NOTE

CORPORATE DISCONNECT:
THE BLACKWATER PROBLEM AND
THE FCPA SOLUTION

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In the aftermath of the Nisour Square tragedy, in which seventeen Iraqi civilians died as a result of actions by Blackwater USA, a security contractor, the United States was confronted with a loophole in its criminal law. While the responsible Blackwater guards would face stiff penalties under the Foreign Corrupt Practices Act for any accounting fraud committed abroad, there was no obvious criminal statute that would cover the senseless act of violence in Nisour Square. With the growth of military contractors specifically and the spread of globalization generally, violent acts by corporations proliferate.

This Note aims to show that a criminal statute with extraterritorial jurisdiction is the proper solution to the Blackwater problem and the plague of corporate human rights abuses abroad. The Foreign Corrupt Practices Act (FCPA) already holds corporations criminally liable for accounting and bribery crimes committed overseas. Congress need only amend the FCPA to address a larger scope of crimes, including human rights abuses, to hold corporations such as Blackwater responsible for their actions. That our statutes make a crime of a corporation's overseas accounting fraud but not overseas murder is an absurdity that demands change.

This Note will explore a variety of legal regimes in search of a possible legal solution to the Blackwater problem. As all existing legal regimes are inadequate, this Note then looks to the FCPA, which has proven promisingly effective in addressing extraterritorial crimes. In order to understand why U.S. law does not already criminalize human rights abuses, the Note considers the historical relationship between corporations and government, beginning with the underpinnings of that relationship in Roman law and political theory. The Note will then examine the problems that arose from British joint-stock trading compa-

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nies and Gilded Age business corporations. Applying the solutions that the British and U.S. governments employed in the past, this Note will explain how expanding the FCPA by adopting new human rights provisions can address the Blackwater problem and many of the other human rights abuses that arise from globalization.

INTRODUCTION

On September 16, 2007, a bomb exploded a few hundred yards from a Baghdad compound in which American diplomats were meeting.\(^1\) Guards working for Blackwater USA, a private military corporation under contract with the State Department, immediately assembled a convoy to transport the diplomats back to the Green Zone, the heavily fortified zone in central Baghdad.\(^2\) Upon reaching Nisour Square, the guards halted traffic and took defensive positions around the intersection.\(^3\) After securing the square, one of the Blackwater guards opened fire on a car,

\(^2\) Id.
\(^3\) Id.
killing its driver and a female passenger who was clutching her infant. Another guard allegedly fired a grenade into a girls’ school nearby. The ensuing chaos, resulting in seventeen civilian deaths and twenty civilians wounded, ended only after one Blackwater guard drew his weapon on another to force him to stop firing. Although the guards claimed to have acted in self-defense, an F.B.I. investigation found that fourteen of the seventeen civilian deaths were unjustified; both the dead and wounded were unarmed.

While Nisour Square received more attention than most incidents involving military contractors, the problem is not a new one. Since the end of the Cold War, the military’s use of private soldiers has quadrupled. “By 2008, the ‘estimated 180,000 private contractors outnum[bered] the 160,000 US. troops stationed in [Iraq].’” With so many private contractors in such volatile locations, abuses such as the Nisour Square incident abound. On July 8, 2006, a military contractor intentionally fired into a moving taxi for amusement, after allegedly telling colleagues “I want to kill somebody today.” On December 24, 2006, a Blackwater guard who had been drinking heavily shot and killed a bodyguard of the Iraqi Vice President. In 2007, the House Committee on Oversight and Government Reform found that Blackwater had been in-

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4 Id.
5 See Del Quentin Wilber, Contractors Charged in ‘07 Iraq Deaths, WASH. POST, Dec. 9, 2008, at A2 (citing an indictment brought by federal prosecutors).
6 See Glanz & Tavernise, supra note 1, at A12 (quoting an American official stating that one guard “got on another one about the situation and supposedly pointed a weapon”).
7 See David Johnston & John M. Broder, F.B.I. Says Guards Killed 14 Iraqis Without Cause, N.Y. TIMES, Nov. 14, 2007, at A1 (citing findings by FBI agents concluding that three of the seventeen deaths “may have been justified” because they may have resulted from a “perceived” threat—even if no threat actually existed).
volved in 195 “escalation of force” incidents since 2005.\textsuperscript{14} More recently, reporters discovered that the CIA hired and trained Blackwater for an aborted plan to assassinate Al Qaeda leaders.\textsuperscript{15} Above all, the U.S. government contributed to the problem by freeing such contractors from legal constraints: on June 28, 2004, as his last act before stepping down as head of Iraq’s Coalition Provisional Authority, Paul Bremer issued Order 17, immunizing contractors in Iraq from prosecution in Iraqi courts.\textsuperscript{16}

These incidents in Iraq have taken their toll on both relations with Iraqis and on the world’s perception of the United States. Understandably, Iraqis have expressed outrage over the impunity with which Blackwater guards have killed innocent civilians.\textsuperscript{17} Likewise, the question of contractor immunity “has become a key issue in negotiations” between U.S. and Iraqi diplomats.\textsuperscript{18} The critical role private contractors played in the abuses at Abu Ghraib has further fed anti-American propaganda across the world.\textsuperscript{19}

Of course, the issue of corporate human rights abuses is not limited to Iraq and Blackwater USA. In June 2009, Shell settled a federal suit in which Nigerian families sued the company for its alleged complicity in the execution of eight Nigerian activists, including Nobel Laureate Ken Saro-Wiwa.\textsuperscript{20} In 2007, Yahoo settled a lawsuit brought by two Chinese journalists who claimed that Yahoo’s disclosures to the Chinese govern-

\begin{itemize}
  \item \textsuperscript{14} See Maj. Staff of Members on the Comm. on Oversight and Gov. Reform, 110th Cong., Memorandum on Additional Information About Blackwater USA (Oct. 1, 2007).
  \item \textsuperscript{15} See Mark Mazzetti, Outsiders Hired As C.I.A. Planned To Kill Jihadists, N.Y. Times, Aug. 21, 2009, at A1. Although this plan emerged in 2002, Congress did not learn about it until 2009. See id.
  \item \textsuperscript{17} See Steve Fainaru, Warnings Unheeded On Guards In Iraq, Wash. Post, Dec. 24, 2007, at A1 (quoting a contractor as saying “[t]he Iraqis‘ fury grew as they realized that Blackwater was untouchable”).
  \item \textsuperscript{18} See Alexandra Zavis, Army Interpreter Sentenced at Court-Martial, L.A. Times, June 24, 2008, at A3.
  \item \textsuperscript{19} See Deborah Hastings, Contractors Incited Prison Abuse, Report Says, Houston Chron., Oct. 24, 2004, at A12 (“CACI and Titan employees were key participants in the ‘sadistic, blatant and wanton criminal abuses’ at Abu Ghraib, said the Taguba report.”); see also Tracie Rozhon, 6 Members of Elite Navy Force Sue News Agency Over Photos, N.Y. Times, Dec. 29, 2004, at A16 (“Mr. Huston said the photos had appeared in Arab news media and on anti-American billboards in Cuba.”).
  \item \textsuperscript{20} See Jad Mouawad, Shell Agrees to Settle Abuse Case for Millions, N.Y. Times, Jun. 9, 2009, at B1 (stating that the settlement was “a striking sum given that the company has denied any wrongdoing”).
\end{itemize}
ment of certain pro-democracy emails led to their arrest and torture.\textsuperscript{21} In 2004, Unocal settled a lawsuit brought by fifteen Burmese refugees who accused the company of complicity in the murder, rape, and torture that accompanied the construction of its oil pipeline in Burma.\textsuperscript{22} From the abuses of colonialism,\textsuperscript{23} to the Holocaust,\textsuperscript{24} to Apartheid,\textsuperscript{25} the role of corporations in human rights abuses is all too common.

This Note aims to show that a criminal statute with extraterritorial jurisdiction is the proper remedy to this plague of corporate abuses abroad. The Foreign Corrupt Practices Act (FCPA) already holds corporations criminally liable for accounting and bribery crimes that they commit overseas.\textsuperscript{26} Congress need only amend the FCPA to address a larger scope of crimes, including human rights abuses by corporations such as Blackwater or Unocal.\textsuperscript{27} That our statutes make a crime of a corporation’s overseas accounting fraud but not overseas murder is an absurdity that demands change.

Part I of this Note will examine some of the existing possible legal solutions to this “Blackwater problem.” As all are inadequate, Part II looks to the FCPA, which has proven to be promisingly effective in addressing extraterritorial crimes by U.S. corporations.\textsuperscript{28} In order to understand why U.S. law does not already criminalize human rights abuses, Part III looks to the historical relationship between corporations and government, beginning with the underpinnings of that relationship in Roman law and political theory. Part III will then examine the problems that arose from British joint-stock trading companies and American business corporations of the Gilded Age. Applying the solutions employed by the


\textsuperscript{23} See discussion infra Part III.C.


\textsuperscript{28} This Note recommends that Congress amend the FCPA to cover crimes such as those that occurred at Nisour Square. Of course, due to ex post facto limitations, these amendments would only serve to prevent future crimes, not punish this individual crime. \textit{See U.S. Const.} art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).
British and U.S. governments during that time, Part IV will explain how expanding the FCPA by adopting new human rights provisions would address the Blackwater problem and many of the other human rights abuses that are likely to occur in the age of globalization.

I. THE AVAILABLE LEGAL SOLUTIONS

A. Iraqi Law

One obvious solution to the Blackwater problem would be to eliminate the blanket immunity that the Provisional Authority granted in the first place. In fact, the U.S. and Iraqi governments have agreed to do just that. Unfortunately, this approach creates as many problems as it solves. One barrier to relinquishing authority to Iraqi courts is that “there is little confidence that trials would be fair and defendants in those [Iraqi] courts have few of the legal protections that are mandatory in the United States.” The trial of Saddam Hussein displayed the shortcomings of the Iraqi judicial system to the world as Saddam’s enemies intervened to ensure his conviction and eventual execution. The lack of due process in the Hussein trial has led some to question the extent of the rule of law in Iraq. These questions cast doubt on the possibility that Blackwater guards would get a fair trial in Iraq.

B. International Law

A second possible solution would be to address the Blackwater problem through international law. Professor Richard Morgan proposes using the Hague Conventions, Geneva Conventions, and Protocol I to hold military contractors responsible for their crimes. He argues that the international nature of their acts and the possibility of a race to the bottom in domestic regulations call for a solution rooted in international law, a new treaty regime, or evolving customary international law.

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29 Blackwater has now renamed itself Xe. See The Associated Press, Blackwater Changes Its Name to Xe, N.Y. TIMES, Feb. 13, 2009, at A10. For simplicity, this Note will use the name Blackwater throughout.
32 See Neil Genzlinger, The Backstage Intrigues at a Show Trial, N.Y. TIMES, Oct. 11, 2008, at C11 (“The trial that resulted in Mr. Hussein’s hanging in late 2006 did not conform to the American Way.”) (reviewing The Trial of Saddam Hussein (PBS television broadcast Oct. 12, 2008)).
33 See John F. Burns, Western Lawyers Say Iraq Discarded Due Process in Hussein Trial, N.Y. TIMES, Sept. 25, 2008, at A17 (explaining how Prime Minister Maliki “forced the resignation of one” judge “to avert the possibility” of life imprisonment in place of execution).
35 See id. at 244–45.
Other scholars have come to similar conclusions regarding human rights abuses by corporations more generally. Professor Steven Ratner argues that, in light of the problems that emerge between corporations and states in the context of globalization—including the very erosion of state power—“[a]ny answer not depending exclusively on diverse and possibly parochial national visions of human rights and enterprise responsibility must come from international law.”

International law, Professor Ratner argues, would eliminate the uncertainty that comes from ad hoc responses by legislatures and international organizations. The solution then would be a marriage between corporate law and international law, imposing certain obligations on corporations in order to protect human rights.

Unfortunately, a solution rooted in international law is also problematic. First, there is the ongoing debate over whether international law really is law at all. International law lacks the backing of a legislature, an executive body, and a judiciary with compulsory jurisdiction. These qualities have led some to conclude that international law is more ‘positive morality’ than law. While Professor Ratner warns of the uncertainty that comes from ad hoc responses by different legislatures, there is also an inherent uncertainty in trying to create law without any of the traditional lawmaking mechanisms.

Second, even if international law is law, there is another concern in finding a forum to apply it. Even if Professor Morgan were right that international law provides all the necessary tools to address something like the Blackwater problem, he does not address whether the United States would ever subject itself or its citizens to such an international criminal trial. To date, the United States has resolved not to let the International Criminal Court try its citizens. In making its decision,
Congress cited the lack of constitutional protections available in the International Criminal Court. This same concern would apply to any international tribunal; thus, one could conclude that the United States would not fully cooperate with any international criminal court.

The situation is little better in U.S. courts. In practice, American judges give short shrift to international law in their courtrooms. Using the many rules available under the doctrine of “judicial provincialism,” judges may find ways to prevent a hearing on international law cases, to prevent international law from providing the rule of decision in a case, or to hinder the proper handling of international law. Even if U.S. judges decide to use international law in their decisions, supplanting domestic law with international law raises yet another constitutional concern.

These debates over the merits of international law are extensive, and their details are beyond the scope of this Note, but they do illustrate the overall concerns about international law’s ability to protect human rights. For now, one can conclude that human rights require a more solid foundation than international law alone can provide.

C. Domestic Law

For lack of other options—if nothing else—U.S. domestic law provides the greatest potential for holding criminals such as the Blackwater guards liable. There are only a handful of U.S. statutes that have the extraterritorial reach to extend to Iraq. This Note will address three: the Military Extraterritorial Jurisdiction Act (MEJA), the Alien Tort Statute (ATS), and the Foreign Corrupt Practices Act (FCPA). This section examines MEJA and ATS, but concludes that both are inadequate solutions to the problem of holding corporations liable for crimes committed abroad.

Of these three laws, MEJA is seemingly the most on point. The statute covers members of the Armed Forces or those accompanying the
Armed Forces, a definition that would include military contractors. In addition, MEJA applies to any serious criminal acts that occur outside of the United States, allowing for prosecution under U.S. law for those acts. Although MEJA offers a “significant expansion of American criminal law over crimes committed on foreign soil,” and although the United States has attempted to indict the Blackwater guards under MEJA, it is not a clear solution to the problem at hand for three reasons.

First, and most importantly, MEJA would only apply to the individual guards: Blackwater USA itself cannot be prosecuted under MEJA. Second, it remains to be seen whether a conviction of the guards is even possible: the government’s initial indictment under MEJA has been dismissed. To date, there has been only one successful prosecution of a contractor under MEJA, and this involved child pornography. Moreover, MEJA has never applied to contractors working for the State Department, as with the Blackwater guards at Nisour Square. Third, a prosecution under MEJA will not likely clarify the law in the least. If there is a prosecution under MEJA, it will be by twisting the statute into a “an unprecedented use of the law,” likely producing “protracted, technical arguments aimed at scuttling the case well before a jury has the opportunity to evaluate the guards’ actions.” Criminal law deserves more clarity than this extension of MEJA can provide. Finally, setting aside this dubious application of MEJA, it would certainly not address any of the other human rights abuses that corporations commit overseas.

An alternative to the Military Extraterritorial Jurisdiction Act is the Alien Tort Statute, which provides for original jurisdiction in federal district courts for “any civil action by an alien for a tort only, committed in

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51 See id. § 3261.
52 See id. § 3267(1)(A)(ii)-(iii).
53 See id. § 3261.
54 See id. §§ 3261–62.
56 See Scahill, Justice, of a Sort, supra note 8; see also Savage, supra note 8, at A1.
58 See Savage, supra note 8, at A1.
60 See id. at 1315.
62 See supra notes 20–27 and accompanying text.
violation of the law of nations or a treaty of the United States.” Most promisingly, foreigners have used the ATS to sue corporations in federal court for breaches of customary international law with respect to human rights abuses.

Nonetheless, enforcing human rights through the ATS is problematic, and thus far, no corporation has been held liable under the ATS. First, the ATS’s subject-matter jurisdiction is limited to breaches of the “law of nations,” a term that courts have interpreted narrowly. Second, as a private action, a party suing under the ATS must bear its own costs, a disincentive for victims, particularly if they still reside in a foreign country. Finally, an ATS claim is a tort claim rather than a criminal action, and there is a difference between a “breach” and a “crime,” between mere civil liability and the moral condemnation of breaking a criminal law. Consequently, if the United States is serious about condemning the most heinous corporate abuses, it should look to the criminal law rather than tort law.

By process of elimination, one finds the traits necessary to address the Blackwater problem in particular and overseas corporate abuses in general: the United States needs a criminal statute with extraterritorial reach and a purpose broad enough to address a wide variety of corporate crimes. For that, one must turn to the Foreign Corrupt Practices Act.

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66 See Breed, supra note 27, at 1016.

67 See David A. Root, Note, Attorney Fee-Shifting In America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule”, 15 IND. INT’L & COMP. L. REV. 583, 585 (2005) (“[T]he ‘American rule’ which has stood for over 200 years, is one in which each party must bear its own costs for litigation, regardless of the outcome.”).

68 See Paul H. Robinson, The Criminal-Civil Distinction and The Utility of Desert, 76 B.U. L. REV. 201, 206 (1996) (“The shared quality—the defining characteristic—of all civil liability is that it is not criminal liability; it lacks the societal condemnation that criminal liability traditionally suggests.”).
II. THE FCPA: PURPOSE AND STRUCTURE

A. The Purpose of the FCPA

In 1977, Congress enacted the Foreign Corrupt Practices Act (FCPA) in response to a series of foreign bribery scandals by a number of Fortune 500 companies.\(^69\) Investigations by the Watergate Special Prosecutor and the Securities and Exchange Commission (SEC) revealed the existence of slush funds that corporate officials were using to finance contributions to the Nixon reelection campaign and other domestic political campaigns, as well as to bribe foreign officials.\(^70\) Through the SEC’s voluntary disclosure program, 400 companies disclosed overseas payments totaling in excess of $300 million.\(^71\) “The revelations,” Charles McManis wrote in 1976, “have shaken foreign governments, rocked American corporate management, and tarnished the image of American private enterprise both at home and abroad.”\(^72\)

In arriving at a legislative solution to these revelations, Congress invoked many of the same concerns as McManis: overseas bribery is unethical, unnecessary, erodes public confidence in the free market, and casts a shadow over all U.S. corporations.\(^73\) In strong language, the House Report concluded that bribery “is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well.”\(^74\)

When President Carter signed the Act into law on December 20, 1977, he joined Congress in its concerns about corrupt practices.\(^75\) “I share Congress’[s] belief,” he stated, “that bribery is ethically repugnant and competitively unnecessary.”\(^76\) In addition, he spoke to diplomatic concerns: “Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries.”\(^77\) In keeping with this purpose, the

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\(^70\) Id. at 241.

\(^71\) Id. at 244. The chairperson of Lockheed Aircraft Corporation admitted to paying an estimated $22 million in overseas bribes between 1970 and 1975. Exxon admitted to contributing over $46 million in Italian political contributions alone. Id. at 241 n.15.


\(^74\) Id.

\(^75\) See President’s Statement on Signing S.305 Into Law, II Pub. Papers 2157 (Dec. 20, 1977).

\(^76\) Id.

\(^77\) Id.
FCPA provides tough criminal sanctions for U.S. issuers and other entities that commit bribery abroad.\footnote{An “issuer” is defined as any entity that issues a security registered pursuant to 15 U.S.C. § 78l under the Securities Exchange Act of 1934. \textit{See} 15 U.S.C. §§ 78dd-1(a), 78m(a) (2006).}

B. \textit{The Provisions of the FCPA}

The FCPA both regulates accounting and prevents bribery by U.S. companies and issuers. On accounting, the FCPA requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”\footnote{\textit{Id.} at § 78m(b)(2)(A). The purpose of the accounting and bookkeeping provisions of the FCPA is to allow the SEC to better discover improprieties that would not be as apparent under existing accounting systems. \textit{See} Ned Sebelius, \textit{Foreign Corrupt Practices Act}, 45 AM. CRIM. L. REV. 579, 584 (2008).} Issuers must also create a system of internal accounting controls that provide reasonable assurances that transactions have the authorization of management.\footnote{\textit{See} 15 U.S.C. § 78m(b)(2)(B)(iii).} A person or corporation will be criminally liable under this statute if there is a knowing circumvention or failure to implement a system of internal accounting controls, or knowing falsification of any book, record, or account.\footnote{\textit{See id.} § 78m(b)(5). Violations of these accounting provisions can lead to a range of punishments for an employee, from a fine to a prohibition from serving as an officer or director of a public company. \textit{Sebelius, supra} note 79, at 586.}

In addition, the FCPA criminalizes the bribery of foreign officials.\footnote{\textit{Id.} at § 78dd-1(a), 78dd(2)(a), 78dd(3)(a).} For the purposes of the FCPA, the elements of bribery are that a U.S. issuer, domestic concern, or any legal person\footnote{The FCPA’s anti-bribery provisions are broader than its accounting provisions in that the anti-bribery provisions apply to issuers. \textit{See} 15 U.S.C. § 78dd-1(a). The anti-bribery provisions also apply to domestic concerns. \textit{See id.} § 78dd-2. A “domestic concern” is defined as “any individual who is a citizen, national, or resident of the United States; and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.” \textit{Id.} § 78dd-2(h)(1).} makes use of the means of interstate commerce in furtherance of an offer, payment, promise to pay, or authorization to pay anything of value to any foreign official, foreign political party, or official thereof, or any candidate for foreign political office, or other person, knowing that the payment to that person would be passed on to a foreign official, political party, or candidate.\footnote{\textit{Id.} § 78dd-1 (2006) (issuers); \textit{id.} § 78dd-2 (domestic concerns); \textit{id.} § 78dd-3 (any person).} The crime must be for the purpose of corruptly influencing “any act or decision of a foreign official in his official capacity, inducing an action or omission to act in violation of a lawful duty, or securing any improper
advantage.”

Finally, an offense under the anti-bribery provisions has a knowledge standard: “Knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.”

The FCPA is unique in its extraterritorial jurisdiction. The FCPA applies to issuers, domestic concerns, and—since 1998—“any person.”

As applied to U.S. issuers and persons, there is no requirement of a territorial nexus between the corrupt act and the United States. The FCPA may reach foreign agents and employees who have little contact with the United States. Likewise, the FCPA could create liability for a domestic concern through the actions of one of its foreign agents, even if that agent has no contact with the United States.

The SEC and Department of Justice (DOJ) are responsible for the enforcement of and prosecution under the FCPA. The maximum penalty for a natural person who violates the accounting provisions is a fine of $5,000,000 and imprisonment for up to twenty years. An individual who willfully violates the bribery provisions may face a fine up to $100,000 and five years in prison. The maximum penalty for a corporation for willful violations of the accounting provisions is a fine of $25,000,000. The maximum penalty for a corporation for willful violation of the anti-bribery provisions is a fine of $2,000,000.

C. The Success of the FCPA

The FCPA has proven effective in addressing bribery beyond the borders of the United States. Ten years after creating the FCPA, the Senate noted “the significant contribution Congress made in enacting the statute.” A decade later, President Clinton reaffirmed the importance of the FCPA.

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86 Id. § 78dd-1(f)(2)(B) (issuers); id. § 78dd-2(h)(3)(B) (domestic concerns); id. § 78dd-3(l)(3)(B) (any person).
87 See Sebelius, supra note 79, at 588–90; see also 15 U.S.C. § 78dd-1 (issuers); id. § 78dd-2 (domestic concerns); id. § 78dd-3 (“any person”).
88 Sebelius, supra note 79, at 590.
89 Id.
92 Id. § 78ff(a).
95 Id. §§ 78dd-2(g)(1)(A) (domestic concerns), 78ff(c) (issuers).
of the Act, declaring, “We will continue our leadership in the international fight against corruption.”  

In sharp contrast to the Military Extraterritorial Jurisdiction Act, the DOJ and the SEC have enforced the FCPA with frequency and severity. In recent years, there has been an increase in the number of investigations by the SEC, and both the SEC and DOJ have sought larger penalties. In 2004, for the first time, the SEC required a company to disgorge profits of unlawful FCPA activities; that practice is now routine. More proactively, corporate self-monitoring to ensure FCPA compliance has increased, as has voluntary disclosure arising from corporations’ internal investigations. While the FCPA landscape continues to evolve, all signs point to heightened scrutiny and graver consequences for violators.

More promising still, the FCPA has served as a model for both international law and the domestic laws of other nations. While Congress was working on the provisions of the FCPA, it called on U.S. negotiators to seek international cooperation in a variety of fora. As early as 1975—two years before passing the FCPA—the United States was able to convince the Organization of American States to condemn bribery, though that resolution “provided no mechanism for enforcement.” In that same year, the United Nations General Assembly adopted a resolution against bribery, but its Economic and Social Council declined to outlaw corrupt payments in international trade.

After the FCPA’s passage, and through the efforts of the United States, the Ministerial Council of the Organization for Economic Cooperation and Development (OECD) passed a resolution against bribery, but its Economic and Social Council declined to outlaw corrupt payments in international trade.

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98 See Hurst, supra note 59, at 1316 & n.53 (discussing the lack of enforcement of MEJA).
100 See id. at 388–89.
101 Id. at 388.
102 Id. at 392–93.
103 Id. at 394.
104 See Brown, supra note 69, at 259–62.
105 Id. at 262.
106 Id. at 262–63.
discourage bribery. The OECD’s Committee on International Investment and Multinational Enterprises issued a list of recommendations that set forth “concrete and meaningful steps” to address bribery. The OECD adopted those recommendations and established mechanisms for monitoring compliance and for enforcement; it also encouraged its members to “assert aggressively their territorial jurisdiction and nationality jurisdiction to better combat bribery.” This position marked a “sweeping change in the way the industrialized countries of Europe regarded international bribery.” Since then, there has been “a decade of remarkable international activity aimed at combating official corruption.” Much of this international activity arises from the efforts of American corporations, which have found an incentive in leveling the regulatory playing field worldwide: the FCPA has thus leveraged American corporations on the side of fighting bribery. In all, the difference in treatment of anti-bribery agreements before the FCPA and after could not be starker.

Although many scholars have doubted the future positive impact of the Foreign Corrupt Practices Act, the Act’s history has proven its effectiveness. By matching anti-corruption aspirations with the hard enforcement power of a state, the FCPA has created a snowball effect of anti-corruption measures around the world. Once Congress enacted the FCPA and made it a focus of international relations, the OECD was willing to take a hard stance on the issue; the OECD position further encouraged other nations to craft domestic laws against bribery; this in turn has led to a proliferation of anti-corruption treaties. By enacting the FCPA, Congress created a global dialogue on corruption that is leading to hard legal mechanisms around the world. The success of the FCPA on the global stage provides yet another rebuttal to Professor Ratner’s argument for an international solution to corporate abuses: international law only becomes effective after lawmakers codify it into do-

108 Brown, supra note 69, at 265 (internal citation omitted).
109 Id. at 265, 268.
110 Id. at 268.
113 Id. at 311.
114 See Hunt, supra note 111.
115 See Hall, supra note 112, at 312.
mestic law. To legislate through international law alone would only lead to ineffective resolutions without any enforcement mechanisms of their own.

III. THE FCPA DISCONNECT: THEORY AND HISTORY

A. The Theoretical Disconnect

For all the FCPA’s success in combating bribery, it is also the source of a conundrum. Although Congress enacted the FCPA to prevent “ethically repugnant” behavior by corporations, the Act ignores human rights abuses while throwing the book at corporate fraud. Had Blackwater officials knowingly changed the figures in its accounting books, the corporation would face a fine of up to $25,000,000 and its employees could spend up to twenty years in jail.116 But as it happens, because Blackwater guards wrongfully killed seventeen civilians and undermined U.S. interests in Iraq, they and their corporation find themselves in a legal loophole with no certain criminal liability.117 It is not hard to see that there is a disconnect in the extraterritorial law of the United States. While U.S. law severely punishes the relatively harmless act of accounting fraud, it offers no remedy for a corporation’s acts of brutal violence. This part will explain the origins of this disconnect.

From the beginning of corporations under Roman law to the rise of the nation-state, there has been a tension between business corporations and the government. Through a series of conflicts with corporations, nations such as Britain and the United States have managed to curtail the power of corporations within their own borders. They have so managed their corporations that their corporate laws are more concerned with accounting fraud than with murder. Problems ensue when, in the context of globalization, corporations creep into countries unaccustomed to the tensions between corporations and government—or at least with corporations of such magnitude—and those problems manifest themselves in ways like the Blackwater problem. Fortunately, the history of the relationship between corporations and government provides a key to solving these more recent problems.

116 See discussion supra Part II.C.
117 See discussion supra Part I. The irony is that Blackwater may eventually face charges for the bribery that it allegedly committed in the aftermath of Nisour Square. See Mark Mazetti & James Risen, Blackwater Said to Pursue Bribes to Iraq After 17 Died, N.Y. TIMES, Nov. 11, 2009, at A1.
B. The Historical Conundrum

Much of the tension between corporations and government derives from their common origin in Roman law. One finds the first examples of non-human entities entitled to certain rights in Ancient Rome. Although many of these early corporations were private groups such as trade guilds and burial societies, they also included civic institutions, such as municipalities and even the Senate and the People of Rome. In all cases, these entities had many of the privileges of a real person: they could own property, inherit legacies, and appear in legal proceedings. They thus prove to be the forerunner of the modern corporation—both the corporation for business and that for government.

The common history of corporations and government leads to a conundrum. On the one hand, the state has the power to make laws and punish criminals—it is a very real force in the civic world. On the other, it is a legal artifice—a fiction—and is no different in substance from the many corporations that it regulates. Thomas Hobbes, who perhaps more than anyone else sought to explain the power of the state, helps answer this conundrum by identifying the process of authorization that places the state over all other corporations. Professor Quentin Skinner explains that, for Hobbes, a person is no different from an actor in his ability to stand in for another: “As Hobbes’s theory continually reminds us, persona is, in Latin, the ordinary word for a theatrical mask.” As such, a natural person can authorize someone else to represent him. Hobbes writes that “a person, is the same that an actor is, both on the stage and in common conversation; and to personate is to act, or represent himself, or another; and he that acteth another, is said to bear his person, or act in his name . . . .” Hobbes applied this idea of representation to the concept of state power.

118 Blackstone writes that the credit of inventing the corporation “entirely belongs to the Romans.” F.W. Maitland, State, Trust and Corporation 10 (David Runciman & Magnus Ryan eds., Cambridge Univ. Press 2003) (quoting William Blackstone, 1 Commentaries 469).
118 120 See id.
121 Id.
122 Id.
124 Id. at 182.
125 See id. at 181–83.
127 See id. at 111–15; see also Skinner, supra note 123, at 201–03.
Once someone authorizes another to act for him, he gives up his rights to that representative.\textsuperscript{128} For Hobbes, there is no equivocating on this point: “When a man hath in either manner abandoned, or granted away his right; then he is said to be \textit{obliged, or bound}, not to hinder those, to whom such right is granted, or abandoned, from the benefit of it . . . .”\textsuperscript{129}

Such absolute rule through representation is necessary to avoid the natural divisions present in mankind, “[f]or it is the \textit{unity} of the repre-\textit{senter}, not the \textit{unity} of the represented, that maketh the person \textit{one}.”\textsuperscript{130} It is thus by authorizing the state to rule over them that citizens place all persons, real and artificial, under the state’s absolute rule.\textsuperscript{131}

C. \textit{The Age of the Trading Companies}\textsuperscript{132}

Since the state has become the dominant force in the modern era, it is easy to forget that it is merely one of several types of corporations. For all its power, the state remains a distant relative of the business corporation, or as F.W. Maitland puts it, “a genus of which State and Corporation are species.”\textsuperscript{133} There have been times that states have been so weak, or business corporations have been so strong, that such corporations have supplanted the state altogether.\textsuperscript{134} Not long after Hobbes articulated the source of a state’s power, private corporations posed their first challenge to state authority.\textsuperscript{135} Beginning in the seventeenth century, European trading monopolies operating in India, North America, and Africa formed the foundations of private empires.\textsuperscript{136} Although the British Crown chartered many such trading companies with an aim of facilitating colonialism, these corporations often operated with a will of their own.\textsuperscript{137} Left to themselves in distant outposts, they took on all the

\textsuperscript{128} See \textit{Hobbes}, supra note 126, at 88.
\textsuperscript{129} \textit{Id.} Skinner explains that once you have formed a covenant with another, “you must leave it to your representative, who is now in possession of your right of action, to exercise it at his discretion when acting in your name.” \textit{Skinner}, supra note 123, at 186.
\textsuperscript{130} \textit{Hobbes}, supra note 126, at 109. The natural state of man without this powerful representative is, of course, “solitary, poor, nasty, brutish and short.” \textit{Id.} at 84.
\textsuperscript{131} See \textit{Skinner}, supra note 123, at 198–203.
\textsuperscript{132} The joint-stock trading company is a useful example because it is in many ways the model for the modern multinational. \textit{See Nick Robins, The Corporation That Changed the World: How the East India Company Shaped the Modern Multinational} 22 (Pluto Press 2006); \textit{see also id.} at 18 (“If we are to fully understand our corporate present, then we must understand our corporate past . . . .”).
\textsuperscript{133} Maitland, supra note 118, at 1.
\textsuperscript{134} \textit{See, e.g., Philip Lawson, The East India Company: A History} 86–102 (Longman 1993).
\textsuperscript{136} \textit{See Robins, supra note 132, at 23.}
\textsuperscript{137} \textit{See Seeley, supra note 135, at 168.}
trappings of a proper state, more closely resembling the governments that purportedly regulated them than an ordinary business corporation.\textsuperscript{138}

In understanding the role of the trading companies in their respective territories, it is important to consider what qualifies as state action. Under the traditional sociological definition—a definition of particular significance for the Blackwater problem—a state is that “which holds a ‘monopoly of legitimate physical violence within a certain territory.’”\textsuperscript{139}

The history of the most famous trading companies proves that they were more than mere businesses, but were closer to actual quasi-states that held a monopoly of legitimate physical violence as well as many of the other characteristics of a state.

1. The Honourable East India Company

The most famous of the giant trading companies, the Honourable East India Company (HEIC), began in 1600, at the end of Elizabeth I’s reign.\textsuperscript{140} At its foundation, the HEIC was a joint-stock company whose purpose was to trade English goods and gold for spices from the East Indies.\textsuperscript{141} After nearly two centuries of such a trade, the HEIC had transformed itself into a political and territorial power of its own.\textsuperscript{142}

Left to itself in India, the HEIC created an environment suited to its trade. More than anything else, such an environment required security, and in the face of aggressive French rivals and Mogul rulers, this required troops and diplomacy.\textsuperscript{143} For troops, the HEIC recruited locally, and by 1765, the Company had an army of 9,000 Indians, grouped into at least seven battalions, led by English and Indian officers.\textsuperscript{144} One historian has identified the source of the Company’s dominance in India—echoing Max Weber—as its “exclusive right to violence.”\textsuperscript{145}

\begin{footnotes}
\footnotetext{138}{See Lawson, supra note 134, at 104–06; see also Seeley, supra note 135, at 168–69.}
\footnotetext{139}{Max Weber, Political Writings 310–11 (Peter Lassman & Ronald Speirs eds., Cambridge Univ. Press 1994). In his lecture on “The Profession and Vocation of Politics,” Max Weber set out his enduring sociological definition of the state, a definition that he approaches from the perspective of means (Mittel). Id. at 310. “Violence,” Weber argues, “is, of course, not the normal or sole means used by the state. There is no question of that. But it is the means specific to the state.” Id.; see also James Q. Whitman, Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence, 39 Tulsa L. Rev. 901, 920 (2004) (noting that Weber wrote this in the context of associations competing with the state).}
\footnotetext{140}{See Lawson, supra note 134, at 5.}
\footnotetext{141}{Id. at 20.}
\footnotetext{142}{Id. at 86.}
\footnotetext{143}{See id. at 89–93; Robins, supra note 132.}
\footnotetext{144}{Stephen P. Cohen, The Indian Army 8 (Univ. of Cal. Press 1971); see also Seema Alavi, The Sepoys and the Company: Tradition and Transition in Northern India, 1770–1830 43–44 (Oxford Univ. Press 1995) (describing the popularity of the payment and pension structure of the Company army).}
\footnotetext{145}{Alavi, supra note 144, at 3 (internal citation omitted).}
\end{footnotes}
In tandem with its military force, the HEIC employed a heavy amount of diplomacy, often inserting itself into the Mogul power structure. Robert Clive, the HEIC’s Commander-in-Chief in India, took the position of a jagirdar, a military command rank that came with a small territory and its tax revenues. Eventually, through Clive’s skillful use of his army and his Mogul allies, the Company took control of three imperial provinces, including Bengal. As one contemporary noted, “This Empire has been acquired by a Company of Merchants . . . .”

Not surprisingly, the British Parliament was wary of “a great empire being created and ruled by Britons independent of the authority of the British cabinet.” One nineteenth century historian wondered: “May we not feel tempted to exclaim that it was an evil hour for England when the daring genius of Clive turned a trading company into a political Power, and inaugurated a hundred years of continuous conquest?”

Thus, between 1773 and 1858, Parliament set about taking back some of that political power, finally determining where “Company responsibilities ended and those of the British government began.”

To assert itself against the HEIC, Parliament introduced a number of bills regulating practices in India itself. First, Prime Minister Pitt passed the India Act of 1784, which allowed the King to appoint a Board of Control that would supervise the civil and military government of the HEIC. The Act thus subordinated any political conduct of the Company to the national government. Subsequent acts in 1813 and 1833 generally boosted the role of the British government at the expense of the Company. Finally, in 1858, in response to the Company’s inadequate response to India’s Great Rebellion, the Crown took control of governing India once and for all.

At the same time that Parliament was stripping the HEIC of most of its political power, the British courts struck a blow of their own at the

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146 See Lawson, supra note 134, at 105–08.
147 Id. at 105.
148 Id. at 93.
149 Id. at 106.
150 Id.
152 Seeley, supra note 135, at 153.
153 See Lawson, supra note 134, at 120–25.
154 Id. at 117.
155 Id. at 120; see also Philips, supra note 151, at 33–34.
156 Philips, supra note 151, at 33–34.
157 See id.
158 See id. at 195.
159 See Lawson, supra note 134, at 159.
160 See id. at 160–62.
political power of corporations: in 1846, the courts first applied the ultra vires doctrine. The doctrine limited corporations to the enumerated activities that their charters laid out for them; outside of those activities, the corporations were literally powerless. Justice Brandeis later explained, in relation to American corporations, that by restricting corporations to certain enumerated activities, the state could limit corporations’ economic power and societal influence. The ultra vires doctrine thus reflected “society’s wariness of large aggregations of economic power,” and it served the state’s interest in keeping each corporation “within the narrow bounds of specific activity.”

2. The Hudson’s Bay Company

In the same century that Elizabeth I chartered the Honourable East India Company, Charles II chartered the Hudson’s Bay Company (HBC) and made its first directors “true lords and proprietors” of all the sea and lands of Hudson Bay in present day Canada. Like the East India Company, the HBC formed an empire out of its holdings and its fur trade. Also like the East India Company, the HBC founded its empire on security, designing its settlements on a defensive model, complete with redoubts, parapets, and cannons. Within the walls of these forts, and under the HBC flag, the Company maintained a martial spirit based


163 See Greenfield, supra note 161, at 1302; see also Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (Brandeis, J., dissenting) (“There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.”).

164 Greenfield, supra note 161, at 1302–03.

165 PETER C. NEWMAN, COMPANY OF ADVENTURERS 84 (Penguin Books 1985) [hereinafter NEWMAN, ADVENTURERS] (quoting the HBC charter of 1670).

166 Id. at 2.

167 See RAYMOND CALLAHAN, THE EAST INDIA COMPANY AND ARMY REFORM, 1783–1798 39 (Harv. Univ. Press 1972) (“[T]he Company’s power rested upon its army.”). For a general discussion of the East India Company’s reliance on this private army, see id. at 1-13. See also Carl T. Bogus, Rescuing Burke, 72 Mo. L. Rev. 387, 435–36 (2007) (explaining that, by the late eighteenth century, the army had grown to 60,000 soldiers).

168 See NEWMAN, ADVENTURERS, supra note 165, at 167 (noting also that despite the HBC’s militaristic objectives, its forts were often poorly designed to deflect enemy attack. One fort boasted a moat with a fixed bridge running over it, while in others firewood was stacked close to wooden walls that could be easily set ablaze).
on practices taken from the Royal Navy.\textsuperscript{169} So complete was the HBC’s hold over its men that it maintained its own calendar, based on its inception in 1670, rather than the birth of Jesus of Nazareth.\textsuperscript{170}

With these forts as its base, the HBC routinely dealt in violence within its territories. Following a bloody skirmish,\textsuperscript{171} it waged a war against its chief rival, the Montreal-based Northwest Company,\textsuperscript{172} a war that included code\textsuperscript{173} and mercenaries.\textsuperscript{174} The prolonged guerilla warfare was so violent and unrestrained that on May 1, 1817, the Governor-in-Chief of Canada issued a royal proclamation against “open warfare in the Indian Territories.”\textsuperscript{175}

Although the war with its corporate rival was fierce, the HBC’s use of violence against the local tribes was fiercer still. In one telling incident, in 1828, certain Puget Sound natives killed an HBC employee.\textsuperscript{176} The local HBC officer, Dr. John McLoughlin, sent a party by boat and another by land to attack the natives’ village.\textsuperscript{177} Together, the two parties burnt the village and killed twenty-one natives; the families of those killed executed the murderers themselves in order to placate the HBC’s death squads.\textsuperscript{178} In all, McLoughlin writes, “the whole expedition was most judiciously conducted . . . .”\textsuperscript{179} This incident was not unique. It

\textsuperscript{169} See id. at 169–73. Unfortunately, the HBC’s success in conditioning militancy in its employees fared no better than its construction of forts; participation in drills depended largely on local conditions and the militancy of the local officers. Id. at 167. True esprit de corps existed among only “the best Bay men.” Id. at 169. To encourage appropriate militancy in its remaining employees, the HBC awarded cash payouts to those injured in battle: £30 was paid for any employee who lost an arm or a leg in defense of a fort. Id. at 167.

\textsuperscript{170} See id. at 172 n.2.


\textsuperscript{172} See id. at 175–76.

\textsuperscript{173} Id. at 184.

\textsuperscript{174} Id. at 176–77.

\textsuperscript{175} Id. at 176. Not surprisingly, the war ended with the merger of the two companies in 1821. Id. at 207.

\textsuperscript{176} See id. at 285–87.

\textsuperscript{177} Id., see also Letter from John McLoughlin to Governor, Deputy Governor, and Committee of the Hudson’s Bay Company (July 10, 1828), in 4 John McLoughlin, The Letters of John McLoughlin from Fort Vancouver to the Governor and Committee, First Series, 1825–38 57–58 (E. E. Rich ed., 1941) (“[I]t is for our personal security that we should be respected by them [the natives], & nothing could make us more contemptible in their eyes than allowing such a cold blooded assassination of our People to pass unpunished . . . .”).

\textsuperscript{178} Newman, Caesars, supra note 171, at 285–87. For a full explanation of the exploit, see Letter from John McLoughlin to Governor, Deputy Governor, and Committee of the Hudson’s Bay Company (undated), in Letters of John McLoughlin, supra note 177, at 63–66 [hereinafter McLoughlin, Undated Letter].

\textsuperscript{179} McLoughlin, Undated Letter, supra note 178, at 65.
was through such acts as this that Hudson’s Bay Company officials established their brand of justice throughout their territories.\textsuperscript{180}

At the same time that the HBC was establishing its control over the tribes of the Pacific Northwest, the territory itself had become a source of conflict between British and American diplomats.\textsuperscript{181} The Americans claimed ownership of the Oregon Country through first discovery and settlement; the British countered by asserting, among other things, the right of occupancy, pointing to the presence of the HBC, a British company.\textsuperscript{182} Stuck in a stalemate, in 1827, the two countries agreed to renew the Joint Occupancy Treaty of 1818.\textsuperscript{183}

Sharing the land between these two powers, however, could not last. For British diplomats, the aim in any treaty negotiation was to hold on to as much territory as possible.\textsuperscript{184} Fittingly, the British foreign secretary from 1822–1827 was George Canning, “a true disciple of Pitt, an intense nationalist and imperialist.”\textsuperscript{185} It is no surprise then that, on the Oregon Question, Canning advocated for “the undisputed Possession of the whole Country on the Right Bank of the Upper Columbia, and a free issue for its Produce by the Channel of that River.”\textsuperscript{186}

The HBC was of no help to the British in furthering such ambitions. Against British interests, the HBC advanced American claims to the area by directly aiding American settlers and explorers in the greater North-
west, albeit in exchange for a healthy profit. Trading posts such as Idaho’s Fort Hall provided settlers with necessary food and supplies. In its Pacific Northwest post of Fort Vancouver, the HBC set up sawmills, flourmills, and farms. Stories abound of Oregon settlers expressing debts of gratitude for these amenities. Of course, the HBC was motivated by the business that these new settlers offered the outpost. At Fort Hall, for example, the fort’s Chief Trader realized the potential business from those crossing the Oregon Trail. Between 1842 and 1851, the post recorded sizeable profits in the sale of flour, rice, coffee, sugar, and other staples to these American immigrants. For Dr. McLoughlin, Chief Factor of Fort Vancouver, it was certain “that the Company’s future would be best served by his sometimes costly efforts to treat the growing influx of settlers as potential customers rather than unwanted pests.” Although this reasoning may have helped the Company’s balance sheets, it did not serve the British government’s attempt to hold on to its territory in the Oregon Country.

By facilitating the American settlement of Oregon, the Hudson’s Bay Company dealt a mortal blow to Britain’s claim to the territory. Around the 1840s, Americans began to make up a sizeable presence in

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188 See GALBRAITH, HUDSON’S BAY COMPANY, supra note 186, at 108 (describing HBC profits from the sale of basic supplies to American settlers at Fort Hall).

189 NEWMAN, CAESARS, supra note 171, at 285.

190 See, e.g., WYETH, supra note 187, at 22 (“I was received with the utmost kindness and Hospitality by Doct. McLauchland [McLoughlin] the acting Gov. of the place. . . . Our people were supplied with food and shelter from the rain . . . .”).

191 GALBRAITH, HUDSON’S BAY COMPANY, supra note 186, at 108.

192 Id.

193 Id.

194 NEWMAN, CAESARS, supra note 171, at 289–90. There is some disagreement as to McLoughlin’s motives for dealing with the American settlers. One view portrays him as an administrator more concerned with “acting according to the dictates of his conscience” than “fattening the Company’s balance sheets.” Id. He did violate HBC policy by extending credit to needy Americans, however, McLoughlin’s aid to Americans can also be seen in an economic or pragmatic light. See, e.g., RICH, supra note 187, at 717; Frederick Merk, The Oregon Pioneers and the Boundary, in AMERICAN HISTORICAL REVIEW XXIX (July 1924), reprinted in THE OREGON QUESTION, supra note 185, at 235, 247–48 [hereinafter Merk, Pioneers] (suggesting McLoughlin provided American parties with resources primarily to prevent ill-will that could lead to hostile, even violent interactions with the HBC); see also GALBRAITH, HUDSON’S BAY COMPANY, supra 186, at 190 (“McLoughlin’s preoccupation was with trade . . . . He was devoted to the enlargement of profits for his Company and himself, and his actions in Oregon were dominated by a mercantile motivation.”).

195 See RICH, supra note 187, at 737–38.
the Oregon Country, particularly south of the Columbia River. Their growing presence tipped the diplomatic scales sufficiently that the United States had a solid claim to the entire Oregon Country, aiding the government in its boundary dispute with the British. By June 15, 1846, both governments agreed to a border on the forty-ninth parallel, thus leaving the United States with all of modern-day Oregon and Washington. In aiding the aggressive American settlement of Oregon, the HBC helped the United States acquire all of the Oregon Country, far more territory than the British had been willing to cede in previous diplomatic negotiations.

As American pioneers built up their own settlements and institutions, the HBC lost much of its advantage in the area. Shortly after the 1846 treaty, the U.S. government extinguished all the private property rights of the Hudson’s Bay Company and its subsidiaries. In British Columbia, however, the Company still maintained its position as the

196 See Merk, Pioneers, supra note 194, at 236 (stating that 5,000 Americans had settled in the Oregon Country by 1846); RICH, supra note 187 at 717 (noting large immigrations in 1843–45 and the subsequent influx of American traders). It would be difficult for the HBC to claim ignorance that aiding American settlers would in turn advance American claims to the region. Prior to the War of Spanish Succession, the HBC had challenged French claims in Canada on the grounds that the French had acquiesced on their title by discovery because they had not properly settled the territory. See Twiss, supra note 184, at 125. As such, the 1713 Treaty of Utrecht ceded all French claims to the Company’s territory. See id. at 148–49.

197 See GALBRAITH, HUDSON’S BAY COMPANY, supra note 186, at 177 (“The influx of [American] settlers was certainly a factor in the final decision [to accept the United States’ demands in the boundary dispute].”). The presence of American settlers cannot alone account for this territorial acquisition. See, e.g., RICH, supra note 187, at 717 (“It has been maintained, probably with justification, that the Oregon frontier was settled by the climate of American politics, not by the number of immigrants.”). However, a long-standing view, and certainly the one advanced by the Oregon settlers themselves, was that American possession of the territory shaped the final settlement with the British. See Merk, Pioneers, supra note 185, at 234 (“It is a truism in American history that the success of the United States in the Oregon boundary negotiations was due in considerable measure to the Oregon pioneers. They brought pressure to bear on the British government during the final stages of the Oregon negotiations, and this was a factor in winning for their country the empire of the Pacific Northwest.”).

198 See CAREY, supra note 181, at 495. While a mainland border along the forty ninth parallel was agreed to in 1846, the British and Americans continued to dispute sovereignty over the channel islands lying between the mainland and Vancouver Island. This dispute was not resolved until 1872, when an arbitrator ruled that several islands occupied by British military forces should be ceded to the United States. See id. at 494–96.

199 See, e.g., GALBRAITH, HUDSON’S BAY COMPANY supra note 186, at 177–91; Merk, Pioneers, supra note 185, at 234–44; Newman, CAESARS, supra note 171, at 287. See generally CAREY, supra note 181, at 454–57 (detailing Britain’s wish to maintain a border on the Columbia River).

200 GALBRAITH, HUDSON’S BAY COMPANY, supra note 186, at 226–29.

201 In 1869, the U.S. government determined that an award of $650,000 was proper for extinguishing the private property rights of the HBC and its subsidiaries after the Treaty of 1846. See CAREY, supra note 181, at 279.
ultimate authority. In 1849, the HBC acquired a lease to all of Vancouver Island, and in 1851, the British government appointed an HBC officer, James Douglas, as the governor of Victoria.

The HBC had managed Vancouver Island for a little less than a decade when a gold rush in 1858 dramatically increased British interest in the region. In that year, 30,000 prospectors passed through British Columbia. Governor Douglas’ monopolistic control over the miners’ transportation and goods, under color of law, confirmed British suspicions that Douglas was a Company man first, and for the first time, the British government no longer considered HBC rule adequate for the administration of the territory. Shortly thereafter, on August 2, 1858, the House of Commons named British Columbia a Crown colony, ending the HBC’s exclusive trading rights in the area. Parliament presented the local HBC governor with the provincial governorship on the condition that he organize a council, eventually hold elections for an assembly, and relinquish his position in the HBC. In place of perpetual Company rule, Vancouver had its first democratic institutions; meanwhile, the HBC gradually gave up its strong-armed politics for a chain of Canadian retail stores.

3. The British South Africa Company

After the sun finally set on HBC’s empire, Cecil Rhodes introduced its same principles of governing to southern Africa in the form of the British South Africa Company (BSAC). In its business operations, the BSAC operated as a giant concessionaire, producing little on its own and deriving work and profits from subcontractors. In this business, the

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202 See Newman, Caesars, supra note 171, at 309; see also Rich, supra note 187, at 787–96 (describing the Company’s relationship with the British government).

203 Rich, supra note 187, at 762 (explaining that rather than the result of an alliance between the British government and the Hudson’s Bay Company, the appointment of James Douglas was primarily an act of desperation: ‘Douglas’ interests were, at this stage, unmistakably those of the Company, of the fur trade, and of Victoria as a port and depot rather than the broader aspects of settling the whole island. The basic fact was that no-one but the Company would undertake the commitment.’).


205 “The last straw,” one historian writes, “was when Douglas ordered the seizure of any ships selling non-HBC goods.” Id. at 312.

206 See Galbraith, Hudson’s Bay Company, supra note 186, at 305; Newman, Caesars, supra note 171, at 308–12.


BSAC faced little regulation from the British government and had a free hand in its dealings with African peoples.\textsuperscript{211}

Although the ultra vires doctrine had changed the law for joint-stock companies,\textsuperscript{212} the BSAC established its presence in southern Africa through the same use of violence that characterized the East India and Hudson’s Bay Companies.\textsuperscript{213} The BSAC established the British South Africa Police, which was, in actuality, the company’s standing army.\textsuperscript{214} With this army at its disposal—and the revolutionary new Maxim gun\textsuperscript{215}—the BSAC could intervene in local tribal disputes to maintain order and legitimize its authority, much as the Hudson’s Bay Company did in the Pacific Northwest.\textsuperscript{216} From time to time, the Company could even invade neighboring territories, as it did in Mashonaland\textsuperscript{217} and Matabeleland.\textsuperscript{218}

Initially, the British government supported the BSAC’s role in managing southern Africa. In Galbraith’s words, this policy was “Imperialism on the cheap”\textsuperscript{219} because it furthered “the imperial government’s desire . . . to lay claim to territories without accepting the financial burdens of administration.”\textsuperscript{220} In time, however, tensions grew between the economic interests of the Company and the political objectives of the British Colonial Office.\textsuperscript{221} Access to resources and a labor force often dominated BSAC policy, driving it to invade new territories.\textsuperscript{222} By contrast, the British government did not appreciate the BSAC’s frequent use

\begin{footnotes}
\footnote{211}{See id.}
\footnote{212}{See Greenfield, \textit{supra} note 161, at 1302.}
\footnote{213}{How the BSAC escaped the limits of the ultra vires doctrine is unknown to this author. It may be that the British government turned a blind eye to the practices of the company to suit its own agenda in southern Africa. See, e.g., \textit{Galbraith, Crown and Charter, supra} note 209, at 310. If this is the case, this willful ignorance certainly backfired on the government. See id. at 310–39.}
\footnote{214}{\textit{Galbraith, Crown and Charter, supra} note 209, at 256. In 1889, this force numbered 480 men, in addition to the cavalry support of Ngwato allies. See \textit{id.} at 143–44.}
\footnote{215}{Id. at 147; see also Eugene Volokh, \textit{Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda,} 56 \textit{UCLA L. Rev.} 1443, 1477 n.142 (2009) (touching on the history and revolutionary nature of the Maxim gun).}
\footnote{216}{See \textit{Galbraith, Crown and Charter, supra} note 209, at 290–92 (explaining the use of summary justice “to overawe a vastly more numerous African population”). Upon killing twenty-one Africans in response to a trade dispute, one commander reported, “I am sure a very wholesome lesson has been given to all the chiefs of the district.” \textit{Id.} at 292.}
\footnote{217}{Id. at 128–53.}
\footnote{218}{Id. at 287–309. The BSAC began this war because the military system of the Ndebele in Matabeleland was “incompatible with the economic objectives of the company.” \textit{Id.} at 287.}
\footnote{219}{Id. at 310. This expression itself indicates that neither the practice of outsourcing nor its problems are anything new in the western world.}
\footnote{220}{Id. at 311.}
\footnote{221}{See \textit{id.} at 310–39.}
\footnote{222}{See \textit{id.} at 288 (discussing the Company’s search for wealth in both Mashonaland and Matabeleland).}
\end{footnotes}
of force. Most importantly, the Colonial Office understood that from an African’s perspective, an Englishman who served in the BSAC and an Englishman who did not were indistinguishable. Thus, any brutality or militancy by the BSAC necessarily affected and bound the British government.

As a result of these tensions, the British government finally took control of the colony in 1923, thus eliminating the BSAC’s reign that so often conflicted with the government’s interests. To replace the unrepresentative and unpopular administration of the British South Africa Company, the settlers created a government of their own in Southern Rhodesia. Although the subsequent history of Rhodesia and Zimbabwe has been far from ideal, the decline of the British South Africa Company did lead to self-rule, democratic institutions, a progressive constitution, and perhaps the nation’s best chance at a stable and accountable government.

D. The Interstate Corporation and the American Solution

In the early twentieth century, the United States confronted domestically what the British Empire had confronted globally: large, interstate corporations that presented a challenge to the interests of government. Against this new economic reality, the old rural toryism—promoting a return to pre-Civil War economic agrarianism as America’s economic ideal—was inadequate. Just as with the relationship between the British Empire and its joint-stock companies, the relationship between the national government and big business of the Progressive Era teaches a valuable lesson in regulation: the state can only preserve the place of its

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223 See, e.g., GALBRAITH, CROWN AND CHARTER, supra note 209, at 182–83 (describing Rhodes’s refusal to end aggressive action against the Portuguese, despite the Foreign Office’s acknowledgement of the Portuguese claim); id. at 292 (discussing government displeasure with the disproportionate violence used by the BSAC against Africans); id. at 302–04 (noting the general ineffectiveness of British officials in restraining the BSAC during the Matabele War).

224 See id. at 303.

225 See id. In much the same way, India’s Great Rebellion against the HEIC turned into a race war in which Indian forces tried to wipe out all Europeans. See LAWSON, supra note 134, at 161. Thus, decisions by the HEIC affected not only the British government, but Europe as a whole.


228 See id. at 164.


230 See id.
democratic institutions against new concentrations of private power by growing its own state power.

The first great chapter in the history of American corporations is the end of the Civil War, when “[a] lively, even a frenzied, outburst of industrial, commercial, and speculative activity followed hard upon the restoration of peace.”231 Although these changes brought the benefits of modernization to America, they also brought its many problems.232

In such economic growth, there is what Herbert Croly called “an entangling alliance between a wholesome and a baleful tendency.”233 Out of these conditions emerged new political forces that promoted corruption and social disintegration.234 New characters such as the industrialist millionaire, the urban party “Boss,” the union laborer, and the lawyer “all [took] advantage of the loose American political organization to promote somewhat unscrupulously their own interests, and to obtain special sources of power and profit at the expense of a wholesome national balance.”235

Faced with such a situation, the United States could not rely on its familiar Jeffersonian philosophy of asserting the freedom of its institutions against the new domination of private interests.236 By leaving each American to his own liberty, the prevalent philosophy of individualism and self-reliance had neglected to protect the public interest from the forces of industrialization.237 Reformers such as Croly could “no longer expect the American ship of state by virtue of its own righteous framework to sail away to a safe harbor in the Promised Land.”238

In place of this drift, the United States needed a new political efficiency that would look out for the people’s interests while also respecting democratic rule.239 Applying this new philosophy, the solution was to grow the national government so that it could properly preserve democracy—more attention to “[f]ederal responsibilities and the increase of their number and scope, is the natural consequence of the increasing concentration of American industrial, political, and social life.”240 Following what Hobbes theorized and what Croly observed, one might con-

232 See id. at 110–26.
233 Id. at 114–16.
234 See id. at 138.
235 Id.
236 Id. at 152–54.
237 See id. (arguing for the Hamiltonian principle of national political responsibility over the then-prevalent Jeffersonian principle of individualism).
238 Id. at 152–53.
239 See id. at 153–44.
240 Id. at 274.
clude that a large state presence would be necessary to defend the public interest from more dangerous private forces.241

The political figure who most took Croly’s nationalist philosophy to heart was Theodore Roosevelt. Roosevelt set out his position in his “New Nationalism” speech, which he delivered on August 31, 1910, in Osawatomie, Kansas.242 Echoing Croly’s words, Roosevelt declared, “Our country—this great republic—means nothing unless it means the triumph of a real democracy, the triumph of popular government . . . .”243 Roosevelt identified the danger of the “sinister influence or control of special interests”244 to such a government. Here, Roosevelt focused on the possibility that private corporations might interfere with the nation’s democratic institutions.245 “The citizens of the United States,” he went on, “must effectively control the mighty commercial forces which they have themselves called into being.”246

Assuming big business was to be a permanent fixture in modern America,247 only the federal government could leverage the proper amount of external control on these new interstate corporations.248 Just as corporations had centralized their activity, Roosevelt argued, so should the government.249

241 See id. (defending the growth of the federal government to match the growth of other forces in the country); see also Hobbes, supra note 126, at 84 (explaining that without the state’s powerful representation, life would be “solitary, poor, nasty, brutish and short”).
244 Id. at 27.
245 See id.
246 Id.
247 See 1 Theodore Roosevelt, The Roosevelt Policy: Speeches, Letters and State Papers Relating to Corporate Wealth and Closely Allied Topics 34 (The Current Literature Pub’g Co. 1908) [hereinafter Roosevelt, The Roosevelt Policy]. “Under present-day conditions,” Roosevelt stated, “it is as necessary to have corporations in the business world as it is to have organizations, unions, among wage-workers. We have a right to ask in each case only this: that good, and not harm, shall follow.” Id.
249 Roosevelt, The New Nationalism, supra note 242, at 53 (“Big business has become nationalized, and the only effective way of controlling and directing it and preventing the abuses in connection with it is by having the people nationalize the governmental control in order to meet the nationalization of the big business itself.”).
Roosevelt’s prolific rhetoric led to the creation of new divisions within the national government to deal with corporations. In 1903, at the behest of Roosevelt, Congress established the Department of Commerce and Labor, which operated the Bureau of Corporations. In Roosevelt’s words, the Bureau would administer the law “with the firm purpose not to hurt any corporation doing a legitimate business—on the contrary to help it—and, on the other hand, not to spare any corporation which may be guilty of illegal practices, or the methods of which may make it a menace to the public welfare.”

Following Theodore Roosevelt’s administration, the ideas of New Nationalism remained influential in national politics. From New Nationalism to Franklin Roosevelt’s New Deal and from the New Deal to Johnson’s Great Society, Theodore Roosevelt and Herbert Croly permanently transformed the United States into a regulatory state. Thus, even as business corporations have grown in size and complexity since 1903, the federal government has grown in tandem, continuing the counterbalancing that Roosevelt envisioned.

The history of the British joint-stock companies and Roosevelt’s New Nationalism leads to certain conclusions about the relationship between corporations and government. First, it points to the tensions inherent in that relationship. While the state is the strongest of corporations, it sometimes confronts strong business corporations resembling a state of their own. This Note’s brief historical overview demonstrates that this type of confrontation is not rare. Second, the government only rises above these business corporations by exerting a concrete power of its own, whether that is through legislative reform from as with the British Parliament, through judicial restraints such as the ultra vires doctrine, or—in the case of the United States—through an expansive federal government. Third, the triumph of government over corporations strongly correlates with the triumph of democratic institutions. Though almost too obvious to point out, businesses exist to maximize wealth, and are thus rarely accountable to the interests of anyone but their shareholders.

251 Id.
252 Roosevelt, The Roosevelt Policy, supra note 247, at 113.
253 See, e.g., William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal, 1932–1940 34 (Henry Steele Commager & Richard Brandon Morris eds., Harper & Row 1965) (asserting that the New Nationalism theorists, including Theodore Roosevelt, had the most influence on the New Deal policy makers).
255 It would be unnecessary to lay out a list of Securities Exchange Act provisions to show that business corporations in the United States answer to the government in the end.
While Britain’s colonial governments were not perfect, they often replaced the rule of joint-stock trading companies with a more prudent, and somewhat more democratic, colonial administration.256 In the United States, through Progressive-era movements such as New Nationalism, the government preserved existing democratic institutions from the threat that large corporations posed to small government.257 Together, these lessons are critical in understanding the next chapter in the relationship between corporations and government: globalization.

IV. AMENDING THE FCPA TO ADDRESS THE BLACKWATER PROBLEM

A. The Challenges of Globalization

The power of private corporations that governments have wrestled with for centuries takes on new importance in the context of globalization. While powerful governments such as the United States have learned to manage the world’s largest corporations, globalization puts giant interstate corporations into contact with relatively weaker states that have little experience in dealing with the accompanying problems. Professor Dan Danielsen explains that as a result of such contact, “we begin to loosen our customary view that states ‘act’ and corporations ‘react.’”258 Whenever these corporations “create or shape the content, interpretation, efficacy, or enforcement of legal regimes, and in so doing, produce effects on social welfare similar to the effects resulting from rulemaking and enforcement by governments,” then, Professor Danielsen concludes, “corporate actors are engaged in governance.”259 Andrew Kuper points out that in the face of a new international economy, “citizens of states, especially those in smaller and developing states, have little or no control over factors that impact greatly on their lives but over which their particular state has no authority or sway.”260 For these citizens, a corporation “insulated from public participation, engagement, or scrutiny” has supplanted a legitimate government.261 It is not too much to say that transnational corporations “have become this generation’s surrogate of a dominant world power.”262

Although the resulting problems are extensive and unlikely to disappear any time soon, there is some hope in that the problems arising from globalization are nothing new. As with the United States at the turn of

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256 See supra part III.C.
257 See Waton, supra note 250, at 107-10.
259 Id. at 412.
260 Kuper, supra note 39, at 125.
261 Danielsen, supra note 258, at 424.
the twentieth century, small states around the world now confront large multinational corporations that may have greater reach and more resources than the state itself. In some cases, states cooperate with the goals of the corporations, whatever they may be.263 But all too often, the corporation pursues its goals without answering to any state. One example of that is Blackwater’s behavior in Iraq. The solution, as British and U.S. history illustrates, is to authorize the state to grow in proportion to the corporations it is responsible for regulating. Such growth is possible through greater extraterritorial jurisdiction, specifically by expanding the scope of the Foreign Corrupt Practices Act.

B. **The FCPA Solution**

Considering the effectiveness of the FCPA, all that is presently necessary to address human rights abuses by corporations such as Blackwater is political will: Congress must expand the provisions of the FCPA to address additional crimes besides bribery and accounting fraud. As this Note explained in Part III, the FCPA suffers from a disconnect between the mild crimes that it addresses and the more heinous crimes that it ignores. This disconnect is primarily a factor of history: while the United States has so managed corporations within its borders that it need only fear business-like crimes such as bribery or fraud, outside the United States, business corporations may still wield all the power—particularly the monopoly on violence—of a proper state. Congress could remedy the problem by expanding the scope of the FCPA.

In expanding the FCPA, much of the necessary language may come from existing domestic and international legal concepts. Substantively, Congress could seek to create criminal liability for corporations that aid and abet or perpetrate a crime against peace, a war crime, or a crime against humanity.264 Congress could define such terms by looking to the language of international law, particularly the Nuremberg Principles. First, *crimes against peace* are the “planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; or participation in a common plan or conspiracy for the accomplishment” of any of the same.265 Second, *war crimes* are “violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of the civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas,

263 See, e.g., Girion, supra note 22, at A1.


265 Id., at principle IV.
killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.”

Third, crimes against humanity are “murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts occur in execution of or in connection with any crime against peace or any war crime.”

While this Note has spoken to the shortcomings of international law, this is not to say that international law cannot inform domestic law. As the FCPA has proven, international law works best in tandem with domestic law, serving as a medium for countries to develop effective domestic legal regimes. In addition, by codifying international law into U.S. law, a lawmaker avoids the judicial provincialism that usually hamstrings international law in U.S. courts. As a result, U.S. law would provide these international legal principles with the teeth of a domestic regime; at the same time, the United States would promote a dialogue between countries through international law.

Ideally, a revised FCPA would also include a special provision that would apply exclusively to defense contractors. With the understanding that these particular corporations intend to use force, this special provision could look to the standards for “excessive force” in the police context. In excessive-force cases, courts have held individual police officers liable for unreasonable acts of force, using the Fourth Amendment’s reasonableness standard to determine whether a police officer’s use of force is excessive. In addition to imposing liability on individual police officers, some jurisdictions have also imposed vicarious liability on municipal corporations. Using analogous reasoning, the FCPA should allow for criminal liability for individual defense contractors who use excessive force, and it should impose vicarious liability on the employer corporation.

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266 Id.
267 Id.
268 See supra Part II.
269 See discussion supra Part I.
270 See, e.g., Bougess v. Mattingly, 482 F.3d 886 (6th Cir. 2007) (holding that there is no qualified immunity from civil damages for a police officer who uses excessive force); Davis v. City of Las Vegas, 478 F.3d 1048 (9th Cir. 2007) (setting aside qualified immunity for police officers who use excessive force).
271 See Graham v. Connor, 490 U.S. 386, 395 (1989) (“[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.”).
272 See, e.g., Matczak v. Mathews, 265 Wis. 1, 60 N.W.2d 352 (1953) (allowing for claim against city for excessive force by police officer); McCarthy v. City of Saratoga Springs, 56 N.Y.S.2d 600 (N.Y. App. Div. 3d Dep’t 1945) (imposing liability on city for excessive force by police officer).
To establish liability under these expanded provisions, the FCPA should incorporate the Model Penal Code’s “purpose test,” that a person acts purposely with respect to a material element of an offense when (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.273

Likewise, a person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense, such person aids or agrees or attempts to aid such other person in planning or committing it.274

Jurisdiction for these provisions should follow that of the existing FCPA. Thus, they would apply to any issuer,275 any domestic concern,276 or for any other person who is in the United States.277 In addition, the acts of a foreign agent or employee would create liability for a U.S. company, and vice versa.278

Finally, the statute must also prohibit private rights of action.279 Such a limit would be necessary to avoid the challenges present in ATS cases,280 and ensure that these provisions are used to promote U.S. interests abroad, rather than private interests pushed through U.S. courts. This limit should also appeal to corporations, as it would allow them to avoid the uncertainty present in private rights of action.281

CONCLUSION

During the 1970s, a series of corporate scandals led to the enactment of the Foreign Corrupt Practices Act. Today, in the midst of a
scourge of corporate abuses, the United States requires an expansion of that Act. The Blackwater problem poignantly displays what happens when corporations can act with impunity: such abuses hurt not only innocent civilians, but also U.S. interests and its credibility as a nation. This situation demands a real legal response, not in international law or in an occasionally questionable foreign law, but in the criminal law of the United States, a legal regime with the teeth to carry out justice, but also with the constitutional protections to ensure a fair trial. For historical reasons, U.S. law has not had to deal with corporate abuses on the scale found in other countries, and so the FCPA currently addresses financial crimes such as bribery while ignoring the most heinous human rights abuses. Globalization has revealed the shortcomings of the FCPA: while the Act has proven itself more than adequate in small matters, its success calls for bigger things.