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# The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violators

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## THE U.K. BRIBERY ACT: ENDLESS JURISDICTIONAL LIABILITY ON CORPORATE VIOLATORS

*Jessica A. Lordi\**

*From ancient times, governments have prohibited bribery because of its negative implications in society and business transactions. The U.S. Foreign Corrupt Practices Act, the work of the Organization for Economic Cooperation and Development, and the United Nations Convention against Corruption have inspired the United Kingdom to revise its Bribery Act, expanding its extraterritorial provision to reach corporations with loose ties to the United Kingdom. However, the U.K. Bribery Act takes the extraterritorial arm of most bribery statutes and extends it to a harmful extreme; it may employ universal jurisdiction, an extraterritorial reach saved for the world's most egregious crimes. Even if Britain never uses the broad provision as the basis of universal jurisdiction, the Act creates a host of complex international issues including prosecuting attenuated cases. The U.K. should amend the Act to narrow its scope to match the extraterritorial reach that the Foreign Corrupt Practices Act and international conventions utilize and allow. The international community should work to prohibit bribery, but encourage each nation to do so on its own terms within its own cultural norms and appropriate boundaries.*

I.	INTRODUCTION .....	956
II.	BRIBERY'S COMPLICATED IMPACT AND THE ACTS AND CONVENTIONS THAT INFLUENCE THE EXTRATERRITORIAL PROVISION OF THE U.K. BRIBERY ACT.....	958
	A. <i>The Bribery Problem</i> .....	958
	B. <i>Bribery Laws that Influenced the U.K.'s Bribery Act</i> .....	964
	1. U.S. Foreign Corrupt Practices Act .....	964
	2. Organization for Economic Cooperation and Development Concerning the Bribery of Foreign Public Officials.....	966
	3. U.N. Convention Against Corruption .....	967
III.	U.K. BRIBERY ACT'S EXTRATERRITORIAL REACH COMPONENT POSES POTENTIAL PROBLEMS .....	969
	A. <i>An Overview of the Act</i> .....	969

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B. <i>Types of Extraterritoriality that the U.K. Bribery Act Could Utilize and the Resultant Problems and Complications</i> .....	973
1. Types of extraterritoriality that the U.K. Bribery Act could employ .....	973
2. If the U.K.'s broad jurisdictional element uses universal jurisdiction, then it is inappropriate and not in line with universal jurisdiction's historical uses.....	976
3. The Act creates a possibility for prosecutors to misuse the power the Act gives them .....	981
C. <i>The World is Not a Global Village that is Conducive to Far-Reaching Extraterritorial Laws on Bribery</i> .....	983
D. <i>The Act May Have Serious Implications on U.K. Business</i> .....	984
E. <i>The Act Potentially Discredits International Law</i> .....	986
IV. PROPOSED SOLUTIONS TO THE PROBLEMS THAT THE ACT POSES .....	987
V. CONCLUSION.....	990

## I. INTRODUCTION

Imagine an American company that produces large-scale electric generators and conducts business internationally. This company has done business periodically in the United Kingdom (U.K.) and plans future transactions with British clients. In a completely separate transaction absent any British affiliates and connection, this American company sells a generator to a German company. During the transaction, an agent of the American company bribes an agent of the German company without fraud and independent investigation. The Serious Fraud Office (“SFO”) in the U.K. files suit against the American company for a bribery violation under the U.K. Bribery Act 2010. Under the Bribery Act, Britain has the expansive and unprecedented power to prosecute the American company for its violations in Germany and impose liability with serious sanctions, including prison terms of up to ten years and limitless fines.<sup>1</sup> The American company does not anticipate a U.K. prosecution, so the company does not prepare for liability anywhere except for in Germany. This hypothetical illustrates the potentially expansive reach of Britain’s revised Bribery Act.

The U.K. Bribery Act 2010 (“Bribery Act” or “the Act”) criminalizes three primary offenses: (1) paying and receiving bribes; (2) bribing foreign public officials; and (3) failing to prevent bribery.<sup>2</sup> The Act not only

<sup>1</sup> Bribery Act, 2010, c. 23, § 7(5) [hereinafter Bribery Act].

<sup>2</sup> See generally *id.* (listing the crimes of the Act under these three major headings). See also David Kirk, *A Guiding Light on Bribery*, 57 J. CRIM. L 157, 157 (2011); Michael Volkov, *The UK Bribery Act: Let's Cool Down the Hysteria*, THE FCPA BLOG (Jan. 11, 2011, 7:08 AM), <http://www.fcpablog.com/blog/2011/1/18/the-uk-anti-bribery-act-lets-cool-down-the-hysteria.html>.

allows for the U.K. to prosecute a violation under the Act if the perpetrator is a British resident or if a corporation is incorporated in the U.K., it also allows for prosecution of any company that “carries on a business or part of a business in the U.K. irrespective of the place of incorporation or formation.”<sup>3</sup> Because of its extraterritorial reach,<sup>4</sup> the law regarding this last type of violator is particularly problematic.

Such broad reaching language raises the question—is this extraterritorial provision even legal under international law? If the U.K. uses the provision as a means to prosecute bribery anywhere in the world against companies with any level of connection to the U.K., the law could reach beyond permissible extraterritorial jurisdiction and effectively establish universal jurisdiction for bribery offenses.<sup>5</sup>

How British prosecutors will utilize the Act’s broad provision is difficult to predict. While the Act’s Guidance helps predict the U.K.’s approach to interpreting the law, the Guidance is a compilation of non-binding promises and suggestions to the SFO and its enforcement agents.<sup>6</sup> These statements and the Act’s proposed interpretation do not legally change the broad language that potentially grants prosecutors great, unbounded discretion to prosecute. Enforcing the Act within its extraterritorial reach could have serious implications on international business transactions and operations. Therefore, the U.K. should not prosecute these violations to the full extent of the current statutory language.

This Note explores the Act’s jurisdictional component and its problematic extraterritorial reach, and proposes an amendment to remove that reach in conformance with international law. Part II discusses bribery’s impact on international business and analyzes the Act in relation to domestic and international standards. Part III analyzes the potential problems with the Act’s extraterritorial reach component. Part IV proposes potential solutions to the problems that the Act poses including: (1) prosecutors could refrain from exercising broadly reaching powers under the Act; (2) Britain could repeal the Act; or (3) Britain could amend the Act by eliminating the extraterritorial reach component. Part IV illustrates that the most likely and prac-

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<sup>3</sup> MINISTRY OF JUST., THE BRIBERY ACT 2010 — GUIDANCE 1, 15 (2010), available at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>.

<sup>4</sup> A state exercises extraterritoriality when it increases its jurisdiction beyond its own boundaries and into another state’s territory. 15A C.J.S. *Conflict of Laws* § 33 (2011); 48 C.J.S. *International Law* § 19 (2001) (“As a general rule, no state or nation can exercise jurisdiction to take enforcement action as of right within the territorial limits of another independent state or nation.”).

<sup>5</sup> See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 88–89 (2001) (discussing how nations exercise universal jurisdiction).

<sup>6</sup> See MINISTRY OF JUST., *supra* note 3, at 15 (discussing the jurisdictional scope of the Bribery Act).

tical option is to revise the extraterritorial reach component, limiting the broad jurisdiction that it currently allows.

II. BRIBERY'S COMPLICATED IMPACT AND THE ACTS AND CONVENTIONS  
THAT INFLUENCE THE EXTRATERRITORIAL PROVISION OF THE U.K.  
BRIBERY ACT

A. *The Bribery Problem*

Nations have different definitions of bribery and have different levels of acceptable practices. However, from ancient times, governments have prohibited bribery, in varying degrees, because of bribery's implications in society and business transactions.<sup>7</sup> Every major religion and school of ethics, including Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, Sikhism, and Taoism expressly admonishes bribery.<sup>8</sup> Bribery is socially unacceptable and is illegal at some level in every nation.<sup>9</sup>

Bribery results in economic, systemic, and social damage.<sup>10</sup> Bribery causes economies to function inefficiently;<sup>11</sup> instead of depending on price and quality, corrupt transactions hinge on which buyer is able to pay the

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<sup>7</sup> See MONTY RAPHAEL, BLACKSTONE'S GUIDE TO THE BRIBERY ACT 9 (2010).

The proceeds of corruption corrupt others in so far as they must be laundered through the banking system and into the legitimate economy. Treasuries are looted, tax revenues denied, useless and unfinished infrastructures are created, while whole communities remain deprived of the basics of life, such as clean water, shelter, food, and medicines.

*Id.*; Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT'L ECON. L. 863 n. 38 (2001) (discussing prohibitions on bribery through out history).

<sup>8</sup> See e.g., *Isaiah* 1:4 ("Ah sinful nation, a people laden with iniquity, a seed of evildoers, children that are corrupters: they have forsaken the LORD..."); *Hosea* 9:9 ("They have deeply corrupted themselves...therefore he will remember their iniquity..."); *Qur'an* 11:85 ("And O my people, give full measure and weight in justice and do not deprive the people of their due and do not commit abuse on the earth, spreading corruption."); Nichols, *supra* note 7, at 878.

<sup>9</sup> Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 272 (1999) [hereinafter Nichols, *Regulating Transnational Bribery*].

<sup>10</sup> See P. AARNE VESILIND & ALASTAIR S. GUNN, HOLD PARAMOUNT: THE ENGINEER'S RESPONSIBILITY TO SOCIETY 114 (2010) (asserting that bribery is inefficient like monopolies are inefficient); Nichols, *supra* note 7, at 872-73.

<sup>11</sup> DANIEL QUINN MILLS, WHEEL, DEAL, AND STEAL: DECEPTIVE ACCOUNTING, DECEITFUL CEOs, AND INEFFECTIVE REFORM 48 (2003) ("Corruption has two different types of effects on us. First, it causes an unjust transfer of wealth and income from some people to those who are corrupt. Second, it reduces the efficiency of our economy and so reduces the well-being of all of us.").

largest bribe.<sup>12</sup> Bribery thus expels competitors, develops monopolies, and discourages foreign business.<sup>13</sup> Further, bribery impedes productivity, and its future and long-term damages far outweigh any immediate benefits.<sup>14</sup>

There is evidence that bribery is causing a decrease in investments.<sup>15</sup> Studies have shown a correlation between perceived levels of bribery and investment.<sup>16</sup> Moreover, a survey of one-hundred-and-fifty prominent individuals from sixty-three developing nations showed that half thought that corruption had increased in their nations over the past ten years.<sup>17</sup> There is an inverse relationship between corruption and gross domestic product.<sup>18</sup> As corruption in a country decreases, it increases the country's investment to gross domestic product ratio four percent and raises its gross domestic product almost half a percent.<sup>19</sup> Bribery decreases growth in gross domestic product.<sup>20</sup> Low gross domestic product growth rates negatively influence health, mortality rates, environmental quality, and directly correspond to degeneration in living conditions.<sup>21</sup> For instance, Nigeria once

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<sup>12</sup> Nichols, *Regulating Transnational Bribery*, *supra* note 9, at 275 (“In a corrupted transaction, the decision is based not on prices and quality, but instead on which supplier is able to pay the largest bribe.”); see Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 213 (1994) (“Bribery sabotages the free market system...the best product at the best price does not win.”).

<sup>13</sup> See Nichols, *supra* note 7, at 863 n.28 (describing the impact of bribery on commercial relationships).

<sup>14</sup> To illustrate bribery's virulent implications, Salim Rashid analyzed bribery and telephone service in India. Initially, Rashid thought that bribing the telephone service would help to delineate clients in an otherwise egalitarian system. In the beginning of his study, as he predicted, Rashid discovered that bribing resulted in differentiating customers. However, the bureaucrats began to anticipate bribes and delay transactions in order to acquire more and larger bribes, which resulted in inefficiencies. While these implications are serious, still more consequences exist. Salim Rashid, *Public Utilities in Egalitarian LDC's: The Role of Bribery in Achieving Pareto Efficiency*, 34 KYKLOS: INT'L REV. SOC. SCI. 448, 448–55 (1981); Ibrahim F.I. Shihata, *Corruption—A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L. 451, 454–55 (1997).

<sup>15</sup> Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681, 705–06 (1995) (discussing a “negative association between corruption and investment, as well as growth, [that] is significant in both a statistical and an economic sense”).

<sup>16</sup> *Id.*

<sup>17</sup> Daniel Kaufmann, *Corruption: The Facts*, 107 FOREIGN POLICY 114, 125 (1997).

<sup>18</sup> Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross Country Analysis*, in CORRUPTION AND THE GLOBAL ECONOMY 83, 91 (Kimberly Ann Elliot ed., 1996).

<sup>19</sup> *Id.*; Nichols, *supra* note 7, at 863 n.28; Nichols, *Regulating Transnational Bribery*, *supra* note 9, at 257 n.97 (“Considering the fact that the average annual growth rate in world domestic product is between 2.5 and 3.0 percent, half a percentage point represents a considerable improvement.”).

<sup>20</sup> Nichols, *Regulating Transnational Bribery*, *supra* note 9, at 272.

<sup>21</sup> *Id.* at 276.

had a dynamic middle class.<sup>22</sup> This middle class “watched its wealth disappear, its neighborhoods turn into slums, and its children grow up in hardship” because of economic corruption in the country.<sup>23</sup> In Kenya, individuals who gained title of land through bribes violently forced the poor from their lands.<sup>24</sup> The Zairian people suffered as their nation sank into a “Zaire-shaped hole” in the center of Africa.<sup>25</sup> Their country had been sold, bought, and stolen.<sup>26</sup>

Bribery is a systemic problem around the globe.<sup>27</sup> Research by the World Bank shows that cryptic regulatory systems coupled with weak enforcement institutions allow a domestic environment in which individuals are more likely to offer and accept bribes.<sup>28</sup> Additionally, industrialized nations substantially add to the bribery problem.<sup>29</sup> Foreign businesses from industrialized nations that do business abroad, particularly in developing countries, generally contribute to corruption by making the assumption that

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<sup>22</sup> *Id.* See generally DANIEL JORDAN SMITH, A CULTURE OF CORRUPTION: EVERYDAY DECEPTION AND POPULAR DISCONTENT IN NIGERIA 53–87 (2007) (providing an illustration of bribery in everyday life).

<sup>23</sup> Nichols, *Regulating Transnational Bribery*, *supra* note 9, at 276.

<sup>24</sup> See HUMAN RIGHTS WATCH, FROM HORROR TO HOPELESSNESS: KENYA’S FORGOTTEN SOMALI REFUGEE CRISIS 15 (2009) (discussing bribery in the context of the Liboi transit center closure and its implications for Somali refugees escaping to Dadaab). In 2008, “Human Rights Watch documented serious Kenyan police abuses against Somali refugees between the boarder and Dadaab’s camps, including systemic bribery and reports of violence, including rape.” *Id.* Kenya has however made efforts to curb corruption in the courts. Marc Lacey, *A Crackdown on Corruption in Kenya Snares Judges*, N.Y. TIMES (Oct. 26, 2003), <http://www.nytimes.com/2003/10/26/world/a-crackdown-on-corruption-in-kenya-snares-judges.html>.

Kenya’s judiciary has been thrown into disarray by a wide-ranging corruption investigation that has many of the country’s most brazen judges trembling under their robes . . . It has been no secret here that a stack of cash has always been considered just as valuable as a well-researched legal argument in winning a court case in Kenya.

*Id.*

<sup>25</sup> Nichols, *Regulating Transnational Bribery*, *supra* note 9, at 276.

<sup>26</sup> *Id.*

<sup>27</sup> LOTHAR F. NEUMANN, DANCE IN THE GLOBAL VILLAGE 79 (2008) (discussing corruption as the subject of global moral judgment).

<sup>28</sup> WORLD BANK, THE WORLD BANK RESEARCH PROGRAM, 2005–2007: ABSTRACTS OF CURRENT STUDIES 55 (2007) (summarizing findings that weak and difficult to navigate regulatory systems is directly related to use of bribes).

<sup>29</sup> The Speaker of the South African Parliament stated, “international corruption is often tacitly supported and actively encouraged by Western countries...attributing corruption to our [African] cultures is both arrogant and racist, as well as convenient and self-serving.” Anver Versi, *On Corruption and Corrupters*, AFRICAN BUS., Nov. 1996, at 7 (“Let’s make no bones about it: Corruption is an evil social and economic disease which must be rooted out wherever it resides.”).

bribes are general business practice—“an attitude which often turns out to be a self-fulfilling prophecy.”<sup>30</sup>

As the world becomes more integrated, it transforms into a “global village.”<sup>31</sup> In 1967, Marshall McLuhan invented this phrase, and many use it to describe globalization in international business, economics, politics, and society.<sup>32</sup> As the world shrinks, there is more awareness that conduct in one region may have ripple effects over the entire world.<sup>33</sup> The global village conception encourages nations to increase their efforts to standardize transnational order with a sole set of united laws and regulations.<sup>34</sup> However, the cultural diversity with respect to bribery creates a serious enforcement challenge.<sup>35</sup>

While bribery is illegal to some extent in every nation, there are different cultural norms for corruption and bribery, including gift giving, gift giving as a declaration of gratitude and loyalty, gift giving as symbolic expression, gift giving as etiquette, and entertainment and hospitality gift giving.<sup>36</sup> Gift giving is extremely prevalent in Asian countries, but there is a nuanced distinction between inappropriate and appropriate gift giving in the bribery context.<sup>37</sup>

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<sup>30</sup> Shihata, *supra* note 14, at 461; *see id.* (suggesting that western nations assume a culture of corruption in Africa).

<sup>31</sup> ARTICLE 1. MARSHALL McLuhan & QUENTIN FIORE, *WAR AND PEACE IN THE GLOBAL VILLAGE* (1st ed. 1968); *see also* Jeremy Brecher, *Introductory Outline: “Global Village or Global Pillage?” A New Architecture and New Architects, in WHICH “GLOBAL VILLAGE”?: SOCIETIES, CULTURES, AND POLITICAL-ECONOMIC SYSTEMS IN A EURO-ATLANTIC PERSPECTIVE 3–8* (Valeria Gennaro Lerda ed., 2002) (discussing McLuhan’s phrase and questioning its assumptions); Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?*, 24 *YALE J. INT’L L.* 223, 228–29 (1999).

<sup>32</sup> *See generally* MARSHALL McLuhan & QUENTIN FIORE, *WAR AND PEACE IN THE GLOBAL VILLAGE* (1968) (introducing McLuhan’s global village concept); Salbu, *supra* note 31, at 228.

<sup>33</sup> Salbu, *supra* note 31, at 228–29.

<sup>34</sup> *Id.* at 232 (stating that there are nuances in the bribery context that make the creation of uniform boundaries difficult to draw because the lines between unacceptable and acceptable practices are different in different settings). “Moreover, in the context of cultural pluralism that continues to pervade the global village, convergence on a single set of acceptable rules is highly implausible.” *Id.*

<sup>35</sup> *See id.* at 230 (discussing the need to avoid the temptation to impose an international, standardized rule of law).

<sup>36</sup> *Id.* at 235; *see also* VESILIND & GUNN, *supra* note 10, at 114 (describing the legality of different payments a company might make to a company or government official).

<sup>37</sup> Salbu, *supra* note 31, at 235; *How Gift Giving Can Build Stronger Business Relationships with Your Asian Hosts and Partners*, PR NEWSWIRE, Mar. 29, 1998, available in LexisNexis, News Library, Allnews File.



South Korean culture illustrates the complex problem of making a distinction between acceptable gifts and unacceptable bribes.<sup>38</sup> In South Korea, *chonji*<sup>39</sup> encompasses many types of gratitude.<sup>40</sup> *Chonji* includes acts such as gifts to teachers for leniency, bankers for advantageous interest rates, and government officials for expedited administrative tasks.<sup>41</sup> However, South Korea's society probably would function more efficiently if teachers treated students fairly and equally, if bankers did not give advantageous interest rates but allowed the market to dictate rates, and government agents processed all requests equally.<sup>42</sup> Despite this, *chonji* is prevalent and ingrained in Korean culture.<sup>43</sup>

Thus, it appears wrong for one country to extend its jurisdiction to impose liability for a cultural norm in a sovereign state, demand that the culture change, and infringe on the state's sovereignty, even when that cultural norm creates dysfunction.<sup>44</sup> Such an exercise of jurisdiction undercuts international law by counteracting treaties that protect domestic values and transnational business.<sup>45</sup>

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<sup>38</sup> Salbu, *supra* note 31, at 235; see also Daniel Y. Jun, *Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor*, 29 VAND. J. TRANSNAT'L L. 1071, 108–87 (1996) (explaining South Korean law regarding bribery).

<sup>39</sup> ARTICLE II. JON S. T. QUAH, CURBING CORRUPTION IN ASIAN COUNTRIES: AN IMPOSSIBLE DREAM? 321 (2011).

Article III. *Chonji* or “bribe money” is a way of life in South Korea as rich persons and large companies are expected to pay *chonji* for the services and cooperation provided by civil servants. This “deeply entrenched custom” is also practiced by government ministries and agencies that pay *chonji* to journalists and editors for favorable coverage of their activities.

*Id.*

<sup>40</sup> *Agenda for a New Leader*, ASIaweek (Mar. 13, 1998), <http://edition.cnn.tv/ASIANOW/asiaweek/98/0313/ed1.html>.

<sup>41</sup> *Id.*; QUAH, *supra* note 39, at 321.

<sup>42</sup> Salbu, *supra* note 31, at 235–36.

<sup>43</sup> *Id.*; QUAH, *supra* note 39, at 321.

<sup>44</sup> Salbu, *supra* note 31, at 231.

This suggests that the ubiquitous transnational application of any one set of laws is dangerous. The peril of extraterritorial application is the risk of inflicting incongruent or discordant values on others in instances where legitimate, nuanced moral differences are supportable. Moreover, in a world that acknowledges cultural pluralism, extraterritorially applied law embracing a single value system is too narrow to achieve wide acceptance.

*Id.*

<sup>45</sup> *Id.* at 238 (“When social and cultural nuances associated with norms of socializing are added as an aspect of a gratuity, gift-giving becomes even more culturally textured and complex. Extraterritorial meddling in these situations appears truly foolhardy.”).

In some cultures, gift giving in business is simply expected in professional culture.<sup>46</sup> In Japan, it is bad mannered to ask for a favor empty-handed, and gifts are not considered bribes.<sup>47</sup> This practice and the accompanying expectations result in ambiguity and inconsistency because through a Western lens, it is a challenge to distinguish between a cultural courtesy of bringing a gift when seeking a favor and a bribe.<sup>48</sup> The Japanese make a distinction here and Westerners must tread lightly and consciously before imposing judgment.<sup>49</sup>

“Extraterritorial tampering creates a recipe for misinterpretation of motives.”<sup>50</sup> It is difficult to identify motives in gift giving because gift giving in a business context is closely connected to cultural surroundings.<sup>51</sup> Affording deference to domestic and internal evaluation is the best way to evaluate such a nuanced and culture-specific practice.<sup>52</sup>

Bribery in the government context corrodes legitimacy, particularly in democratic states.<sup>53</sup> Citizens in governments that participate in bribery “may come to believe that the government is simply for sale to the highest

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<sup>46</sup> Dawn Bryan, *Beware the Purple Pigskin Clock!*, SALES & MARKETING MGMT., Aug. 1, 1990, at 74 (“Gift giving in Japan is inextricably linked with maintaining good relationships, the keeping of wa (peace and harmony), and the general art of getting things done.”).

<sup>47</sup> See generally Harumi Befu, *Gift-Giving in a Modernizing Japan*, in JAPANESE BUSINESS: CULTURAL PERSPECTIVES 109 (1993) (describing gift giving custom in Japan).

<sup>48</sup> QUAH, *supra* note 39, at 52.

In Japan, bribery is defined legally as “an act of receiving or giving any compensation, outside the legally specified salary, for the execution of public duties.” There are three forms of bribery: acceptance of compensation with a request to execute an irregular act (*seitaku shuwai*), execution of an irregular act for compensation, and receiving compensation to use his official capacity to influence another official to execute an irregular act (*assen shuwai*).

*Id.*; see also Salbu, *supra* note 31, at 238 (“None of this is to suggest that bribery and corruption go without notice or comment in Japan. Despite a culture that embraces gift-giving in business environments, Japan has adopted what one commentator calls ‘a ferocious anti-corruption campaign,’ likely spurred at least in part by the country’s late-1990s economic woes.”).

<sup>49</sup> Befu, *supra* note 47, at 109–10 (suggesting the importance of understanding gift-giving custom if traveling in Japan); Salbu, *supra* note 31, at 238 (“Japan has adopted what one commentator calls ‘a ferocious anti-corruption campaign’ likely spurred at least in part by the country’s late-1990s economic woes. This developing attitude is commendable, and the countries of the world should applaud and support Japan’s efforts to clean up business transactions within its borders.”).

<sup>50</sup> Salbu, *supra* note 31, at 237.

<sup>51</sup> CHARLES MITCHELL, A SHORT COURSE IN INTERNATIONAL BUSINESS ETHICS 82 (3d ed. 2009).

<sup>52</sup> Salbu, *supra* note 31, at 235.

<sup>53</sup> Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 31, 45 (Kimberly Ann Elliott ed., 1997).

bidder.”<sup>54</sup> This effect may crumble the government’s foundation for public trust and democratic leadership.<sup>55</sup> Considering bribery’s nefarious effects, cultural complexities, and transnational complications, legislatures have responded to the need to regulate bribes.

*B. Bribery Laws that Influenced the U.K.’s Bribery Act*

The U.S. Foreign Corrupt Practices Act (“FCPA”), the Organization for Economic Cooperation and Development’s Convention on Combating Bribery of Foreign Public Officials, and the United Nations Convention Against Corruption inspired the U.K. to create its new Act.<sup>56</sup> All three have instrumentally affected the provisions and restrictions that the U.K. included in drafting the Act.<sup>57</sup> Specifically, these bribery laws and international conventions allow a certain level of extraterritorial reach in effectively regulating transnational bribery.<sup>58</sup> The U.K. Bribery Act extends this reach to an unprecedented and unacceptable level.

*1. U.S. Foreign Corrupt Practices Act*

Before the U.K. Bribery Act, the FCPA was the most stringent bribery law in the world.<sup>59</sup> In 1977, the United States enacted the FCPA in response to the Watergate scandal, intending it to have a large impact on American business.<sup>60</sup> One of the FCPA’s main purposes is to resolve “the head-in-the-sand” or willful blindness problem.<sup>61</sup> The FCPA does this by

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<sup>54</sup> *Id.*

<sup>55</sup> Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J. L. & TRADE AM. 179, 184 (1996).

<sup>56</sup> See Transparency Int’l, *Bribery Act: Myth and Reality 2–3* (2011) (noting that the Bribery Act is rooted in the FCPA and a number of international conventions); See generally 15 U.S.C.A. § 78dd-1 (1998) [hereinafter FCPA]; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Convention]; United Nations Convention Against Corruption, Jan. 21, 2002 – Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC].

<sup>57</sup> F. Joseph Warin, et al., *The British Are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT’L L.J. 1, 4 (2010) (discussing the FCPA, OECD, and UNCAC influence on the Bribery Act).

<sup>58</sup> See *id.* at 4–6 (describing the extraterritorial reach of these laws and conventions); see also FCPA § 78dd-1(a) (prohibiting the use of bribes in business with foreign officials); OECD Convention, arts. 38, 39 (encouraging international cooperation); UNCAC, art. 43 (requiring international cooperation).

<sup>59</sup> See Warin et al., *supra* note 57, at 7–8 (noting the Bribery Act’s expansions on FCPA’s already strident framework).

<sup>60</sup> See *id.* at 4 (observing that, although FCPA was a reaction to a scandal involving public officials, the act also targeted the private sector).

<sup>61</sup> H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 32 (1998).

imposing overseas liability on companies that “look the other way” when maintaining off the books accounting funds including disguised improper payments.<sup>62</sup> Through the years, the jurisdiction of the FCPA has increased and the federal agencies enforcing the Act have prosecuted more individual executives, employed more aggressive tactics, such as sting operations and search warrants, increased monetary penalties, and implemented greater cooperation between the United States and foreign authorities.<sup>63</sup>

The FCPA contains prohibitions against bribing foreign government officials “to obtain or retain business” and, for the first time under federal law, an accounting provision.<sup>64</sup> Under the accounting provision, companies are required to “(1) keep and maintain accurate books and records, and (2) establish and maintain a system of internal controls that reasonably assures that corporate assets are used only for authorized corporate purposes.”<sup>65</sup> This provision gave the Securities and Exchange Commission more regulatory authority and jurisdiction over the internal management of public corporations.<sup>66</sup>

The FCPA confines its jurisdiction to “domestic concerns,” which it construes to mean “any individual who is a citizen, national, or resident of the United States,”<sup>67</sup> or any business organization that has its principal place of business in the United States or that is “organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States.”<sup>68</sup> The United States determines its jurisdiction based on whether some part of the offense took place in the United States.<sup>69</sup> Addi-

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<sup>62</sup> *Id.* at 32; FCPA § 78dd-1(f)(2)(B) (providing that knowledge is established if person is aware of a high probability of the existence of an illegal bribe).

<sup>63</sup> *See* Warin et al., *supra* note 57, at 8–10 (describing the scope and application of the FCPA).

<sup>64</sup> U.S. DEP’T. OF JUST., FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS 2, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> [hereinafter DOJ LAY PERSON’S GUIDE]; Warin et al., *supra* note 57, at 7.

<sup>65</sup> Warin et al., *supra* note 57, at 7.

<sup>66</sup> Brown, *supra* note 60, at 7.

<sup>67</sup> DOJ LAY PERSON’S GUIDE, *supra* note 64, at 3.

<sup>68</sup> FCPA § 78dd-1(g)(1); *see e.g.*, U.S. v. DPC (Tianjin) Co., No. 05-CR-482 (C.D. Cal. May 20, 2005), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/dpc-tianjin.html> (stating that the a defendant with a principal place of business in China was “a wholly-owned subsidiary” of the U.S. issuer and “acted as an agent of DPC within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1”); SEC v. Westinghouse Air Brake Techs. Corp., No. 08-706 (E.D. Pa. 2008), available at <http://www.sec.gov/litigation/litreleases/2008/lr20457.htm> (holding liable a parent company for its Indian subsidiary’s bribing an Indian-government officer); *see* Brown, *supra* note 60, at 37–8 (stating that the original “knows or has reason to know” was changed to “no willful blindness” standard for the court to hold a parent company liable for its subsidiary’s actions).

<sup>69</sup> *See* Warin et al., *supra* note 57, at 9–10 (describing different situations in which the U.S. found jurisdiction).

tionally, the FCPA prosecutes “issuers,” which are corporations that have “issued securities that have been registered in the United States or who [are] required to file periodic reports with the SEC.”<sup>70</sup> This provision applies to foreign subsidiaries as well.<sup>71</sup> A foreign subsidiary may cause its U.S. parent corporation to violate the accounting provision because of conduct abroad.<sup>72</sup>

Since the 1998 amendments to the FCPA, however, a foreign company is subject to the FCPA “if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.”<sup>73</sup> This causation analysis is the safety valve that properly limits the FCPA’s jurisdictional reach. The U.K. Bribery Act lacks such an “effects test,” which could allow for an expansive and unprecedented extra-territorial reach.

## 2. Organization for Economic Cooperation and Development Concerning the Bribery of Foreign Public Officials

After the United States enacted the FCPA, Congress was concerned that American companies conducting business internationally would operate at a disadvantage to those foreign corporations paying bribes.<sup>74</sup> In 1997, the United States and thirty-three other countries signed the Organization for Economic Cooperation and Development (“OECD”)<sup>75</sup> Convention on Com-

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<sup>70</sup> DOJ LAY PERSON’S GUIDE, *supra* note 64, at 3; *see also* Warin et al., *supra* note 57, at 9 (noting U.S. authority over foreign nationals carrying out an act in furtherance of a U.S. payment); Brown, *supra* note 60, at 16–17 (discussing SEC authority over “issuers” and possible penalties). FCPA-individual violators are subject to imprisonment for up to five years and fines of up to \$100,000. Additionally, the FCPA allows a civil penalty of up to \$10,000 for violations, and a corporation can incur a fine of up to \$2,000,000. A *knowing* violation of the accounting and controls provision may result in criminal liability. An individual may incur criminal fines of up to \$1,000,000, a prison term of up to ten years, or both, and a corporation may incur fines of up to \$2,500,000. *Id.*

<sup>71</sup> FCPA § 78dd–1(a)(1)–(2).

<sup>72</sup> *Id.*; *see also* Warin et al., *supra* note 57, at 9 (discussing the FCPA’s broad reach, which includes “corporations and individuals, including any officer, director, employee, or agent of a corporation and any stockholder acting on behalf of a subject entity.” The FCPA also imposes liability on individuals and firms “if they order, authorize, or assist in violations of the bribery provisions or if they conspire to violate those provisions”).

<sup>73</sup> DOJ LAY PERSON’S GUIDE, *supra* note 64, at 3.

<sup>74</sup> *See* Warin et al., *supra* note 57, at 13 (noting Congress’ concern about American competition abroad and the nuanced customs of business internationally).

<sup>75</sup> *See generally* OECD, *History*, [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761863\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1,00.html) (last visited June 3, 2012).

The Organization for European Economic Cooperation (OEEC) was established in 1947 to run the US-financed Marshall Plan for reconstruction of a continent ravaged by war. By making individual governments recognize the interdependence of their economies, it paved the way for a new era of cooperation that was to change

bating Bribery of Foreign Public Officials in International Business Transactions.<sup>76</sup> Both the United States and the U.K. ratified the Convention in 1998.<sup>77</sup>

The purpose of this Convention is to promote transparency domestically and cooperation in the fight against bribery internationally.<sup>78</sup> The Convention requires member states to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.<sup>79</sup> Since these offenses will likely occur in the company's home nation, when the bribe occurred in a different country, the domestic measures help to "fill gaps in the effective reach of the Convention."<sup>80</sup> To that end, the Convention addresses supply-side bribery and requires member states to prosecute the bribery.<sup>81</sup> Further, the Convention requires mutual legal assistance, enabling countries to coordinate and to provide legal help to member states prosecuting bribery.<sup>82</sup>

### 3. U.N. Convention Against Corruption

In 2003, delegates from all over the world convened to sign the U.N. Convention Against Corruption ("UNCAC").<sup>83</sup> The UNCAC seeks to promote principles of fairness, responsibility, equality, and integrity.<sup>84</sup> The

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the face of Europe. Encouraged by its success and the prospect of carrying its work forward on a global stage, Canada and the US joined OEEC [Organisation for European Economic Cooperation] members in signing the new OECD Convention on 14 December 1960. The Organization for Economic Co-operation and Development (OECD) was officially born on 30 September 1961, when the Convention entered into force.

*Id.*

<sup>76</sup> See OECD Convention, *supra* note 56.

<sup>77</sup> OECD, *Ratification Status as of April 2012*, <http://www.oecd.org/dataoecd/59/13/40272933.pdf> (last visited June 3, 2012).

<sup>78</sup> See Maurice Harari & Anne Valérie Julien Berthod, *Articles 9, 10, and 11. International Cooperation*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 406 (Mark Pieth et al., eds., 2007) (observing the obligation of parties to the Convention to support mutual legal assistance).

<sup>79</sup> Gregory S. Brauch & Akita N. Adkins, *Article 8. Accounting*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 378 (Mark Pieth et al., eds., 2007).

<sup>80</sup> *Id.*

<sup>81</sup> Ingeborg Zerbes, *Article 1. The Offence of Bribery of Foreign Public Officials*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 51 (Mark Pieth et al., eds., 2007).

<sup>82</sup> Gregory S. Brauch & Akita N. Adkins, *Article 8. Accounting*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 378 (Mark Pieth et al., eds., 2007) (discussing that The OECD prescribes "effective proportionate and dissuasive" sanctions and grants member states discretion to impose them however they deem necessary).

<sup>83</sup> *Adoption of the UN Convention Against Corruption*, 98 AM. J. INT'L L. 182 (2004); UNCAC, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

<sup>84</sup> UNCAC, *supra* note 56, pmb1.

UNCAC has one hundred and thirty parties, one hundred and forty signatories, and focuses on three major facets of anti-corruption efforts: prevention, criminalization, and international cooperation.<sup>85</sup> The UNCAC gives member nations the responsibility to determine the standard of compliance with the UNCAC and to what extent to weave the Convention into national law.<sup>86</sup>

Article 43 of the UNCAC details international cooperation.<sup>87</sup> First, it mandates that states cooperate in criminal matters according to Articles 44 to 50 of the UNCAC.<sup>88</sup> Second, if the underlying offense is criminal under the laws of both nations, the offense satisfies dual criminality regardless of whether it is in the same category of level of offense in each nation.<sup>89</sup> Meaning, a defendant could be subject to liability in more than one nation with varying degrees of sanctions leveled against him.

The UNCAC permits a state to exercise jurisdiction: (1) when the offense is within the State's territory; (2) when the offense is committed on a "vessel flying the flag of the State" or on a State-registered aircraft; (3) when the offense is committed against a State national; (4) when a national of the State commits the offense; (5) when the offense is committed against the State; and (6) "when the offender is present in the territory of the State but the State does not extradite the offender."<sup>90</sup> These provisions allow for extraterritorial reach in prosecutions (excluding the first and sixth offenses).<sup>91</sup>

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<sup>85</sup> U.N. OFFICE ON DRUGS AND CRIME, *United Nations Convention Against Bribery*, <http://www.unodc.org/unodc/en/treaties/CAC/> (last visited June 3, 2012).

<sup>86</sup> Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 221 (2005).

<sup>87</sup> UNCAC, art. 43.

<sup>88</sup> *Id.* ("Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.").

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* art. 42.

<sup>91</sup> Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 540-41 (2008).

The "nationality" principle premises jurisdiction on the nationality or allegiance of the offender, regardless of where acts perpetrating the crime are committed. The nationality principle is expressly granted in article 42 as the fourth offense in the list. The principle of "passive personality" grants jurisdiction when "the victims [of an offense] are nationals of the forum state"; this is the situation described in the third and, arguably, the fifth offense. Finally, the "floating territorial" principle, which allows jurisdiction over vessels flying the flag of the forum state irrespective of the physical location of the vessel, encompasses the second offense.

*Id.*

The UNCAC provides that member nations must take measures to penalize corruption such as withdrawing contracts or withdrawing concessions founded on corrupt practices.<sup>92</sup> Additionally, the Convention mandates that states must “ensure that legal persons held liable . . . are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.”<sup>93</sup> Although the UNCAC’s provisions seem to lay an effective groundwork for international cooperation against corruption, it will have very little practical impact if it does not monitor member compliance.<sup>94</sup>

To summarize, before the U.K. Bribery Act, the FCPA was the most stringent anti-bribery legislation in existence.<sup>95</sup> Although the United States wanted other nations to follow suit, the FCPA’s main goal was not to end worldwide corporate corruption, but to curb U.S. businesses’ poor conduct.<sup>96</sup> The OECD ensured that U.S. companies would not operate at a disadvantage because of the harsh penalties of the FCPA by attempting to hold other nations to a higher standard of responsibility with respect to corruption.<sup>97</sup> The UNCAC further limits and defines the jurisdiction of each member state to exercise extraterritorial reach to prosecute violators of their bribery acts.<sup>98</sup> The Bribery Act expands the FCPA and UNCAC’s extraterritorial jurisdictions well beyond the established bounds and allows for an extended reach for prosecutions.<sup>99</sup>

### III. U.K. BRIBERY ACT’S EXTRATERRITORIAL REACH COMPONENT POSES POTENTIAL PROBLEMS

#### A. *An Overview of the Act*

Before the U.K. enacted the Bribery Act, the OECD consistently criticized the U.K.’s bribery-legal framework,<sup>100</sup> consisting of a medley of

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<sup>92</sup> See UNCAC, *supra* note 56, pmb. (“[A] comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively.”).

<sup>93</sup> *Id.* art 26.

<sup>94</sup> See Webb, *supra* note 86, at 228 (observing the need for follow-up measures to ensure UNCAC is effective).

<sup>95</sup> Warin, *supra* note 57, at 4.

<sup>96</sup> *Id.* at 9.

<sup>97</sup> See generally OECD Convention, *supra* note 56 (implementing new anti-bribery standards similar to FCPA).

<sup>98</sup> See UNCAC, Preamble (discussing the need to be mindful to other principles of international law, but also the need for international cooperation and effort to eradicate bribery).

<sup>99</sup> Bribery Act, *supra* note 1, § 7; MINISTRY OF JUST., *supra* note 3, at 15 (discussing the jurisdictional scope of the Bribery Act).

<sup>100</sup> See OECD, UNITED KINGDOM: PHASE 2BIS, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN



three statutes from the late-nineteenth century and the early-twentieth century along with the U.K. common law prohibiting bribery.<sup>101</sup> The OECD claimed that the U.K. laws did not meet the enforcement standards of the OECD, which as a member, the U.K. is required to meet.<sup>102</sup> The U.K.'s former anti-bribery laws underwent little amendment in the preceding ninety years and were burdensome to apply.<sup>103</sup>

The controversy between the British defense contractor BAE Systems PLC ("BAE") and the Government of Saudi Arabia highlights the deficiencies in previous British anti-bribery laws.<sup>104</sup> In the mid-1980's, Saudi Arabia and BAE made a £43 billion (\$65 billion) arms deal, which became Britain's biggest export deal to date.<sup>105</sup> However, serious accusations of corruption blemished these contracts.<sup>106</sup> Instead of the U.K.'s SFO initially investigating these allegations, the U.S. Department of Justice initiated an investigation.<sup>107</sup> The SFO filed suit only after significant global criticisms.<sup>108</sup> Because of all of these criticisms, the U.K. proposed and passed the Bribery Act.<sup>109</sup>

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INTERNATIONAL BUSINESS TRANSACTIONS 4 (2008) [hereinafter UK: PHASE 2BIS], available at <http://www.oecd.org/dataoecd/23/20/41515077.pdf> ("Overall, the group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK."); Press Release, Transparency Int'l, OECD Report Deplored UK Anti-Bribery Record (Oct. 16, 2008), [http://archive.transparency.org/news\\_room/latest\\_news/press\\_releases\\_nc/2008/2008\\_10\\_17\\_oecd\\_anti\\_bribery\\_record](http://archive.transparency.org/news_room/latest_news/press_releases_nc/2008/2008_10_17_oecd_anti_bribery_record) ("The Government's claim that the UK is leading the way in tackling corruption is fiction.").

<sup>101</sup> Warin, *supra* note 57, at 4–5; see also UK: PHASE 2BIS, *supra* note 100, at 12–14 (describing the state of UK anti-bribery law prior to the Bribery Act).

<sup>102</sup> Warin, *supra* note 57, at 5 ("[The U.K.] acknowledged . . . failure to implement legal reform . . . call[ing] into question the United Kingdom's commitment to the [OECD]."); UK: PHASE 2BIS, *supra* note 100, at 4 (noting the failure of the U.K. to implement and execute laws according to OECD standards).

<sup>103</sup> See Warin, *supra* note 57, at 5. See, e.g., Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vic., c. 69; Prevention of Corruption Act, 1906, 5 Edw.7, c. 34; Prevention of Corruption Act, 1916, 6 Geo.5, c. 64.

<sup>104</sup> See generally Tim Webb, *BAE Forced into the Red by Probes into Sales to Saudi Arabia*, GUARDIAN (Feb. 18, 2010), <http://www.guardian.co.uk/business/2010/feb/18/bae-systems-losses-corruption-sfo-us-military> (discussing the BAE-Saudi deal).

<sup>105</sup> David Leigh & Rob Evans, *BAE and the Saudis: How Secret Cash Payments Oiled £43bn Arms Deal*, GUARDIAN (Feb. 5, 2010), <http://www.guardian.co.uk/world/2010/feb/05/bae-saudi-yamamah-deal-background>.

<sup>106</sup> *Id.*

<sup>107</sup> Warin, *supra* note 57, at 3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 4. At first, the U.K.'s anti-bribery laws were basically antiquated and ineffective, which perhaps led U.K. businesses to take advantage of the loose laws, bribing to gain an advantage in business abroad. Now, it appears as though the U.K. overcompensated for its prior laws and now is exercising a global police power over bribery.

The Act covers three types of bribery: (1) paying and receiving bribes; (2) bribing foreign public officials; and (3) failing to prevent bribery.<sup>110</sup> The Act gives the U.K. extended jurisdiction over corporate violators.<sup>111</sup> Through this broad jurisdictional hook, the U.K. hopes to suppress and regulate corruption and bribery, and walk the delicate line of addressing the bribery problem without burdening legitimate business.<sup>112</sup>

The U.K. Bribery Act's jurisdictional component with respect to commercial organizations states that a "relevant organization" means:

- (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
- (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
- (c) a partnership which is formed under the law of any part of the partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, or
- (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.<sup>113</sup>

The Ministry of Justice provides a Guidance text for interpreting the Act, which supplies definitions and explanations for how prosecutors should use this jurisdictional discretion.<sup>114</sup> The Guidance interprets the jurisdictional clause to mean that if the organization is incorporated or formed in the U.K., or if the organization "carries on a business or part of a business" in the U.K., regardless of where it was incorporated or formed, the U.K. will have jurisdiction.<sup>115</sup>

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<sup>110</sup> See generally Bribery Act, *supra* note 1 (listing the criminal elements under three headings: (1) general bribery offenses; (2) bribery of foreign public officials; and (3) failure of a commercial organization to prevent bribery).

<sup>111</sup> Bribery Act, *supra* note 1, § 7; MINISTRY OF JUST., at 15–16 (explaining the Act's jurisdiction over commercial organizations).

<sup>112</sup> Lord McNally, *Bribery Act 2010*, HANSARD (Mar. 30, 2011), <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110330-wms0001.htm#11033060000223>.

<sup>113</sup> Bribery Act, *supra* note 1, § 7(5)(a)–(d).

<sup>114</sup> See generally MINISTRY OF JUST., *supra* note 3 (providing guidance and clarification on the Bribery Act).

<sup>115</sup> *Id.* at 9, 15–16.

The Guidance states that, “[t]he key concept here is that of an organization which ‘carries on a business.’”<sup>116</sup> This is largely fact determinative, with the courts making the final determination.<sup>117</sup> This loose language could mean that a corporation or partnership or body would have to have a physical structure in the U.K. to “carry on a business.”<sup>118</sup> But, it is unclear if the legislature intended a business to establish a physical office stationed in Britain to be under the purview of British jurisdiction.<sup>119</sup> It is more probable that the texts mean *business* not *a business*; the corporation must *do business* in Britain not actually have a physical business there.<sup>120</sup>

The Guidance assures the international community that the courts will apply a “common sense approach” to determine if the “bodies incorporated, or partnerships formed, outside the United Kingdom,” are carrying on a business or part of a business in any part of the United Kingdom.<sup>121</sup> The U.K. states that a common sense approach means “organizations that do not have a demonstrable business presence in the United Kingdom would not be caught.”<sup>122</sup>

Since there is no case law in the U.K. to guide a discussion on what exactly a “common sense approach” and a “demonstrable business presence” may mean for a foreign-corporation violator, this leaves the door open for a wide spectrum of liability and interpretation of the Act’s legal

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<sup>116</sup> *Id.* at 15.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* (suggesting a common sense approach in determining what constitutes carrying on business).

<sup>119</sup> *See id.* (failing to clarify if a physical location in the U.K. is a prerequisite to prosecution); Warin, *supra* note 57, at 29 (“Indeed, the illustrative examples contained in annex B of the Guidance address only U.K.-based organizations. For the time being then, it appears that the U.K. Government is content to remain mum on how it views the scope of its jurisdiction under the Act.”).

<sup>120</sup> Warin, *supra* note 57, at 28–9 (“The inclusion of the second and fourth groups as ‘relevant commercial organizations’ seemingly sweeps into the Bribery Act’s ambit virtually all major multinational corporations—the vast majority of which conduct some business in the United Kingdom.”).

<sup>121</sup> MINISTRY OF JUST., *supra* note 3, at 15

<sup>122</sup> *Id.* at 15–16.

The Government would not expect, for example, the mere fact that a company’s securities have been admitted to the UK Listing Authority’s Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a “relevant commercial organization” for the purposes of section 7. Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.

*Id.*

meanings.<sup>123</sup> This Act proposes to use a type of extraterritorial jurisdiction to ensnare corporations that violate the Act's provision. The most pertinent considerations are (1) the length of this extraterritorial arm; and (2) the legality of that reach.

*B. Types of Extraterritoriality that the U.K. Bribery Act Could Utilize and the Resultant Problems and Complications*

1. Types of extraterritoriality that the U.K. Bribery Act could employ

Since the U.K. Bribery Act establishes criminal liability, international laws regarding extraterritorial criminal jurisdiction may apply. International law identifies five theories of extraterritorial criminal jurisdiction.<sup>124</sup> First, territorial jurisdiction, including both subjective and objective, operates based on the location of the offense or the location of the effects of the offense.<sup>125</sup> Second, nationality jurisdiction bases its extension on the nationality of the offender.<sup>126</sup> Third, protective jurisdiction hinges on the protection of the nation's interest, security, and integrity.<sup>127</sup> Fourth, passive personality jurisdiction rests on the nationality of the victim.<sup>128</sup> Fifth, universal jurisdiction extends jurisdiction for egregious acts, piracy, war crimes, genocide, and terrorism.<sup>129</sup> The UNCAC approves the first four of these uses of extraterritorial jurisdiction with respect to corruption crimes, but the U.K.'s jurisdictional link may functionally extend into the purview

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<sup>123</sup> See Joel M. Cohen et al., *UK Serious Fraud Office Discusses Details of UK Bribery Act with Gibson Dunn*, GIBSON, DUNN & CRUTCHER LLP (Sept. 7, 2010) <http://www.gibsondunn.com/publications/pages/UKSeriousFraudOfficeDiscussion-RecentlyEnactedUKBriberyAct.aspx> ("The [SFO] Staff declined to opine on specific, hypothetical fact patterns designed to test elements of the Act's jurisdictional reach. However, they made clear that the test for jurisdiction is simply whether the company in question carries out business in the UK.").

<sup>124</sup> See *U.S. v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) ("International law permits extraterritorial jurisdiction under five theories: territorial, national, protective, universality, and passive personality. In the instant case the territorial, national, and passive personality theories combine to sanction extraterritorial jurisdiction."); see also *U.S. v. Smith*, 680 F.2d 255, 257-58 (1st Cir. 1982) (describing international law's general principles allowing a nation to exercise prescriptive jurisdiction); *U.S. v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994) ("[A]n exercise of jurisdiction on one of these bases still violates international principles if it is 'unreasonable.'"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. ("The principle that an exercise of jurisdiction on one of the bases indicated...is nonetheless unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law.").

<sup>125</sup> Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323 (2001).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 324.

of universal jurisdiction, which would present a host of difficulties and complications.<sup>130</sup>

Various other countries have amended and updated their anti-bribery laws, but none reach the level of prosecutorial discretion or extraterritorial reach that the Bribery Act employs. Recently, India passed anticorruption legislation provoking citizen demonstrations and protests for more stringent anti-bribery laws.<sup>131</sup> China recently amended its anti-corruption legislation allowing prosecutors broad discretion because of its vague provisions.<sup>132</sup> Similarly, Canada allows territorial jurisdiction to prosecute foreign bribery when that bribery occurs in Canada as long as there is a “real and substantial link” between the offense and Canada.<sup>133</sup> Despite Transparency International’s recommendations for Canada to exercise nationality jurisdiction over foreign bribery offences, Canada has not implemented such jurisdiction into its bribery framework.<sup>134</sup> Although the world is moving towards prosecuting corruption and bribery more harshly, the U.K. Bribery Act is certainly far more expansive and potentially aggressive than any existing treaty or domestic statute.

Recall the hypothetical from Part I. If the U.S.-corporate violator has connections to the U.K., however attenuated, then the U.K. is attempt-

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<sup>130</sup> See Lestelle, *supra* note 91, at 540–41 (outlining the modes of jurisdiction in the UNCAC).

<sup>131</sup> Jim Yardley & Vikas Bajaj, *Lower House of Indian Parliament Passes Anticorruption Measure*, N.Y. TIMES, Dec. 28, 2011, at A5. Some citizens have staged protest through civil disobedience demonstrations and even hunger strikes. *Id.*

<sup>132</sup> WHITE & CASE, CHINA’S NEW ANTI-CORRUPTION LAW GOES INTO EFFECT May 1, 2011 (Apr. 19, 2011), [http://www.whitecase.com/files/Publication/49f8553b-00b9-4573-bf24-741b0614e08c/Presentation/PublicationAttachment/d0253a48-813b-42cd-81d5-7d9e241e2dd4/Alert\\_Chinas\\_New\\_Anti-Corruption\\_Law\\_Goes\\_into\\_Effect\\_May\\_1\\_2011.pdf](http://www.whitecase.com/files/Publication/49f8553b-00b9-4573-bf24-741b0614e08c/Presentation/PublicationAttachment/d0253a48-813b-42cd-81d5-7d9e241e2dd4/Alert_Chinas_New_Anti-Corruption_Law_Goes_into_Effect_May_1_2011.pdf) (“In relevant part, the Amendment prohibits individuals and corporations from providing ‘money or property to any foreign party performing official duties or an official of international public organizations’ for the purpose of ‘seeking illegitimate business benefits.’”).

<sup>133</sup> *Twelfth Report to Parliament*, FOREIGN AFF. AND INT’L TRADE CANADA (Oct. 17, 2011), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx?view=d>. In addition, unlike some other countries, Canada can extradite its nationals to face criminal prosecution in other countries. *Id.*

<sup>134</sup> *Id.*

On May 15, 2009, the Minister of Justice introduced Bill C-31 (An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act) which, if passed, would have amended the CFPOA to allow Canada to prosecute Canadian companies, or Canadian citizens or permanent residents for bribing a foreign public official without having to provide evidence of a link between Canada and the offence. The Bill had passed Second Reading and was at the Committee Stage when the House was prorogued in December 2009.

*Id.*

ing to utilize extraterritoriality. A state exercises extraterritoriality when it increases its jurisdiction beyond its own boundaries and into another state's territory.<sup>135</sup> The concept of extraterritoriality arose when Western nations began to engage in considerable trade with Eastern nations.<sup>136</sup> These Western nations utilized extraterritoriality via treaties so that Western law would govern their sojourning citizens, instead of local, Eastern laws.<sup>137</sup>

The presumption is that domestic laws do not apply outside the boundaries of the nation to prevent unintended strife with foreign-nation laws.<sup>138</sup> However, it seems as though this presumption is eroding.<sup>139</sup> International law gives states a large amount of discretion in defining their jurisdictional doctrines,<sup>140</sup> and nations are increasingly enforcing their laws abroad and imposing their own international influence.<sup>141</sup>

Extraterritorial laws have already caused transnational problems.<sup>142</sup> In particular, the United States has experienced a few instances of difficulty

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<sup>135</sup> 48 C.J.S. *International Law*, *supra*, note 4, § 19 (“As a general rule, no state or nation can exercise jurisdiction to take enforcement action as of right within the territorial limits of another independent state or nation.”).

<sup>136</sup> David P. Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 *Tex. Int'l L. J.* 387, 385–86 (2000).

<sup>137</sup> *Id.*

<sup>138</sup> 48 C.J.S. *International Law*, *supra*, note 4, § 19 (“Extraterritoriality principles limit the ability of the United States to hold a party legally accountable for conduct that has occurred beyond its borders.”). *See also* 2 *LOID Extraterritorial Legislation* § 8:4 (2011) (discussing the tension between applying extraterritoriality for jurisdiction and the presumption towards domestic law).

<sup>139</sup> *See* Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 *TEMP. INT'L & COMP. L.J.* 123, 125 (1996) (discussing developments in law suggesting possible enforcement of U.S. human rights law abroad).

<sup>140</sup> Austen L. Parrish, *Reclaiming International Law From Extraterritoriality*, 93 *MINN. L. REV.* 815, 867 (2009).

<sup>141</sup> Pieth, *supra* note 81, at 270 (“Even if, in the *Lotus case*, the Permanent Court of International Justice had maintained that a state may not exercise its power in any form in another state (executive jurisdiction), this has not prevented states from developing extra-territorial forms of legislative jurisdiction.”).

<sup>142</sup> For example, in 1982, many were critical of the U.S. sanctions against the Soviet natural gas pipeline. Kenneth W. Dam, *Economic and Political Aspects of Extraterritoriality*, 19 *INT'L L.* 887, 887 n.1 (1985)

The Soviet pipeline sanctions consisted of two phases. In December 1981, previously existing foreign policy controls were expanded by requiring a validated license for exports to the U.S.S.R. of commodities and technical data for the transmission or refinement of petroleum or natural gas. (Validated licensing requirements previously applied only to oil and gas exploration and production equipment and related technical data.) In addition, the Department of Commerce suspended the processing of all licensing for exports to the U.S.S.R. and announced that out-

when attempting to apply its laws extraterritorially.<sup>143</sup> For instance, in *In re Marc Rich & Co., A.G.*, Switzerland stated that its government had exclusive power to order the production of records and refused to produce those records for the United States, even though the United States had extensive contacts with the case, Americans wholly owned the Swiss corporation, a New York office allegedly directed the transaction, U.S. customers allegedly bought the oil, and U.S. tax fraud was in controversy.<sup>144</sup>

The most difficult problems arise when nations attempt to impose their laws abroad when economic activity is centered abroad.<sup>145</sup> For instance, in 1985, the United States owned a controlling interest in thirty-five percent of Canadian industry.<sup>146</sup> Canada's export products contained U.S. components and technology.<sup>147</sup> If the United States attempted to exercise jurisdiction with such heavy interests in Canadian industry, it appears as though Canada does not have sovereign power to govern its own people and products.<sup>148</sup>

2. If the U.K.'s broad jurisdictional element uses universal jurisdiction, then it is inappropriate and not in line with universal jurisdiction's historical uses

The jurisdictional element of the Bribery Act is so broad that it is possible to construe its language to imply an intention to use universal jurisdiction to impose liability.<sup>149</sup> In Part I's hypothetical, the U.S. company has very few ties with the U.K. and violates the Act in Germany with a German company. Then the SFO brings a suit against the U.S. company. It

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standing licenses and reexport authorizations were subject to review . . . In June 1982, controls on oil and gas goods and technology were further expanded to include exports of non-U.S. origin goods and technical data by U.S. foreign subsidiaries as well as exports of commodities produced abroad under licensing agreements with U.S. firms . . . This second phase provoked the harshest criticisms from our allies.

*Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *In re Marc Rich & Co., A.G.*, 739 F.2d 834, 836–38 (2d Cir. 1984); *see also* Dam, *supra* note 142, at 889 n.12 (“The case involved an alleged 100 million dollar tax fraud scheme, based on a fraudulent chain of oil transactions. The U.S. sought records kept at the company headquarters in Switzerland and in many other foreign locations.”).

<sup>145</sup> Dam, *supra* note 142, at 889.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *C.f.* Bassiouni, *supra* note 5, at 88 (discussing how universal jurisdiction allows a nation to prosecute crimes to which it has no connection and despite objections of the defendants and victims' home nations; in universal jurisdiction, a nation operates on behalf of the international community).

appears as though the U.K. is using universal jurisdiction to prosecute. If this broad language propels the Act into the realm of universal jurisdiction, it is a gross misuse of the doctrine.<sup>150</sup>

Universal jurisdiction's original and even more progressive uses are not appropriate to apply in the bribery context. Beginning in the early 17<sup>th</sup> century, piracy, or robbery on the high seas, led to the concept of universal jurisdiction.<sup>151</sup> Universal jurisdiction allowed nations to prosecute any pirate it found, regardless of the pirate's nationality or in which jurisdiction the nation found the pirate.<sup>152</sup>

For centuries, universal jurisdiction only applied to piracy.<sup>153</sup> Over the last few decades, nations have utilized universal jurisdiction for numerous human rights crimes.<sup>154</sup> These nations have since expanded the doc-

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<sup>150</sup> *C.f.* LATTIMER & SANDS, *supra* note 125, at 50 (providing historical context for uses and development of universal jurisdiction); Eugene Kontorovich, *The Piracy Analogy: The Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. J. 183, 190 (2004) (describing universal jurisdiction's history and typical uses and application in piracy cases).

<sup>151</sup> The following cases state that universal jurisdiction over the crime of piracy is commonplace: *S.S. Lotus*, France v. Turkey, 1927 P.C.I.J. 5, 65 (Sept. 7, 1927) (dissenting opinion of Judge Moore); International Court of Justice, Concerning the Arrest Warrant, Democratic Republic of Congo v. Belgium, 2002 I.C.J. 3, 37–38 (Feb. 14, 2002) (separate opinion of President Guillaume); *In re Piracy Iure Gentium*, 1934 A.C. 586, 589 (July 2, 1934).

<sup>152</sup> *See e.g.* Republic v. Mohamed Ahmed Dahir & Ten (10) Others, Crim. Side No. 51, at 17–18 (July 26, 2010) (Sey.) (determining terrorism charges apply in a piracy case); Republic v. Abdi Ali et al., Crim. Side No. 14, at 2 (Nov. 3, 2010) (Sey.) (discussing accomplice liability for piracy in the Seychelles and establishing criminal attempt for piracy); *see also* Kontorovich, *supra* note 150, at 190.

Some commentators have mistakenly suggested that universal jurisdiction existed merely because the traditional jurisdictional categories did not cover piracy. The high seas lay outside the territorial jurisdiction of any nation, a global commons. But, the ships that pirates attacked were registered in a particular nation and thus were within that nation's flag jurisdiction; those on board the victim ship were nationals of some state and hence within its passive personality jurisdiction.

*Id.*

<sup>153</sup> Kontorovich, *supra* note 150, at 183.

<sup>154</sup> *See* United States v. Rezaq, 134 F.3d 1121, 1133 (1997) (discussing extraterritorial rights and jurisdiction); Kontorovich, *supra* note 150, at 196–97.

Justice Agranat recognized that unless a general principle could be extracted from the piracy precedent, universal jurisdiction would be vulnerable to the argument that nothing but piracy could be regarded as a universal offense. [This broad principle encompasses heinous acts that] “damage vital international interests; they impair the foundations and security of the international community [and] violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations.”

*Id.*



trine's application and are now more willing to invoke the doctrine.<sup>155</sup> Presently, nations use universal jurisdiction to prosecute significant international crimes including war crimes, crimes against humanity, and genocide.<sup>156</sup> Treaties have broadened the scope to other international crimes, such as terrorism.<sup>157</sup> However, national judicial decisions have seldom relied on universal jurisdiction.<sup>158</sup> To that end, the international community has not clarified whether universal jurisdiction is appropriate to apply beyond traditional uses.<sup>159</sup>

The doctrine of universal jurisdiction allows a nation to prosecute crimes to which it has no connection, despite any objections of the defendants' and victims' home nations.<sup>160</sup> In universal jurisdiction, a nation operates on behalf of the international community.<sup>161</sup> The operating nation has an interest in the "preservation of world order as a member of that community."<sup>162</sup> Naturally, a nation may also have its own interest in pursuing universal jurisdiction.<sup>163</sup> Universal jurisdiction allows a nation to exercise jurisdiction "without any jurisdictional connection or link between the place of commission, the perpetrator's nationality, and the enforcing state."<sup>164</sup> There are numerous recent examples of universal jurisdiction. Belgium used

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<sup>155</sup> See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d, 736, 746 (9th Cir. 2011) (discussing extending the alien tort statute extraterritorially); Kontorovich, *supra* note 150, at 196 ("Piracy was cited as the 'classic' example of such an offense.").

<sup>156</sup> Bassiouni, *supra* note 5, at 82.

<sup>157</sup> The agreements and acts concerning bribery that currently exist do not seem to broaden the scope to universal jurisdiction. *Id.*; Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 780 (2011).

There are several other toxic side effects of foreign bribery, such as subsidization of terrorism and brutal tyrants. Companies that routinely engage in corrupt business practices abroad play an active role in helping maintain the "ungoverned states" that "continue to export poverty and serve as havens for all sorts of gangsters, pirates, and terrorists." For example, investigators revealed that Siemens' indiscriminate use of its "web of secret bank accounts and shadowy consultants" to secure government contracts abroad resulted in "\$1.7 million to Saddam Hussein and his cronies."

*Id.*

<sup>158</sup> Bassiouni, *supra* note 5, at 82.

<sup>159</sup> *Id.*

<sup>160</sup> Kontorovich, *supra* note 150, at 183; see *S.S. Lotus*, 1927 P.C.I.J. (ser. A) (stating that the Lotus principle or Lotus approach, which many consider a foundation of international law, states that sovereign nations may act in any way they wish so long as they do not contravene an explicit prohibition. International law allows states ample discretion to characterize their jurisdictional approaches).

<sup>161</sup> Bassiouni, *supra* note 5, at 85.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

universal jurisdiction to indict Israeli Prime Minister Ariel Sharon for alleged responsibility for Christian Arabs' war crimes against Muslim Arabs in Lebanon.<sup>165</sup> A German Swiss court also relied on universal jurisdiction for convictions of Serbian officials who committed war crimes against Bosnian Muslims.<sup>166</sup>

There is no need to operate on behalf of the international community to prosecute bribery. The Bribery Act's intent was to act as a surrogate for the international community and to police the bribery issue.<sup>167</sup> Although the international community may have an interest in making legitimate business transactions internationally, avoiding monopolies, and creating fair business practices, the international community does not need the U.K. to extend jurisdiction to prosecute bribery.<sup>168</sup> Unlike crimes such as genocide, nations define bribery differently, so there is a transnational discrepancy in how nations should treat bribery offenses and who should prosecute them.<sup>169</sup> Universal jurisdiction applies when the crime is universally identified, defined, and abhorred so that it does not matter who prosecutes just as long as someone prosecutes.<sup>170</sup> For instance, when nations first used universal jurisdiction for acts of piracy, every nation had the same definition for

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<sup>165</sup> Decision of the Investigating Magistrate, Patrick Collignon, Court of First Instance, Brussels, Dossier No. 56/01, Case against Ariel Sharon and Amos Yaron, in response to Note by Michele Hirsh, Etat d'Israel - Considerations sur l'incompétence des juridictions belges pour connaître de la plainte déposée le 18.6.2001 sans l'aire portant le no. 54/1 de Monsieur le juge d'instruction Collignon [Considerations on the incompetence of Belgian jurisdictions to hear the complaint submitted on June 18, 2001]; Kontorovich, *supra* note 150, at 183.

<sup>166</sup> The case eventually failed on the merits, because none of the five prosecution witnesses could identify the defendant. *Republic of Austria v. Cvjetkovic*, *Landesgericht Salzburg*, 31 May 1995; Higher Regional Court Vienna, 22dVR4575/01; Extraterritorial Jurisdiction in the European Union, REDRESS, [http://fidh.org/IMG/pdf/Extraterritorial\\_Jurisdiction\\_In\\_the\\_27\\_Member\\_States\\_of\\_the\\_European\\_Union\\_FINAL.pdf](http://fidh.org/IMG/pdf/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union_FINAL.pdf).

[A]n investigation was instituted but not concluded against a Croatian citizen living in Austria. In 1993, a Croatian court convicted him in absentia for war crimes under the Croatian Penal Code and handed down a ten-year prison sentence. The suspect moved from Austria to Hungary, and in September 2001 was extradited to Croatia, where he is currently serving his prison sentence. The Austrian case has been suspended.

*Id.*; see e.g., Norway Court Cancels Bosnian's War Crimes Sentence, THE TELEGRAPH (Dec. 3, 2010), <http://www.telegraph.co.uk/news/worldnews/europe/bosnia/8179811/Norway-court-cancels-Bosnians-war-crimes-sentence.html> (discussing Norway's charges against a Bosnian-born man for Bosnian war crimes); *R v. Faryadi Zardad* [2007] EWCA Crim. 379 (finding Afghan warlord Faryadi Zardad guilty of conspiring to torture and take hostages in Afghanistan in the early 1990s under the U.K. Criminal Justice Act).

<sup>167</sup> Nichols, *supra* note 7, at 863 n.28; MINISTRY OF JUST., *supra* note 3, at 1, 15.

<sup>168</sup> See Nichols, *supra* note 7, at 863 n.28 (discussing the problems of corruption).

<sup>169</sup> Kontorovich, *supra* note 150, at 204.

<sup>170</sup> *Id.*

piracy and every nation felt the same need to prosecute it.<sup>171</sup> Conversely, not every nation defines bribery in the same way and not all nations prosecute bribery to the same extent.<sup>172</sup>

Although the universal jurisdiction doctrine is expanding, it has not reached the level of inclusion that permits its application to bribery. The most expansive view here looks not to where the crimes occurred or to the status of the perpetrator, but to the nature of the crime, which results in an application of universal jurisdiction.<sup>173</sup> According to some modern opinion, "heinousness is the common denominator of piracy and the new universal offenses: these are crimes that are profoundly despised throughout the world."<sup>174</sup> Those who commit heinous crimes cannot assert the protection of a nation's jurisdiction.<sup>175</sup> Corporations that commit or whose agents commit bribery are not committing a heinous crime. Although the implications of bribery are severe, these results do not offend the conscience as a crime like genocide does, to which universal jurisdiction extends.<sup>176</sup> Bribery deteriorates a government's efficiency, expels foreign business, and creates monopolies.<sup>177</sup> But, a corporation that commits bribery abroad should be able to assert the protection of a nation's jurisdiction because bribery does not raise the same issues that heinous crimes under the universal jurisdiction doctrine provoke leading to collective disgust and border-less efforts to prosecute.

The foundation for universal jurisdiction raises some interesting notions. Piracy is a *malum in se* crime reprehensible to a degree.<sup>178</sup> But historically, piracy belonged to a category of lesser crimes like murder rather than a higher class of offenses like war crimes.<sup>179</sup> The idea that piracy is a lesser evil than other crimes subject to universal jurisdiction makes piracy an ex-

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<sup>171</sup> Republic v. Mohamed Ahmed Dahir, Crim. Side No. 51 (2009) (Sey.) (determining if piracy can be prosecuted as terrorism); see e.g. Republic v. Abdi Ali, Crim. Side No. 14 (2010) (Sey.) (discussing accomplice liability for piracy in the Seychelles and establishing criminal attempt for piracy).

<sup>172</sup> Kontorovich, *supra* note 150, at 183.

<sup>173</sup> STEPHEN MACEDO, UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 18 (2006) (discussing universal jurisdiction as based "solely on the nature of the crime"); *Id.* at 204.

<sup>174</sup> Kontorovich, *supra* note 150, at 204.

<sup>175</sup> *Id.*

<sup>176</sup> See Nichols, *supra* note 7, at 863 n.28 (discussing corruption's consequences in society).

<sup>177</sup> VESILIND & GUNN, *supra* note 10, at 114; see WORLD BANK, *supra* note 28 (describing social implications of bribery); Nichols, *supra* note 7, at 863 n.28.

<sup>178</sup> Kontorovich, *supra* note 150, at 217–18.

<sup>179</sup> *Id.*; see MALCOLM NATHAN SHAW, INTERNATIONAL LAW 5 (2003) ("Universal jurisdiction over piracy has been accepted under international law for many centuries and constitutes a long-established principle of the world community.

ception to universal jurisdiction's current application to heinous crimes.<sup>180</sup> However, it is curious that if piracy's violence made it heinous and subject to universal jurisdiction, then why are *per se* acts of violence not subject to universal jurisdiction regardless of where they occurred?<sup>181</sup> Even with the idea that universal jurisdiction should extend to more crimes like piracy; universal jurisdiction's reach and rationale do not support an extension to bribery.

Bribery, on its face, is not violent like piracy is. Although bribery may carry attenuated acts of violence with it, bribery does not result in murder or other inherently evil crimes.<sup>182</sup> Even if bribery leads to other violent crimes like murder, the likelihood of such a result is less likely than piracy.<sup>183</sup> Although bribery may harm economies and societal efficiency, bribery should not fall under the guise of a heinous crime subject to prosecution from any nation. Because bribery does not have the same implications in every country, the international community is never going to agree that bribery rises to the level of a heinous crime subject to universal jurisdiction. The Bribery Act's language may extend to prosecuting a crime beyond its borders on behalf of the international community.<sup>184</sup> However, the U.K.'s potential use of this doctrine is highly inappropriate and inconsistent with the uses and functions of universal jurisdiction.

3. The Act creates a possibility for prosecutors to misuse the power the Act gives them

The Act's broad jurisdictional potential creates a possibility for misuse of power. Simply because the prosecutors claim that they will not prosecute to the extent that the Act allows does not remove their ultimate power to do so.<sup>185</sup> Additionally, the U.K. prosecutors' intent not to interpret

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<sup>180</sup> Kontorovich, *supra* note 150, at 218. ROBIN GEIB & ANNA PETRIG, *PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN* 145 (2011) ("Piracy is the classical example [of a crime under the purview of universal jurisdiction]". However, this statement provoked a measure of astonishment, given that piracy commonly does not even come close to matching the heinousness of genocide or crimes against humanity.").

<sup>181</sup> Kontorovich, *supra* note 150, at 218.

<sup>182</sup> *Id.* at 217–18.

<sup>183</sup> Kontorovich, *supra* note 150, at 217–18.

<sup>184</sup> MINISTRY OF JUST., *supra* note 3, at 1, 15.

<sup>185</sup> Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869 (2009). For example, U.S.

[f]ederal prosecutors wield enormous power. They have the authority to make charging decisions, enter cooperation agreements, accept pleas, and often dictate sentences or sentencing ranges. There are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion. As a result, in the current era dominated by pleas instead of trials, federal prosecutors are

the language of the Act to its full extent presents further problems.<sup>186</sup> This intent indicates that the Act is ineffective because it confers all its authority to the prosecutors.<sup>187</sup>

This view suggests that the interpretation, rather than the plain and ordinary text, is the law.<sup>188</sup> This backwards application of law creates a series of problems. First, the lack of predictable outcomes means that corporations do not have a benchmark for preparation and knowledge for avoiding liability. Second, the Act could raise compliance costs for corporations doing business internationally to potentially debilitating heights when they have loose ties to Britain. Third, the U.K. may use the Act to advance its own political agendas. Perhaps Britain is simply using the Act in retaliation to the OECD's criticisms.<sup>189</sup>

Additionally, if every domestic-bribery statute had such a long-arm provision, the result would potentially lead to endless liability for a violator. In the posited hypothetical, if British prosecutors decide to bring charges against the American company, the United States decides to bring charges under the FCPA, but Germany decides that the U.S. company did not engage in bribery at all, not only does it produce heavy litigation costs for the American company, but seems to raise more political issues than legal issues. While the harm of the crime is felt in Germany, the unharmed U.K. brings charges. This type of prosecution that the Bribery Act allows does not contain a logical causal link between the harm suffered and the liable party.

Finally, the Act prescribes serious sanctions for violations.<sup>190</sup> An individual violator's maximum penalty is ten years in prison (an increase

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not merely law enforcers. They are the final adjudicators in the 95% of cases that are not tried before a federal judge or jury.

*Id.*

<sup>186</sup> MINISTRY OF JUST., *supra* note 3, at 1, 15.

<sup>187</sup> *United States v. Boder*, 342 F.Supp. 2d 176, 180 (S.D. N.Y. 2004) (stating that when a court interprets an ambiguous criminal statute it must "be resolved in favor of lenity"); *see* *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[e]nsures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.").

<sup>188</sup> The language of the law should limit the prosecutor's power to indict; the prosecutor should not limit his own power through his interpretation. Although interpretation of law is critical, the text of the law should govern that interpretation, not merely the spirit of the law. *Boder*, 342 F.Supp. at 180.

<sup>189</sup> *Warin*, *supra* note 57, at 4–5; ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT: WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, UNITED KINGDOM: PHASE 2BIS, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 4 (2008) <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>190</sup> The Bribery Act, 2010.

from a maximum of seven years in the prior act), a fine, or both.<sup>191</sup> A corporation's maximum penalty is an unlimited fine.<sup>192</sup> Additionally, there are consequences such as confiscation of assets, director disqualification, and disqualification from public procurement.<sup>193</sup> If Britain prosecutes a company with an attenuated connection to the U.K. and imposes such serious sanctions on that company, then this Act not only seems to misuse extraterritoriality and discretion, but it is also unfair to these types of violators.

C. *The World is Not a Global Village that is Conducive to Far-Reaching Extraterritorial Laws on Bribery*

The global village is not ripe for far-reaching extraterritorial laws on bribery. Ubiquitous laws with extraterritorial application place values in peril.<sup>194</sup> This application of law may impose "incongruent or discordant" values on people in situations where viable, moral differences could arise.<sup>195</sup> An extraterritorial law that focuses on one value system "is too narrow to achieve wide acceptance."<sup>196</sup> Although in the future nations may merge into less-defined nations, the world currently consists of separate sovereignties, and these sovereignties have a right to their own moral constitutions and governance absent another nation's imposition of law.<sup>197</sup>

Commentators, the OECD, and groups such as the Organization of American States continuously endorse legislation that mirrors the FCPA.<sup>198</sup> Advances in technology resulting in a smaller, more interconnected world may allow and develop transnational value convergence and united agendas, which may deem extraterritorial bribery laws less problematic.<sup>199</sup>

But, the modern world is not at this point.<sup>200</sup> When one nation, like Britain, enforces its laws upon another state, that nation "imposes its discre-

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<sup>191</sup> The Bribery Act, 2010; Paul Schofield, *Bribery Act Warning—New Laws Come into Force April 2011*, FARLEYS (Nov. 23, 2011), <http://www.farleys.com/blog/bribery-act-warning-new-laws-come-into-force-april-2011>.

<sup>192</sup> Schofield, *supra* note 192.

<sup>193</sup> *Id.*

<sup>194</sup> Salbu, *supra* note 31, at 230; Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 417 n.68 (1995).

<sup>195</sup> Salbu, *supra* note 31, at 232 (providing that different nations have different standards of acceptable practices with respect to bribery and one set of rules to govern these differences is unimaginable; see generally MARSHALL McLUHAN & QUENTIN FIORE, *WAR AND PEACE IN THE GLOBAL VILLAGE* (1968) (providing McLuhan's global village concept).

<sup>196</sup> *Id.* at 231; Steven R. Salbu, A. Peter Mutharika, Essay, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 FORDHAM INT'L L.J. 1706, 1719 (1995).

<sup>197</sup> Salbu, *supra* note 31, at 231.

<sup>198</sup> *Id.* at 225.

<sup>199</sup> Salbu, *supra* note 31, at 226.

<sup>200</sup> *Id.*

tionary values” as well.<sup>201</sup> This imposition carries with it dangers of intrusiveness, paternalism, imperialism, disrespect for regional values, resentment, and potential political conflict.<sup>202</sup> The U.K. Bribery Act represents a possibility for these dangers to materialize. As previously mentioned, nations have different definitions of bribery and different levels of acceptable practices.<sup>203</sup> Britain should not impose its definitions of corruption and thresholds for appropriate conduct to violators with attenuated connections to Britain. Even though the SFO may not have the ability to prosecute a high potential of violations due to the size and resources of the department, the U.K. should not bestow upon itself the sole responsibility of a global policeman of international bribery, which may occur if prosecutors use the broad discretion the Act gives them.<sup>204</sup>

*D. The Act May Have Serious Implications on U.K. Business*

The U.K. Bribery Act's implications on U.K. businesses are difficult to measure. There is not much if any evidence of the effects that the Bribery Act has had on U.K. business besides corporate anticipatory compliance measures. Since the U.S.'s FCPA is similar to the U.K. Bribery Act, it is appropriate to analyze the prospective implications of the U.K. Bribery Act through the lens of the FCPA's effects on U.S. business.

Many criticize and regard the FCPA as causing U.S. companies a disadvantage in overseas business.<sup>205</sup> In a 1981 report detailing U.S. companies' response to a questionnaire regarding FCPA compliance, the Comptroller General reported to Congress that sixty percent of those companies responded that they could not compete successfully with foreign competitors who paid bribes.<sup>206</sup> Specifically, aircraft and construction companies

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<sup>201</sup> *Id.* at 227.

The case against criminalizing extraterritorial bribery is built on the following logic: When laws are imposed across borders, there should be considerable transnational value consensus. Otherwise, the imposition threatens to deny respect for legitimate regional value variance. Moreover, the state being imposed upon may resent the intrusion as imperialistic or even menacing, resulting in increased potential for subtle or more palpable retaliation.

*Id.*

<sup>202</sup> Salbu, *supra* note 31, at 227.

<sup>203</sup> *Id.*

<sup>204</sup> See *The SFO's Response*, SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk/bribery--corruption/the-sfo's-response.aspx> (last visited Feb. 29, 2012) (discussing reporting and the SFO's settlement and plea negotiation efforts).

<sup>205</sup> H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407 (1999); Impact of Foreign Corrupt Practices Act on U.S. Business, FED. SEC. L. RPTR. (CCH) P 82, 841 (1981).

<sup>206</sup> Brown, *supra* note 206, at 407; Impact of Foreign Corrupt Practices Act on U.S. Business, FED. SEC. L. RPTR. (CCH) P 82, 841 (1981); see Annual Report of the Office of the

noted that the FCPA restrictions caused them to lose business.<sup>207</sup> However, the Comptroller General reported verifiable data could neither support nor refute the companies' belief.<sup>208</sup>

Other nations seem to resist employing U.S. companies for work subject to U.S. extraterritorial purview.<sup>209</sup> In fact, for this reason, some foreign companies use non-U.S. companies for long-term industrial work or export manufacturing, which affects U.S.-company sales and U.S. company involvement in joint ventures.<sup>210</sup> However, it is not clear if this is always true.<sup>211</sup> A Transparency International report stated that corporations with an anti-corruption program and ethical guidelines suffered fifty percent fewer instances of corruption and were less likely to lose business opportunities than corporations without those programs.<sup>212</sup> Transparency International Chair Huguette Labelle states, "[w]inning on anti-corruption means adding to the bottom line. It is time that corporations face up to the risk of paying millions in fines and the long-term loss of trust from their customers and shareholders."<sup>213</sup>

In a survey, four hundred stockholders of public corporations and four hundred certified public accountants noted that the FCPA resulted in losses for U.S. companies.<sup>214</sup> Conversely, a 1977–1978 survey of Fortune 500 companies showed that sixty-six percent of respondents did not feel as though the FCPA placed their companies at a disadvantage.<sup>215</sup> Rather, the survey showed that the U.S. companies that lost business due to bribery lost that business to other U.S. companies.<sup>216</sup> Finally, the study reported that

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United States Trade Representative on Discrimination in Foreign Government Procurement (last modified Apr. 30, 1996) <http://www.ustr.gov/reports/special/title7.html> ("It appears that many U.S. firms are hesitant to come forward publicly with cases in which they have seen bribery and corruption influence contract awards for fear that they may experience a commercial backlash with respect to future contracts.").

<sup>207</sup> Brown, *supra* note 206, at 407.

<sup>208</sup> *Id.*

<sup>209</sup> Dam, *supra* note 140, at 887.

<sup>210</sup> *Id.* ("The political and economic implications are so significant that they could become a bigger threat to American economic interests than the present concerns about tariffs, quotas, and exchange rates.").

<sup>211</sup> *Engaging the Private Sector in the Fight Against Corruption*, TRANSPARENCY INT'L, [http://www.transparency.org/whatwedo/activity/engaging\\_the\\_private\\_sector\\_in\\_the\\_fight\\_against\\_corruption](http://www.transparency.org/whatwedo/activity/engaging_the_private_sector_in_the_fight_against_corruption) (last visited June 27, 2012).

<sup>212</sup> *Id.*

<sup>213</sup> Rob O'Brien, Watchdog Slams Global Corruption, GOV'T NEWS (Sept. 24, 2009, 2:29 PM), <http://www.governmentnews.com.au/2009/09/24/article/Watchdog-slams-global-corruption/GFGNATKCXC.html>.

<sup>214</sup> Brown, *supra* note 206, at 407 n.5.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*



U.S. companies were reluctant to report incidents in which they lost business to another company that uses bribery in transactions.<sup>217</sup> The United States does not seem to view these losses, if any, as more important than the other harms that bribery causes.<sup>218</sup>

It is difficult to discern what is the real loss for businesses; the only certainty is that corruption causes societal harm. The results of compliance to the bottom line are blurred. These problems and complications could translate to Britain as a result of its Bribery Act.

*E. The Act Potentially Discredits International Law*

Critics have stated that international law is already less effective and less important than domestic law.<sup>219</sup> These critics assert that nations only use international law to secure their own interests, and international law does not force nations to comply when the law does not pursue those interests.<sup>220</sup> If the U.K. does not prosecute to the extent the Act allows, it harms the practice of international law because it further waters down the field by employing broad, to the point of almost meaningless and ineffective, language.<sup>221</sup>

Additionally, if the U.K. does enforce the Act, it undercuts the feasibility of international law because it seems to override international treaties that remedy transnational bribery disputes.<sup>222</sup> This ambiguous Act bolsters its critics' claims because through it, the U.K. purports to act as an international arbiter—solving the world's bribery problem through attenuated connections to U.K. jurisdiction.<sup>223</sup> However, the U.K. will probably not enforce the Act when it is not in its best interest or is not easily feasible to do so. Whose interests will the U.K. prosecutors choose, the U.K.'s or the international community's, and who will force compliance when the U.K. does not pursue its own interests? The Act sets a bad precedent for future bribery acts that involve reaching beyond the limits of a nation's jurisdiction

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 407 n.6.

<sup>219</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 186–189 (2005); see Deen K. CHATTERJEE, *ENCYCLOPEDIA OF GLOBAL JUSTICE* 134 (2011) (“especially given that international law is already generally acknowledged to be less stable than the domestic law of well-established constitutional democratic states.”)

<sup>220</sup> GOLDSMITH & POSNER, *supra* note 220, at 186–89.

<sup>221</sup> See *The Bribery Act*, *supra* note 1, § 7(5) (providing the basis for such expansive scope for prosecution).

<sup>222</sup> A discussion of the functionality of the International Conventions preventing bribery is beyond the purview of this Note.

<sup>223</sup> *Id.*; Lord McNally, *Bribery Act 2010*, HANSARD DOCUMENT (Mar. 30, 2011), <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110330-wms0001.htm#11033060000223>.

to prosecute any foreign violator because of the Act's lack of clarity and potential enforcement inconsistencies.

#### IV. PROPOSED SOLUTIONS TO THE PROBLEMS THAT THE ACT POSES

International conventions like the OECD and UNCAC in concert with ever more stringent domestic legislation attempt to create a uniform and pervasive transnational fight against bribery.<sup>224</sup> Although more nations are beginning to impose harsher punishments for bribery, every nation does not view bribery uniformly.<sup>225</sup> If every country, however, takes it upon itself to prosecute and establish a standard for bribery with harsh penalties for violators with limited jurisdictional ties, chaos would result. The U.K. is attempting to take such a stance. The international community and possible violators must know where Britain's jurisdictional power begins and ends. However, it is difficult to find that bright line within the Bribery Act.<sup>226</sup>

Currently, the SFO is looking for difficult cases to tackle, specifically those cases involving foreign companies that have a British business presence and are violating the Act in other countries.<sup>227</sup> These types of prosecutions will likely involve extraterritoriality and the dangers that accompany it.<sup>228</sup> Britain should have the ability to prosecute those companies that harm its businesses and society; however, Britain should not have the power to prosecute companies with attenuated ties to Britain that bribe in violation of its laws.

There are two obvious solutions to this problem, both of which are inadequate: (1) British prosecutors could refrain from exercising broad

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<sup>224</sup> THE OECD CONVENTION ON BRIBERY: A COMMENTARY 406 (Mark Pieth, Lucinda A. Low & Peter J. Cullen, eds., 2007); United Nations Convention against Corruption pmbl., Dec. 11, 2003, S. Treaty Doc. No. 109-6 (2005), 43 I.L.M. 37; Richard Alderman, *The UK Bribery Act: Engagement with Companies and Compliance Effects*, FCPA PROFESSOR, November 29th, 2011, <http://www.fcprofessor.com/the-uk-bribery-act-engagement-with-companies-and-compliance-effects>.

<sup>225</sup> JON S.T. QUAH, CURBING CORRUPTION IN ASIAN COUNTRIES: AN IMPOSSIBLE DREAM? 321 (2011) (describing gift-giving in Korea); SUBHASH DURLABHI & NORTON E. MARK JAPANESE BUSINESS: CULTURAL PERSPECTIVES 109 (1993) (describing gift-giving in Japan); Alderman, *supra* note 225.

<sup>226</sup> Alderman, *supra* note 225.

<sup>227</sup> *Id.*; see *The SFO's Response*, *supra* note 205 (discussing reporting and the SFO's settlement and plea negotiation efforts); Simon Bowers, *Financial Fraud Risks Slipping Under the Radar as SFO Tackles Bribery Abroad*, THE GUARDIAN (July 23, 2011), <http://www.guardian.co.uk/law/2011/jul/24/financial-fraud-sfo-overseas-bribery> ("The Serious Fraud Office (SFO) has more investigators working on overseas bribery investigations than on complex and large-scale probes into suspected white-collar crimes originating in the City, raising concerns that tackling the very biggest UK fraud cases may be slipping as the agency's top priority.")

<sup>228</sup> Alderman, *supra* note 233.

reaching powers under the Act; or (2) Britain could repeal the Act. The first solution is not the best option because it does not guarantee consistent behavior. While prosecutors could refrain from prosecuting attenuated cases for the time being, circumstances could change and prosecutors could decide to start prosecuting these cases. The second solution is not the best option because Britain's former bribery regulatory framework is ineffective. This Act is clearly more useful than the old framework, but its extraterritorial reach component is problematic.

A better solution is one where Britain could amend the Act's extraterritorial reach component. The U.K. could change the language from *a business* to *an established business* in order to convey to prosecutors that foreign violators must have a physical business in Britain. Then, the U.K. could mirror the language of the FCPA, "if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the authority of the [United Kingdom]."<sup>229</sup> This would trigger the effects test for Britain to exercise jurisdiction.<sup>230</sup> This amendment would make the Bribery Act more acceptable than the Act is in its current state. This option is the easiest to accomplish a desirable result that will affect enforcement. By adding one word to the provision, *established*, and language that would trigger the effects test, the entire provision would become satisfactory.

Extraterritorial antitrust law brings similar complications to transnational business as bribery laws and provides guidance for limiting the extraterritorial reach of domestic laws. With international commerce, liberal trade law, and new instruments of trade, antitrust has generated debate over defining the limits of nations' extraterritorial reach.<sup>231</sup> Defining a nation's extraterritorial laws is difficult because of the high likelihood of international political disputes, international conflict, and foreign compliance issues.<sup>232</sup> Generally, these definitions and debates center on international

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<sup>229</sup> Warin, *supra* note 57, at 8–10; 15 U.S.C. § 78dd–1.

<sup>230</sup> The original text of the Act states:

- (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere);
- (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom;
- (c) a partnership which is formed under the law of any part of the partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

The Bribery Act, *supra* note 1, § 7(5).

<sup>231</sup> 2011 Harvard Law Review Association, *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1269, 1270 (2011).

<sup>232</sup> *Id.*

comity.<sup>233</sup> The recent growth in comity has motivated extraterritorial jurisdiction.<sup>234</sup>

U.S. law has dealt with comity and extraterritorial reach in the anti-trust context in the following way. In *Hoffman-La Roche Ltd. v. Empagran S.A.*, the court used the concept of comity to narrowly interpret the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) definition of extraterritorial antitrust limitations.<sup>235</sup> Even though the foreign defendant’s conduct had effects in the United States and abroad, the court refused to exercise jurisdiction because the defendant’s “domestic effects were [not] linked to that foreign harm.”<sup>236</sup>

This holding encouraged other courts to find against extraterritorial use.<sup>237</sup> The D.C. Circuit and most circuits require a party to show proximate causation, which further limits the reach of extraterritoriality in antitrust suits.<sup>238</sup> However, the First Circuit held that the U.S. Department of Justice could prosecute foreign companies for “activities committed abroad which have a substantial and intended effect within the United States.”<sup>239</sup>

These trends in both civil and criminal extraterritoriality offset each other’s negative implications.<sup>240</sup> The civil trend of curtailing jurisdiction draws criticism for decreasing the deterrent effect of U.S. antitrust law abroad.<sup>241</sup> However, the increase in criminal enforcement abroad along with the threat of criminal fines should at least partly offset that effect.<sup>242</sup> If the U.K. looked to the trend in anti-trust law and corruption, did not prosecute foreign attenuated cases and instead criminally prosecuted those cases with a “substantial and intended effect” in the U.K., the U.K. Bribery Act would not cause the amount of problems it may cause as it is written now.<sup>243</sup>

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<sup>233</sup> See generally Christen Broecker, *The Clash of Obligations: Exercising Extraterritorial Jurisdiction in Conformance with Transitional Justice*, 31 LOY. L.A. INT’L & COMP. L. REV. 405, 409 (2009) (discussing exercising extraterritorial jurisdiction and international comity).

<sup>234</sup> 2011 Harvard Law Review Association, *supra* note 232, at 1270.

<sup>235</sup> *Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004); 2011 Harvard Law Review Association, *supra* note 232, at 1275.

<sup>236</sup> 2011 Harvard Law Review Association, *supra* note 232, at 1275 (“Such a link, the Court reasoned, would satisfy the FTAIA’s effects test by showing that the anticompetitive conduct was not ‘significantly foreign,’ but exercising jurisdiction in the absence of linked domestic effects would mark an extraterritorial ‘extension of the Sherman Act’s scope.’”).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*; *United States v. Nippon Paper Industries Co.* 109 F.3d 1 (1st Cir. 1997).

<sup>240</sup> 2011 Harvard Law Review Association, *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1269, 1278 (2011).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

## V. CONCLUSION

Although the FCPA, the UNCAC, and the OECD guided the provisions of the U.K. Bribery Act, the Act takes an extraterritorial approach to foreign violators that is inappropriate and sets a dangerous precedent.<sup>244</sup> It is indisputable that bribery is harmful and it should warrant proper sanctions.<sup>245</sup> However, the appropriate body of law should impose those sanctions. This body should have close ties to the violation. It should not impose its definitions, liabilities, and punishments on the citizens and businesses of foreign violators with limited and attenuated ties to the imposing nation.<sup>246</sup>

Extraterritoriality in the bribery context is itself questionable and complex.<sup>247</sup> Nations should have the power to prosecute violators of their laws if that violation affects its citizens. The FCPA pushes this limit, and it allows prosecution for foreign violators, but the U.S. Securities and Exchange Commission and the U.S. Department of Justice keep the connection within reason.<sup>248</sup> Additionally, the United States noted that it does not want to use the FCPA to act as the world police of corruption.<sup>249</sup> The United States simply wants to have the power to prosecute when it is necessary and germane to do so.<sup>250</sup> The U.K. takes a step over the proverbial line and onto a slippery slope of imposition and potentially bad precedent.

If the U.K. imposes liability on a company with loose ties to the U.K. as this Act allows, then it appears as though the U.K. is utilizing a form of extraterritoriality reserved for the most debilitating and shocking crimes.<sup>251</sup> Although bribery can lead to terrorism and economic and societal damage, corruption is not the type of crime that should allow the U.K. to act

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<sup>244</sup> 15 U.S.C.A. § 78dd-1; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAF/IME/BR(97)20, 37 ILM 1 (1998), available at <<http://www.oecd.org>>; G.A. Res. 58/4, U.N. GAOR, 58<sup>th</sup> Sess., Supp. No. 108, U.N. Doc. A/RES/58/4, at 22 (Nov. 21, 2003).

<sup>245</sup> See DANIEL QUINN MILLS, WHEEL, DEAL, AND STEAL: DECEPTIVE ACCOUNTING, DECEITFUL CEOs, AND INEFFECTIVE REFORM 48 (2003) ("Corruption has two different types of effects on us. First, it causes unjust transfer of wealth and income from some people to those who are corrupt. Second, it reduces the efficiency of our economy and so reduces the well-being of all of us."); *supra* note 10, at 274 ("The overwhelming consensus in both economics and political science literature is that bribery is harmful.").

<sup>246</sup> Salbu, *supra* note 31, at 231.

<sup>247</sup> *Id.* at 238.

<sup>248</sup> See 15 U.S.C.A. § 78dd-1.

<sup>249</sup> See *Bribery Law in the US and UK: A Case of Continuing Convergence?*, in THOMSON REUTERS, ANTI-BRIBERY AND CORRUPTION: A SPECIAL REPORT 23 (2011) (discussing the scope of the FCPA in comparison to the Bribery Act).

<sup>250</sup> See *id.* at 23-24 (noting successful application of the FCPA in U.S. anti-bribery prosecutions).

<sup>251</sup> Bassiouni, *supra* note 5, at 82.

as a national surrogate—battling corruption on behalf of the world’s community.<sup>252</sup> This use of extraterritoriality is a gross misuse of the doctrine of universal jurisdiction.

Even if the U.K. never uses the broad provision as universal jurisdiction, the Act creates a host of complex international issues including prosecutor misuse of power and an affront to international law. If the U.K. is the first of many nations to impose its bribery laws on foreign corporations with loose ties to Britain, then there could be a potential for limitless liability. Moreover, the prosecutions could become politically charged and motivated causing governmental disputes and complications. These prosecutions could stunt the growth of trade and transnational commerce far beyond business consequences.

The U.K. should not have the transnational power it has given itself, and the U.K. should amend the Act so that it’s the extraterritorial breadth does not exceed that which the FCPA allows. The international community should work to prohibit bribery, but each nation on its own terms and within its own cultural norms. As Allan E. Gottlieb, Ambassador of Canada to the United States once said, “We must, in the final analysis, know where one jurisdiction ends and another begins and we must respect the line of demarcation, as ill-defined and amorphous as they may be.”<sup>253</sup>

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<sup>252</sup> MINISTRY OF JUST., *supra* note 3, at 1, 15.

<sup>253</sup> Address by Allan E. Gottlieb, Ambassador of Canada to the United States, New York International Law Association (Nov. 12, 1982).