acquittal or procedural defenses will not preclude a federal charge under RICO, even when the predicate act must "include the essential elements of the state crime." Although the location of the crime will trigger the particular state's law to be examined, the relevant information for a RICO action is the substantive, not procedural, portion of the state's law. RICO can have extraterritorial effect because only substantive foreign law is applied in the U.S. as the foundation for a violation of the U.S. domestic RICO statute.

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188 See, e.g., Orion Tire Corp. v. Goodyear Tire & Rubber Co., 268 F.3d 1133, 1137 (9th Cir. 2001) (examining facts under RICO, state law, and foreign law claims).

189 See United States v. Paone, 782 F.2d 386, 393 (2d Cir. 1985) (explaining that RICO predicate acts may be acts "chargeable by state law" and that, particularly in this case, all were New York state offenses).


191 See, e.g., United States v. Coonan, 938 F.2d 1553, 1564-65 (2d Cir. 1991) (striking down defendant’s argument regarding Double Jeopardy clause because Congress’ intention in using state law to define predicate acts in RICO was for generic definitory purposes rather than specific procedural history).

192 United States v. Carillo, 229 F.3d 177, 186 (2d Cir. 2000).

193 See Paone, 782 F.2d at 393 (concluding that the court is “satisfied that Congress did not intend to incorporate the various states’ procedural and evidentiary rules into the RICO statute” and that “[t]he statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge”); see also Coonan, 938 F.2d at 1564 (alluding to Paone and its progeny). But see Peters v. Welsh Dev. Agency, No. 86 Civ. 2646, 1991 WL 172950, at *7 (N.D. Ill. Aug. 29, 1991) (asserting that allowing state law charges as predicate acts extends bounds of RICO too far).

194 See Orion Tire Corp. v. Goodyear Tire & Rubber Co., 268 F.3d 1133, 1137 (9th Cir. 2001) (opening possibility of using foreign law for predicate offenses).
2. Jurisdiction: Does RICO Have Extraterritorial Effect?

Though it is possible to apply foreign law in the U.S. (i.e. Chinese law could be the basis of a RICO action)\(^{195}\) that does not necessarily imply the reciprocal proposition (i.e. U.S. domestic violations of RICO have extraterritorial effect), RICO is silent concerning its potential extraterritorial effect.\(^ {196}\) Although a foreign corporation is not shielded from RICO liability merely because of its location,\(^ {197}\) the amount of activity a foreign corporation must maintain in the United States to obtain jurisdiction for a RICO claim is uncertain.\(^ {198}\) Thus, the key problem does not seem to be whether RICO can have extraterritorial effect but rather under what circumstances would sufficient contacts exist to the U.S. in order to justify the exercise of U.S. jurisdiction over a transaction at least partly occurring outside the U.S.\(^ {199}\)

In *United States v. Noriega*, RICO was found to have extraterritorial application in the context of illegal drug sales.\(^ {200}\) A later federal district court case held,\(^ {201}\) however, that RICO does not apply extraterritorially because U.S. legislation is presumed to have no extraterritorial effect, and none will ordinarily be inferred absent an explicit congressional indication.\(^ {202}\) Since cases must be interpreted consistently where possible, and later cases have made clear that extraterritorial

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195 *See id.* at 1137 (theorizing that Chinese law may be considered when interpreting intentions of RICO statute).

196 *See N. S. Fin. Corp. v. Al Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) (ascertaining whether Congress, under RICO, intended federal courts to extend jurisdiction over international controversies because RICO statute is textually silent regarding extraterritoriality).

197 *See Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991) *cert. denied*, 419 U.S. 1105 (1975) (noting proposition that foreign corporations are not immune from RICO liability because they are not located within the United States (citing United States v. Parness, 503 F.2d 430 (2d Cir. 1974))).

198 *See N. S. Fin. Corp.*, 100 F.3d at 1051 (expressing lack of definitive precedent regarding amounts of activity necessary for RICO subject matter jurisdiction).

199 *See id.* at 1051–52 (reiterating that extraterritorial jurisdiction is possible, but must meet standards of "conduct" and "effects" test).


202 *See id.* at 357 (asserting that unless Congress made its intentions clear within statutory language, it would not be considered to extend extraterritorially and emphasizing because RICO is silent on the matter, it should not be considered to extend extraterritorially).
jurisdiction under RICO is possible, the better view is to limit *Jose et al. v. M/V Fir Grove* to the facts in that case and not to see it as prohibiting extraterritorial application of RICO in all cases. This view is supported in *U.S. v. Bowman* where the court held that, although extraterritorial jurisdiction may not be inferred in civil cases, it may be inferred in criminal cases. Essentially, statutes that do not explicitly claim to have extraterritorial application are presumed to be applicable only domestically, but in criminal cases that presumption is rebuttable.

Courts do have some guidance in determining the extraterritorial application of RICO by looking to "precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters." The appropriate test for jurisdiction "var[ies] depending on the substantive law to be applied." Securities fraud can be a RICO predicate act, and U.S. securities fraud statutes can have extraterritorial effect. In order for subject matter jurisdiction for the extraterritorial application of RICO, the complaint must pass either the 'conduct' or 'effects' test used in securities fraud and antitrust cases.

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203 Extraterritorial jurisdiction may be established under RICO claims, but delicate prerequisites must first be solidified. There are two tests that have been developed to examine whether jurisdiction may be extended extraterritorially: the "effects" test and the "conducts" test. See generally *N. S. Fin. Corp. v. Al Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996).

204 *See United States v. Bowman*, 260 U.S. 94, 97-98 (1922) (advocating broad statutory interpretation in federal criminal cases regarding offenses not necessarily confined to local territory, such as those that may make the United States vulnerable by acting on the high seas or in foreign countries).

205 *See United States v. Layton*, 509 F. Supp. 212, 217-18 (N.D. Cal. 1981) (advancing that extraterritorial jurisdiction may be inferred by courts when statutes represent vulnerabilities to the United States if only construed as permitting domestic jurisdiction).

206 *N. S. Fin. Corp.*, 100 F.3d at 1052 (recognizing that there is little caselaw within the circuit regarding extraterritorial application using RICO and that, accordingly, the court relies on precedent from international securities and antitrust matters).

207 *Id.* at 1052 (suggesting that substantive law must be carefully scrutinized by courts to determine whether each particular statute suggests extraterritorial jurisdiction).


209 *See Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995) (holding that although the Securities Exchange Act itself does not express extraterritorial jurisdiction, courts have surmised that it does based upon jurisdictional tests).

210 The court in *Alfadda* held that the possibility for RICO to extend extraterritorially should be extended because the act is based upon a pattern of racketeering activity, which may include securities or antitrust violations. Both securities and antitrust violations must surpass either the "conduct" or the "effects" test for application of extraterritorial
However, tests developed in securities and antitrust may not correspond exactly to RICO because each statute serves a different purpose.\textsuperscript{211}

It seems that in order to obtain subject matter jurisdiction for a RICO claim, the plaintiff must show that either the conduct "within the United States directly caused the loss"\textsuperscript{212} or that "a predominantly foreign transaction has substantial effects within the United States."\textsuperscript{213} The former is known as the "effects test" and the latter as the "conduct test."\textsuperscript{214} Although both the "conduct" and "effects" test arise out of case law that interprets U.S. Securities laws, they apply to RICO as well.\textsuperscript{215}

\textbf{a. The "Conduct" Test}

Under the conduct test, federal jurisdiction in securities fraud cases exists outside U.S. territory only if the conduct "within the United States directly caused."\textsuperscript{216} Mere preparation in the United States alone will not support jurisdiction for the extraterritorial injury.\textsuperscript{217} Alternatively, "actual execution" (e.g., fraudulent statements made in the U.S.),\textsuperscript{218} or execution of sales contract based on overseas fraud would.\textsuperscript{219}

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\item See N. S. Fin. Corp. v. Al Turki, 100 F.3d 1046, 1052 (2d Cir. 1996) (qualifying use of securities and antitrust violations as RICO predicates because tests regarding former acts were developed specifically with them in mind and noting that because RICO is a different statute with different congressional intent, it must be approached differently).

\item Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1046 (2d Cir. 1983) (quoting Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975)).


\item See Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122 (2d Cir. 1995) (highlighting two jurisdictional tests).

\item See Alfadda, 935 F.2d at 479 (opening possibility that extraterritorial jurisdictional tests will be used as predicates for securities and antitrust violations in RICO violations). But see N. S. Fin. Corp., 100 F.3d at 1052 (distinguishing line between intent for extraterritorial jurisdiction with securities and antitrust violations and intent in RICO).

\item Psimenos, 722 F.2d at 1046 (quoting Bersch, 519 F.2d at 993).

\item Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (holding that jurisdiction will not be taken when acts in country are "merely preparatory or take the form of culpable nonfeasance and are relatively small in comparison to those abroad").

\item See Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334–35 (2d Cir. 1972) (recalling that defendants made telephone calls and mailed fraudulent statements within the U.S.).

\item See Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1046 (2d Cir. 1983) (upholding jurisdiction where fraudulent acts were committed in Greece and contracts executed in New York).

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For example, in *Psimenos v. E.F. Hutton* fraudulent statements were made overseas, primarily in Greece. However, several of the contracts were executed in New York. Further, the company accused was an American company whose agents defrauded the foreign plaintiff. The court determined that the U.S. had sufficient interest in the claim because the claim, that an agent of a U.S. company overseas made fraudulent statements to a foreign person, if not remedied by exercise of jurisdiction, would imply corruption of U.S. markets in New York. Thus, the court determined that hearing the claim for the fraudulent statements in Greece would serve the interests of justice would be served by protecting the integrity of the U.S. market. In that case, the preparatory acts (fraudulent statements and conclusion of a series of unfair contracts) were undertaken in Europe, but the actual execution of the sales-orders occurred in the U.S. It is worth pointing out that interpretative schemes in one branch of securities law are interpretive aids in understanding other securities laws. The logic of the conduct test is to prevent “the United States [from being used] as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.”

**b. The “Effects” Test**

The effects test dictates that securities fraud statutes “may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States.” Extraterritorial effect can be given to U.S. antitrust statutes “if

220 Id. at 1043.
221 Id. at 1044 (highlighting that trading contracts were often executed in New York).
222 Id. at 1043 (recalling that defendant was Delaware corporation with its principal place of business in New York).
223 Id. at 1046 (finding potential use of United States commodities markets as place to commit improprieties persuasive in determining jurisdiction).
225 Id. at 1024.
227 ITT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975).
the conduct is intended to and actually does have an effect on United States imports or exports which the state reprehends.\textsuperscript{229} The relevant inquiry is whether the antitrust violation "has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States."\textsuperscript{230}

The rationale behind the application of the effects test to anti-fraud statutes in securities cases and anti-trust cases is "to protect domestic... markets from corrupt foreign influences."\textsuperscript{231} With that teleology\textsuperscript{232} it seems reasonable that RICO could have an extraterritorial effect in cases of human rights abuse, although there is little clear federal authority on the question.

c. Extraterritorial Jurisdiction in Antitrust Legislation

Antitrust law, like securities law, also has an extraterritorial effect \textsuperscript{233} and can be the basis for a RICO claim;\textsuperscript{234} therefore, it seems that the test for the extraterritorial effectiveness of RICO will be that of the underlying predicate acts. RICO can have extraterritorial effect where the underlying predicate act, whether it is securities fraud or anti-trust violations, allows the exercise of extraterritorial jurisdiction.\textsuperscript{235} To demonstrate this reasoning a \textit{maiore ad minus},\textsuperscript{236} where a law is derived from a

\textsuperscript{229} N. S. Fin. Corp., 100 F.3d at 1052 (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945)); see Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993) (rejecting argument that international comity prevents U.S. courts from taking jurisdiction over overseas parties who conspire to restrain illegally interstate or foreign commerce in the United States).

\textsuperscript{230} Nat'l Bank of Canada v. Interbank Card Ass'n., 666 F.2d 6, 8 (2d Cir. 1981).


\textsuperscript{232} Teleology, or final causality, is the ultimate reason for a thing's becoming. The final cause of a child, for example, is an adult. Likewise, the teleology of a law is its ultimate purpose. When we know a law's reason, the goal it seeks to accomplish, in addition to its historical or textual interpretation, we can understand that law in its proper context. Merriam-Webster Online defines teleology as "the fact or character attributed to nature or natural processes of being directed toward an end or shaped by a purpose." Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/teleology (last visited Jan. 20, 200).


\textsuperscript{234} See Alfadda v. Fenn, 935 F.2d 475, 477–80 (2d Cir. 1991) (stating that foreign violation of Securities Exchange Act and RICO may serve as basis of subject matter jurisdiction even though these statutes are silent as to extraterritorial application).

\textsuperscript{235} See id. at 480. (holding that securities fraud violation may serve as predicate act justifying RICO claim)

\textsuperscript{236} Literally, the Latin phrase a \textit{maiore ad minus}, \textit{a simili}, \textit{a pari} means "from the greater to the lesser, similarities or differences." Sir Edward Coke, \textit{A Commentarie Upon
law that has extraterritorial effect, then the new law by logical implication must also have extraterritorial effect. Thus, RICO's criminal provisions certainly apply outside of U.S. territory and it is likely that RICO's civil provisions do so as well.

d. Should RICO Have Extraterritorial Effect?

While RICO's potential extraterritorial application in certain circumstances seems clear, the question remains whether it should be applied in such a manner. Comparing RICO with Helms-Burton and the FCPA may help to understand this point. Helms-Burton attempts to remedy Cuban expropriation of U.S. assets by creating a private cause of action against successors in interest to expropriated property. Helms-Burton provides extraterritorial treble damages. However, the underlying claim of recapturing expropriated assets via successors in interest is much more controversial than RICO. This is one argument for RICO's extraterritorial application. Helms-Burton, which is another treble damage statute, goes much further in exercising U.S. jurisdiction extraterritorially.

The Foreign Corrupt Practices Act also has extraterritorial effect. It makes bribery of foreign government officials intended to obtain or retain business a punishable offense in the U.S. even where the conduct occurred outside of U.S. territory. SEC statutes against securities fraud also have

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Littleton, http://www.la.utexas.edu/research/poltheory/coke/coke.pa01.c01.s03.html (last visited Jan. 20, 2006). In other words, the greater includes the lesser. Thus, if the substantive offense has extraterritorial effect then RICO also has extraterritorial application, at least as to that offense.


238 22 U.S.C. § 6082 (a) (2005) (providing civil remedy for U.S. nationals whose property was confiscated by Cuban Government and then sold to third party).


240 See S. Kern Alexander, Trafficking in Confiscated Cuban Property: Lender Liability Under the Helms-Burton Act and Customary International Law, 16 DICK. J. INT'L L. 523, 561 (1998) (positing that United States has extended extraterritorial reach under Helms-Burton to such extent that it violates international law.)


242 Id. at 686 (stating that FCPA prohibits bribery of foreign government officials in order to obtain or retain business).

243 Id. at 687 (finding that FCPA covers any act person, foreign or national, who commits bribery within U.S.).
extraterritorial effect. This is logical because organized crime, tax evasion, money laundering, and postal fraud, like classical pirates, ignore borders.\textsuperscript{244} So, why should criminals benefit from borders they do not respect? Although the court has not decided this issue, valid reasons exist for applying RICO internationally.

3. Standing (Injury in Fact) and Remedies

a. Standing (injury in fact) to Bring a RICO claim

In order to bring a claim under RICO, the plaintiff must have suffered an injury-in-fact. This means the plaintiff must have been "injured in his business or property by reason of a violation of § 1962."\textsuperscript{245} Courts also use the term standing. The violation of § 1962 must have been the proximate cause\textsuperscript{246} (e.g., the legal cause)\textsuperscript{247} of the injury\textsuperscript{248} to the business or property of the plaintiff.\textsuperscript{249} A predicate act is a proximate cause if it is a "substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence."\textsuperscript{250}

b. Remedies under RICO

Once RICO jurisdiction has been established and a judgment against the plaintiff is entered, the remedial provisions of RICO come into play. These include treble damages\textsuperscript{251} and forfeiture.\textsuperscript{252}


\textsuperscript{245} Hecht v. Commerce Clearing House, 897 F.2d 21, 23 (2d Cir. 1990) (quoting 18 U.S.C. § 1964(c) (1988)).


\textsuperscript{247} See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir. 1994) (explaining "proximate" or "legal" cause required in RICO cases).

\textsuperscript{248} See Beck v. Prupis, 529 U.S. 494, 505-06 (2000) (concluding, in congruence with common-law tort principles that recovery under RICO is limited to injuries caused by conduct forbidden by RICO).


\textsuperscript{250} Hecht v. Commerce Clearing House, 897 F.2d 21, 23-24 (2d Cir. 1990) (defining proximate cause).

\textsuperscript{251} See 18 U.S.C. § 1964 (2005) (listing civil remedies such as treble damages).

\textsuperscript{252} See 18 U.S.C. § 1963 (2005) (listing criminal penalties such as forfeiture).
i. Treble Damages

RICO provides for treble damages to be awarded to plaintiffs (e.g., twice the substantive damages plus the initial damages and also attorneys fees and court costs) which is similar to certain tort remedies. RICO also provides for the possibility of prison, similar to the criminal law. Internationally, punitive damages are viewed as an aspect of criminal law rather than tort law. Civil law systems do not recognize punitive damages in their tort system. Because RICO is probably viewed as a penal statute rather than a civil statute in terms of international law, courts are led to question its extraterritorial application due to concerns over comity. Therefore, an argument against applying RICO internationally is that it is a criminal statute because it provides for treble damages and imprisonment.

Since exercise of criminal law overseas is a greater invasion of the sovereignty of a foreign country courts are less likely to imply

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253 RICO provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 . . . . The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.


254 See 18 U.S.C. § 1964(a) (2005) (specifying that “whoever violates any provision of section 1962 of this chapter . . . shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both . . . ”).

255 See Volkher Behr, Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts, 78 Chi-Kent L. Rev. 105, 106 (2003) (stating that in German law, punitive damages are seen as function of criminal law because they punish the wrongdoer as opposed to compensating the plaintiff).

256 Punitive damages are not recognized in French law. See C. CIV, § 1382 (1995). Section 1382 requires the tortfeasor to simply “make reparation[s],” thus, it suggests that the tortfeasor is liable for only compensatory damages. Additionally, German civil law only requires a tortfeasor to “indemnify” the plaintiff. See §§ 249–255 BGB. It defines “indemnity” as “restor[ing] the condition, which would exist if the circumstance causing the indemnity had not occurred.” Punitive damages for torts are a specificity of the common law. For an explanation of the evolution of punitive damages in torts see Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 283–99 (1989) (O’Connor, J., dissenting).

257 See N.S. Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1052 (2d Cir. 1996) (noting that extraterritorial application of RICO is “delicate work” due to comity concerns).

extraterritorial application of the criminal statute.\textsuperscript{259} One way around this jurisdictional objection might be to simply waive claims for treble damages and imprisonment in international cases and to argue that the civil portions of RICO are in tort. While foreign courts such as Germany will not enforce U.S. treble damages claims,\textsuperscript{260} they do enforce U.S. substantive tort law—even though U.S. compensatory awards are much higher than in Europe.\textsuperscript{261} But in RICO, because the statute contains provisions for imprisonment, execution of the U.S. judgment overseas would be even less likely to be obtained than in the case of treble damages in tort.

ii. Forfeiture

RICO also includes a forfeiture provision wherein any interest in the enterprise, or any property derived from any illegal acts will be surrendered to the U.S. government.\textsuperscript{262} Again, controlling precedent seems to be lacking. However, in \textit{U.S. v. Approximately $25,829,681.80 in Funds},\textsuperscript{263} extraterritorial application of a federal civil forfeiture statute\textsuperscript{264} was permissible.\textsuperscript{265} One main argument of the government was based on an analogy to the domestic application of RICO for civil forfeitures.\textsuperscript{266} Thus, it is very likely that the civil forfeiture provisions of RICO can have extraterritorial effect. However, actual enforcement of judgment overseas becomes problematic because of the possibility of imprisonment and treble damages

\textsuperscript{259} \textit{See N.S. Fin. Corp.}, 100 F.3d at 1052 (expressing comity concerns over application of criminal aspects of RICO due to treble damages).

\textsuperscript{260} The Germans regard such claims as criminal, and not civil, because they lead to the overcompensation of plaintiffs. \textit{See Behr, supra} note 255, at 108. "Thus, to this day, American punitive damage awards are not enforced in Germany." \textit{Id.}


\textsuperscript{262} \textit{See} 18 U.S.C. § 1964(a) (2005). "Whoever violates any provision of section 1962 of this chapter . . . shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both . . . ." \textit{Id.}

\textsuperscript{263} 56 Fed. Appx. 40 (2d Cir. 2003).


\textsuperscript{265} \textit{See Approximately $25,829,681.80 in Funds}, 56 Fed. Appx. at 41 (holding that court had jurisdiction over funds in controversy).

against the defendant. These features transform what the
common law regards as a civil statute into what the civil law
regards as a criminal law, with a correspondingly increased
infringement of national sovereignty. Thus treble damages
forfeiture statutes might be unenforceable overseas, where
ordinary damages would be.

c. RICO in the Context of the ATCA

As earlier noted, RICO has been invoked in the context of the
ATCA and TVPA.267 Its applicability in this context has not, to
the best of the author's knowledge, been determined. For
example, RICO was invoked, especially before the trial court, in
Wiwa v. Royal Dutch Petroleum.268 In Wiwa, the plaintiff argued
that the defendant's actions were in furtherance of a criminal
conspiracy.269 The plaintiff alleged that that Shell hired and
bribed Nigerian officials to intimidate opponents with violence
and to corrupt the law to the profit of Shell. The RICO claim was
not addressed in the Wiwa appeal as the case was remanded for
further proceedings.270 The court did note, however, that as to
forum non conveniens a foreign forum was still adequate despite
the absence of similar conspiracy statute in the foreign
jurisdiction.271 RICO was also invoked by plaintiffs in Doe v.
Unocal272 for reasons similar to Wiwa. Namely, that Unocal
hired security forces of the government of Myanmar (Burma) to
intimidate and enslave indigenous persons, to force them to flee
from oil fields and to force them to work as slave labour – all of
which profited Unocal.273 But, in Unocal the four-year statute of
limitations for a RICO claim had passed. Consequently the
RICO claim was dismissed. The plaintiff in Unocal could have –
but did not – argue that the statute of limitation should have
been tolled ("put on hold" so to speak) under the doctrine of

267 See supra text accompanying notes 79–80 (discussing RICO in the context of
ATCA).
268 226 F.3d 88, 93–94 (2d Cir. 2000) (discussing trial level proceeding).
269 See id. at 92–93 (describing facts of case).
270 See id. at 101 (remanding case for further proceedings).
271 See id. at 101 (citing PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 74
(2d Cir. 1998)).
allegation of RICO violation).
273 See id. at 1295–1303 (describing Unocal's relationship with Burmese security
forces that utilized forced labor).
equitable tolling. Equity may toll a federal statute of limitations where defendant's wrongful conduct prevented plaintiff from asserting the claim or where extraordinary circumstances outside the plaintiff's control made it impossible assert the claim in time.\textsuperscript{274} Not having argued for equitable tolling their claim for RICO was time-barred.

B. Anti-Bribery Laws

1. Anti-Bribery Laws In International Law

Internationally, efforts to combat corruption are expressed in at least two regional anti-corruption conventions sponsored by the Organization of American States (OAS),\textsuperscript{275} and the Organization for Economic Co-operation and Development (OECD).\textsuperscript{276} The OECD Convention was signed on November 21, 1997 by the twenty-six member countries of the OECD and by five non-member countries: Argentina, Brazil, Bulgaria, Chile and the Slovak Republic. Further, human rights implicate the various Bretton-Woods institutions,\textsuperscript{277} such as the International

\textsuperscript{274} See Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987) (discussing recognition and application of equitable tolling of statutes of limitations with respect to federal claims where it is in the interest of justice), \textit{pet. for extradition sub nom. In re Requested Extradition of Suarez-Mason}, 694 F. Supp. 676, 679–80 (N.D. Cal. 1988) (granting Argentina's request for respondent's extradition on thirtynine murder charges, also granting extradition on forgery charge, but denying petition for writ of habeas corpus), \textit{reconsideration granted in part and denied in part}, 694 F. Supp. 707, 712 (N.D. Cal.1988) (granting leave to file Second Amended Complaint including allegations of "Disappearance and Presumed Summary Execution" and "Torture or other Cruel, Inhuman or Degrading Treatment").

\textsuperscript{275} Organization of American States: Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter Inter-American Convention] (creating treaty among Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Pery, Suriname, Uruguay, and Venezuela).

\textsuperscript{276} Argentina-Brazil-Bulgaria-Chile-Slovak Republic-Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1998, 37 I.L.M. 1 [hereinafter Convention Combating Bribery] (stating its purpose to criminalize bribery because it undermines both good governance and economic development, as well as, distorts international competitive conditions).

Bank for Reconstruction and Development (IBRD), also known as the World Bank Group (WB),\textsuperscript{278} and the International Monetary Fund (IMF),\textsuperscript{279} which also opposes corruption and seeks to find methods to solve it: these anti-corruption treaties include prohibitions against bribery.

2. The Foreign Corrupt Practices Act (FCPA)

a. Introduction

Under American law, companies that commit bribery violate the U.S. Foreign Corrupt Practices Act (FCPA)\textsuperscript{280} and regulations of the Securities and Exchange Commission (SEC).\textsuperscript{281} For example, SEC regulations make secret bank accounts illegal for use in bribery as a contravention of the requirement of complete and accurate financial disclosure under the SEC's rules.\textsuperscript{282} A convention similar to the FCPA exists and applies to members of the EU and its associated states in the third world under the Cotonou Agreement.\textsuperscript{283} Bribery may also be a violation of international law.\textsuperscript{284}


\textsuperscript{279} See id. at 399-400 (stating that World Bank and International Monetary Fund took active roles against corruption in mid 1990's only after emergence of anti-corruption initiatives).


\textsuperscript{281} 17 C.F.R. § 240.17a-3 (2005) (mandating that national securities exchange members shall keep current employment records including any arrests or indictment for bribery).

\textsuperscript{282} See Posadas, supra note 278, at 346 (reiterating Security Exchange Commission's contention that unaccountably distributing money abroad through "secret slush funds" contravenes United States securities law, which requires public companies to file accurate financial statements).

\textsuperscript{283} Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, Signed in Cotonou on 23 June 2000, Chapter 1 art. 1, art. 3,) (stating "good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement. The Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97 constitute a violation of that element.")

The FCPA, like the Convention on Bribery, makes the worst instances of bribery illegal. The FCPA regulates illegal activity by U.S. companies outside of U.S. territory. It criminalizes bribery of foreign government officials involving U.S. corporations outside the United States by making such conduct a punishable offense within the U.S., where such bribery is intended to obtain or retain business. Liability for violations of the FCPA generally consist of fines, which are determined according to guidelines, although an indictment can result in suspension of the right to do business with the federal government, or result in suspension of export licenses for military equipment.

b. Does the FCPA Imply a Private Cause of Action?

The explicit remedy of the FCPA is that the Attorney General can sue for injunction and obtain civil or criminal penalties. As to whether there is an implied private right of action against a company guilty of bribery within the FCPA, the Federal Circuit in Scientific Drilling Int'l, Inc. v. Gyrodata determined that there is none. The court noted, however, that the legislative

Convention Combating Bribery proscribes intentionally receiving undue advantage from foreign public officials.

285 Convention Combating Bribery, supra note 276 (criminalizing bribery of foreign public officials).

286 See Morgan & O'Grady, supra note 243 (advancing that regardless of whether companies are publicly traded, they are prohibited from bribing foreign officials to gain or retain business).

287 See Sperber, supra note 241, at 686 (furthering it is also illegal to bribe foreign government officials for purpose of directing business to another person under FCPA).

288 See id. at 699 (delineating penalties for bribing foreign officials and citing example as those who willfully violate FCPA accounting provisions may be punished by fines up to $1,000,000 and may be jailed for up to ten years).

289 See id. at 700 (warning that a likely result of a violation of the FCPA is debarment before several government agencies).


291 Id. at *7 (dismissing Gyrodata Corp's counterclaim because FCPA does not grant private cause of action).
history on that point is in fact unclear.\textsuperscript{292} There is evidence both for and against a finding of a private remedy under the FCPA.\textsuperscript{293}

The court's reasoning in \textit{Scientific Drilling} seems tautological. The court argues that the FCPA creates no implicit private cause of action because there is no explicit text to that end.\textsuperscript{294} The illogic is further demonstrated in the court's argument that a private cause of action would be "inconsistent" with the FCPA, even though the FCPA explicitly provides the possibility of civil penalties.\textsuperscript{295} In dicta, the \textit{Scientific Drilling} court also noted that even if an implied remedy were found, practical facts would block its application. Although an illegal contract can constitute commercial activity under the Foreign Sovereign Immunities Act,\textsuperscript{296} and can be the basis for a finding of jurisdiction under the FCPA,\textsuperscript{297} the equitable doctrine of clean hands would bar recovery.\textsuperscript{298} There is a problem with this justification of the court for its decision. Unless a statute states otherwise, its remedies are legal not equitable.\textsuperscript{299} "Unclean hands" is a doctrine based in

\textsuperscript{292} See id. at *7--*8 (explaining that legislative history of FCPA gives credence both to permitting private claims, as well as prohibiting them, and, therefore, it does not assist discovery of congressional intent).

\textsuperscript{293} See id. at *7 (acknowledging that defendant's legislative history argument is not conclusive as FCPA's legislative also offers equal support for opposite contention).

\textsuperscript{294} See id. at *8--*9 (finding that lack of creation of explicit private cause of action under FCPA is conclusive evidence that Congress meant to exclude such right).


\textsuperscript{296} United States Foreign Sovereign Immunities Act of 1976 § 1603(d)-(e) (1988), available at \url{http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID20Documents/rp04039.html} (defining international commercial activity as "regular course of commercial conduct or a particular commercial transaction or act" where the United States has substantial contact with another nation).

\textsuperscript{297} \textit{See} Adler v. Federal Republic of Nigeria, 219 F.3d 869, 871 (9th Cir. 2000) (holding that illegal contract was actionable pursuant to Foreign Sovereign Immunities Act because it constituted commercial activity), amended by No. 98-55456, 2000 U.S. App. LEXIS 20687, at *4 (9th Cir. Aug. 17, 2000) (noting definition of "commercial activity" in previous case was erroneous since Supreme Court ruled that "question is not whether the foreign government is acting ... with the aim of fulfilling uniquely sovereign activities").

\textsuperscript{298} \textit{Id.} at 876--77 (explaining that doctrine of unclean hands "closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behaviour of the defendant").

\textsuperscript{299} \textit{See} Time Warner Cable of NYC v. Kline Davis and Mann, Inc., No. 00 Civ. 2897, 2000 U.S. Dist. LEXIS 18280, at *9--*10 (S.D.N.Y. 2000) (stating statutory damages are punitive and are, thus, legal, not equitable, remedies).
equity.\(^{300}\) Even if the plaintiff had invoked equity, and thus permitted the court to apply the equitable doctrine of unclean hands to prohibit a particular case from going forward, that is not an argument for all cases to be categorically rejected from the outset. The court in *Scientific Drilling* makes basic errors in logic and law that could, and in fact, should be easily overturned.

The reasoning of the court in *Scientific Drilling* is unconvincing. Better arguments reaching the same result could have been found. For example, under a plain meaning, or “black letter” interpretation, the statute was unambiguous. Thus, there was no need to imply meanings not facially evident. The court could have reasoned that the express remedy excluded all other implicit remedies. Instead, the court in *Scientific Drilling* struggles, perhaps unconvincingly, with legislative history it considers ambiguous.\(^{301}\) The court noted the statements of the House committee report, which stated “[t]he committee intends that courts shall recognize a private cause of action based on this legislation”.\(^{302}\) However, Senator Tower contradicted the House committee report, as did the statements of Representative Devine, also a member of the conference committee.\(^{303}\) Rejecting the contradictory statements, the court concludes with a tautology. The court explains that there is no implicit remedy because the remedy is not explicitly stated.\(^{304}\) This is based on a questionable teleology; namely, that the statute aims at deterrence not compensation. The teleological argument, however, is not based on legislative intent but rather the inference of the court. The court holds that the detailed enforcement scheme did not explicitly include a private remedy.\(^{305}\) That is, of course, an *expressio unius*\(^ {306}\) argument;

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\(^{300}\) See Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 244 (1933) (explaining that fundamental principle of equity jurisprudence is that plaintiffs have “clean hands” before coming into court).


\(^{302}\) Id. at *7 (citing H.R. Rep. No. 95-640, at 10 (1977)).

\(^{303}\) Id. at *8 (arguing that FCPA is for Securities and Exchange Commission and Justice Department to enforce with no right to a private cause of action (citing 123 Cong. Rec. 38, 778 (1977))).

\(^{304}\) Id. at *8-*9 (stating that FCPA’s structure, which consists of detailed enforcement schemes, tends to negate possibility of implicit remedies).

\(^{305}\) Id. at *8 (finding that lack of explicit private remedy implies that no private right was intended).
however, the court does not appear to recognize this or use the term. For these reasons, it would be possible in future litigation to limit or reverse *Scientific Drilling* and find an implied right of action similar to that in SEC Rule 10b-5, which addresses stock fraud. Alternatively, Congress could simply amend the FCPA to specifically provide a private cause of action.\textsuperscript{307}

Presently, however, individuals can call the attention of the government to violations of the law,\textsuperscript{308} but enforcement of the FCPA is only possible via government prosecution.\textsuperscript{309} Private parties cannot ordinarily bring suit under the FCPA,\textsuperscript{310} although an FCPA claim may be evidence of a pattern of racketeering necessary to support a RICO claim.\textsuperscript{311}

c. Jurisdiction

The FCPA is an extraterritorial application of U.S. law, unlike the Alien Tort Claims Act and Torture Victims Protection Act.\textsuperscript{312}

\textsuperscript{306} *Expressio unius* is defined as a “canon of construction holding that to express or include one thing implies the exclusion of the other.” *Black's Law Dictionary* 265 (2d pocket ed. 2001).

\textsuperscript{307} See Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Right of Private Action*, 82 CAL. L. REV. 185, 216 (1994) (explaining that government agencies have failed to enforce the vague terms of FCPA and that a possible solution would be to create private cause of action for general public for violations of Act).

\textsuperscript{308} In a similar context, Robert J. Liubicic describes the former Secretary of Labor's recognition that private enforcement via private action may be more effective since it relies on the self interest of the corporation and argues that corporations can be encouraged to compete against each other through the pointing out of their competitors' human rights violations. See Robert J. Liubicic, *Corporate Codes Of Conduct And Product Labelling Schemes: The Limits And Possibilities Of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 121–22 (1998).

\textsuperscript{309} See Sperber, supra note 241, at 692 (explaining that the DOJ and SEC are "solely responsible" for enforcing FCPA).

\textsuperscript{310} See Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1027–30 (6th Cir. 1990) (explaining that private action is not recognized under FCPA as it is inconsistent with its legislative scheme, it is not in congressional intent behind enactment of FCPA, and the FCPA provides adequate means of redress in the private realm).


\textsuperscript{312} 28 U.S.C. § 1350 (2001) (giving US district courts original jurisdiction for torts committed in violation of laws of nations or treaties by aliens and allowing civil suit for damages against individuals under actual or apparent authority of foreign nations that subject individuals to torture or extrajudicial killing).
The FCPA has incited some objection internationally as an invasion of the sovereignty of other countries. Those objections, however, are not well founded. In fact, the FCPA is not so unusual; similar legislation also exists under regional and international law. For example, the European Union also has anti-bribery legislation and the United Nations has entered a resolution of the General Assembly to curb corruption and bribery. Nevertheless, it is necessary to consider the jurisdictional aspects of the FCPA to determine whether there is any substance to the critique.

The exercise of jurisdiction by U.S. courts over companies outside of U.S. territory, whether for violations of SEC disclosure laws or violations the FCPA raises the same jurisdictional problems found elsewhere in the case of tort liability in the U.S. for torts committed outside of U.S. territory under either the Alien Tort Claims Act or the Torture Victims’ Protection Act. In SEC v. Montedison, S.p.A., an Italian corporation was prosecuted by the SEC under 5 U.S.C. §§ 78a, 78dd-1, 78dd-2,

313 See Christopher J. Duncan, The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?, 1 ASIAN-PAC. L. & POL’Y J. 16, *1–*5 (2000) (stating that objection stems from different customs and values in other nations, such as gift giving in Asian countries).

314 See Inter-American Convention, supra note 198, at 724, 729–30 (providing agreement, among Central and South American countries, to establish measures preventing corruption, including bribery, and allowing each member state to establish jurisdiction for offenses committed in its territory or offenders located in its territory).

315 See Convention Combating Bribery, supra note 273, at 1, 4 (providing criminal penalties among agreeing countries for bribery of foreign officials in international business transactions).


317 But see Philip M. Nichols, Outlawing Transnational Bribery Through The World Trade Organization, 28 LAW & POL’Y INT’L BUS. 305, 306 (1997) (describing that problem with current international laws against bribery is that most countries have laws prohibiting payment of bribes to its officials, but only two countries make it illegal to make transactional bribes).

318 See Sperber, supra note 241, at 695–96 (describing that objective of UN resolutions is to have member states criminalize payment of bribes and to deny tax deductibility of bribes).


and 78ff\textsuperscript{321} for violations of the FCPA, for acts wholly undertaken in Italy.\textsuperscript{322} In that case, defective internal accounting led to failure to report bribery of Italian officials in Italy and ultimately, the company was held liable. While there are many procedural, jurisdictional, and prudential obstacles in exercising “long arm” (ex orbitante) jurisdiction, U.S. exercise of “long arm” jurisdiction overseas seems to be a part of the current international legal landscape.\textsuperscript{323} Although jurisdictional obstacles are not necessarily going to block application of the FCPA outside American territory, there are some loopholes in the FCPA, which allow substantive acts to escape liability. Not all acts of bribery are illegal under the FCPA.\textsuperscript{324} The FCPA does, however, establish accounting requirements for companies registered with the SEC,\textsuperscript{325} effectively granting the SEC new regulatory powers outside of U.S. territory\textsuperscript{326} with far reaching implications.\textsuperscript{327} While the FCPA is functionally enforceable, it raises jurisdictional questions; namely, when may an extraterritorial transaction or defendant be brought before a U.S. court. Those questions can be partially answered by the fact that the SEC does not compel all companies to register, but only requires registration for publicly traded companies in the United States.\textsuperscript{328} Therefore, companies

\textsuperscript{322} See Montedison, 1996 WL at (explaining the charges against Montedison were, among other things, falsifying documents to artificially inflate company’s financial statements).
\textsuperscript{324} See H. Lowell Brown, Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp?, 26 N.C.J. Int’l L. & Com. Reg. 239, 289 (2001) (acknowledging that not all payments to officials are prohibited by the FCPA but rather only payments intended to secure markets or gain other improper advantages are prohibited).
\textsuperscript{327} See Barbara Crutchfield et al., Responsibilities of Domestic Corporate Management Under the Foreign Corrupt Practices Act, 31 Syracuse L. Rev. 865, 880 (1980) (positing that the “SEC may be changing from an agency that chiefly regulates the securities markets to a wide-reaching federal corporations commission”).
\textsuperscript{328} See 69 Am Jur 2d SECURITIES REGULATION —FEDERAL § 577 (finding “the Exchange Act registration requirements apply, generally, to publicly-traded securities
benefiting from trading in U.S. markets should not be surprised when that includes regulation by the U.S. laws. Thus, jurisdiction for the FCPA (and, by extension, the Securities and Exchange Act) may be considered universal jurisdiction under the protective principle.\textsuperscript{329}

d. Conclusion

Unilateral remedies to criminal activity, such as the FCPA, are generally criticized.\textsuperscript{330} Multilateral remedies, however, do not seem any more or less effective in reducing the worst instances of bribery. The various anti-bribery conventions and federal laws are a small step in the direction of transparent markets, which also respect human rights.

CONCLUSION

Corporations can be held liable either as principals or accomplices for activity overseas which is against U.S. law, international law, and violations of foreign domestic law. Violations of criminal law often include civil damages as a remedy and/or imply violations of tort law. This article has tried to outline some of the problems and possibilities in bringing extraterritorial criminal law to bear on corporations. As so often is the case in criminal law if prosecutors wish to bring the power of the state to bear they can, but they must be aware of the limits on the exercise of their power, not the least of which is their limited resources. Hopefully, this outline of possible remedies will stretch those resources a bit into creative attacks on wrongful activity \textit{Salus Reipublicae}.\textsuperscript{331}

\begin{footnotesize}
\begin{enumerate}
\item Brown, supra note 324, at 258–59 (acknowledging that Congress must address issue of bribery internationally if it were to have any effect).
\item For the health of the republic.
\end{enumerate}
\end{footnotesize}