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Recalibrating after Kiobel: Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act ("RICO") in Litigating International Corporate Abuse

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Recalibrating after Kiobel: Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act ("RICO") in Litigating International Corporate Abuse

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I would like to thank Jenny Martinez and Allen Weiner for helpful guidance.

**RECALIBRATING AFTER *KIOBEL*: EVALUATING
THE UTILITY OF THE RACKETEER
INFLUENCED AND CORRUPT ORGANIZATIONS
ACT (“RICO”) IN LITIGATING INTERNATIONAL
CORPORATE ABUSE**

Julian Simcock[†]

ABSTRACT

*This analysis seeks to explore the unexamined question of whether the Racketeer Influenced and Corrupt Organizations Act (“RICO” or “The Act”) could one day become a useful surrogate for the Alien Tort Statute (“ATS”) in litigating international corporate abuses. Decades after the ATS became a robust tool for bringing claims for international violations in U.S. courts, the U.S. Court of Appeals for the Second Circuit recently ruled in *Kiobel v. Royal Dutch Petroleum Co.* that corporations cannot be held liable for torts in violation of the law of nations under the ATS.¹ Rulings by the D.C. Circuit² and the Seventh Circuit³ quickly breathed new life into the debate, and the circuit split is now destined for resolution by the Supreme Court. Although the final outcome is still unknown, *Kiobel*’s reverberations are already apparent. With corporations potentially immune from the reach of the ATS, the search has begun for vehicles by which to sustain momentum in litigating international corporate abuses.*

Litigators have highlighted RICO as one potential alternative.⁴ Although originally structured as a domestic device to combat organized crime, over the past decade RICO has been deployed increasingly often in litigation concerning international corporate abuse.⁵ This Note seeks to

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¹ 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S.Ct. 472 (2011).

² *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11,15 (D.C. Cir. 2011) (“[C]ontrary to . . . the Second Circuit, we join the Eleventh Circuit in holding that neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.”).

³ *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011) (“All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable [under the ATS].”).

⁴ *See Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1248–49 (N.D. Cal. 2004) (summary judgment order); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *20–27 (S.D.N.Y. Feb. 28, 2002).

⁵ *Id.*

explore the question of whether RICO is truly a useful tool for this realm of litigation.

I have been unable to find any work that addresses this issue specifically. Commentators have addressed the best manner in which to shape RICO claims as an adjunct to ATS litigation,⁶ but never in isolation, and never in a manner that tackles post-Kiobel implications. As I explain in this Note, Kiobel has added increased urgency to the search for other strategies. Commentators have also addressed RICO's applicability to domestic corporations,⁷ and RICO's use in casting a web of liability across peripheral actors⁸—both of which I draw upon in my analysis. None of these assessments, however, considers RICO's utility in litigating against such entities for actions committed abroad, an issue especially worthy of exploration given the recent developments in ATS litigation.

This Note builds on work conducted by Beth Stephens concerning the Alien Tort Statute.⁹ It also draws upon the work of Chimène Keitner in helping to establish the context for why, given the complicated choice of law debate that surrounds ATS litigation, the push toward RICO has some understandable appeal.¹⁰ I use work by G. Robert Blakey, Professor of Law at Notre Dame Law School and expert on RICO, to provide the foundations for my assessment regarding the evolution of RICO's domestic application.¹¹ Finally, from a practical perspective, this piece also builds upon the litigating tactics that were deployed in two well-known ATS cases: *Bowoto v. Chevron Texaco Corp.*¹² and *Wiwa v. Royal Dutch Petroleum Co.*¹³ In both instances, the litigators supplemented their ATS claims with RICO claims, providing the backdrop upon which my analysis regarding RICO's extraterritorial obstacles is formed.

I conclude that intuitions regarding RICO's utility in this realm have proven largely misguided. A thorough analysis of RICO's structure, evolution in domestic case law, and burgeoning use in cases concerning international activity reveals that despite RICO's appeal, it is a limited tool for litigating against corporate abuse abroad. Although RICO offers

⁶ See BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 42 (2d ed. 2008).

⁷ See e.g., G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 243 n.20 (1982).

⁸ See Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the Reves "Operation or Management" Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1 (2006).

⁹ See STEPHENS ET AL., *supra* note 6, at 42.

¹⁰ See Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 62–65 (2008).

¹¹ See, e.g., Blakey, *supra* note 7, at 307–325; see also G. Robert Blakey, *On the Waterfront: RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341 (1980); G. Robert Blakey & B. Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

¹² 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

¹³ No. 96 CIV. 8386(KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

several structural and remedial options that are helpful to litigators—particularly for plaintiffs who have alleged economic claims, such as injury to business or property—RICO’s disadvantages outweigh these benefits. RICO provides a generally narrow set of remedial options, is hamstrung by a more onerous test of extraterritorial jurisdiction than that of its ATS counterpart, and—based on the trajectory of domestic case law—will likely be of limited help in avoiding the complicated choice of law issues which remain a part of ATS litigation. These findings will remain true regardless of the way in which Kiobel may be resolved by the Supreme Court. As a result, RICO claims are best used, if at all, as an adjunct tactic to ATS litigation, rather than as the primary thrust of legal strategy.

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INTRODUCTION

By almost any account, September 17, 2010 was a trying day for public interest lawyers. Decades after the Alien Tort Statute (“ATS”) had become a robust tool for bringing claims for international violations in U.S. courts,¹⁴ the Second Circuit ruled in *Kiobel v. Royal Dutch Petroleum* that corporations cannot be held liable for torts in violation of the law of nations under the ATS.¹⁵ Rulings by the D.C. Circuit¹⁶ and the Seventh Circuit¹⁷ quickly breathed new life into the debate, prompting the Supreme Court to grant certiorari and resolve the split. But definitive answers were slow to arrive. On March 5, 2012, the Supreme Court took the unusual step of asking the parties to return with expanded arguments.¹⁸ It called upon parties to address the following question in a revised round of briefing: “Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”¹⁹

The reverberations are already apparent. While the ATS had previously allowed litigators to bring civil actions in U.S. courts for a small range of violations against the law of nations, if the Second Circuit’s ruling prevails, corporate entities will be largely out of reach. In fact, given the nature of the Court’s March 5th order, the ramifications may be even more expansive: the Alien Tort Statute may be seriously circumscribed even in its applicability to non-corporate actors. Accordingly, as the parties in *Kiobel* push forward, litigators in the broader community appear to be undergoing a recalibration—a search for alternative vehicles by which to sustain

¹⁴ The ATS had existed for over 200 years, yet the statute had received little attention until 1976, when a team of enterprising lawyers employed the device on behalf of a Paraguayan client seeking justice for the torture and murder of her husband. Their efforts led to the landmark decision, *Filártiga v. Peña-Irala*, which expressly enabled the victims of international rights violations to bring civil actions in U.S. federal courts. 630 F.2d 876 (2d Cir. 1980).

¹⁵ 621 F.3d 111 (2d Cir. 2011).

¹⁶ *See Doe v. Exxon Mobil Corp.*, No. 09–7125 2011 WL 2652384 (D.C. Cir. 2011) (“[C]ontrary to . . . the Second Circuit, we join the Eleventh Circuit in holding that neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.”).

¹⁷ *See Flomo v. Firestone*, 643 F.3d 1013, 1017 (7th Cir. 2011) (“All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable [under the ATS]”).

¹⁸ Order In Pending Case, 565 U.S. ___ (Mar. 5, 2012) (*available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/10-1491-order-rearg-3-5-12.pdf>).

¹⁹ *Id.*

the momentum in litigating corporate involvement in extraterritorial abuses. If the Supreme Court endorses the Second Circuit's ruling on the issue, or if it limits the ATS more broadly, the search for alternatives will develop a renewed sense of urgency.

While practitioners may struggle to find a vehicle with the same potency as the ATS, litigators have highlighted the Racketeer Influenced and Corrupt Organizations Act ("RICO") as a potential alternative.²⁰ Although originally structured as a domestic device to combat organized crime, over the past decade RICO has been deployed increasingly often in litigation concerning international corporate abuse.²¹

The analysis herein seeks to explore the unexamined question of whether RICO could one day prove a useful surrogate for ATS litigation. A thorough analysis of RICO's structure, evolution in domestic case law, and burgeoning use in cases concerning international activity, reveals that despite RICO's intuitive appeal, it is a limited tool for litigating against corporate abuse abroad. Although RICO offers several structural and remedial options that are helpful to litigators—particularly for plaintiffs who have alleged economic claims, such as injury to business or property—RICO's disadvantages outweigh these benefits. The Act provides a generally narrow set of remedial options, is hamstrung by a more onerous test of extraterritorial jurisdiction than that of its ATS counterpart, and—based on the trajectory of domestic case law—will likely be of limited help in avoiding the complicated choice of law issues which remain a part of ATS litigation. These findings will remain true regardless of the way *Kiobel* is resolved by the Supreme Court. As a result, RICO claims are best used, if at all, as an adjunct tactic to ATS litigation, rather than as the primary thrust of legal strategy.

A. *The Evolution of ATS Litigation and the Search for New Methods*

Although *Kiobel* has given the search for alternative litigation strategies new urgency, the trend was well underway before the Second Circuit's decision. Almost two decades after the resurrection of the ATS enabled the victims of international human rights violations to bring civil actions in federal courts,²² two trends in ATS

²⁰ See, e.g., *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1248-49 (N.D. Cal. 2004); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *20-27 (S.D.N.Y. Feb. 28, 2002).

²¹ See cases cited *supra* note 20.

²² See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

litigation led litigators to reach for supplemental tactics. First, ATS-related litigation shifted increasingly from individuals and government officials to corporate entities.²³ Unlike earlier ATS cases, this recent wave of claims pose substantial economic consequences that cannot easily be shirked in the event of adverse judgments.²⁴ Second, corporate-based ATS litigation hinges more often on proving a company's *complicity* in torts, rather than ascribing fault for the direct perpetration of crimes. This process requires parsing a complicated and largely unresolved choice of law question;²⁵ and, in turn, proving the existence of the requisite mental state associated with that standard.²⁶ In particular, courts have split on whether to employ a purposefulness standard in cases involving international accomplice liability, or whether knowledge should suffice as the requisite mental state.²⁷

B. Exploring RICO as a Potential Alternative

Originally designed as a legislative response to the growing problem of organized crime, RICO has since been used to target the criminal activities of unions,²⁸ abortion protest groups,²⁹ and a wide range of corporate entities.³⁰ The well-documented flexibility of RICO as a tool for ascribing liability to individuals who are removed from the direct perpetration of crimes has led some commentators to suggest that the Act may be an appropriate vehicle by which to pursue corporate involvement in international abuses.³¹ In light of these suggestions, and in the context of the broader shifts taking place in ATS litigation, a closer reevaluation of RICO is instructive.

²³ See David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STANFORD INT'L L. J. 121, 129 (2010).

²⁴ This is unlike many of the default judgments awarded against former government officials in the earlier rounds of ATS cases. Many of the defendants refused to remain in the U.S. to defend against claims, and in the event that a final judgment was awarded against them, few had the financial means with which to adequately compensate the victims. See STEPHENS ET AL., *supra* note 6, at 42.

²⁵ Chimène Keitner has provided a considered view of both sides in this debate. See Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 62–65 (2008).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union*, 639 F.2d 782, 790 (D.C. Cir. 1988).

²⁹ See *Nat'l Org. For Women v. Scheidler*, 510 U.S. 249 (1994).

³⁰ See, e.g., *Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc.*, 74 F. Supp. 2d 221, 229 (E.D.N.Y. 1999); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 244 (1989).

³¹ See STEPHENS ET AL., *supra* note 6, at 113–17.

The contours of this analysis include four parts. Part I explores the congressional history and statutory language of RICO, as well as some of the reasons why RICO's structure lends itself to an intuitive, if ultimately misguided, application to multinational corporate abuses. My assessment in this Part focuses largely on RICO's positive characteristics in pursuing the type of claims often involved in ATS litigation. It also provides context for why the decision regarding whether to employ RICO in such circumstances is not straightforward, and worthy of exploration. Part II explores the evolution of RICO in domestic litigation, and illustrates that although RICO is well designed for litigation against corporate defendants, domestic case law has substantially limited the Act's remedial offerings. Part III examines RICO's use in litigation regarding international abuses, and the considerable difficulties involved in establishing extraterritorial jurisdiction under RICO. Finally, Part IV assesses the potential value of RICO as a method of avoiding the more complicated choice of law debate regarding complicity liability. It concludes that based on domestic jurisprudence, RICO is unlikely to allow for a more direct avenue of ascribing liability, leaving litigators once again embroiled in the choice of law debate which continues to frustrate ATS litigation.

PART I: STATUTORY HISTORY AND LANGUAGE—RICO'S INTUITIVE, IF
ULTIMATELY MISLEADING, APPEAL IN LITIGATING AGAINST
CORPORATE MULTINATIONALS

A. *RICO's Congressional History*

In 1970, Congress passed RICO as a response to the growing domestic problem of organized crime. The Act was designed to prohibit "conducting or conspiring to conduct the affairs of an enterprise engaged in (or whose activities affect) interstate commerce 'through a pattern of racketeering activity.'"³² The political impetus behind RICO is expressly depicted in the congressional record at the time: "Congress finds that organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."³³

Congress also highlighted the legal system's increasingly ap-

³² 18 U.S.C. § 1962(b) (2006).

³³ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose).

parent deficiencies: “organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.”³⁴ In short, the federal justice system was grappling with a new species of criminal entity—one in which key decision makers were largely removed from the ground-level crimes which their organizations perpetrated. As a result, a new legislative device, replete with the capacity to link multiple parties together in the form of an “enterprise,” and able to identify “patterns of activity,” became necessary to counteract the threat. As will be explained, these characteristics are an important part of understanding why RICO has generated appeal as one method of litigating against multinational corporations.

Debate continues regarding the original intent behind RICO’s extraterritorial applicability, and also the intended scope of its remedial possibilities, both of which are addressed later in this analysis. For now, however, it bears mentioning that from a *structural* perspective, the congressional intent underlying RICO does appear to align with the Act’s use in litigation against multinational corporate defendants. One of Congress’s primary goals was to bridge the evidentiary distance between the decision makers and the crimes themselves. This problem continues to frustrate litigators in pursuing claims against corporate defendants abroad, which, given the contractual nature of most of their activities, are more likely to be peripherally, rather than directly, involved in the perpetration of the alleged crimes.

B. *Statutory Language*

Even before RICO’s evolution into a tool for litigation beyond traditional notions of organized crime, the plain language of the statute provides several potent enforcement mechanisms for ascribing liability. RICO outlines four substantive violations: the first three define the substantive offenses of the Act, and the fourth makes it a crime to conspire to violate any of the three preceding.³⁵ Subsections (a) and (b) are primarily aimed at the tendency for organized crime to take over otherwise legitimate businesses.³⁶ As a

³⁴ *Id.*

³⁵ 18 U.S.C. § 1962(a)–(d).

³⁶ Subsection (a) states in part, “[i]t shall be unlawful for any person who has

result, although these sections have been used in some litigation against corporate defendants, they are more appropriate as a means of targeting crime syndicates—i.e., wholly illegitimate enterprises—which are attempting to influence or acquire otherwise legitimate businesses.

The third subsection, however, works in reverse. Rather than focus on the illegal takeover of a business, it applies when a business—or an employee of the business—begins to conduct its affairs in a way that qualifies as racketeering. It states in part that “[i]t shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering”³⁷ In this regard, “section 1962(c) aims at corruption of the enterprise from within.”³⁸ To that end, subsection (c) provides a more obvious tool by which to target corporations engaged in international abuses. When an employee of a multinational firm with otherwise legitimate business practices begins to conduct her work using, or conspiring to use, methods which qualify as racketeering, the possibility of a RICO violation surfaces.

C. Predicate Offenses—What Counts as “Racketeering”?

As far as what constitutes racketeering, subsection 1961 of the Act provides a lengthy and specific list. Racketeering activity “means . . . any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in obscene matter . . . [or controlled substances], which is chargeable under State law and punishable by imprisonment for more than one year

received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise.” *Id.* § 1962(a). Subsection (b) takes this regulation one step further, prohibiting the direct acquisition of a business through racketeering, rather than the indirect investment of illegally obtained funds. It states in part that “[i]t shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” *Id.* § 1962(b). Combined, these subsections prevent organizations both from laundering illegally obtained profits through the acquisition of legitimate businesses, and also from obtaining legitimate businesses through more assertive means (via coercion, threats, or pressure regarding “unlawful debts,” for example).

³⁷ *Id.* § 1962(c).

³⁸ KAPLAN, WEISBERG & BINDER, *CRIMINAL LAW: CASES AND MATERIALS* (7th ed. 2012).

. . . .”³⁹ In addition, any act which is indictable under Title 18 of the U.S. Code can constitute racketeering, including, among others, “bribery, counterfeiting, theft from interstate shipment . . . obstruction of justice, obstruction of criminal investigations . . . [and] interstate transportation of stolen property.”⁴⁰

With an eye toward the Act’s potential applicability in cases against multinational corporations, the intuitive appeal is once again understandable. Many of the claims that have been brought under ATS cases (and other human rights litigation) are featured as predicate offenses under RICO as well. Specifically, the acts of murder, robbery, bribery, extortion, obstruction of criminal investigations, and transportation of stolen property are all either forms of international human rights abuses, or activities which take place frequently in the context of such abuses.

These advantages, however, are tempered somewhat by RICO’s requirement that there be a “pattern” of racketeering activity. Section 1961 of the Act defines a “pattern of racketeering activity” as requiring “at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”⁴¹

The flexibility of the pattern requirement is in keeping with Congress’s larger intention to create a dynamic and functional law enforcement tool. Recent court rulings, however, have provided some limitations regarding how far the concept can be stretched. Courts have looked in particular for both a numeracy variable (how many times has the action taken place?), and a qualitative relatedness variable (do the acts have some sort of common relationship?).⁴² In *Sedima v. Imrex Co.*, the Supreme Court established “that while two acts are necessary, they may not be sufficient.”⁴³ On the other hand, there also need not be a temporal separation between the acts. In *United States v. Indelicato*, the Second Circuit Court of Appeals held that in some circumstances a pattern of activity “may be found. . . in the simultaneous commission of like acts

³⁹ 18 U.S.C. § 1961(a) (2006).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Robert Weisberg provides a comprehensive discussion of the vagaries associated with defining a pattern which meets the concepts of both continuity and relatedness. See KAPLAN, WEISBERG & BINDER, *supra* note 38, at 9.

⁴³ *Sedima v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

for similar purposes against a number of victims.”⁴⁴ The Supreme Court’s ruling in *H.J. Inc. v. Northwestern Bell Co.* added much needed clarity when it articulated a six-step process to identify when continuity and relatedness were both present.⁴⁵ The test continues to allow litigators substantial flexibility, and has reduced confusion regarding how best to identify a pattern. To determine the qualitative relationship component of the pattern, the test allows litigators to prove merely that the acts are “related to an external organizing principle.”⁴⁶ Equally important, with regard to the quantitative component, the ruling appears to leave the *Indelicato* standard largely intact. That is, if a *threat* of continuity can be inferred from acts that occurred simultaneously, the requisite continuity component has been met and the existence of a pattern can still be established.

In the context of the difficulties that ATS litigators have faced, the predicate offenses enumerated under RICO are once again understandably appealing. The Act, by contrast to the ATS, provides a lengthy and specific list of violations that fall under its purview. Moreover, the evolution of domestic case law has continued to allow great flexibility in establishing a “pattern”—so much so that a pattern may be established via the *simultaneous* occurrence of acts which feature only some relation to an “external organizing principle.”

D. *The Flexibility of the Term “Enterprise” as Applied to Corporate Defendants*

Finally, a lengthy precedential history places a range of corporations and corporate activity well within RICO’s reach.⁴⁷ Much of this can be traced to the flexibility of the term “enterprise.”⁴⁸ In *United States v. Cauble*, the Fifth Circuit Court of Appeals held that

⁴⁴ *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989).

⁴⁵ *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242–44 (1989).

⁴⁶ *H.J. Inc.*, 492 U.S. at 238.

⁴⁷ *See Sedima*, 473 U.S. at 496 n.14 (1985); *Indelicato*, 865 F.2d at 1381; *H.J. Inc.*, 492 U.S. at 244.

⁴⁸ Some of this flexibility can be attributed to the range of uses depicted in the statute itself. *See* 18 U.S.C. § 1962 (2006). As recent scholarship has noted, enterprise is used in at least four different ways in Section 1962 alone: it is, in various contexts, a “prize,” an “instrument,” a “victim,” and a “perpetrator.” *See e.g.*, Blakey, *supra* note 7, at 307–25; Blakey, *supra* note 11, at 341; Blakey & Gettings, *supra* note 11, at 1009. Section 1961 provides a list of groups which fall under the definition, which “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961 (2006). As denoted by the term “includes,” Congress appears to have intended that this be an illustrative rather than exhaustive list.

RICO applies to “enterprise criminality” broadly, which consists of “all types of organized criminal behavior . . . from simple political corruption to sophisticated white-collar crime schemes”⁴⁹ More importantly, the term enterprise extends beyond corporations that are wholly illegitimate or corrupt. The Supreme Court’s holding in *Sedima v. Imrex Co.* placed otherwise respectable businesses squarely within RICO’s reach if they were found to be engaging in criminal activity.⁵⁰ Although the Court acknowledged that “in its private civil action, RICO [was] evolving into something quite different from the original conception of its enactors,”⁵¹ it nevertheless resisted calls to curb the Act’s application. In overturning the lower court’s ruling, the Court interpreted congressional intent expansively:

[C]ongress wanted to reach both ‘legitimate’ and ‘illegitimate’ enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.⁵²

The court based this evolution largely on the “breadth of the predicate offenses” which included such corporate-oriented activities as “wire, mail and securities fraud.”⁵³

The Court’s expansive interpretation in *Sedima* was once again based on both the intentions of Congress in enacting RICO, and also the inference to be drawn from Congress’s use of a wide list of predicate offenses to constitute racketeering. This precedential history has enabled litigators to employ RICO as a potent tool for domestic litigation against corporate defendants. As the following parts depict, however, RICO’s intuitive structural appeal is eventually outweighed by other limitations. In particular, the Act’s limited remedial advantages, burdensome requirements for extraterritorial jurisdiction, and inability to avoid the complex choice of conspiracy law debate, all serve to frustrate the Act’s utility in litigating against corporate multinationals.

⁴⁹ 706 F.2d 1322, 1330 (5th Cir. 1983) (quoting Blakey & Gettings, *supra* note 11, at 1013–14).

⁵⁰ *See Sedima*, 473 U.S. at 499–500.

⁵¹ *Id.* at 500.

⁵² *Id.* at 499.

⁵³ *See id.* at 500.

PART II. THE EVOLUTION OF RICO IN DOMESTIC CASE LAW—
A TOOL WITH LIMITED REMEDIAL OPTIONS

As noted, the application of RICO has become more expansive, reaching beyond traditional notions of organized crime to a variety of conceptions of criminal enterprise. Despite these advantages, however, the scope of RICO's civil remedies has received a much narrower interpretation by U.S. courts. The result is that while RICO's wide applicability to corporations is helpful, the scope of its civil remedies substantially narrows the pool of plaintiffs that can receive compensation.

A. *RICO's Limited Remedial Scope*

RICO's interpretation in domestic case law has substantially limited its remedial advantages. As previously mentioned, RICO provides for a civil remedy at law. Section 1964(a) of the Act gives courts the power to award injunctive relief including "prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in . . . or ordering dissolution or reorganization of any enterprise."⁵⁴ In some circumstances, RICO also stipulates the possibility of substantial punitive damages, including "threefold the damages [sustained]" as well as "the cost of the suit, including a reasonable attorney's fee."⁵⁵ This provision, however, is reserved only for individuals who have been "injured in [their] business or property."⁵⁶ The manner in which this latter restriction has been interpreted by courts substantially limits the Act's potential for garnering remuneration in cases involving multinational corporate abuse.

With regard to seeking compensation for injuries (rather than injunctive relief) the enumerated categories of "injury to business" and "injury to property" provide obvious restrictions. Their inclusion makes clear that Congress was intending to compensate victims for a somewhat narrowly tailored type of harm, such as innocent business owners who had lost their profits (or worse) through acts of racketeering. This restriction sits in contrast, however, to an uncodified portion of the RICO statute in which Congress articulates its intention that RICO "be liberally construed to effectuate its remedial purposes."⁵⁷ This juxtaposition has provided

⁵⁴ 18 U.S.C. § 1964(a) (2006).

⁵⁵ *Id.* § 1964(c).

⁵⁶ *Id.*

⁵⁷ Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) (codified with some differences in language at 18 U.S.C. § 1961).

ample room for disagreement among courts regarding how far to extend the scope of what constitutes a business or property related injury.⁵⁸

Despite this congressional guidance, courts have almost uniformly held that personal injuries do not qualify as injuries to business or property.⁵⁹ As such, these elements appear to restrict the pool of potentially successful plaintiffs to those who had some form of objective economic interest at stake. In fact, the Seventh and Eleventh Circuits have gone so far as to interpret injury to business or property as a requisite to establish standing, rather than an element of the cause of action.⁶⁰ Although the most expansive of existing interpretations permits the inclusion of “employment losses” under the category of “business,” and also includes “intangible items” under the category of “property,” none appear to provide for the possibility of reparation for personal injury itself.⁶¹

The extent to which plaintiffs can recover from economic losses which flow from personal injuries is the subject of greater debate. Yet the weight of authority once again leans toward a narrow remedial scope. In *Grogan v. Platt*, the Eleventh Circuit considered claims from the estates of F.B.I. agents that had been murdered in a gun battle with suspected bank robbers.⁶² The plaintiff estates sought, among other claims, compensation for the resulting economic losses of the murders, including lost wages and funeral expenses.⁶³ The court engaged in a lengthy interpretation of congressional intent, and ultimately concluded that while the plaintiffs’ argument had “some merit,” Congress had not intended RICO to provide this manner of remedy.⁶⁴ The court therefore affirmed the district court’s summary judgment against the plaintiffs as to their RICO claims.⁶⁵

Although this decision has been followed by other courts seeking to parse the scope of RICO’s remedies,⁶⁶ it has also met with substantial criticism. In *National Asbestos Workers Medical Fund v.*

⁵⁸ See *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1248-49 (N.D. Cal. 2004); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *20-27 (S.D.N.Y. Feb. 28, 2002).

⁵⁹ See *Blakey & Gettings*, *supra* note 11, at 1013-14.

⁶⁰ See *Evans v. City of Chicago*, 434 F.3d 916, 924 (7th Cir. 2006); *Grogan v. Platt*, 835 F.2d 844, 846 (11th Cir. 1988).

⁶¹ See *STEPHENS ET AL.*, *supra* note 6, at 116.

⁶² *Grogan*, 835 F.2d at 845.

⁶³ *Id.*

⁶⁴ *Id.* at 846-48.

⁶⁵ *Id.* at 848.

⁶⁶ See, e.g., *Evans v. City of Chicago*, 434 F.3d 916, 930 (11th Cir. 2006).

Phillip Morris, Inc., the Eastern District of New York considered claims from a group of plaintiffs who managed self-insured trust funds that provided health care benefits to union workers.⁶⁷ The plaintiffs sought compensation under RICO for the “economic injuries associated with treatment of smoking related injuries.”⁶⁸ By contrast to *Grogan*, the court upheld the plaintiffs’ claims, and delivered an emphatic endorsement of RICO’s ability to compensate victims for economic losses which derive from personal injury:

The recovery of pecuniary losses associated with physical injuries directly caused by racketeering conduct is consistent with the language of the RICO statute. Such claims, furthermore, would materially advance the statute’s legislative purposes of deterring racketeering, in all its forms, and of remedying, as fully as practicable, the economic consequences of racketeering.⁶⁹

Despite this isolated example, however, successful efforts to establish standing through the economic damages which flow from personal injury are rare. Contrary to the holding in *National Asbestos Workers Medical Fund*, the more restrictive *Grogan* ruling has found enduring traction in modern RICO cases.⁷⁰

B. A Narrower Class of Parties Eligible for Relief

Placing these holdings in the context of claims against multinational corporations, it becomes clear that the pool of applicants capable of garnering compensation via RICO is limited. A business or landowner who, in the course of suffering abuses, lost either business or property holdings, would likely fall under the purview of RICO’s civil remedies. But the more common profiles—individuals who have sought the help of litigators by virtue of the *human* suffering they have incurred—fall largely outside the realm of RICO’s civil compensation provision. This does not, of course, restrict RICO’s remedial scope to a point of complete futility. The

⁶⁷ 74 F. Supp. 2d 221, 224 (E.D.N.Y. 1999).

⁶⁸ *Id.* at 229.

⁶⁹ *Id.* This perspective found similar traction in *Libertad v. Welch*, a First Circuit ruling concerning claims from women who had sought reproductive health services at blockaded clinics and had been intimidated by protestors outside. 53 F.3d 428 (1st Cir. 1995). Although the court ultimately found that the plaintiffs lacked standing because they claimed no injuries beyond general intimidation and harassment, the opinion suggested that economic injuries, and even physical injury itself, would have been sufficient to confer standing. *Id.* at 437. The court held that “Plaintiffs. . . could have standing to sue under RICO, if they were to submit sufficient evidence of injury to business or property such as lost wages or travel expenses, actual physical harm, or specific property damage sustained as a result of a RICO defendant’s actions.” *Id.* at 437 n.4.

⁷⁰ See, e.g., *Evans*, 434 F.3d at 924–25.

option to recover damage to business or property is not provided for under the ATS, as courts have generally held that property claims do not meet the requisite standards of a “widely accepted, clearly defined violation of the law of nations.”⁷¹ Rather than pursuing RICO as a primary legal tactic, however, litigators should consider its utility as an adjunct strategy to ATS claims. In doing so, they both broaden the scope of claims that can be made, and also slightly expand their remedial opportunities. Moreover, as the following sections depict, the onerous requirements of establishing jurisdiction, coupled with RICO’s limited advantages for ascribing liability, further establish that RICO claims are not worth pursuing in isolation.

PART III. LITIGATING INTERNATIONAL ABUSES WITH RICO—THE OBSTACLE OF EXTRATERRITORIAL JURISDICTION

Although RICO has enjoyed burgeoning use in the realm of international litigation, the case law in this area is sparser than in the domestic arena. This paucity is further compounded by the lack of final judgments available—in several instances, although RICO claims have survived early motions for summary judgment, parties have agreed upon a settlement before a final verdict is reached. From the limited amount of case law that is available, however, the requirements for establishing extraterritorial jurisdiction under RICO have emerged as a substantial obstacle, significantly more onerous than the steps necessary to establish extraterritorial jurisdiction under the ATS. In *Bowoto v. Chevron Texaco Corp.* and in *Wiwa v. Royal Dutch Petroleum*—which both featured alleged abuses by extraction companies in the Niger Delta—the plaintiffs’ RICO claims survived the initial rounds of pleading.⁷² This progress elicited hopeful commentary from human rights proponents.⁷³ A more complete evaluation, however, reveals that the claims did not survive long. In both cases, RICO claims were dismissed for failure to uncover sufficient evidence during discovery to substantiate extraterritorial jurisdiction.⁷⁴ The courts demon-

⁷¹ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710–14 (2004).

⁷² See *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1248–49 (N.D. Cal. 2004); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *20–27 (S.D.N.Y. Feb. 28, 2002).

⁷³ See STEPHENS ET AL., *supra* note 6, at 114.

⁷⁴ See *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010, 1012 (N.D. Cal. 2007); *Wiwa v. Royal Dutch Petroleum Co.*, Nos. 96 Civ. 8386(KMW)(HBP), 01 Civ. 1909(KMW)(HBP), 02 Civ. 7618(KMW)(HBP), 2009 WL 928297, at *1 (S.D.N.Y. Mar. 18, 2009) (consolidating the three claims brought by Mr. Wiwa and granting defend-

strated a tendency to seek guidance in antitrust and securities law for a framework by which to evaluate RICO's extraterritorial reach.⁷⁵ These frameworks place heavy burdens on litigators at early stages of the case, rendering RICO claims less appealing than their ATS counterpart in this regard.

Before examining these cases, it should be noted that the statutory language of RICO itself is largely silent with regard to extraterritorial jurisdiction.⁷⁶ Although it features repeated references to activities which effect "foreign commerce," courts have been reticent to hear suits in which the transaction or activities only "casually touch upon the United States."⁷⁷ Instead, the prevailing inquiry, as articulated by the Second Circuit in *North South Fin. Corp. v. Al-Turki*, is whether "Congress would have wished the precious resources of the United States courts" to be dedicated to the activities at issue.⁷⁸ With regard to litigation against corporations, this standard has been operationalized in two tests, both of which derive from securities and antitrust law: the conduct test and the effects test.

A. *The Conduct Test*

The conduct test requires the defendant to have committed activities *inside* the United States which "materially furthered the unlawful scheme."⁷⁹ The Ninth Circuit has held that in order for the conduct to be sufficient to establish jurisdiction, it "cannot be merely preparatory."⁸⁰ This latter stipulation proved critical in *Bowoto*, a case that was filed by a group of Nigerian nationals seek-

ants' motion to dismiss extraterritorial RICO claims for lack of subject matter jurisdiction).

⁷⁵ See cases cited *supra* note 74.

⁷⁶ In addition, this analysis assumes that personal jurisdiction has been established, preferring instead to focus on the disproportionate standards between establishing subject matter jurisdiction between RICO and the ATS. Personal jurisdiction, however, has also been the subject of some difficulty in both ATS and RICO claims. In *Wiwa v. Royal Dutch Shell*, for example, a district court found *forum non conveniens* in 1998 and directed that future litigation take place in London. On appeal, however, this decision was reversed, allowing the case to continue on U.S. soil. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

⁷⁷ *Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1524 (11th Cir. 1990).

⁷⁸ 100 F.3d 1046, 1051 (2d Cir. 1996) (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975)) ("[T]he ultimate inquiry is . . . whether 'Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [foreign transactions] rather than leave the problem to foreign countries.'") (alterations in original).

⁷⁹ *STEPHENS ET AL.*, *supra* note 6, at 119, citing to *Butte Mining, PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996).

⁸⁰ See *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983).

ing to recover for a series of attacks at Chevron Nigeria's extraction facilities in the Niger Delta.⁸¹ The plaintiffs, together with a group of over 100 local community members, had occupied the platform of one of Chevron's barges.⁸² They alleged that after several days on the platform, Chevron Nigeria solicited the help of Nigerian Government security forces to remove the defendants, leading to the killing of several protestors and the torture of another protestor while in custody.⁸³

Despite the plaintiffs' lengthy account of the connections between the conduct of the defendant's offices in the United States and the alleged attacks in Nigeria, the court held that the corporation's actions in the United States were "'merely preparatory,' and not a 'direct cause' of the attacks."⁸⁴ The plaintiffs presented evidence that the defendants' office in the United States had a substantial range of control over the Nigerian based subsidiary. This included having "designed and adjusted the general security policies," maintaining "general control and supervision" over the subsidiary, and also engaging in a robust "media campaign to cover up [the subsidiary's] involvement in the attacks."⁸⁵ Regardless, the court dismissed these connections as insufficient to constitute "material" conduct, and reiterated its earlier assessment that "the evidence produced by plaintiffs reflects not that defendants made decisions during the attacks, but that there was an extraordinarily close relationship between the parents and the subsidiary prior to, during and after the attacks."⁸⁶ The *Bowoto* ruling, as a result, sets a difficult evidentiary standard in order to satisfy the conduct test. Short of a direct and well-documented order which instructs the international subsidiary to engage in, or pay for, activities which constitute a human rights abuse, establishing sufficient conduct to warrant extraterritorial jurisdiction is unlikely.

B. *The Effects Test*

Unfortunately for litigators, the effects test provides little additional flexibility. In *Wiwa*, despite allowing the RICO allegations to survive the pleading stage, the court eventually granted a summary judgment motion on the grounds that the plaintiffs had not established "sufficient effects in the United States to give the Court sub-

⁸¹ See *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010, 1012 (N.D. Cal. 2007).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1015.

⁸⁵ *Id.*

⁸⁶ *Id.*

ject matter jurisdiction.”⁸⁷ *Wiwa* was one of three lawsuits brought against the Royal Dutch Petroleum Company, as well as several of the company’s employees and subsidiaries, alleging the corporation’s complicity in human rights abuses in the Niger Delta.⁸⁸ Although a wide range of claims were filed, including environmental damage, bribery, and obstruction of justice, the most severe allegations concerned Shell’s complicity in the arrest and execution of the “Ogoni 9”—a group of nine activists who had protested Shell’s activities in the region as part of a broader community of protestors.⁸⁹

In its assessment of extraterritorial jurisdiction, the court acknowledged the paucity of litigation on the subject and also the lack of clarity regarding which standard to apply.⁹⁰ Like the *Bowoto* ruling, however, the court once again sought guidance in “precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters.”⁹¹ The *Wiwa* ruling spliced the tests one step further, stating that the effects test can be further subdivided into the “securities-based effects test” on one hand, in which “Plaintiffs must show substantial, direct effects on the United States,” and the “antitrust based effects test,” on the other, in which plaintiffs must demonstrate “intentional, actual, and substantial effects on United States imports and exports.”⁹²

In *Wiwa*, the plaintiffs sought to establish effects in the United States through the impact which the actions of the Nigerian subsidiary had on the profits of the United States parent company. Specifically, the plaintiffs alleged that racketeering activity had allowed the corporation to avoid several activities which would have jeopardized profits, including: agreeing to the demands of the activists; addressing the environmental hazards the corporation had created; and generally allowing their “manner of operations” and “international position” to be challenged by the activist movement.⁹³ The corporation’s ability to smother these activities, the plaintiffs alleged, allowed the corporation to import Nigerian oil into the United States at a lower cost, thereby increasing profits and al-

⁸⁷ See *Wiwa v. Royal Dutch Petroleum Co.*, Nos. 96 Civ. 8386(KMW) (HBP), 01 Civ. 1909(KMW) (HBP), 02 Civ. 7618(KMW) (HBP), 2009 WL 928297, at *1 (S.D.N.Y. Mar. 18, 2009).

⁸⁸ *Id.* at *1–3.

⁸⁹ *Id.* at *2–3.

⁹⁰ *Id.* at *11.

⁹¹ *Id.* (quoting *North South Fin. Corp. v. Al Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)).

⁹² *Id.* at *4.

⁹³ See *Wiwa* 2009 WL 928297 at *5.

lowing the corporation to “sell stocks and American Depository Receipts in the United States that offered investors a higher margin of return than they would have had if Defendants had met [the activists’ demands].”⁹⁴

These arguments failed to resonate. As the court explained, despite the plaintiffs’ assertions, there was no evidence that the defendants’ actions had contributed to an increase in investment returns or profits. Specifically, the plaintiffs had failed to establish “either (1) that Defendants’ alleged racketeering activity lowered their costs of producing oil in Nigeria . . . or (2) if Defendants did have lower production costs in Nigeria, that these lower costs resulted in greater investment returns or otherwise affected commerce in the United States.”⁹⁵ The latter of these two conclusions appears to pose a unique and especially intractable obstacle for litigators seeking to establish extraterritorial jurisdiction via the effects test. Prior to the *Wiwa* holding, it might have appeared reasonable to assume that a multinational corporation which aggregates profits from a range of international subsidiaries will benefit by at least *some* margin if one of its subsidiaries has managed to lower production costs. Although the absolute sum of profits from the corporation’s international subsidiaries may remain unchanged when they are pooled, the fact that one division’s increase in profit might be off-set by another division’s loss should not discount the reality that the corporation has still felt the “effects” of the increased profit margins from its Nigerian operations. The court’s conclusion, however, appears to suggest the opposite. It states that even in the event that the defendants are able to prove that production costs in Nigeria have been lowered through racketeering activity, defendants must also have demonstrable evidence of the effect—presumably through incremental profit increases or a shift in the corporation’s share price—of the increased returns to the parent company in the United States. If this holding proves durable through subsequent judgments in international RICO cases, the standard it sets will remain an onerous obstacle for human rights litigators to overcome.

With regard to the alternative test articulated in the *Wiwa* holding—the antitrust-based effects test—the plaintiffs’ evidence fared no better.⁹⁶ The court reiterated a similar argument, stating

⁹⁴ *Id.* at *6.

⁹⁵ *Id.*

⁹⁶ In *Bowoto*, the court’s analysis of the antitrust effects test was nearly identical: Plaintiffs fail, however, to provide any evidence that defendants’ treatment of the environment, the local community, oil protestors generally,

that “even assuming that Defendants’ alleged racketeering activity lowered their Nigerian production costs, Plaintiffs provide no specific evidence that these lower costs resulted in lower oil prices or higher investment returns in the United States.”⁹⁷ Although the court did not find it necessary to reach the question of whether or not “intent” had been established, it did provide some guidance for future litigation in this regard. The court noted that because the plaintiffs had failed to demonstrate the proportion of Nigerian oil that had been exported to the United States, there was insufficient evidence to “establish that the Defendants undertook their alleged racketeering activity *in order to* affect the United States, in addition to, or as opposed to, other countries.”⁹⁸ Should future holdings stipulate that the antitrust test is a more apposite evaluation, litigants will be faced with the obvious difficulty of proving not only the effects mentioned above, but also the underlying intent of the corporation to bring about such effects. In any event, the antitrust-based test appears to mirror the difficult obstacles provided by the securities-based test. Both require litigators to isolate an incrementally identifiable chain of connections from a complex and opaque operating environment.

C. *A Comparison to Extraterritorial Jurisdiction Under the ATS*

Regardless of which test litigants employ to establish extraterritorial jurisdiction, the expectations on the litigator are substantially more cumbersome than that of establishing extraterritorial jurisdiction under ATS litigation. This held true even before *Kiobel* introduced the possibility that corporate complicity falls entirely outside the realm of the statute. The language of the ATS states that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of

or these specific plaintiffs, generated any impact on the United States economy. Plaintiffs state that “[s]uppressing protest allows defendants to escape paying for measures that would avoid and remediate the harms caused by extraction, thereby lowering the cost of extraction and increasing profits earned by defendants from the sale of Nigerian oil in the U.S.” Plaintiffs’ statement, however, lacks any evidentiary support. Plaintiffs present no evidence that killing or otherwise suppressing protestors saves defendants money, or otherwise increases their profit margin. Plaintiffs therefore fail to present evidence that defendants gained a competitive advantage in the United States, or impacted the U.S. economy, by engaging in the alleged racketeering activity.

Bowoto v. Chevron Corp., 481 F. Supp. 2d 1010, 1014–15 (N.D. Cal. 2007).

⁹⁷ See *Wiwa*, 2009 WL 928297, at *8.

⁹⁸ *Id.* at *8 n.20 (emphasis added).

nations or a treaty of the United States.”⁹⁹ There is some debate as to whether the term “violation” mandates that courts engage in a more “searching preliminary review of the merits than is required, for example, under the more flexible ‘arising under’ formulation.”¹⁰⁰ Yet this assertion has been countered on the basis that it “appears to conflate subject matter jurisdiction and whether plaintiffs have stated a claim for relief.”¹⁰¹ Under the latter interpretation, the plaintiff need only allege an “arguable violation of the law of nations” in order to establish subject matter jurisdiction.¹⁰² The trend, in fact, appears to be in the direction of a less onerous standard for establishing subject matter jurisdiction under the ATS. In 2007, the Ninth Circuit stated that a “district court [has] subject matter jurisdiction under the [ATS] so long as plaintiffs alleged a nonfrivolous claim by an alien for a tort in violation of international law.”¹⁰³ Under this more flexible formulation, the comparative ease of establishing subject matter jurisdiction under the ATS is evident. There is no need to establish U.S.-based conduct or a chain of events leading to substantial effects occurring on U.S. soil. Provided that the alleged activity falls within the category of a violation of the law of nations, the plaintiff will be able to proceed to discovery and to the merits of the case.

Wiwa provides an instructive example of the differential between ATS and RICO with regard to establishing extraterritorial jurisdiction. As mentioned, the RICO claims in *Wiwa* foundered based on the plaintiffs’ inability to establish extraterritorial subject matter jurisdiction. The ATS claims, by contrast, were allowed to proceed. The court held that the plaintiffs had met the standard of adequately pleading a “widely accepted, clearly defined violation of the law of nations.”¹⁰⁴ In this instance, given the nature of some of the crimes alleged (including killings and torture), the burden was not substantial. But the ability for the plaintiffs to plead claims which concerned only the defendant’s conduct *abroad*—rather than the ripple of connections it produced or the larger corporate motive for the conduct—substantially lessened the difficulty of establishing subject matter jurisdiction. The survival of the ATS claims ultimately proved paramount. Royal Dutch Shell settled with the plaintiffs out of court, agreeing to provide the plaintiffs with

⁹⁹ See 28 U.S.C. § 1350 (2006).

¹⁰⁰ *Filártiga v. Peña-Irala*, 630 F.2d 876, (2d Cir. 1980).

¹⁰¹ See STEPHENS ET AL., *supra* note 6, at 29.

¹⁰² *Id.*

¹⁰³ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201 (9th Cir. 2007).

¹⁰⁴ See STEPHENS ET AL., *supra* note 6, at 156.

\$15.5 million to “establish a trust for the benefit of the Ogoni people, and cover some of the legal costs and fees associated with the case.”¹⁰⁵

From the perspective of a litigator, the lessons emerging from these cases are clear. First, from what limited rulings are available, the test to establish extraterritorial jurisdiction has yet to be met in a case where human rights allegations are being brought. Pleading a broad effect on profitability is not sufficient. Second, the standards that courts have articulated are onerous, requiring substantial analysis and discovery on the part of the litigator at an early stage of the case—well before the merits of the substantive RICO claims can be addressed. Finally, by comparison to the standards of establishing subject matter jurisdiction via the ATS, RICO is especially cumbersome.

PART IV. RICO’S LIMITATIONS AS A METHOD OF ASCRIBING DIRECT LIABILITY

If the obstacles regarding extraterritorial jurisdiction can eventually be overcome, there is, as mentioned, a limited class of plaintiffs who would be able to benefit from RICO’s remedial options. These plaintiffs, however, are unlikely to discover that RICO provides litigators with a more direct avenue of ascribing liability to corporations involved in human rights abuses. Although the expansive scope of RICO’s “enterprise” once suggested that courts might draw a wide net over players involved at the periphery of an enterprise’s activities, domestic case law has substantially curtailed this reach. It should be noted that this question has yet to be fully addressed by courts in an international human rights setting (as most claims have foundered at the extraterritorial jurisdiction stage). But there is little reason to believe courts will approach international cases in a different manner than their domestic counterparts. Litigators who file RICO claims are just as likely to face the largely unresolved debate regarding which standards of law to apply to complicity allegations as they would if pursuing ATS claims alone.

A. *The Once-Expansive Possibilities of the Term “Enterprise”*

As previously mentioned, the term “enterprise” has been flexibly construed in domestic case law. To some degree, this flexibility

¹⁰⁵ *Commentary on Wiwa et al v. Royal Dutch Petroleum et al.* CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (last visited Nov. 21, 2012).

pertains to not only the type of organization at issue, but also the size and scope of its participants. Litigators may choose, for example, to stretch the conception of an enterprise broadly so as to encompass a wide array of possible participants, or they may draw a narrower conception of the core enterprise and rely on the conspiracy elements of the Act to implicate actors on the periphery. In past litigation regarding corporate violations of RICO, this flexibility depended largely on the theory by which litigators (and courts) chose to define a corporation. The “nexus of contracts theory,” for example, posits that a corporation is composed merely of a series of interconnected contracts—employees, managers, customers, and suppliers are joined by contracts which, in aggregate, form a functioning corporation.¹⁰⁶ If placed in the context of RICO litigation, this construction once held expansive possibilities. Litigators might have placed both the contracted service providers and the corporation that had engaged their services under the same “enterprise” umbrella. Doing so would have enabled litigators to charge both the service providers (local security forces, for example) as well as the corporation itself, with a *direct* violation of RICO, rendering allegations of conspiracy, aiding and abetting, or vicarious liability, unnecessary. Critically, the possibility of dispensing with complicity charges would not only enable litigators to pursue a less convoluted pathway of ascribing liability, but would also allow them to sidestep the unresolved choice of law debate regarding whether to apply domestic or international standards of complicity liability.

B. The Narrow Construction Featured in Reves

Recent case law concerning RICO’s domestic application, however, suggests that courts are likely to pursue a narrow construction of how far the term “enterprise” can be stretched. This strict approach would derail legal strategies that had sought to ascribe liability directly, rather than via conspiracy allegations. In *Reves v. Ernst & Young*, the Supreme Court established the “operation or management test” which required that, in order for an individual to be held directly liable for a violation of RICO, the individual must have had some role in conducting or managing the enterprise.¹⁰⁷ The *Reves* case involved the relationship between the auditing firm Arthur Young (prior to its evolution into Ernst &

¹⁰⁶ Judge Frank Easterbrook of the Seventh Circuit, in particular, has been a leading proponent of the nexus of contracts theory. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 72 (1991).

¹⁰⁷ 507 U.S. 170, 173, 183–84 (1993).

Young), and the manager of a farmer's cooperative that had encountered financial trouble. The auditors had made several "questionable decisions" regarding how best to value the assets of the cooperative, creating an inflated valuation that led to subsequent confusion and financial reliance by the cooperative's trustees.¹⁰⁸ Among other allegations, the plaintiffs in the case alleged that the cooperative and the auditor had committed a violation of RICO as members of a common enterprise.¹⁰⁹ The Eighth Circuit granted summary judgment in favor of the auditor, and on appeal the Supreme Court upheld the decision, opting for a more restrictive interpretation of the RICO "enterprise" than those earlier announced by the Eleventh Circuit and the District of Columbia Circuit.¹¹⁰

The Court's analysis focused in particular on the language in section 1962(c), which makes it illegal for a person to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs."¹¹¹ The Court's interpretation concluded that if individuals who were mere participants in the enterprise could be held liable, the word "conduct" becomes essentially superfluous.¹¹² As such, rather than read "conduct" out of the statute entirely, the Court concluded that the term "participate" was modified by the phrase "[in the] conduct of such enterprise's affairs."¹¹³ The Court thereby concluded that Congress had intended to focus on individuals who had a controlling or influencing role in the conduct of the organization, rather than on mere participants.¹¹⁴ Following the ruling, some commentators have remarked that "the decision heralded an end to the liability of so-called 'outsiders,' including lawyers, accountants, and various other professionals sometimes pulled into RICO suits."¹¹⁵

¹⁰⁸ *Id.* at 174.

¹⁰⁹ *Id.*

¹¹⁰ *Reves*, 507 U.S. at 185–88 (citing *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union*, 639, 913 F.2d 948 (D.C. Cir. 1990); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986)).

¹¹¹ 18 U.S.C. § 1962(c) (2006).

¹¹² *See Reves*, 507 U.S. at 182.

¹¹³ *Id.* at 178–79 (citing 18 U.S.C. § 1962(c)).

¹¹⁴ Curiously, the Court's interpretation appears to have read "participate" largely out of the statute instead. A strong argument could be made that emphasis on the term "conduct" should not be so emphatic as to completely drown out an express provision in the statute. For an argument that *Reves* was not only correctly decided but should also apply to the conspiracy prong of RICO, see Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the Reves "Operation or Management" Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1 (2006).

¹¹⁵ *Id.* at 2. Others, however, while acknowledging the obvious limitations that the

In *Reves*, the Supreme Court's interpretation allowed a service contractor—an auditor in that instance—to escape the “enterprise” umbrella. As a consequence, litigators were left having to plead allegations of conspiracy and accomplice liability, strategies which, had they been applied in the international context, would have embroiled litigators in the familiar choice of law debate surrounding ATS litigation. Placed in the context of a case involving corporate engagement in international abuses, the *Reves* standard presents clear limitations. In the instance of a service contractor hired by a multinational extraction company, for example, the *Reves* ruling would likely thwart any arguments that alleged that the contractor and the corporation were part of a common enterprise. It could be argued that a corporation that has actively acquired services should be characterized as the controlling or managing individual in the broader enterprise. Yet courts are likely to demand evidence that depicts the hiring corporation as the controlling or influencing participant in the pattern of racketeering itself. An individual who conducts or manages the security force that committed the abuses is almost certain to fall into this category. But it appears unlikely that the contracting corporation for whom they perform those services will also be implicated.

A thorough evaluation of the ways in which proving *conspiracy* liability under RICO may differ from proving aiding and abetting liability under the ATS lies beyond the scope of this analysis. It bears mentioning, however, that it is not at all clear that RICO is a better option in this regard either. The Court's ruling in *Reves* was silent as to whether the management or operations test was also applicable to RICO's conspiracy provision. This silence leaves litigators with the existing precedent for establishing conspiracy under RICO as originally articulated in *United States v. Neapolitan*.¹¹⁶ It requires that litigators prove the existence of both “an agreement to conduct or participate in the affairs of an enterprise” and also “an agreement to the commission of at least two predicate acts.”¹¹⁷ The *Neapolitan* ruling placed considerable emphasis on distancing this standard from one based solely on association, stating, “[i]f either aspect of the agreement is lacking then there is insuffi-

ruling created, maintain that the holding was largely context dependant. As such, “to the extent that a particular professional's services, as compared to an auditor's, are intimately connected with management, *Reves* will provide less protection.” Jeffrey Shapiro, *Attorney Liability under RICO § 1962(c) after Reves v. Ernst & Young*, 61 U. CHI. L. REV. 1153, 1153–54 (1994).

¹¹⁶ 791 F.2d 489 (7th Cir. 1986).

¹¹⁷ *Id.* at 498–99.

cient evidence that the defendant embraced the objective of the alleged conspiracy . . . mere association with the enterprise would not constitute an actionable 1962(d) violation.”¹¹⁸

In aggregate, the “operation or management test” has substantially constricted the ability of domestic litigators to envelop peripheral players—such as contracting parties—into the core “enterprise.” More importantly, this restriction suggests that, contrary to initial appearances, RICO does not provide a more direct route of ascribing liability. The likely outcome, as scholars have suggested, is that “plaintiffs will more often plead aiding and abetting and conspiracy theories of liability.”¹¹⁹ As a result, litigators who use RICO against multinational corporations will likely find themselves embroiled in a similar choice of law debate as that which they would have faced in pursuance of ATS claims alone.

CONCLUSION

RICO has become a potent resource for corporate litigation in U.S. courts, and the intuitive appeal of RICO in context of corporate multinational litigation is clear. From the time of its inception as a tool for combating the mafia and other organized crime syndicates, it has enjoyed applicability to a wide array of activities and entities. Moreover, when considering that corporate-based ATS litigation strategies have been increasingly confronted with a complex and unresolved choice of law debate regarding conspiracy law, the search for alternative legal strategies is understandable. While *Kiobel* may not have germinated this trend, it has certainly added a sense of urgency.

With few exceptions, however, the early intuitions regarding RICO have proven misguided. An analysis of RICO’s potential utility in litigation against abuses committed by corporations abroad reveals that the Act offers few advantages. RICO provides narrow remedial opportunities, is burdened by a substantially more onerous test for establishing extraterritorial jurisdiction than the ATS, and is unlikely to allow for a more direct pathway of ascribing liability to corporate defendants in international locations. This analysis should not be interpreted, however, so as to suggest that RICO has no applicability in the context of international corporate litiga-

¹¹⁸ *Id.*

¹¹⁹ See Shapiro, *supra* note 115, at 1173 n.95 (citing C. Stephen Howard, Payne L. Templeton, & Devan D. Beck, *RICO Claims Against Accountants After Reves v. Ernst & Young*, in 467 LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 291 (1993)).

tion. In instances where a plaintiff has suffered economic harm in the form of injury to property or business, RICO offers valuable remedial alternatives. In these cases, RICO should be strongly considered as a potential adjunct tactic to other legal strategies.

RICO doesn't suffice as a replacement for the ATS. Barring a reversal of *Kiobel* in the months to come, employing RICO without careful forethought is likely to lead litigators down a time consuming and resource intensive pathway.