

CANCEL ~~CORPORATE~~ ~~ABUSE~~

**How the United States can lead
on business and human rights**

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EarthRights is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.” We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, EarthRights seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work.

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EXECUTIVE SUMMARY

In 2021, the U.S. Supreme Court will decide whether victims of child slave labor in West Africa can seek justice from two multinational corporations, Nestlé and Cargill, in federal court.¹ The plaintiffs in the lawsuit allege that both companies knowingly profited from slave labor in their cocoa supply chains in Côte d'Ivoire and refused to compensate the victims.

The case revolves around the Alien Tort Statute, a centuries-old law that has provided human rights victims with a path to justice in U.S. courts, but whose scope has been repeatedly narrowed by the Supreme Court in the past decade. The Trump administration and corporate lobby groups asked the Supreme Court to take this opportunity to end victims' ability to use the statute to bring lawsuits against corporations in U.S. courts for human rights abuses committed outside of America's borders.² They argued that corporate human rights abuses are an issue best left to the president and Congress.³

When Congress threatened to regulate the cocoa industry in the early 2000s, Nestlé, Cargill, and other industry leaders promised to take voluntary actions to end child labor in their supply chains.⁴ These voluntary efforts have failed. In 2019, a Washington Post investigation in West Africa found “an epidemic of child labor that the world's largest chocolate companies promised to eradicate nearly 20 years ago.”⁵

Nestlé's and Cargill's behavior is not unique. Corporate human rights abuses are rampant around the world, and many cases involve businesses with close connections to the United States. This includes not only the subsidiaries and supply chains of U.S. corporations, but also the foreign corporations that are listed on U.S. stock exchanges and that benefit from access to U.S. markets.

For over 25 years, EarthRights International has supported communities that seek justice for corporate human rights abuses.⁶ Victims of human rights abuses are often unable to use the courts in their home countries, due to corruption, high risks of retaliation, and other barriers. They must look outside their own countries for justice. In this context, numerous foreign victims have brought civil lawsuits against corporations in U.S. courts.

Over the past decade, at the urging of corporate lobbies, the Supreme Court has increasingly closed federal courts as a forum for justice for abuses committed overseas. In contrast, courts in Canada, the United Kingdom, and EU member countries have recognized the global nature of the corporate sector and are allowing these types of cases to proceed.⁷

Drawing on our own experiences and the work of our colleagues in the nonprofit human rights and environmental communities, we have taken a closer look at what options for justice exist in the United States, and where the barriers lie. The purpose of this discussion paper is to examine the extent to which the United States has become a safe haven for corporate human rights abuses. We put forward these recommendations to stimulate discussion and action on these issues in the new Congress and administration. Progress towards reform will require a broad-based effort by civil society, labor groups, and the private sector.

Key findings

Corporate abuse is widespread in U.S. investments and supply chains. Abuses occur with frequency in the global networks and supply chains of U.S. corporations. These abuses can have devastating effects on people's health, livelihoods, and dignity. The corporate sector has also contributed to some of the failures in the U.S. government's responses to the COVID-19 pandemic, the climate crisis, and racial injustice.

The U.S. government has expanded corporate rights while decreasing corporate responsibilities. The government has increasingly provided corporations with rights and privileges beyond what most citizens enjoy. This includes, for example, rights to influence the political system in ways that ordinary citizens cannot, as well as freedom from federal taxation. Meanwhile, corporations have used their political power to evade liability when they cause harm to others, both domestically and overseas.

Victims have limited options for accessing remedies, and these options are becoming increasingly narrower. The U.S. government rarely, if ever, prosecutes corporations for abuses committed overseas. While civil lawsuits and criminal prosecutions have occasionally resulted in important victories, many corporations get away with little more than a slap on the wrist.

For over two decades, the U.S. government has relied on voluntary initiatives to respond to corporate abuses committed overseas. Few of these initiatives succeed at providing victims with access to remedies. Many of these initiatives have a greenwashing effect — corporations that join them can claim to have “addressed” human rights issues simply by participating in the initiative, while evading any consequences when abuses occur.⁸

Voluntary initiatives are not a substitute for corporate accountability

Accountability for corporate human rights abuses has two dimensions. First, victims must have a right to effective remedies that enable them to rebuild their lives and dignity. Remedies need to be available for all rights violations, no matter how economically or politically powerful the perpetrator is.

Second, corporations must face consequences for their roles in human rights abuses, even if their roles are indirect, or if the host governments share in their culpability. Penalties should be remedial to the victims, but they should also serve a deterrent effect, imposing costs that are significant enough to change the behavior of the perpetrators and prevent others from engaging in similar conduct.

We cannot rely on voluntary initiatives to provide access to remedies. Ten years after the adoption of the U.N. Guiding Principles on Business and Human Rights, it is clear that a voluntary approach is insufficient. The Biden administration should shift towards a business and human rights approach that places access to remedies and legal accountability at its center. Corporations will implement stronger due diligence practices when it is in their best interest to do so — when the consequences of becoming involved in human rights abuses impose a real cost on their operations.

Recommendations for the Biden administration

The Biden administration has significant, untapped legal tools and authorities that could be used to respond more effectively to corporate human rights abuses. We recommend that the administration take the following steps as part of its efforts to rebuild U.S. diplomatic leadership.

Use the existing power of the Department of Justice to promote corporate accountability for human rights. This includes investigating and prosecuting corporate human rights abusers, filing amicus briefs in support of civil litigation against corporate human rights abusers, and ensuring that victims are able to recover at least some of the fines paid by corporations to the federal government.

Ensure that the State Department proactively addresses corporate accountability as part of its human rights diplomacy. The State Department should update its 2016 Business and Human Rights Action Plan with a stronger focus on access to remedies. Corporate human rights abuses should also factor into core State Department human rights functions, such as the Annual Human Rights Reports and security assistance vetting. The Biden administration can also strengthen access to remedies by directing consular officers to provide visas to participants in human rights litigation in the United States, rather than denying visas for such purposes.

Use sanctions to respond to corporate human rights abuses. The Biden administration should call for the renewal and permanent authorization of Global Magnitsky sanctions before they expire in December 2022. The government should also begin to use its authority under the Global Magnitsky Act and Executive Order 13818 to sanction corporations, block property associated with abuses, deny visas to corporate executives, and ban imports of products where serious human rights abuses contributed to their production. As with criminal fines levied by the DOJ, the administration should designate a portion of the proceeds acquired through sanctions programs to help provide remedies to victims.

Fully implement trade regulations designed to combat modern slavery. The U.S. Customs and Border Patrol should use its existing authorities to respond more effectively to forced labor. This includes (1) establishing transparent methods of investigating allegations of forced labor in supply chains, (2) removing the overly onerous requirement that a specific shipment of goods be made with forced labor, and (3) rigorously enforcing existing regulations

prohibiting imports based on forced labor, including through the Foreign Supplier Verification Program and Section 307 of the Tariff Act of 1930.

Leverage the U.S. government's spending power to promote corporate accountability. The U.S. government is one of the world's largest procurers of goods and services, as well as a significant financier of overseas investment. The administration should develop a binding and enforceable human rights standard for federal contractors and federal grant recipients that explicitly applies to some of the most pervasive forms of corporate abuses, such as land grabbing, attacks against communities by security forces acting on behalf of companies, and attacks on human rights defenders.

Prohibit any U.S. government financing to projects that have a significant risk of violating human rights. The U.S. government is the largest shareholder in the World Bank Group and can wield substantial influence through its voting power in this institution. The Biden administration has the power to instruct the U.S. delegates to these bodies to insist on robust human rights safeguards and access to remedies when abuses occur. Additionally, the United States engages in a substantial amount of development finance through the Export-Import Bank and the Development Finance Corporation. The administration should ensure that these institutions similarly implement robust human rights safeguards and provide access to remedies.

Integrate corporate accountability into the administration's climate justice agenda. The administration can play a role in holding businesses accountable for reckless behavior that contributes to the climate crisis, such as widespread deforestation, land grabbing, and attacks on environmental defenders and Indigenous communities who are advocating for climate-related reforms at the local level. Several existing tools and authorities, such as sanctions, could be used for this purpose.

Strengthen interagency responses to corporate human rights abuses. The new administration should fully staff, and provide sufficient resources to, all offices involved in protecting human rights and the environment. To ensure that existing tools and authorities are used strategically, the president should also instruct the National Security Council to coordinate corporate accountability policy across the federal government.

Recommendations for Congress

Ultimately, Congress should enact legislation to hold corporations accountable for human rights abuses. We need legislation to make sure that victims of transnational human rights abuses have access to remedies and that corporations face legal consequences when abuses occur. This includes Congressional action to:

- Adopt a human rights version of the Foreign Corrupt Practices Act (FCPA), which is compatible with mandatory human rights due diligence legislation being designed in the European Union.
- Revise the Alien Tort Statute or expand other existing human rights statutes to overcome barriers that victims face in bringing transnational human rights claims against corporations that have a significant presence or property in the United States.
- Allow the seizure of U.S.-based assets that are linked to corporate human rights abuses, much as is already done in cases involving terrorism, drug trafficking, organized crime, and grand corruption.

Recommendations for state governments

At the state level, we need laws that enable victims of corporate human rights abuses to more easily overcome procedural barriers to transnational litigation, such as statutes of limitations and the doctrine of *forum non conveniens*.

Practical options exist for strengthening corporate accountability in a way that enhances American competitiveness and advances other U.S. foreign policy objectives. But it requires a recognition that corporations should not be above the law. If the U.S. government is going to succeed in confronting today's most pressing global challenges, it needs to take a stronger stand against corporate human rights abuses.

INTRODUCTION

In 2021, the United Nations will celebrate the ten-year anniversary of the Guiding Principles on Business and Human Rights.⁹ The U.N. Guiding Principles have changed the way that businesses around the world view their human rights obligations. Having a global standard has helped many businesses — especially large multinational corporations — to voluntarily strengthen human rights due diligence in their operations and supply chains.

But uptake of these measures has been alarmingly slow,¹⁰ and transnational business activities continue to cause widespread human rights abuses in all regions of the world. Even leading multinational corporations that are active in U.N. discussions to implement the Guiding Principles have opposed efforts to provide meaningful access to remedies to victims of business-related human rights abuses.¹¹ U.S. corporations are no exception.

For years, the U.S. business community has successfully pursued an agenda of expanding corporate rights while limiting corporate responsibility. Communities, both within the United States and abroad, that fall victim to corporate human rights abuses face enormous barriers to convincing Congress, the federal government, or the courts to take action.

Many of the industries that are most often implicated in overseas human rights abuses — such as the natural resources sector — are spending millions of dollars in lobbying expenses each year to reduce accountability.¹² As in the case of child labor in West African cocoa plantations, corporate lobby groups routinely evade accountability by promising to take voluntary action.

The corporate sector has had over ten years to demonstrate that accountability can come from within its own ranks. The outcome of this experiment is clear: We cannot curb corporate human rights abuses through voluntary measures alone.

FIFTY YEARS OF CORPORATE OPPOSITION TO HUMAN RIGHTS AND THE ENVIRONMENT

Fifty years ago, America's largest corporations began a coordinated effort to fight back against environmental, labor, and public health protections. In August 1971, Lewis Powell, a prominent Virginia attorney and board member of the Philip Morris tobacco company, wrote a confidential memo for the U.S. Chamber of Commerce called "Attack on American Free Enterprise System."¹³ The document, which later became known as the "Powell Memorandum," became the blueprint for large corporations to expand their influence over the U.S. political system.

The Powell Memorandum was a direct response to the U.S. government's expansion of social and environmental protections in 1970 and 1971. At the time, Ralph Nader's consumer protection movement was drawing national attention to automobile safety; Congress had just passed the National Environmental Policy Act, leading President Nixon to create the Environmental Protection Agency; scientists had established a link between smoking and cancer; and liberal activism was growing in prominence on university campuses.

Powell viewed these reforms as a leftist attack on the business community. He wrote, "One does not exaggerate to say that, in terms of political influence with respect to the course of legislation and government action, the American business executive is truly the 'forgotten man.'"¹⁴

The Powell Memorandum sparked the creation of a corporate influence system that now dominates Washington, D.C. Corporate executives began to view themselves as political actors.¹⁵ A group of leading CEOs formed the Business Roundtable, an organization that would play a leading role in expanding the political influence of corporations. The U.S. Chamber of Commerce began to strengthen its efforts to promote corporate interests and to fight regulations. Corporations began to build a network of think tanks, like the Heritage Foundation and the American Legislative Exchange Council, to promote pro-business ideas. They invested heavily in campaign finance and began a decades-long effort to fill the courts with pro-corporate judges.¹⁶

Less than four months after writing his memorandum, Lewis Powell himself became a justice of the U.S. Supreme Court.

Five decades later, corporate lobbies have succeeded in capturing all three branches of the U.S. political system.¹⁷ In a 2017 study for Harvard Business School, Katherine M. Gehl and Michael E. Porter examined the national politics industry and whether it was serving the general public. They found that:

The starting point for understanding the problem is to recognize that our political system isn't broken. Washington is delivering exactly what it is currently designed to deliver. The real problem is that our political system is no longer designed to serve the public interest, and has been slowly reconfigured to benefit the private interests of gain-seeking organizations: our major political parties and their industry allies.¹⁸

By the early 2000s, corporate lobbying expenditures exceeded the total operating budget of both the House and Senate.¹⁹ President Obama received millions of dollars in campaign contributions from banks, hedge funds, and private equity firms.²⁰ President Trump filled his cabinet with corporate executives and lobbyists who were given the power to regulate their own industries.²¹ The Trump administration took drastic steps to roll back government enforcement in cases of corporate abuse, often enacting policies written directly by industry lobbyists.²²

The U.S. Supreme Court under Chief Justice John Roberts has also made a number of rulings that are favorable to corporations.²³ The Supreme Court's 2010 *Citizens United* decision opened the door to "pay-to-play" politics in Congress, granting domestic and even foreign corporations a level of access to elected officials that ordinary citizens do not have.²⁴ Evidence suggests that foreign actors have benefited widely from the Supreme Court's decision to allow secret political contributions.²⁵

Corporate capture has become apparent as the U.S. government expands corporate rights while decreasing corporate responsibilities. Nearly 20 percent of large corporations paid zero, or even negative, federal income taxes in 2019.²⁶ Numerous big industries have evaded regulation of their human rights and environmental footprints. The fossil fuel industry, for example, has succeeded in delaying federal climate change action for decades, reaping record profits while receiving massive subsidies that keep the prices of its products artificially low.²⁷ (See Box 1.)

Box 1: The Fossil Fuel Industry's History of Climate Change Deception

Communities in the United States and around the world have started to experience the devastation associated with climate change. In 2020, thousands of families across the western United States were displaced by record-setting wildfires. Tropical storms in the southeastern part of the country have become more frequent and more severe. The impacts are expected to grow in magnitude over the coming decades.

Greenhouse gas (GHG) emissions trapped in the Earth's atmosphere are leading to higher average temperatures, which is causing drastic alterations in the climate. The United Nations concluded that fossil fuel combustion accounted for nearly 80 percent of all greenhouse gas emissions between 1970 and 2010.²⁸

For more than 50 years, the fossil fuel industry has known about the harm that their products would cause to communities.²⁹

In 1968, industry scientists warned these corporations that "significant temperature changes are almost certain to occur by the year 2000" due to rising GHGs, and that "the potential damage to our environment could be severe."³⁰ By the 1970s, industry executives knew with high certainty that their products were dangerous and that inaction would cause dramatic, or even catastrophic, changes to the climate.³¹ ExxonMobil even took measures to protect itself from climate change: For example, the company adapted its own facilities to protect against rising sea levels.³²

Yet the fossil fuel industry chose to conceal this knowledge from the public so it could continue promoting and selling fossil fuels. Worse, the industry led efforts to spread doubt about climate change and discredit the scientific voices that were warning about the dangers. This helped to delay climate action by decades.

In 2012, pioneering shareholder activist Robert Monks wrote, “American corporations today are like the great European monarchies of yore: They have the power to control the rules under which they function and to direct the allocation of public resources.”³³

Meanwhile, a new wave of social movements has risen with large-scale protests against systemic racism, the climate crisis, gross levels of inequality, worsening labor conditions, and human rights abuses throughout the global supply chains of major multinational corporations. Corporate lobbies have consistently blocked efforts by the U.S. government to address these issues.

In 2019, in response to growing public frustration with corporate abuse,³⁴ the Business Roundtable released a statement, signed by 181 CEOs, saying that corporations do not exist solely to make money for shareholders.³⁵ The CEOs committed to run their companies in a way that benefits all stakeholders — shareholders, but also customers, employees, suppliers, and communities. The announcement made headlines for its potentially transformative shift in the U.S. business community towards a more environmentally and socially responsible business model.³⁶

However, the CEOs’ statement has not yet resulted in any noticeable reforms.³⁷ A 2020 study found no evidence that the CEOs were taking their commitment seriously.³⁸ None of the boards of directors for these corporations amended their corporate governance guidelines to reflect the statement.³⁹ As the COVID-19 pandemic unexpectedly upended the U.S. economy a few months later, many of these same corporations responded by engaging in shameless profiteering. (For more information, see the next section of this paper.) As millions of Black Lives Matter protesters demanded an end to police brutality and systemic racism, many of the same corporations that expressed public support for the movement continued to fund politicians and industry groups that promote racial discrimination.⁴⁰

Nevertheless, the CEOs’ announcement draws attention to the role that corporate abuse plays in many of the crises facing the United States today. Corporations have disproportionate power and influence in the United States, and they wield this power to pursue their own interests, at the same time using sophisticated maneuvers to shield themselves from accountability.⁴¹

CORPORATE HUMAN RIGHTS ABUSE IS WIDESPREAD IN U.S. SUPPLY CHAINS

Many modern corporations operate through complex networks of subsidiaries, suppliers, contractors, and shell companies. These networks provide the parent corporations with tax and financial benefits, while also shielding them from liability.

With such complex structures in place, corporations do not always play a direct role in abuses; they can also play an aiding and abetting role when they support, finance, or source from a local business partner that directly engages in the abuses.⁴² In some cases, this is a result of negligent oversight; in others, the abuses occur with the knowledge of corporate management.

Laws and regulations in the United States — like in many countries — do not adequately reflect the reality of modern corporate relationships, supply chains and transnational business deals, nor how corporate human rights abuses occur. Gray areas in the law leave corporations with substantial room to escape accountability. As a result, many corporations appear to find it more cost effective to deny and deflect allegations, rather than to remedy harms where they occur.⁴³

There is no single statistic to measure the scale of corporate human rights abuses committed overseas. U.S. corporations have long partnered with foreign governments, security forces, and local elites engaged in serious corruption and human rights abuses. However, experts in the business and human rights field have consistently observed that the problem is widespread and potentially growing.

Since 2005, the Business and Human Rights Resource Center has invited businesses to respond to allegations of human rights abuses raised by civil society. Between 2005 and 2020, the Resource Center recorded over 5,800 company responses to allegations.⁴⁴ In a 2017 briefing on corporate legal accountability, the Resource Center reported, “The impunity of companies for involvement in human rights abuses is increasing, and in the context of increasing economic nationalism, it is likely to get worse — particularly where

business interests are able to ride populist nationalist politics to acquire deep influence and insulate themselves from accountability.”⁴⁵

Several organizations have tracked trends related to specific types of abuses. To name just a few:

Environmental rights

Environmental cases appear to be one of the most common forms of corporate human rights abuse.⁴⁶ Business activities devastate the health and livelihoods of local communities when they cause environmental pollution, forced evictions, and land grabbing.⁴⁷ In October 2020, for example, the Association of Brazil’s Indigenous Peoples and Amazon Watch identified six U.S. based financial institutions — BlackRock, Citigroup, JP Morgan Chase, Vanguard, Bank of America, and Dimensional Fund Advisors — that had invested in companies linked to violations of Indigenous rights in the Brazilian Amazon.⁴⁸ Globally, the United Nations estimated that an average of 15 million people were forced to leave their homes every year between 1994 and 2014 for large-scale development and business projects.⁴⁹

Modern slavery

Modern slavery occurs in the supply chains of many U.S. businesses, as illustrated by the ongoing crisis affecting Uyghur communities in China, which has implicated several well-known American brands.⁵⁰ (See Box 2.) In 2016, the International Labor Organization estimated that 16 million people were in forced labor in the private sector.⁵¹ The most problematic sectors were domestic workers (24 percent), construction (18 percent), manufacturing (15 percent), and agriculture and fishing (11 percent).⁵² Human trafficking and child labor also continue to be widespread challenges.

Labor rights

The International Trade Union Confederation’s (ITUC) 2020 Global Rights Index reported a seven-year high in violations of workers’ rights.⁵³ The ITUC found that 85 percent of countries violated the right to strike and 80 percent violated the right to collective bargaining. Governments and companies targeted workers with violence in 51 countries, while arresting and detaining workers in 61 countries. The ITUC also named 50 companies that had allegedly violated workers’ rights, including U.S. corporation Coca-Cola.

Box 2: Corporate Complicity in Repression of the Uyghurs

For years, the Chinese government has systematically targeted Muslim Uyghurs and other Muslim minority ethnic groups in the Xinjiang Uyghur Autonomous Region.⁵⁴ The United Nations reports that, since 2017, the Chinese government has placed over one million Uyghurs in forced labor camps.⁵⁵ The “End Uyghur Forced Labor” coalition estimates that one in five cotton garments sold globally contains cotton or yarn produced in Xinjiang.⁵⁶

By 2019, media outlets and human rights researchers began to find evidence of Uyghur forced labor in the supply chains of well-known brands such as Adidas, Apple, Calvin Klein, H&M, Lacoste, Nike, Ralph Lauren, and Tommy Hilfiger.⁵⁷

Yet corporations were hesitant to cut off ties with Xinjiang or to damage their lucrative relationships with the Chinese government.⁵⁸ U.S. corporations claimed they had investigated but had not found forced labor in their Xinjiang supply chains.⁵⁹ However, human rights researchers and investigators observed that standard due diligence practices, like third-party auditing and on-site inspections, were less likely to be effective in this situation because of the Chinese government’s high degree of control and monitoring of workers.

The abuses have only worsened during the COVID-19 pandemic. In July 2020, the New York Times reported that Chinese companies were using Uyghur forced labor to make disposable surgical masks and other personal protective equipment.⁶⁰

The U.S. government has responded with a series of measures to try to stop the repression, although these efforts still fall short of a “zero tolerance” approach to forced labor. The Department of Commerce blacklisted 37 entities involved in the abuses, prohibiting U.S. actors from doing business with them.⁶¹ In June 2020, President Trump signed the Uyghur Human Rights Policy Act of 2020, which imposed sanctions on Chinese individuals and companies involved in the abuses.⁶² In September, Customs and Border Protection announced partial restrictions on goods being imported from Xinjiang.⁶³

Congress is now considering legislation that would require multinational corporations to take stronger steps to curb the abuses.⁶⁴ In November 2020, the New York Times reported that Nike, Coca Cola, and other corporations were lobbying Congress to weaken this legislation.⁶⁵

Pandemic profiteering

Numerous businesses took advantage of the COVID-19 pandemic to pursue their own financial interests at the expense of the broader public. In March 2020, as people in the United States first began to experience the wider impacts of the pandemic, the fossil fuel industry asked the Trump administration for relief from regulations designed to protect health and safety. Three days later, the U.S. Environmental Protection Agency announced that it would stop enforcing environmental regulations.⁶⁶ Soon after, President Trump took steps to make these changes permanent. Similar efforts took place in Latin America, Europe, and other parts of the world.⁶⁷

Attacks against human rights defenders

Civil society plays a crucial role in holding businesses accountable for human rights abuses and corruption, especially in the absence of strong government enforcement.⁶⁸ Yet human rights defenders face hundreds of attacks each year as a result of their work.

During the first six months of the COVID-19 pandemic, for example, the Business and Human Rights Resource Center tracked 286 attacks against human rights defenders working on business-related activities in 44 countries. Most of these attacks occurred within a few sectors: mining (one-third), construction (one-fifth), and agribusiness (one-eighth). The most frequent type of attack was arbitrary detention (108 incidents).⁶⁹

In 2020, the Electronic Frontier Foundation reported that “surveillance, communications, and database systems, just to name a few, have been used by foreign governments — with the full knowledge of and assistance by the U.S. companies selling those technologies — to spy on and track down activists, journalists, and religious minorities who have been imprisoned, tortured, and even killed.”⁷⁰

While governments and businesses have used spying technologies to target human rights defenders for years, the issue gained prominence in the United States in 2020. During Black Lives Matter protests, human rights advocates raised concerns that U.S. corporations such as Microsoft, IBM, Amazon, and Axon were selling facial recognition tools, weapons, and predictive police software that were being used to target activists.

These tools are not only invasive from a privacy perspective, but also appeared to be based on algorithms that have inherent racial biases built into them. Following public outrage, several of the corporations agreed to suspend sales of some technologies to police departments, while continuing to provide quiet assistance through other channels.⁷¹

Among human rights defenders, those who work on environmental and land issues face particularly high risks. Global Witness reported that killings of land and environmental defenders reached record levels in 2019.⁷² At least 212 land and environmental defenders were killed in 2019, with over two-thirds of these assassinations taking place in Latin America. The vast majority of these attacks were linked to corporate abuse. Global Witness reported that the mining, agribusiness, and logging sectors were the deadliest in 2019.

WHAT THE U.S. GOVERNMENT IS ABLE TO DO, AND WHAT IT IS WILLING TO DO

The U.S. economy relies extensively on cross-border trade and investment. Many of the largest U.S. multinational corporations do most of their business overseas, and most of their employees and assets are overseas.⁷³ Meanwhile, the United States attracts more foreign investment than any other country.⁷⁴ With such a wide reach in the global economy, the U.S. government has the ability — and obligation — to respond to corporate human rights abuses outside of its borders, especially when there is a link to U.S. corporations.⁷⁵

Moreover, despite the claims by corporate lobby groups, greater accountability will be beneficial to both the U.S. economy and the U.S. government's foreign policy.

The public policy rationale for corporate accountability

In October 2020, economics professors Joseph E. Stiglitz and Geoffrey M. Heal, along with Oxfam America, submitted an amicus brief to the U.S. Supreme Court as part of the *Nestlé and Cargill v. Doe* case.⁷⁶ The brief describes the economics and public policy benefits of the Alien Tort Statute, and presents the rationale for stronger civil liability for corporations that commit human rights abuses in their overseas operations. Some of these benefits include:

Promoting economic efficiency

Corporate civil liability — the ability to bring civil lawsuits against corporations that commit human rights abuses — is an economically efficient way to enforce human rights laws. Stiglitz et al. wrote that civil liability reduces transaction costs and “puts enforcement in the hands of those with the greatest incentive to enforce compliance — the victims — and targets the costs of non-compliance to those with the greatest ability to police their own actions — corporations.”⁷⁷

Incentivizing stability and economic development in partner countries

Improved human rights conditions lead to long-term economic benefits by fostering political stability and attracting foreign capital flows. Stiglitz et al. cited several studies that demonstrate a link between respect for human rights and improved economic performance. This, in turn, creates more favorable markets for U.S. corporations. When Professor Stiglitz was Chief Economist at the World Bank, for example, the Bank found that economic returns in the projects that it financed were systematically higher in countries with higher human rights and civil liberties scores.⁷⁸

Leveling the playing field by encouraging a race to the top

When the U.S. government first began implementing the FCPA and the Sarbanes-Oxley Act, corporate lobby groups expressed concern that these regulations would place American corporations at a competitive disadvantage. According to this argument, if competitors engaged in bribery, American corporations should be able to engage in bribery, too. Stiglitz et al. observed that this argument encourages a race to the bottom, because “it rests on the premise that bad businesses in the United States should be on the same footing as bad businesses in other countries.”⁷⁹

Stiglitz et al. reported that the FCPA “created an international environment that is more attractive for U.S. firms.”⁸⁰ U.S. corporations enjoyed a “reputational premium” because they were known to engage in more responsible practices, and they enjoyed an advantage over competitors that faced the same potential civil liability but were not already taking steps to manage their exposure to corruption risks.⁸¹ The same logic applies to human rights abuses.

Providing a competitive advantage in democratic countries

Stiglitz et al. also argued that some host governments in least developed countries (LDCs) do not have strong enforcement capacity, so they want to attract investment from corporations with strong track records of respecting human rights. Corporate liability provides assurances to foreign governments that U.S. corporations have an incentive to adhere to international human rights standards.

Strengthening human rights in resource-rich countries

Stiglitz et al. observed that corporations involved in natural resource extraction in LDCs might have difficulty divesting when human rights abuses occur, because few alternative sources of those resources exist. The Democratic Republic of the Congo has a kleptocratic and highly corrupt government, for example, but also possesses a significant portion of the world's minerals needed for digital technologies. In these cases, the U.S. government can improve the investment environment for U.S. corporations by implementing broad corporate accountability measures that encourage industry-wide compliance with international human rights standards.⁸²

Strengthening the international democratic order

The U.S. government benefits by ensuring broad corporate commitments to international norms upheld by the United Nations. The greater the extent to which the corporate sector must adhere to these norms, the better positioned that American corporations will be to compete. When international human rights norms are not a factor in investment decisions, competitors from U.S. rivals such as China and Russia will be better positioned.

Providing American investors with greater confidence

For many U.S. corporations, reputation and brand image are an important source of value. U.S. investors, especially institutional investors, have taken significant steps to monitor the environmental and social footprints of their portfolios.⁸³ For example, by 2020, over 1,200 institutions had announced their divestment from fossil fuels (which are not only destructive to the climate, but are often associated with human rights abuses).⁸⁴ The U.S. government can support this shift towards responsible, informed investment by providing incentives for responsible business practices, both domestically and abroad.

The U.S. government has numerous legal tools available

The U.S. government has multiple tools and authorities that enable it to respond to corporate human rights abuses that occur overseas. Leverage potentially exists to hold corporations accountable within the United States whenever cases involve U.S. businesses, their subsidiaries, and supply chains.

Under the International Emergency Economic Powers Act (IEEPA), the President has direct authority to regulate transactions with foreign businesses, including parents, subsidiaries, and affiliates of U.S. companies. These powers have now also been supplemented by the Global Magnitsky Act. Leverage also exists over cases involving foreign businesses that are listed on U.S. stock exchanges and that benefit from access to U.S. markets and its consumer base.

As the world's single largest buyer of goods and services, the U.S. government also has substantial leverage over global supply chains through its purchasing power, and it exercises a similar power as a financier of development projects worldwide. (See Box 3.)

These legal tools are largely unused

While the U.S. government has substantial existing legal authority and numerous points of leverage, these tools remain largely unused. In practice, victims have few ways to access remedies. In civil lawsuits, the U.S. government has actively sought to undermine human rights litigation by intervening on the side of corporations.⁸⁵ Over the last decade, courts have further limited access to remedies for victims of corporate human rights abuses.

Meanwhile, the U.S. government rarely prosecutes corporations for human rights abuses committed overseas. Even in the rare instances where the government pursued criminal prosecutions, many corporations get away with little more than a slap on the wrist.

Politics are the biggest barrier to effective U.S. government action. Both U.S. and foreign multinational corporations have extensive political influence in the United States.⁸⁶ Many of the industries that are most often implicated in overseas human rights abuses, such as the natural resources sector, spend millions of dollars each year lobbying to reduce their accountability.⁸⁷

Box 3: Examples of U.S. Legal Tools and Authorities

Holding businesses accountable

- Prosecute corporations under federal human rights or anti-corruption statutes, and ensure that victims share in any fines or other monetary penalties.
- Submit supportive amicus briefs and statements of interest in civil litigation against corporations in U.S. courts for transnational human rights abuses.
- Impose IEEPA measures, Global Magnitsky sanctions, and visa restrictions on foreign businesses and individuals involved in abuses.
- Assist investigations, discovery, and prosecutions in foreign countries.

Withholding U.S. government support to abusive actors

- Prohibit U.S. government agencies from procuring goods and services from, or providing financing to, a business implicated in human rights abuses.
- Restrict support provided to foreign security forces that are implicated in business-related human rights abuses.
- Restrict the importation of goods and services from businesses involved in human rights abuses.
- Limit the advocacy that a U.S. embassy will conduct on behalf of a U.S. business involved in human rights abuses.

Conducting oversight of high-risk business activities

- Use the U.S. government's direct financing of development projects, as well as its vote as a prominent shareholder at the World Bank Group and other multilateral development banks, to withhold funding from abusive projects and provide remedies where harm occurs.
- Conduct human rights due diligence before providing support to businesses in the form of export credits, guarantees, and development assistance.
- Limit the transfer of surveillance technologies, arms, and other products to foreign entities where there is a risk of human rights abuses.
- Require businesses that are publicly traded on U.S. stock exchanges to disclose environmental and social risks.

ACCOUNTABILITY, PART 1: ENSURE ACCESS TO REMEDIES IN TRANSNATIONAL HUMAN RIGHTS CASES

To truly promote human rights in its foreign policy, the U.S. government needs to promote access to remedies. As described by the U.N. Working Group on Business and Human Rights, “There is a close relationship between rights and remedies. If a human right is breached, the holder or holders of the right should be able to seek remedies from the duty bearers. The remedies should be effective, lest rights mean little in practice.”⁸⁸

Victims of human rights abuses face enormous barriers in accessing remedies both in the United States and abroad. The process can be expensive and time consuming. The perpetrators can often evade liability through corruption and governmental connections. This is particularly true where the abuses occur in countries with weak legal and regulatory frameworks.

Remedies can take different forms, including apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions. Remedies can also take the form of preventative measures, such as injunctions that prevent future harm.⁸⁹

Courts are the traditional venue for victims to seek remedies for human rights abuses, although businesses have advocated for less punitive alternatives where they have substantially more control, such as company-controlled grievance mechanisms, arbitration, and mediation.⁹⁰ For human rights abuses that rise to the level of criminal activity, a company-controlled mechanism is not the appropriate forum.⁹¹ To the extent any nonjudicial mechanism is utilized, it should not be used to bar legal accountability and access to courts.

Civil litigation is critical to providing remedies and preventing human rights abuses

Since the founding of the United States, civil lawsuits have been one of the primary ways that victims of human rights abuses access remedies. Tort law requires individuals and businesses to internalize the negative externalities of their harmful acts. As Stiglitz et al. described in their amicus brief in *Nestlé and Cargill v. Doe*, “Tort law represents an important part of an efficient economic system. It provides incentives for appropriate behavior by requiring those who injure others, to pay damages to those whom they have harmed.”⁹²

But civil litigation may be impractical or unavailable in many countries. Victims of human rights abuses all too often are unable to sue corporations in the host country where the abuses took place, due to corruption, high risks of reprisals, and other barriers.⁹³ Many business-related human rights abuses implicate government officials in some way. This can make it extremely dangerous, if not impossible, for victims to access courts in their home country. In these situations, human rights victims must look outside their own countries for justice.

Civil lawsuits are often a strategy of last resort. Indeed, having access to the courts can help to improve the effectiveness of other dispute resolution mechanisms, by ensuring that businesses participate in good faith and offer meaningful solutions outside the courtroom. Civil liability is also an important incentive that encourages businesses to prevent human rights abuses throughout their operations and contractual relationships.

In the United States, there are substantial — and ever increasing — barriers for accessing the courts in such cases. Corporate liability for torts has become increasingly evasive as corporate structures grow in complexity.⁹⁴ Stiglitz et al. wrote:

It is now well-recognized that in a modern economy, the provision of appropriate incentives (to avoid injury to others) must extend beyond the imposition of liability to the person who commits the injury. In particular, corporations must be provided with incentives to discourage and deter their agents from engaging in such potentially harmful acts and to develop monitoring systems that promote compliance. Because corporations are in the best position to monitor such activities, domestic corporate liability can

minimize enforcement transactions costs. In addition, the limited resources of persons—as compared to those of the corporations for which they work —attenuates the effectiveness of liability on persons alone.⁹⁵

Industry lobby groups have relentlessly deployed legislative and litigation strategies that make it increasingly difficult for victims to obtain remedies for corporate human rights abuses, including those committed both domestically and abroad.⁹⁶ Over the last 15 years, these arguments have increasingly gained traction in some courts, and in particular the U.S. Supreme Court, which has consistently dismissed civil lawsuits arising out of corporate abuse committed overseas.

Box 4: The Violent Legacy of Chiquita Bananas

Chiquita is an iconic brand whose bananas are found in supermarkets across the United States.⁹⁷ It is also an example of a company that has evaded accountability for human rights atrocities for over 20 years.

From the 1990s to early 2000s, Chiquita bankrolled a paramilitary group, the Autodefensas Unidas de Colombia (AUC), which murdered thousands of trade unionists, banana workers, political organizers, and social activists in Colombia's banana-growing regions along the Caribbean coast.

At the time, Chiquita was a U.S. company with headquarters in Ohio.⁹⁸

In 2007, following an investigation by the U.S. Department of Justice, the company pled guilty to the crime of financing the AUC, which was designated as a foreign terrorist organization by the United States.

The company paid a \$25 million fine to the U.S. government, a small percentage of the \$4.6 billion in revenue that it earned in 2007.⁹⁹ However, none of this fine was designated for the AUC's victims; the AUC's victims and their families have never been compensated for the grievous harms they suffered.¹⁰⁰ EarthRights continues to work with the victims to seek justice.

Closing space for transnational torts in U.S. federal courts

In the past, victims and survivors of corporate human rights abuses pursued lawsuits in federal courts using federal statutes such as the Torture Victim Protection Act (TVPA) of 1991 and the Alien Tort Statute (ATS) of 1789. Over the last 10 years, however, the U.S. Supreme Court has dramatically narrowed the scope of these statutes to prohibit or limit their use against corporate actors, cutting off some of the few avenues that exist to pursue such cases at the federal level.

The TVPA is a federal statute that permits victims of torture or extrajudicial killings abroad to file civil lawsuits in U.S. courts against those responsible for those acts.¹⁰¹ Both U.S. and foreign citizens may bring suits under the TVPA. The TVPA was a limited tool to begin with, as it only applies to two types of abuses — torture and extrajudicial killings — committed with some involvement by foreign officials. But in 2012, the U.S. Supreme Court further limited the statute’s utility, holding that it could not be used against organizations or corporations.¹⁰²

For 25 years, human rights advocates used the ATS as a basis for bringing claims in federal courts when suing corporations for human rights violations committed outside of the United States.¹⁰³ As the American Bar Association described, “The ATS has proved an important means of securing relief for victims who have fled their home countries under the threat of persecution, and who cannot return to pursue their cases in the courts of their home countries.”¹⁰⁴

In 2004, the U.S. Supreme Court agreed that the ATS allows plaintiffs to bring civil lawsuits for violations of international norms that are “specific, universal and obligatory.”¹⁰⁵ In more recent cases involving corporate defendants, however, the Supreme Court has dramatically limited the statute’s scope, restricting its use in cases where abuses occur abroad and barring its use entirely against foreign corporations.¹⁰⁶ In 2021, the Supreme Court will decide a third ATS case against U.S. corporations Nestlé and Cargill that could further insulate corporate actors from accountability and limit victims’ ability to seek remedies.¹⁰⁷

A few other federal laws allow civil lawsuits against corporations under narrow circumstances. Congress passed the Trafficking Victims Protection Act in 2000, which has been amended and reauthorized several times as the

Trafficking Victims Protection Reauthorization Act. The law now includes a federal civil cause of action, which allows victims to sue businesses that knowingly benefits from human trafficking.¹⁰⁸ This includes businesses that profit from trafficking in their supply chains.

The Anti-Terrorism Act allows U.S. nationals to sue businesses that have provided support to international terrorist organizations.¹⁰⁹ This serves as an important protection for U.S. nationals who become victims of human rights abuses overseas, but it does not apply to foreign victims.

Barriers to bringing human rights lawsuits against corporations in federal courts

The Alien Tort Statute is a well-known law that enabled civil lawsuits to be brought for a broad range of human rights abuses committed overseas. The Supreme Court's weakening of the ATS is illustrative of the broader barriers that exist to bringing these kinds of cases.

Presumption against extraterritoriality

Two recent Supreme Court cases significantly limited the ability of human rights victims to bring claims against corporations under the ATS for harms that occur in whole or in part outside the United States. The first was *Kiobel v. Royal Dutch Petroleum Co. (Shell)*, a case against Shell for aiding and abetting the Nigerian military in the torture and killing of peaceful environmental activists in the 1990s.¹¹⁰ The Court ultimately held that Shell could not be sued for abuses occurring outside the United States, because it was a foreign corporation and its only connection to the United States was the fact that Shell does business here.

The *Kiobel* case concerned the “presumption against extraterritoriality,” a statutory interpretation tool that assumes that Congress does not intend to regulate conduct outside the United States unless it says so expressly, based largely out of a concern for generating a conflict between U.S. law and foreign laws. When a statute is silent about its extraterritorial reach, federal courts restrict its application to situations where there is a strong connection to the United States.

In *Kiobel*, the Supreme Court concluded that the principles underlying the presumption against extraterritoriality apply to the ATS, even though the ATS is strictly a jurisdictional statute.¹¹¹ The Court went on to hold that cases like

Kiobel — where the claims are brought by foreign plaintiffs, against foreign defendants, based on violations occurring abroad, without any clear connection to the United States (sometimes called “foreign cubed” cases) — were impermissibly extraterritorial in nature.

However, the Court said that other extraterritorial ATS cases could proceed, if the claims “touch and concern” the United States with “sufficient force” to “displace” the presumption that U.S. law does not apply abroad.¹¹² This language, which does not result in a clear legal standard, has proved challenging for the lower courts to apply. Most lower courts have simply dismissed any cases with an extraterritorial component rather than attempt the necessary analysis.

Liability of foreign corporations in U.S. courts

In the second case, *Jesner v. Arab Bank*, victims of terrorist acts committed abroad brought a civil lawsuit against a foreign bank that operated in the United States, based on its role in transferring funds to terrorist groups.¹¹³ *Jesner* involved allegations that the defendant, Arab Bank, supported international terrorism by financing suicide bombings in Israel and making “martyrdom” payments to the families of deceased bombers.

American victims of these attacks had already won a jury trial against Arab Bank, in which the bank was found liable for violating the U.S. Anti-Terrorism Act. However, since that statute only applied to American victims, the foreign victims needed to proceed under the ATS instead. Yet in 2018, the Supreme Court held that plaintiffs may not bring claims against foreign corporations under the ATS at all. The Court did not make its decision based on the text of the law, which clearly provides no such exceptions, but instead on general foreign policy concerns.¹¹⁴

Liability of U.S. corporations

The *Kiobel* and *Jesner* cases involved lawsuits against foreign corporations. In July 2020, the Supreme Court agreed to take up two related ATS cases against U.S. corporations Nestlé USA and Cargill for aiding and abetting child slave labor on cocoa plantations in Côte d’Ivoire.¹¹⁵ The Court’s decision in these cases could determine whether U.S. corporations are subject to suit under the ATS. In prior ATS cases, the U.S. government took the position that corporations could be defendants under the ATS. In the *Nestlé and Cargill*

case, the Trump Administration took the extreme position that corporations should be immunized from liability under the ATS entirely.

Aiding and abetting

Another question in the *Nestlé and Cargill* case concerns corporate liability for aiding and abetting. The doctrine of aiding and abetting extends liability beyond individuals who directly commit harmful acts to those who are complicit in them. For example, a corporation might contract with a supplier that it knows engages in human rights abuses such as forced labor, or it might contract with an armed group to secure its operations.

U.S. courts are divided on how to apply the aiding and abetting issue to ATS cases. For example, some courts have held that for a corporation to be liable, it must *knowingly* provide substantial assistance to a party that violates human rights, which is the same standard generally applied in U.S. criminal and civil law. Other courts, however, have gone a step further to find that it must provide assistance with the *purpose* of violating human rights.¹¹⁶

While the Supreme Court's decision in the cases against Nestlé and Cargill will be important to watch, significant ground has already been lost for victims of human rights abuses who wish to bring claims under the ATS.

Personal jurisdiction over foreign corporations

The U.S. constitution requires that a federal court must have personal jurisdiction over a defendant in order to hear a case against them. Generally, a court has personal jurisdiction over any individual who is present in the forum and who is served with the complaint. However, foreign corporations and U.S. multinational corporations have greater protections than individuals and many U.S. businesses under these rules. In two recent cases, the Supreme Court restricted the ability of victims to obtain personal jurisdiction over foreign or out-of-state corporate actors.

For many years, U.S. courts applied a rule under which corporations that do substantial business in, have offices in, or employ staff in the United States can essentially be treated the same as U.S. corporations for jurisdictional purposes. These corporations could be sued here just like U.S. corporations. Thus, a multinational corporation with a major U.S. presence could not avoid U.S. jurisdiction simply by moving its registration and headquarters offshore.

The same rules applied to out-of-state corporations within the United States. In other words, a state could exercise jurisdiction over corporations from another state that had a substantial presence in the first state.

In *Goodyear v. Brown* (2011) and *Daimler AG v. Bauman* (2014), the Supreme Court narrowed the rules allowing personal jurisdiction in federal courts over foreign and out-of-state corporations.¹¹⁷ These decisions make it substantially harder to bring cases against U.S. corporations, particularly where they act through their subsidiaries, and severely limits the options for where a survivor can pursue legal action.

Forum non conveniens

Another obstacle to justice that often arises in the early stages of human rights cases is the doctrine of *forum non conveniens*, which is Latin for an “inconvenient forum.” Corporations have successfully used this doctrine to evade liability in both federal and state courts, arguing that a lawsuit filed against them in their home forum, or where their corporate headquarters are located, is “inconvenient” and would be more appropriately heard in another court in a different country — such as one located in a foreign country where corruption is rife.¹¹⁸ Using this doctrine, several judges have dismissed human rights cases by concluding that a forum outside the United States, usually the location of the human rights abuses that are the basis of the suit, is more “convenient” for hearing the lawsuit.

While the *forum non conveniens* doctrine was created to promote efficiency and justice by permitting U.S. courts to decline to hear cases for which they are not the proper forum, allowing them to be heard in another country, the reality is that it is used as a method of dismissing lawsuits entirely. The vast majority of cases dismissed on these grounds are never refiled in foreign courts.¹¹⁹ The reality is that human rights victims in these cases usually bring their cases to the United States as a last resort, when they have no meaningful or safe options available to pursue justice in their home countries. The result is too often to deny them any forum at all.

Visas for plaintiffs and witnesses

Barriers have always existed for victims of human rights abuse to enter the United States. While some may be eligible for asylum, presenting an asylum claim requires first traveling to the United States. Applying for refugee status while abroad is difficult and may take many years, and the Trump

administration has greatly reduced the number of eligible resettling refugees.¹²⁰ But many participants in human rights cases are not seeking to resettle in the United States — they are only seeking to enter the country to present evidence to a U.S. court. Even in such cases, they may be denied visas to enter the United States. The result is that the visa policy of the Executive Branch can play a role in denying justice to victims presenting legitimate claims in U.S. courts.¹²¹

Barriers to justice in state court claims

While ATS claims have often drawn more public attention, most ATS cases have traditionally also included common law tort claims as well. State tort law claims — such as assault, battery, or false imprisonment — can be used to pursue claims for transnational human rights abuses. While these state law claims have historically proceeded in federal courts due to the fact that they often are paired with federal statutory claims under the ATS and TVPA, such cases are expected to increasingly proceed in state court given how the U.S. Supreme Court has curtailed the utility of those federal laws.

As with the federal level, however, plaintiffs bringing state-level tort claims face numerous barriers. For example, state statutes of limitations are often only one to three years long, as opposed to the ten-year statute of limitations provided by the TVPA at the federal level. These restrictions pose a particular challenge for victims of human rights violations abroad. Finding U.S. counsel and gathering evidence and testimony while plaintiffs are still traumatized and living in precarious conditions generally means that the process of preparing transnational human rights cases is more time-consuming than in a typical tort case.

It's worth noting that the result of the Supreme Court's decisions to narrow the scope of the ATS will mean that more of these cases proceed in state courts. But this was precisely the result the First Congress sought to avoid in enacting the ATS in 1789. Concerned about the potential foreign policy implications of having myriad different state courts decide cases involving the laws of nations in potentially inconsistent ways, Congress enacted the ATS to provide a federal forum for such cases that was more capable of producing consistent results. By distorting the plain language of the original statute to read in exceptions for corporate actors, the Supreme Court has encouraged such cases to proceed at the state level, potentially creating the very result Congress sought to avoid.

ACCOUNTABILITY, PART 2: STRENGTHEN THE U.S. GOVERNMENT'S RESPONSE

Under international law, the U.S. government — like all governments — is obligated to provide remedies when U.S. citizens cause harm in other countries.¹²² This applies when U.S. corporations cause harm, too.

In 2016, during the launch of the *Corporate Crime Principles*, Seema Joshi of Amnesty International said, “No company, however powerful, should be above the law, yet in the last 15 years no country has put a company on trial after an NGO brought evidence of human rights related crimes abroad. The inability and unwillingness of governments to meet their obligations under international law and stand up to rights-abusing companies sends the message that they are too powerful to prosecute.”¹²³

The U.S. government lags behind its peer governments on accountability issues. The government has consistently embraced aspects of the U.N. Guiding Principles on Business and Human Rights that involve voluntary corporate initiatives, yet has failed to support access to remedies in the United States for abuses that occur outside of its borders.

The U.S. government's preference for voluntary initiatives, rather than access to remedies

Since the early 2000s, the U.S. government's approach to business and human rights has focused on voluntary corporate initiatives.¹²⁴ Overreliance on voluntary initiatives has come at the expense of measures to shore up accountability and provide access to remedy.¹²⁵

On the one hand, businesses participating in these voluntary initiatives typically demonstrate a management-level desire to behave ethically, and their collaborative efforts have probably prevented numerous human rights abuses from happening. Voluntary initiatives also provide a space where business leaders can discuss and learn about human rights issues.

On the other hand, these initiatives do not pressure companies to provide access to effective remedies or to face accountability for their role in complex human rights situations.¹²⁶ (See Box 5.) Even where such initiatives might recommend corrective action, as voluntary initiatives they lack any enforcement power. In the worst cases, corporations have used voluntary initiatives to greenwash their harmful conduct.¹²⁷

Box 5: How the Cocoa Industry Has Evaded Regulation

Most of the world's cocoa comes from West Africa. Every major chocolate brand in the United States sources cocoa from the region

Awareness of slave labor and child labor in West Africa cocoa supply chains grew in the late 1990s. In 2001, the U.S. House of Representatives passed a bill that would ban the import of chocolate made with child labor. In response to the threat of regulation, the cocoa industry offered to make a deal.¹²⁸

After negotiations, the cocoa industry agreed to the 2001 Harkin-Engel protocol, in which it promised to eradicate “the worst forms of child labor” from its supply chains by 2005 in exchange for avoiding regulation.¹²⁹

Twenty years later, the industry has still failed to meet its promise. The cocoa industry reportedly spent over \$150 million over two decades to try to address the problem, an amount much smaller than the industry's estimated \$103 billion in annual sales.¹³⁰

A 2020 study commissioned by the U.S. Department of Labor found that an estimated 1.6 million children still work in child labor conditions in West Africa, and that 43 percent of these children are engaged in hazardous work — a higher percentage than a decade ago.¹³¹

In a 2019 investigation, the *Washington Post* found that “the odds are substantial that a chocolate bar bought in the United States is the product of child labor.”¹³²

Despite the pervasive influence of corporate actions on the lives of American citizens and people around the world, there is no interagency coordination mechanism for corporate accountability policy in the U.S. government.

The State Department's Bureau of Democracy, Human Rights and Labor (DRL) leads much of the U.S. government's engagement on business and human rights issues.¹³³ DRL plays an active role in several multistakeholder dialogues that encourage businesses to take voluntary action and police themselves.¹³⁴ For example, in September 2020, the State Department published voluntary guidance for U.S. businesses to consider when providing surveillance technologies or services to foreign governments that might be used to attack human rights defenders or otherwise infringe on civil liberties.¹³⁵

The major exception to the U.S. government's voluntary approach is with modern slavery. Congress has passed several laws that give the U.S. government authority to punish businesses involved in modern slavery, such as human trafficking, forced labor, and child labor. Under the Trafficking Victims Protection Reauthorization Act, for example, businesses can face criminal fines for reckless disregard that they benefited from trafficking or forced labor in their overseas supply chains. Business executives can also face imprisonment.¹³⁶ Several other laws allow the U.S. government to hold businesses accountable for engaging in modern slavery practices through criminal liability, civil liability, and restrictions on imports and exports.¹³⁷

The U.S. government also takes preventative measures in its public procurement policies. For example, private security companies that contract with the Department of Defense must demonstrate that they meet the standards of the International Code of Conduct for Private Security Service Providers. Regulations also prohibit the use of forced labor, child labor, and human trafficking by government contractors.¹³⁸

In some cases, however, the U.S. government actually works against corporate accountability for human rights. For example, the State Department's annual Award for Corporate Excellence does not appear to consider the human rights record of the entire company. This has led to some truly surprising finalists and awardees — such as Cargill, which, despite the fact that it is credibly accused of profiting from child slave labor, was honored for its Vietnam operations in 2015.¹³⁹ This sends the message to business that they can obtain honors from the U.S. government while still engaging in serious human rights abuses.

In December 2016, in the final month of the Obama administration, the State Department published its Business and Human Rights Action Plan in accordance with the U.N. Guiding Principles on Business and Human Rights.¹⁴⁰ Former EarthRights attorney Jonathan Kaufman observed:

The Government’s scattershot “approach” appears to consist of a random collection of public-private partnerships, generally informative and aspirational guides, and legislative initiatives, most of which are years — if not decades — old. Most glaring of all, despite enthusiastic references to the UN Guiding Principles on Business and Human Rights, the document completely ignores the need for victims to have access to justice and glosses over the administration’s troubling record on remedies.¹⁴¹

The U.S. government has created more robust legal and regulatory compliance regimes for other areas of corporate abuse committed overseas such as corruption, money laundering, and fraud. Yet the U.S. government lacks a similarly robust regime for human rights.

The U.S. government’s peers are shifting away from voluntary initiatives

Following the adoption of the U.N. Guiding Principles on Business and Human Rights in 2011, legislators began to pressure businesses to meet their “responsibility to respect human rights” by conducting human rights due diligence. A few jurisdictions — the United Kingdom and California — adopted laws that required businesses to report on their efforts, if any, to manage their human rights risks. The laws did not punish businesses that contributed to human rights abuses, nor were businesses punished for failing to conduct human rights due diligence.

Now, several jurisdictions are moving towards stronger laws that would require businesses to manage human rights risks throughout their value chain and would subject businesses to penalties for failure to comply.

In 2017, France adopted a Duty of Vigilance law that requires the largest French corporations to conduct human rights due diligence and report on their efforts.¹⁴² Obstruction of the implementation of this law is punishable by imprisonment or fine. The law also allows victims of human rights violations to bring civil claims in French courts if a corporation’s failure to comply with the law causes damages.

In April 2020, the European Commissioner for Justice, Didier Reynders, announced that the European Commission plans to introduce legislation in 2021 that will require EU businesses to conduct human rights due diligence.¹⁴³ The announcement came after a study finding widespread support, including among companies, for this regulation.¹⁴⁴ Legislators in Germany and Switzerland are also working on mandatory human rights due diligence laws.¹⁴⁵

Meanwhile, the U.S. government is facing pressure to adopt its own framework. Socially responsible investors are leading efforts to strengthen corporations' human rights due diligence, including through a growing number of shareholder resolutions targeting both U.S. and foreign corporations.¹⁴⁶ A proposal for a human rights version of the FCPA is gaining bipartisan support, which would align the United States with the framework being developed in the European Union. As with the FCPA, this legislation would require corporations to take meaningful action to root out instances of grave human rights violations in their supply chains. (See Box 6.)

While mandatory human rights due diligence creates a minimal level of accountability for businesses, it does not necessarily provide access to effective remedies for victims of human rights abuses. It is important not to think of such legislation as a “one-stop shop” for resolving business-related human rights abuses, but rather as an important piece of a bigger puzzle.

The U.S. government rarely prosecutes businesses for overseas human rights abuses

The United States has federal criminal statutes in the area of human rights that apply extraterritorially and could be invoked against businesses. In particular, federal law provides the U.S. Department of Justice (DOJ) with authorization to prosecute certain types of violations — including genocide,¹⁴⁷ torture,¹⁴⁸ war crimes,¹⁴⁹ recruitment and use of child soldiers,¹⁵⁰ modern slavery,¹⁵¹ piracy,¹⁵² and acts of terrorism.¹⁵³

The DOJ is charged with prosecuting these crimes in cooperation with other government agencies.¹⁵⁴ However, with the exception of modern slavery cases, prosecutions against businesses for these human rights abuses remain rare.¹⁵⁵ Moreover, federal criminal prosecutions of these crimes do not generally result in damages or compensation to victims.

Box 6: Lessons from the FCPA

In 1977, Congress enacted the Foreign Corrupt Practices Act (FCPA) in response to the widespread bribery of foreign officials by U.S. companies.¹⁵⁶ Several key elements of the FCPA approach will be relevant for a human rights due diligence regime.

Congress established the FCPA with the **explicit intention to create a global anti-corruption system**. After the law's passage, subsequent presidential administrations advocated for a global standard.¹⁵⁷ The private sector generally supported this approach, because it reduces the burden of meeting different reporting requirements for each jurisdiction.

A **carrots-and-sticks approach** has worked for the FCPA. Businesses can face penalties for failing to maintain books or for acts of bribery. But the DOJ provides incentives for cooperation and reporting, which can drastically reduce the penalties.¹⁵⁸ This encourages businesses to be forthcoming about corruption. Just in case, however, Congress added incentives for whistleblowers to report bribery.¹⁵⁹

Companies disagree about what “**leveling the playing field**” means. During the first few years of FCPA implementation, U.S. corporate lobbies complained that U.S. companies were being disproportionately targeted. In 1998, Congress amended the law so that foreign businesses could also be prosecuted.¹⁶⁰ Since then, U.S. government officials have interpreted this issue differently. To some, “leveling the playing field” means helping ethical businesses to compete against unscrupulous actors; to others, it means targeting only foreign businesses.¹⁶¹

The FCPA does not contain a **private right of action**. Although some shareholders have brought civil lawsuits against businesses implicated in corruption,¹⁶² few if any victims of corruption have recovered damages linked to FCPA violations. At the time the law was created, policymakers considered corruption to be a “victimless crime” that hurt business competitiveness, so a private right of action was not considered to be necessary. Human rights abuses are different, however. The consequences of a business's failure to conduct proper human rights due diligence are unlikely to be “victimless”; it is essential that the U.S. government's approach consider access to effective remedies.¹⁶³

Part of the problem with the current approach is that the DOJ is not using its existing authority adequately. Part of the problem also lies with the scope of the authorities provided to DOJ. The list of “gross human rights violations” does not necessarily align with the most common types of business-related human rights abuses. This is especially true in the natural resource sector, where abuses often occur in the form of attacks on human rights defenders, severe environmental pollution, large-scale forced evictions, and crimes against humanity (where atrocities do not necessarily have to be linked to an armed conflict).¹⁶⁴

At times, the DOJ has used other statutes to hold corporations accountable, especially when the violations link to terrorism or international criminal networks. In the case of Chiquita, for example, the DOJ fined the company \$25 million under the Anti-Terrorism Act for financing a designated terrorist organization. However, the U.S. government did not use any of this money to compensate the families of Chiquita’s victims in Colombia.

Growing use of sanctions as the U.S. government’s preferred punishment tool

With the passage of the 2016 Global Magnitsky Human Rights Accountability Act, the federal government began to expand its use of sanctions to punish perpetrators of human rights abuses and extreme cases of corruption.¹⁶⁵ In 2017, the Trump administration took a significant step forward toward accountability for serious human rights abuses by issuing Executive Order 13818, which both implements the Global Magnitsky Act and also recognizes that serious human rights abuses worldwide are a “national emergency” constituting “an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”¹⁶⁶ This is sufficient to invoke the President’s broad sanctions authority under IEEPA, at least with respect to foreign individuals and corporations, and their property.

Sanctions allow the federal government to seize perpetrators’ assets held in U.S. banks, block them from using the U.S. financial system, and prevent them from conducting business with U.S. entities, among other penalties. Sanctions can be placed against individuals as well as businesses.

As of November 2020, 100 of the 215 publicly announced designations under the Global Magnitsky Act targeted business entities.¹⁶⁷ In all of these cases, the sanctions primarily targeted a specific individual, but also targeted

business entities associated with that person. For example, the U.S. government sanctioned Israeli billionaire Dan Gertler and at least 33 business entities linked to him, in response to Gertler's role in fueling conflict and kleptocracy in the Democratic Republic of the Congo.

However, the U.S. government's sanctions regime has its limitations as a human rights and corporate accountability tool. The decision to impose sanctions is ultimately a political one that can be influenced by the U.S. government's competing geopolitical interests. After the assassination of journalist Jamal Khashoggi, for example, the U.S. government placed Global Magnitsky sanctions on 17 Saudi officials, but did not target Crown Prince Mohammed bin Salman, a close ally of the Trump administration, despite evidence of his direct involvement. Any efforts to sanction a multinational corporation could be met with similar political resistance. In 2018, for example, Swiss mega-corporation Glencore announced that it planned to circumvent U.S. sanctions against Dan Gertler in order to maintain a stake in the Democratic Republic of the Congo's lucrative mining sector.¹⁶⁸

Glencore's defiance of U.S. sanctions is an ongoing test case for whether the U.S. government can shift the behavior of large corporations through the use of sanctions.¹⁶⁹ Ultimately, to be a successful corporate accountability tool, sanctions will need to be implemented on a multilateral basis with the EU and other governments and will need to be used in combination with other legal tools and authorities. In the case of Glencore, the U.S., Swiss, and U.K. governments have instead opened criminal investigations in order to hold the corporation accountable.¹⁷⁰ Negotiations appear to be ongoing.

There is also no accessible and transparent process to accept and investigate complaints of serious human rights abuses. While the Global Magnitsky Act requires the U.S. government, through the Treasury Department, to consider information about human rights abuses submitted by nongovernmental organizations, there is no easy access to this process by victims themselves. Nor is there any public investigatory process, resulting in findings of serious human rights abuses; the existing process is secretive and generally results only in either an addition to the sanctions list, or no action. There does not appear to be an effort to engage with accused parties to advocate for prevention of abuse or remedies to victims.

Additionally, some potential sanctions available under IEEPA have not yet been used to their fullest extent. For example, IEEPA could be used to block or seize imports of goods produced with serious human rights abuses. The

President could also prevent individuals, including any executives or officials associated with corporations engaged in serious human rights abuses, from obtaining visas to enter the United States.

Finally, sanctions do not help to resolve cases where U.S. corporations are involved in the human rights abuses. By definition, the U.S. government only imposes sanctions against foreign actors. As a result, the U.S. government cannot rely on sanctions alone to end corporate human rights abuses. But the fact that many U.S. corporations, or corporations doing substantial business in the U.S., have relied on a web of foreign subsidiaries and affiliates actually gives the U.S. government greater sanctions authority over them. For example, while sanctions authority does not extend to a U.S. corporation such as Chiquita, it *does* extend to foreign corporations such as Banadex — the Chiquita subsidiary that was directly engaged in paying paramilitary death squads in Colombia.

If U.S. corporations choose to offshore their operations in order to seek tax benefits and less stringent government oversight, the consequence should be that, as non-U.S. entities, these companies are subject to U.S. sanctions. In most cases where U.S. corporations are engaged in human rights abuses abroad, foreign subsidiaries and affiliates are also involved, giving the Executive Branch substantial leverage should it choose to use it.

RECOMMENDATIONS

In 2021, the Supreme Court will issue a ruling in *Nestlé and Cargill v. Doe*. In its decision, the Court is expected to clarify the extent to which victims of human rights abuses can bring civil lawsuits against corporations using the Alien Tort Statute. No matter the outcome, the ruling will provide clear signals to the Biden administration and Congress on the extent to which existing laws are sufficient to provide victims with access to remedies, and which gaps need to be filled.

For years, the U.S. government has embraced the concept of “voluntary multistakeholder initiatives” in response to corporate human rights abuses. In several cases, the U.S. government has actively fought against accountability, siding with industry lobbies to advance legal arguments that limit the ability of human rights victims to seek remedies.

One decade after the adoption of the U.N. Guiding Principles on Business and Human Rights, it is clear that a voluntary approach to corporate human rights abuses is insufficient. Voluntary initiatives are valuable to the extent that they provide a space where businesses and civil society can exchange ideas and best practices. However, voluntary initiatives are not a substitute for accountability.

Recommendations for the Biden administration

The U.S. government has significant untapped legal tools and authorities that could be used to respond more effectively to corporate human rights abuses, even before new legislation is enacted. We recommend the following:

Leverage the existing power of the Department of Justice to promote corporate accountability for human rights.

The DOJ’s human rights prosecutions have focused overwhelmingly on abuses by individuals with little or no attention to corporate abuse. The DOJ should use existing legal authorities to investigate and prosecute corporate human rights abusers. This could include both examining the human rights dimensions of corruption cases that it is pursuing and prosecuting corporations that play a role in gross human rights violations.

The Biden administration should reverse the Trump administration's practice of advocating for corporate immunity. Instead, the DOJ should promote civil litigation against corporate human rights abusers by filing amicus briefs in support of these cases in U.S. courts.

Where victims of corporate human rights abuses are not otherwise compensated, the DOJ should ensure that fines paid by corporations are used in part to provide such compensation. Some statutes allow crime victims to recover restitution, but these are not comprehensive. Cases exist where companies have paid significant fines and yet their victims received no compensation (see the example of Chiquita in Box 4 on page 25).

Ensure that the State Department proactively addresses corporate accountability as part of its human rights diplomacy.

In consultation with civil society, the Biden administration should update the U.S. government's Business and Human Rights Action Plan with a stronger focus on access to remedies. The U.N. Working Group on Business and Human Rights encourages governments to develop and regularly update a business and human rights action plan. Four years have passed since the Obama Administration published a U.S. government plan in December 2016. The Trump Administration appears not to have taken any steps to implement the plan.

In mid-2021, the U.N. Working Group will present its roadmap for the next ten years of implementation of the U.N. Guiding Principles on Business and Human Rights, which is expected to provide greater emphasis on access to remedies. This will provide the U.S. government with an opportunity to establish itself as a leader on this issue; at minimum, the U.S. government will face pressure to demonstrate how it will help to implement the U.N. Working Group's Ten-Year Roadmap.¹⁷¹

The State Department should also consider corporate accountability issues in its annual Country Reports on Human Rights Practices. The annual human rights reports inform the U.S. government's responses to complex situations. As a result, it is important that they provide an accurate assessment of how businesses — including U.S. businesses — play a role in human rights abuses, and whether victims are able to seek remedies from these actors in the civil justice system.

The U.S. government's support for foreign security forces is another area that often links to business-related human rights abuses. The Biden administration should expand security assistance vetting beyond the limited number of "gross human rights violations," in order to consider the role of security forces in business-related human rights abuses.

For example, public and private security forces often play a role in supporting business activities that harm local communities, such as attacks on and surveillance of human rights defenders, forced evictions, and environmental crimes. These abuses are often part of broader patterns of abuse and precursors to extrajudicial killings and other gross violations of human rights. U.S. taxpayer dollars should not support foreign security forces that participate in business-related human rights abuses.

The State Department also has an important role to play in promoting victims' access to remedies through civil litigation. The administration should direct consular officers to provide visas to participants in human rights litigation in the United States, using existing authority to require posting of bonds where necessary, rather than denying visas. Existing regulations allow consular officers to require posting a bond, instead of denying a visa, where there is any doubt about whether a visa applicant will return to their country. Participants in human rights litigation should not have visas denied where their counsel or supporting NGOs are willing to pay for their travel expenses and post a bond to guarantee their return.

Use sanctions to respond to corporate human rights abuses.

The Global Magnitsky Act has proved to be an important tool for responding to serious human rights abuses and acts of corruption around the world. The administration should immediately begin efforts to prepare to permanently authorize this sanctions program before the law sunsets in December 2022.

According to publicly available data, the U.S. government has sanctioned a number of businesses under Global Magnitsky, but only as derivative sanctions that are linked to an individual who is the primary target. The U.S. government can and should use existing authorities under the Global Magnitsky Act, Executive Order 13818, and the International Emergency Economic Powers Act to sanction corporations, block property associated with abuses, deny visas to corporate executives, and ban imports of products where serious human rights abuses contributed to their production. The government should also invest in outreach around this program, so that civil society

organizations working directly with victims of human rights abuses at the grassroots level are better aware of the program and the process for submitting evidence of abuses to sanctions officials.

To the extent that these sanctions programs result in fines or confiscated property, the government should ensure that these are made available to victims of the underlying abuses who have not had access to remedies.

Fully implement trade regulations designed to combat modern slavery.

The U.S. government should use its existing authorities to respond more effectively to forced labor cases. In particular, the U.S. Customs and Border Patrol should (1) establish transparent methods of investigating allegations of forced labor in supply chains, (2) remove the overly onerous requirement that a specific shipment of goods be made with forced labor, and (3) rigorously enforce existing regulations that prohibit imports based on forced labor, including through the Foreign Supplier Verification Program and Section 307 of the Tariff Act of 1930.

Leverage the U.S. government's spending power to promote corporate accountability.

The Biden administration should develop a binding and enforceable human rights standard for federal contractors and federal grant recipients that explicitly applies to some of the most pervasive forms of corporate abuses, such as land grabbing, attacks against communities by security forces acting on behalf of companies, and attacks on human rights defenders. Similar to existing standards on affirmative action and anti-discrimination, the administration can implement such a standard by executive order. The U.S. government should investigate complaints of violations with penalties up to and including debarment for companies that do not respect human rights.

Additionally, the U.S. government could do more to prohibit taxpayer dollars from contributing to economic development projects that have a significant risk of violating human rights. The U.S. government is the largest shareholder in the World Bank Group and can wield substantial influence through its voting power in this institution. The Biden administration has the power to instruct the U.S. delegates to these bodies to insist on robust human rights safeguards and access to remedies when abuses occur. Additionally, the U.S. government engages in a substantial amount of direct development finance, including through the Export-Import Bank and Development Finance

Corporation. The administration should ensure that these institutions similarly implement robust human rights safeguards and provide access to remedies.

Integrate corporate accountability into the administration’s climate justice agenda.

To reduce future greenhouse gas emissions and help people to adapt to the changing climate, the Biden administration should hold businesses accountable for reckless behavior that contributes to widespread deforestation, land grabbing, and attacks on environmental defenders and indigenous communities who are advocating for climate-related reforms at the local level.

To do this, the administration should examine explicitly how it can use existing tools and authorities to end corporate human rights abuses that are driving the crisis. For example, members of Congress have already developed a way in which sanctions could be applied to the climate crisis.¹⁷²

Strengthen interagency responses to corporate human rights abuses.

The Trump administration has “hollowed out” many parts of the U.S. government, leaving many offices without the resources they need to fulfill their mandates. The new administration should fully staff, and provide sufficient resources to, offices involved in responding to corporate human rights abuses. This includes, but is not limited to, the DOJ’s Human Rights and Special Prosecutions Section, the Treasury Department’s Office of Foreign Assets Control, and the State Department’s Bureau of Democracy, Human Rights, and Labor.

The U.S. government has a wide range of tools and authorities that can be used to respond effectively to corporate abuse if carefully coordinated. The President should create a new position at the National Security Council to strengthen coordination, similar to the new special envoy for climate change.

Recommendations for U.S. Congress

Ultimately, we need legislation at the federal level to ensure that victims of human rights abuses perpetrated overseas can access federal courts in civil lawsuits against all corporations that have a significant presence or property in the United States.

Adopt a human rights version of the FCPA.

The FCPA system has proved to work well and has bolstered American competitiveness abroad. Having a parallel system for human rights would be familiar to the business community and cost effective. Because of the significant work already underway in the EU on mandatory human rights due diligence, the U.S. system should be designed from the outset to be compatible.

Create a federal private right of action that can be brought against corporations by victims of transnational human rights abuses.

Victims of human rights abuses should be able to bring civil lawsuits in U.S. courts against U.S. corporations and foreign corporations that have a significant presence or property in the United States. This includes liability for abuses committed by their subsidiaries, suppliers, and agents overseas. It includes corporations who play a role through “command responsibility” and “aiding and abetting.”

The legislation could be structured in three ways: (1) amending the Alien Tort Statute to make it apply explicitly to business activities overseas; (2) amending other federal human rights statutes to explicitly allow civil lawsuits against businesses and to expand the scope to cover a broad range of abuses, or (3) adopting new legislation, modeled on the Trafficking Victims Protection Reauthorization Act, which includes venture liability and applies to a broad range of abuses.

Allow the seizure of U.S.-based assets that are linked to human rights abuses.

Civil forfeiture is a powerful tool that the U.S. government uses in cases involving terrorism, drug trafficking, organized crime, and grand corruption.¹⁷³ There is no reason why a similar strategy could not be used in response to human rights abuses. The government should be able to seize the

property of foreign corporations that is traceable to human rights abuses outside the United States, and which is found in the United States. The government could then use these assets to help provide victims of those abuses with remedies.

Recommendations for state governments

Finally, we need legislation at the state level to strengthen the ability of victims of corporate human rights abuses to bring transnational tort claims. Many of the same reforms needed at federal level are also necessary at state level, especially in jurisdictions where multinational corporations have an active presence.

For example, the statute of limitations for bringing human rights cases should be long enough to allow victims to find U.S. legal representation, prepare their cases, and gather evidence of human rights abuses. *Forum non conveniens* should only be available in cases in which the forum court is truly incompetent to hear the case (e.g., when all parties and evidence are located in a foreign country). Corporate defendants should not be able to use the doctrine where threats to the safety and security of human rights defenders exist.

ENDNOTES

¹ For more information about *Cargill and Nestlé v. Doe*, please see EarthRights’ “Cancel Corporate Abuse” webpage, <https://www.cancelcorporateabuse.org>. Legal documents related to the Supreme Court case are available on ScotusBlog.com at <https://www.scotusblog.com/case-files/cases/nestle-usa-inc-v-john-doe-i>. Both of these multinational corporations have a strong connection to the United States. Nestlé USA sells its products under the umbrella of 2,000 household brands found in grocery stores across the country. Cargill is the largest privately held corporation in the United States, producing beef, soy, cocoa, and countless other agricultural items.

² See the amici curiae brief filed by the U.S. Chamber of Commerce et al. in *Cargill and Nestlé v. Doe*, filed on Sept. 8, 2020 and available at https://www.supremecourt.gov/DocketPDF/19/19-416/153386/2020090815552216_19-416.19-453%20tsac%20Chamber%20of%20Commerce.pdf. See also, the U.S. government’s amicus curiae brief filed in the case on Sept. 8, 2020, available at https://www.supremecourt.gov/DocketPDF/19/19-416/153365/20200908144507659_19-416tsacUnitedStates.pdf.

³ U.S. Chamber of Commerce and U.S. government amicus briefs, *ibid*.

⁴ See the Chocolate Manufacturers Association, “Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (also known as the Harkin-Engel Protocol),” Sept. 2001, https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Harkin_Engel_Protocol.pdf.

⁵ Peter Whoriskey & Rachel Siegel, “Cocoa’s Child Laborers,” *Washington Post*, 19 June 2019, <https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa>. A recent study commissioned by the U.S. Department of Labor reached similar conclusions. See NORC at the University of Chicago, *Assessing Progress in Reducing Child Labor in Cocoa Production in Cocoa Growing Areas of Côte d’Ivoire and Ghana*, Oct. 2020, <https://www.norc.org/NewsEventsPublications/PressReleases/Pages/increase-in-hazardous-child-labor-in-cocoa-production-amid-an-expansion-of-cocoa-farming-in-cote-d%E2%80%99ivoire-and-ghana.aspx>.

⁶ For more information, see “EarthRights at 25,” <https://earthrights.org/25th-anniversary>.

⁷ For example, see the Canadian Supreme Court’s 2020 decision in *Nevsun Resources Ltd v. Araya*. James Yap, “Nevsun Resources Ltd v. Araya: What the Canadian Supreme Court decision means in holding Canadian companies accountable for human rights abuses abroad,” Canadian Lawyers for International Human Rights, Apr. 23, 2020, <http://claihr.ca/2020/04/23/nevsun-resources-ltd-v-araya-what-the-canadian-supreme-court-decision-means-in-holding-canadian-companies-accountable-for-human-rights-abuses-abroad>.

⁸ See e.g., Richard Conniff, “Greenwashed Timber: How Sustainable Forest Certification Has Failed,” *Yale Environment 360*, Feb. 20, 2018, <https://e360.yale.edu/features/greenwashed-timber-how-sustainable-forest-certification-has-failed>.

⁹ On June 16, 2011, the U.N. Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights. United Nations, “UN Human Rights Council endorses principles to ensure businesses respect human right,” <https://news.un.org/en/story/2011/06/378662>. The U.N. Guiding Principles are available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁰ The 2019 Corporate Human Rights Benchmark is an impartial assessment of the 200 largest companies in four high-risk sectors (agribusiness, apparel, extractives, and information and communications technology). According to the study, “The fact that nearly half of the companies assessed (49%) score 0 across all indicators related to the process of human rights due diligence is particularly alarming.” World Benchmarking Alliance, *Corporate Human Rights Benchmark: 2019 Key Findings*, Nov. 2019, <https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf>. See also, U.N. General Assembly, “The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,” July 16, 2018, UN Doc A/73/163, paras. 23-28.

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¹⁵ In his 1971 memorandum, Powell wrote, “The day is long past when the chief executive officer of a major corporation discharges his responsibility by maintaining a satisfactory growth of profits, with due regard to the corporation’s public and social responsibilities. If our system is to survive, top management must be equally concerned with protecting and preserving the system itself.” Powell Memorandum, *ibid*.

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¹⁸ Katherine M. Gehl & Michael E. Porter, Harvard Business School, *Why Competition in the Politics Industry is Failing America* (Sept. 2017), <https://www.hbs.edu/competitiveness/Documents/why-competition-in-the-politics-industry-is-failing-america.pdf>.

¹⁹ Drutman, “How Corporate Lobbyists Conquered American Democracy,” note 16.

²⁰ Jonathan Easley, “President Obama Raised Most From Private Equity, Hedge Funds in 2008,” *The Hill*, May 22, 2012, <https://thehill.com/blogs/blog-briefing-room/news/228795-obama-raised-35m-from-private-equity-in-2008>.

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²³ See Adam Liptak, “Corporations Find a Friend in the Supreme Court,” *New York Times*, May 4, 2013, <https://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html>; Andrew Chung, “Supreme Court’s business-friendly reputation takes a hit,” *Reuters*, June 26, 2019, <https://www.reuters.com/article/us-usa-court-business-idUSKCN1TR302>.

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³⁸ KKS Advisors, *Covid-19 and Inequality: A Test of Corporate Purpose* (Sept. 2020), <https://www.kksadvisors.com/tcp-test-of-corporate-purpose-september2020>.

³⁹ Lucian A. Bebchuk & Roberto Tallarita, "The Illusory Promise of Stakeholder Governance: Presentation Slides," Harvard Law School, Nov. 9, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581299.

⁴⁰ See e.g., Rashad Robinson, "Corporations Profit from Racism. It's Time for Us to Stand up to Them," *The Guardian*, May 16, 2019, <https://www.theguardian.com/commentisfree/2019/may/16/racial-justice-corporations>; Fernando Duarte, "Black Lives Matter: Do companies really support the cause?" *BBC World Service*, June 12, 2020, <https://www.bbc.com/worklife/article/20200612-black-lives-matter-do-companies-really-support-the-cause>; Amanda Holpuch, "Why corporate America makes an unconvincing ally against racism," *The Guardian*, June 27, 2020, <https://www.theguardian.com/business/2020/jun/27/corporations-racial-injustice-donations-statements>.

⁴¹ In 2020, for example, a consortium of ten nonprofit organizations, led by the Center for Research on Multinational Corporations (SOMO), published *Mind the Gap: Corporate Strategies to Avoid Responsibility for Human Rights Abuses*. The report highlights five tactics that corporations use to evade accountability, each of which are described in detail. These tactics are in widespread use on a global scale: (1) Constructing deniability, (2) Avoiding liability through judicial strategies, (3) Distracting and obfuscating stakeholders, (4) Undermining defenders and communities, and (5) Utilizing state power. See SOMO, "Five Strategies Corporations Use to Avoid Responsibility for Human Rights Abuses," July 10, 2020, <https://www.somo.nl/five-strategies-corporations-use-to-avoid-responsibility-for-human-rights-abuses>.

⁴² Bennett Freeman et al. observe that while the U.N. Guiding Principles clearly articulate a responsibility to respect human rights, "less clear is the definition of linkage in different contexts that companies should be prepared to assess. A range of situations and factors can cause companies to be linked to alleged harm: companies' operations; the products or services they produce in certain markets; the legal and commercial relationships they have created with local supply chain partners (as for textiles and manufacturing); or geographic proximity between a company's operations and affected indigenous communities (as for oil, mining and agriculture)." Business and Human Rights Resource Center & International Service for Human Rights, *Shared Space Under Pressure*, Aug. 2018, <https://media.business-humanrights.org/media/documents/fdfe07e3d812cfcfed4235fbbf820a3d77599b13.pdf>.

⁴³ See e.g., Sheera Frenkel et al., "Delay, Deny and Deflect: How Facebook's Leaders Fought Through Crisis," *New York Times*, Nov. 14, 2018, <https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html>.

⁴⁴ Business and Human Rights Resource Center, "Company Response Mechanism," <https://www.business-humanrights.org/en/from-us/company-response-mechanism>. As of the end of November 2020, the Resource Center had tracked 5843 total company responses in the portal; the overall worldwide company response rate was an average of 73 percent.

⁴⁵ Business and Human Rights Resource Center, *Corporate Legal Accountability Annual Briefing: Corporate impunity is common & remedy for victims is rare*, 2017, https://media.business-humanrights.org/media/documents/files/documents/CLA_AB_Final_Apr_2017.pdf.

⁴⁶ See e.g., U.N. Human Rights Council, “Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum: Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse,” May 23, 2008, U.N. Doc. A/HRC/8/5/Add.2, para. 67: “The Special Representative reviewed 320 cases of alleged corporate-related human rights abuses [between 2005 and 2007] and found that nearly one third of the cases alleged environmental harm that affected human rights, including the rights to life, health, food and housing. Most of the cases of direct harm to communities involved environmental impacts.” See also, European Union Agency for Fundamental Rights (FRA), *Business and Human Rights – Access to Remedy* (2020), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf. The EU FRA found, “Among the many human rights identified as being adversely affected by businesses in the business-related human rights incidents [in the EU] uncovered in the first phase of FRA’s research, ‘environmental rights’ are mentioned most often (in 44 cases)” (p. 33).

⁴⁷ See e.g., John Knox, “Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,” U.N. Human Rights Council, Dec. 30, 2013, U.N. Doc. A/HRC/25/53. Special Rapporteur Knox’s report maps out many of the ways that environmental destruction affects human rights. In 2016, the International Criminal Court said that types of environmental rights abuses could arise to the level of crimes against humanity, and indicated its intent to prioritize these types of cases. John Vidal & Owen Bowcott, “ICC Widens Remit to Include Environmental Destruction Cases,” *The Guardian*, Sept. 15, 2016, <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>.

⁴⁸ *Association of Brazil’s Indigenous Peoples & Amazon Watch*, “American Financiers Invested More Than US\$18 Billion in Companies Linked to Indigenous Rights Violations in the Brazilian Amazon,” Oct. 27, 2020, <https://amazonwatch.org/news/2020/1027-american-financiers-invested-billion-in-companies-linked-to-indigenous-rights-violations>.

⁴⁹ U.N. Economic and Social Council, Report of the United Nations Commissioner for Human Rights, July 11, 2014, U.N. Doc. E/2014/86, para. 5.

⁵⁰ According to the U.S. government, modern slavery is a term that encompasses sex trafficking and compelled labor, such as involuntary servitude, slavery or practices similar to slavery, debt bondage, and forced labor. *U.S. State Department*, “What is Modern Slavery?,” <https://www.state.gov/what-is-modern-slavery>. See also, Vicky Xiuzhong Zu et al., *Uyghurs for Sale* (Mar. 2020), Australian Strategic Policy Institute, <https://www.aspi.org.au/report/uyghurs-sale>.

⁵¹ International Labor Organization (ILO), *Global Estimates of Modern Slavery: Forced Labor and Forced Marriage* (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf; ILO, *Ending child labor, forced labor and human trafficking in global supply chains* (2019), https://www.ilo.org/ipecc/Informationresources/WCMS_716930/lang-en/index.htm.

⁵² ILO, *Global Estimates* (2017), note 51.

⁵³ International Trade Union Confederation, *2020 ITUC Global Rights Index*, https://www.ituc-csi.org/IMG/pdf/ituc_globalrightsindex_2020_en.pdf.

⁵⁴ Human Rights Watch, “*Eradicating Ideological Viruses*: China’s Campaign of Repression Against Xinjiang’s Muslims” (Sept. 2018), <https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs>. For an overview of the forced labor camps in Xinjiang, see Jen Kirby, “Concentration Camps and Forced Labor: China’s Repression of the Uighurs, Explained,” *Vox*, Sept. 25, 2020, <https://www.vox.com/2020/7/28/21333345/uyghurs-china-internment-camps-forced-labor-xinjiang>.

⁵⁵ Stephanie Nebehay, “U.N. Says It Has Credible Reports that China Holds Million Uighurs in Secret Camps,” *Reuters*, Aug. 10, 2018, <https://www.reuters.com/article/us-china-rights-un-idUSKBN1KV1SU>; *The Guardian*, “Detention of Uighurs Must End, UN Tells China, Amid Claims of Prison Camps,” Aug. 30, 2018, <https://www.theguardian.com/world/2018/aug/31/detention-of>

[uighurs-must-end-un-tells-china-amid-claims-of-mass-prison-camps](#); Anna Fifield, “China Compels Uighurs to Work in Shoe Factory That Supplies Nike,” *Washington Post*, Feb. 29, 2020, https://www.washingtonpost.com/world/asia_pacific/china-compels-uighurs-to-work-in-shoe-factory-that-supplies-nike/2020/02/28/ebddf5f4-57b2-11ea-8efd-0f904bdd8057_story.html.

⁵⁶ Coalition to End Uyghur Forced Labor, <https://enduyghurforcedlabour.org>.

⁵⁷ Elizabeth Paton & Austin Ramzy, “Coalition Brings Pressure to End Forced Uighur Labor,” *New York Times*, Aug. 10, 2020, <https://www.nytimes.com/2020/07/23/fashion/uighur-forced-labor-cotton-fashion.html>. Pressure on the corporate sector grew in March 2020, when the Australian Strategic Policy Institute (ASPI) published a report linking at least 82 global brands to the atrocities. ASPI reported that the Chinese government had transferred at least 80,000 Uyghurs from Xinjiang to factories across China between 2017 and 2019 and that these individuals were working “under conditions that strongly suggest forced labor.” Vicky Xiuzhong Zu et al., *Uyghurs for Sale*, note 50.

⁵⁸ Paton & Ramzy, *ibid*: “Many Western fashion businesses have remained quiet when it comes to the Chinese government’s stance on local issues, fearful of losing favor in one of the world’s most powerful and fastest growing consumer markets or access to a critical manufacturing hub in their supply chains. But on the issue of Uighur forced labor, a change is coming, as is new U.S. legislation.”

⁵⁹ *BBC News*, “Apple and Nike Urged to Cut ‘China Uighur Ties’,” July 23, 2020, <https://www.bbc.com/news/business-53481253>.

⁶⁰ Muye Xiao et al., “China Is Using Uighur Labor to Produce Face Masks,” *New York Times*, Aug. 13, 2020, <https://www.nytimes.com/2020/07/19/world/asia/china-mask-forced-labor.html>.

⁶¹ U.S. Commerce Department, “Commerce Department Adds Eleven Chinese Entities Implicated in Human Rights Abuses in Xinjiang to the Entity List,” July 20, 2020, <https://www.commerce.gov/news/press-releases/2020/07/commerce-department-adds-eleven-chinese-entities-implicated-human>.

⁶² Uyghur Human Rights Policy Act of 2020, Public Law No. 116-145, available at <https://www.congress.gov/bill/116th-congress/senate-bill/3744>.

⁶³ Ana Swanson, “U.S. Restricts Chinese Apparel and Tech Products, Citing Forced Labor,” *New York Times*, Sept. 14, 2020, <https://www.nytimes.com/2020/09/14/business/economy/us-china-forced-labor-imports.html>. The Trump administration considered a complete ban on cotton imports from Xinjiang but stopped short of doing this. Swanson, “U.S. May Ban Cotton From Xinjiang Region of China Over Rights Concerns,” *New York Times*, Sept. 24, 2020, <https://www.nytimes.com/2020/09/07/business/economy/us-china-xinjiang-cotton-ban.html>.

⁶⁴ In September 2020, the U.S. House of Representatives passed H.R. 6270, which would require mandatory disclosure for U.S. publicly traded companies that import directly from Xinjiang or use supply chains connected to the region. Companies would also have to certify that the goods were not made from forced labor. As of the date of publication of this discussion paper, the Senate has not taken up this legislation. H.R.6270 - Uyghur Forced Labor Disclosure Act of 2020, <https://www.congress.gov/bill/116th-congress/house-bill/6270/text>.

⁶⁵ Ana Swanson, “Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill,” *New York Times*, Nov. 29, 2020, <https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html>.

⁶⁶ Kirk Herbertson, EarthRights, “Big Oil is Exploiting the COVID-19 Crisis for Profit. Here’s How You Can Fight Back,” 28 May 2020, <https://earthrights.org/blog/big-oil-is-exploiting-the-covid-19-crisis-for-profit-heres-how-you-can-fight-back>.

⁶⁷ See e.g., EarthRights, “Carta Abierta al Presidente Iván Duque Sobre Medidas Regresivas Contra Derechos Humanos y Territoriales de Comunidades Étnicas,” Apr. 15, 2020, <https://earthrights.org/media/carta-abierta-presidente-duque-medidas-regresivas-derechos-humanos-territoriales-comunidades-etnicas>; Friends of the Earth Europe, “Polluters profiting from pandemic bailouts,” Oct. 5, 2020, <https://www.foeeurope.org/how-fossil-fuel-industry-used-covid-derail-green-deal-051020>.

⁶⁸ U.N. General Assembly, “Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,” July 18, 2017, U.N. Doc. A/72/162, paras. 72-74. As described by the U.N. Working Group on Business and Human Rights: “Civil society organizations and human rights defenders...are often ‘justice enablers’ for the victims of corporate

human rights abuses. They raise awareness of rights and available remedies, build the capacity of rights holders, address power imbalances, advocate pro-human rights reforms, contribute to human rights impact assessment processes, assist in documenting harm and collecting evidence, develop standards, highlight abuses, undertake fact-finding, provide counselling to victims, assist in litigation and monitor compliance with remedial orders. Their role becomes more critical when States are unwilling or unable to discharge their human rights obligations, including because of the alleged corporate capture of government agencies.”

⁶⁹ Business & Human Rights Resource Center, *Just Recovery in Peril: Human Rights Defenders Face Increasing Risk During COVID-19* (Nov. 2020), https://media.business-humanrights.org/media/documents/Just_recovery_in_peril_EN.pdf.

⁷⁰ Cindy Cohn & Sophia Cope, “EFF to Supreme Court: American Companies Complicit in Human Rights Abuses Abroad Should Be Held Accountable,” *Electronic Frontier Foundation*, Oct. 21, 2020, <https://www.eff.org/deeplinks/2020/10/eff-supreme-court-american-companies-implicit-human-rights-abuses-abroad-should>.

⁷¹ Will Meyer, “Many of the Same Companies That Say ‘Black Lives Matter’ Are Involved with the Systems That Continue to Oppress Black Americans,” *Business Insider*, Aug. 22, 2020, <https://www.businessinsider.com/corporations-companies-black-lives-matter-invest-police-racism-inequality-2020-7>; Malkia Devich-Cyril, “Defund Facial Recognition,” *The Atlantic*, July 5, 2020, <https://www.theatlantic.com/technology/archive/2020/07/defund-facial-recognition/613771>.

⁷² Global Witness, *Defending Tomorrow: The Climate Crisis and Threats Against Land and Environmental Defenders* (July 2020), <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow>.

⁷³ See e.g., Mark J. Perry, American Enterprise Institute, “Many Large US Firms Sell, Hire and Invest More Overseas than in US and They Have to Think Globally, Not Domestically, to Survive,” June 13, 2018, <https://www.aei.org/carpe-diem/many-large-us-corporations-sell-hire-and-invest-more-overseas-than-in-us-and-they-have-to-think-globally-not-domestically-to-survive>. In August 2020, the nonpartisan Economic Policy Institute reported that over 91,000 manufacturing plants and almost 5 million manufacturing jobs have moved overseas since 1997. Robert E. Scott, Economic Policy Institute, “We Can Reshore Manufacturing Jobs, but Trump Hasn’t Done It,” Aug. 10, 2020, <https://www.epi.org/publication/reshoring-manufacturing-jobs>.

⁷⁴ In 2019, according to the U.N. Conference on Trade and Development (UNCTAD), \$246 billion in foreign direct investment entered the United States. UNCTAD, *World Investment Report 2020*, https://unctad.org/system/files/official-document/wir2020_en.pdf; see also, U.S. International Trade Administration, “FDI Fact Sheets,” <https://www.selectusa.gov/FDI-global-market>; U.S. Bureau of Economic Analysis, “New Foreign Direct Investment in the United States, 2019,” July 1, 2020, <https://www.bea.gov/news/2020-new-foreign-direct-investment-united-states-2019>.

⁷⁵ Under international law, foreign nations can hold the United States responsible when U.S. nationals violate the universally recognized human rights of foreign nationals, including when this harm takes place overseas. This is a long-standing principle recognized in U.S. common law tradition since at least the 18th century. If the U.S. government does not provide redress for foreign nationals when violations occur, a foreign government is within its right to consider the U.S. government as an abettor. EarthRights International, Brief of Amicus Curiae in Support of the Respondents in *Nestlé and Cargill v. Doe*, U.S. Supreme Court, Oct. 2020, https://www.supremecourt.gov/DocketPDF/19/19-416/158272/20201020154653970_NestleSCTERlamicusfinal.pdf.

⁷⁶ Oxfam America, Joseph E. Stiglitz & Geoffrey M. Heal, Brief of Amicus Curiae in Support of the Respondents in *Nestlé and Cargill v. Doe*, U.S. Supreme Court, Oct. 2020, https://www.supremecourt.gov/DocketPDF/19/19-416/158365/20201021124005332_Amicus%20Brief%20for%20efiling.pdf.

⁷⁷ Oxfam America, Stiglitz & Heal, *ibid*.

⁷⁸ Oxfam America, Stiglitz & Heal, *ibid*.

⁷⁹ Oxfam America, Stiglitz & Heal, *ibid*.

⁸⁰ Oxfam America, Stiglitz & Heal, *ibid*.

⁸¹ Oxfam America, Stiglitz & Heal, *ibid*.

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- ⁸² Oxfam America, Stiglitz & Heal, *ibid.*
- ⁸³ Oxfam America, Stiglitz & Heal, *ibid.*
- ⁸⁴ 350.org, “Fossil Free: Divestment,” <https://gofossilfree.org/divestment/commitments>.
- ⁸⁵ See e.g., U.S. government’s amicus curiae brief filed in *Nestlé and Cargill v. Doe*, note 2.
- ⁸⁶ In Song Kim & Helen V. Milner, “Multinational Corporations and their Influence Through Lobbying on Foreign Policy,” in *Multinational Corporations in a Changing Global Economy* (forthcoming), Washington, DC: The Brookings Institution, <https://scholar.princeton.edu/hvmilner/publications/multinational-corporations-and-their-influencethrough-lobbying-foreign-policy>.
- ⁸⁷ See e.g., *OpenSecrets.org*, “Sector Profile: Energy & Natural Resources,” <https://www.opensecrets.org/federal-lobbying/sectors/summary?cycle=2019&id=E>; see also, Drutman, “How Corporate Lobbyists Conquered American Democracy,” note 16.
- ⁸⁸ U.N. Working Group on Business and Human Rights, Report to the U.N. General Assembly, Human rights and transnational corporations and other business enterprises, July 18, 2017, U.N. Doc. A/72/162, para. 2.
- ⁸⁹ U.N. Guiding Principles on Business and Human Rights (2011), para. 25: commentary, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- ⁹⁰ U.N. Working Group on Business and Human Rights, Report to the U.N. General Assembly, July 18, 2017, note 56, at para. 68.
- ⁹¹ International Commission of Jurists, *Effective Operational-level Grievance Mechanisms*, Nov. 2019, <https://www.icj.org/companies-around-the-world-must-do-more-to-ensure-effective-operational-grievance-mechanism-practices-and-provide-clear-and-transparent-information>.
- ⁹² Oxfam America, Stiglitz & Heal, note 76.
- ⁹³ For a discussion on how corruption prevents judicial systems from being impartial, see U.N. Working Group on Business and Human Rights, “Report to the U.N. Human Rights Council, Connecting the Business and Human Rights and the Anti-Corruption Agendas,” June 17, 2020, U.N. Doc. A/HRC/44/43.
- ⁹⁴ EarthRights, Amicus Curiae Brief in *Nestlé and Cargill v. Doe*, note 75.
- ⁹⁵ Oxfam America, Stiglitz & Heal, note 76.
- ⁹⁶ For more information, see Earthjustice, *Fighting for Real Justice: A Report on Access to Justice* (Mar. 2019), <https://accesstojusticereport.org/report>. Earthjustice identified five main ways that access to justice is being targeted in the United States: (1) preventing the courts from hearing challenges to certain types of government actions, (2) restricting people’s ability to bring corporations to court through the use of forced arbitration clauses and limits on class action lawsuits; (3) making public interest litigation too financially risky to pursue; (4) limiting the ability of courts to provide effective redress for injuries; and (5) undermining the government’s ability to reach settlements in a way that provides relief to people who are urgently in need.
- ⁹⁷ EarthRights, “10 Things Chiquita Doesn’t Want You To Know About Its Bananas,” Feb. 7, 2019, <https://earthrights.org/blog/10-things-chiquita-doesnt-want-you-to-know-about-its-bananas>.
- ⁹⁸ Chiquita Brands International is the successor to the United Fruit Company, which has a long legacy of atrocities committed in Latin America. Its headquarters are now based in Switzerland.
- ⁹⁹ *BusinessWire.com*, “Research and Markets: A Company Profile of Chiquita Brands International, Inc: Also with an Analysis of the U.S. Frozen Fruit, Juice, and Vegetable Manufacturing Industry,” Dec. 12, 2008, <https://www.businesswire.com/news/home/20081212005185/en/Research-Markets-Company-Profile-Chiquita-Brands-International>.
- ¹⁰⁰ Two decades later, the victims’ families continue to seek justice in U.S. courts. EarthRights represents some of the victims in an ongoing civil lawsuit. For more information, please visit EarthRights, “Doe v. Chiquita Brands International,” <https://earthrights.org/case/doe-v-chiquita-brands-international>.
- ¹⁰¹ See the Torture Victim Protection Act of 1991, Public Law 102-256, 106 Stat. 73. In the case of an extrajudicial killing, perpetrators are liable to the legal representative of the deceased, or any person who could be a claimant in a wrongful death case related to that killing.
- ¹⁰² U.S. Supreme Court decision in *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012).

¹⁰³ In 1789, Congress passed the Alien Tort Statute (now codified as 28 U.S.C. 1350). The full text of the statute says: “The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” The First Congress enacted the law in 1789 to provide foreign victims of international law violations with a remedy. The First Congress was concerned that the failure to provide a remedy might provoke foreign nations to hold the United States accountable, leading to international discord.

¹⁰⁴ Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, U.S. Supreme Court, June 13, 2017, available at <https://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/10-1491-tsac-American-Bar-Association.pdf>.

¹⁰⁵ U.S. Supreme Court decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹⁰⁶ In two rulings, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), and *Jesner v. Arab Bank, PLC*, 138 U.S. 1386 (2018), the U.S. Supreme Court limited the use of the Alien Tort Statute against corporations. Afterwards, victims of human rights abuses could only use the statute in cases that “touch and concern” the United States with “sufficient force” to displace the presumption against extraterritoriality. According to the Supreme Court, a corporation’s “mere corporate presence” is not enough — for example, being listed on U.S. stock exchanges is not sufficient to establish personal jurisdiction.

¹⁰⁷ For a complete list of legal filings related to this case, please visit *ScotusBlog.com*, note 1.

¹⁰⁸ Under the Trafficking Victims Protection Act, victims can sue businesses for damages if they demonstrate that the business benefited from participation in a venture that it knew or should have known was engaging in forced labor or trafficking. 18 U.S.C. 1595. See also, Human Trafficking Legal Center, *Federal Human Trafficking Civil Litigation; 15 Years of the Private Right of Action* (Dec. 2018), https://www.htlegalcenter.org/sdm_downloads/federal-human-trafficking-civil-litigation-15-years-of-the-private-right-of-action; Susan A. Maslow, “Business and Ethical Challenges: Human Rights Requirements, Due Diligence, Remediation, and Brand Protection,” *American Bar Association’s Business Law Today*, Nov. 2019, https://www.americanbar.org/groups/business_law/publications/blt/2019/11/ethical-challenges.

¹⁰⁹ The Anti-Terrorism Act allows U.S. nationals to sue those linked to acts of international terrorism. Liability extends to those that knowingly provide substantial assistance to the terrorist organizations, such as financial institutions. See 18 U.S.C. 2333. The scope of civil claims allowed under the law was widened by the Justice Against Sponsors of Terrorism Act of 2016 and the Ant-Terrorism Clarification Act of 2018.

¹¹⁰ *Kiobel v. Royal Dutch Petroleum Co.*, note 106.

¹¹¹ In other words, the presumption against extraterritoriality typically applies only to statutes that regulate conduct. The ATS does not regulate conduct. This is not the typical type of statute the presumption applies to because it does not regulate conduct. In fact, the wrongs relevant to the ATS are ones that other nations recognize as actionable.

¹¹² See the *Kiobel v. Royal Dutch Petroleum* and *Jesner v. Arab Bank* cases, note 106.

¹¹³ *Jesner v. Arab Bank*, note 106.

¹¹⁴ *Jesner v. Arab Bank*, note 106, at 1407. As the four dissenting justices stated, the decision “absolves corporations from responsibility under the ATS for conscience-shocking behavior.”

¹¹⁵ See *ScotusBlog.com*, note 1.

¹¹⁶ For an in-depth discussion of the various decisions tackling aiding and abetting liability under the ATS, see Srish Khakurel, *The Circuit Split on Mens Rea for Aiding and Abetting Liability Under the Alien Tort Statute*, Boston College Law Review, 59 B.C.L. Rev. 2953 (2018), <https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/17>.

¹¹⁷ In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the Supreme Court reset the constitutional test for establishing general personal jurisdiction over corporations and curtailed the ability of U.S. courts, both state and federal, to hear many human rights cases, specifically those brought against foreign defendants, involving foreign abuses.

¹¹⁸ Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390 (2017); see also, Gwynne Skinner, Robert McCorquodale, and Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, International Corporate

Accountability Roundtable, Dec. 2013,

https://corporatejustice.org/documents/publications/eccj/the_third_pillar_-_access_to_judicial_remedies_for_human_rights_violation-1-2.pdf.

¹¹⁹ See e.g., Gardner, *Retiring Forum Non Conveniens*, *ibid*; David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 *L.Q. Rev.* 398, 418–20 (1987) (concluding only 14.5 percent of personal injury plaintiffs and 16.6 percent of commercial plaintiffs refiled cases abroad after *forum non conveniens* dismissals).

¹²⁰ See e.g., Reuters, "Trump administration sets record low limit for new U.S. refugees," Oct. 28, 2020, <https://www.reuters.com/article/us-usa-immigration-refugees/trump-administration-sets-record-low-limit-for-new-u-s-refugees-idUSKBN27D1TS>.

¹²¹ See e.g., *In re Chiquita Brands Int'l, Inc.*, No. 08-MD-01916, 2018 U.S. Dist. LEXIS 58662, *70, S.D. Fla. Apr. 4, 2018 (finding that, despite the fact that plaintiffs in a human rights case had applied for and been denied visas, they would still be required to appear in the U.S. to present testimony).

¹²² EarthRights, Amicus Curiae Brief in *Nestlé and Cargill v. Doe*, note 75.

¹²³ Amnesty International, "Corporate Crime: New principles will help governments and law enforcement tackle corporate abuse," Oct. 6, 2016, <https://www.amnesty.org/en/latest/news/2016/10/corporate-crime-new-principles-will-help-governments-and-law-enforcement-tackle-corporate-abuse>.

¹²⁴ For example, the Obama Administration's State Department described its support for voluntary initiatives: "As U.S. companies seek to implement human rights policies in line with the Guiding Principles and other international guidelines, there must be broad uptake—a race to the top—in order for those firms that are committed to good practices to compete on a level playing field with other market actors. It is thus incumbent on U.S. companies to encourage broad implementation of good corporate human rights practice by working through industry associations, sector-specific initiatives, and other mechanisms." U.S. State Department, *U.S. Government Approach on Business and Human Rights* (2013), https://photos.state.gov/libraries/korea/49271/july_2013/dwoa_USG-Approach-on-Business-and-Human-Rights-updatedJune2013.pdf. For a broader look at the history and trends in the "business and human rights" movement, see Institute for Human Rights and Business, *Building a Movement: Reflections on the History and Future of Business and Human Rights* (Dec. 2019), <https://www.ihrb.org/other/businesss-role/report-building-a-movement>.

¹²⁵ See e.g., MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* (July 2020), <https://www.msi-integrity.org/not-fit-for-purpose>. For example, the Kimberley Process—created in 2003 in response to public outrage over blood diamonds—has devolved into a rubber-stamp process. Among other shortcomings, the initiative has narrowed the definition of "conflict diamonds" such that all diamond operations in the world are currently certified by the process as "conflict free," with the exception of those coming from a few regions in the Central African Republic. Efforts to strengthen the initiative are routinely blocked by the Russian government and other stakeholders. See e.g., Human Rights Watch, "Statement on the Kimberley Process," June 6, 2016, <https://www.hrw.org/news/2016/06/06/human-rights-watch-statement-kimberley-process>; Global Witness, "Diamond Industry Fails to Clean Up Its Act," Nov. 12, 2018, <https://www.globalwitness.org/en/press-releases/diamond-industry-fails-clean-its-act>. For a discussion on limitations on the Voluntary Principles on Security and Human Rights, see EarthRights & Centre for Environment, Human Rights, and Development, *Assessing and Improving the Voluntary Principles on Security and Human Rights: Lessons from Nigeria* (May 2013), <https://earthrights.org/wp-content/uploads/assessing-and-improving-voluntary-principles.pdf>.

¹²⁶ The U.N. Guiding Principles on Business and Human Rights popularized the use of company-controlled grievance mechanisms as a way to address complaints from local communities. While these mechanisms might help companies to respond to minor complaints, they do not provide effective remedies in situations where egregious human rights abuses occur, such as extrajudicial killings, torture, rape, or war crimes. See e.g., SOMO, *The Patchwork of Non-Judicial Grievance Mechanisms: Addressing the limitations of the current landscape* (Nov. 2014),

<https://www.somo.nl/wp-content/uploads/2018/07/The-Patchwork-of-Non-Judicial-Grievance-Mechanisms.pdf>.

¹²⁷ See e.g., Conniff, note 8.

¹²⁸ Whoriskey & Siegel, “Cocoa’s Child Laborers,” note 5.

¹²⁹ Corporate Accountability Lab & International Rights Advocates, “Rights Groups Demand that CBP Order Chocolate Companies to Demonstrate They Have Changed their Practices within 180 days or Face Import Ban,” undated, <https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/5e460a665c4c40794018afd6/1581648486569/Final+PR+Sec.+307.pdf>.

¹³⁰ Whoriskey & Siegel, “Cocoa’s Child Laborers,” note 5.

¹³¹ Peter Whoriskey, “U.S. Report: Much of the World’s Chocolate Supply Relies on More Than 1 Million Child Workers,” *Washington Post*, Oct. 19, 2020, <https://www.washingtonpost.com/business/2020/10/19/million-child-laborers-chocolate-supply/>; Oliver Balch, “Chocolate industry slammed for failure to crack down on child labor,” *The Guardian*, Oct. 20, 2020, <https://www.theguardian.com/global-development/2020/oct/20/chocolate-industry-slammed-for-failure-to-crack-down-on-child-labour/>; Corporate Accountability Lab, *Empty Promises: The Failure of Voluntary Corporate Social Responsibility Initiatives to Improve Farmer Incomes in the Ivorian Cocoa Sector* (July 2019), https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/5d321076f1125e0001ac51ab/1563562117949/Empty_Promises_2019.pdf.

¹³² Whoriskey & Siegel, “Cocoa’s Child Laborers,” note 5.

¹³³ U.S. Department of State, “Factsheet: Business and Human Rights,” June 29, 2018, <https://www.state.gov/business-and-human-rights-2>.

¹³⁴ Examples include the Voluntary Principles on Security and Human Rights, the International Code of Conduct for Private Security Service Providers Association, the Kimberley Process, and the Public-Private Alliance for Responsible Minerals Trade, Mega Sporting Events Platform advisory committee, among others. Note that the Trump Administration ordered a dramatic reduction in U.S. government participation in multilateral and multistakeholder initiatives.

¹³⁵ U.S. State Department, *Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities* (Sept. 2020), <https://www.state.gov/wp-content/uploads/2020/10/DRL-Industry-Guidance-Project-FINAL-1-pager-508-1.pdf>.

¹³⁶ Trafficking Victims Protection Reauthorization Act of 2017, Public Law No: 115-427, available at <https://www.congress.gov/bill/115th-congress/senate-bill/1862>. For a description of related laws, see National Human Trafficking Hotline, “Federal Law,” <https://humantraffickinghotline.org/what-human-trafficking/federal-law>.

¹³⁷ For a good overview of U.S. modern slavery laws that provide for criminal and civil liability, see the Labor Exploitation Accountability Hub, “United States,” <https://accountabilityhub.org/country/the-united-states>; see also, U.S. State Department, Office to Monitor and Combat Trafficking in Persons, “International and Domestic Law,” <https://www.state.gov/international-and-domestic-law>.

¹³⁸ For more information, see U.S. Federal Register, Federal Acquisition Regulation: Ending Trafficking in Persons, Jan. 29, 2015, <https://www.federalregister.gov/documents/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons>.

¹³⁹ U.S. Department of State, *Secretary of State’s Award for Corporate Excellence: Award Winners*, May 4, 2019, <https://www.state.gov/secretary-of-states-award-for-corporate-excellence/secretary-of-states-award-for-corporate-excellence-award-winners>.

¹⁴⁰ U.S. Department of State, *Responsible Business Conduct: First National Action Plan for the United States of America* (Dec. 16, 2016), available at <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/NAP-USA.pdf>.

¹⁴¹ Jonathan Kaufman, EarthRights, “US Approach on Business and Human Rights Neglects Remedies for Victims,” *EarthRights*, <https://earthrights.org/blog/u-s-approach-on-business-and-human-rights-neglects-remedies-for-victims>; see also, *EarthRights*, “US Government Sides with

Shell Over Victims of Crimes Against Humanity,” <https://earthrights.org/blog/u-s-approach-on-business-and-human-rights-neglects-remedies-for-victims>.

¹⁴² For more information about French Law 2017-399, see Responsible and Ethical Private Sector Coalition against Trafficking (RESPECT), “Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre,” <https://respect.international/loi-2017-399-du-27-mars-2017-relative-au-devoir-de-vigilance-des-societes-meres-et-des-entreprises-donneuses-dordre>; RESPECT, “French Corporate Duty of Vigilance Law (English Translation),” <https://respect.international/french-corporate-duty-of-vigilance-law-english-translation>.

¹⁴³ Business & Human Rights Resource Center, “EU Commissioner for Justice Commits to Legislation on Mandatory Due Diligence for Companies,” Apr. 30, 2020, <https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies>.

¹⁴⁴ Stéphane Brabant et al., “2021 Law Will Make Human Rights Due Diligence Mandatory for EU Companies,” *Herbert Smith Freehills LLP*, May 6, 2020, <https://www.lexology.com/library/detail.aspx?g=dc595c67-2ef8-488e-a66c-2ba474ddce8d>; *Business & Human Rights Resource Center*, “26 Companies, Business Associations, and Initiatives Make Joint Call for EU Mandatory Human Rights & Environmental Due Diligence,” Aug. 28, 2020, <https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence>.

¹⁴⁵ Vera Cherepanova, “Get Ready for Mandatory Human Rights Due Diligence,” *The FCPA Blog*, Nov. 23, 2020, <https://fcpublog.com/2020/11/23/get-ready-for-mandatory-human-rights-due-diligence>.

¹⁴⁶ Diana Kearney & Sharmeen Contractor, “Investors Embrace Human Rights in the Era of Corona,” *Responsible Investor*, Sept. 4, 2020, <https://www.responsible-investor.com/articles/investors-embrace-human-rights-in-the-era-of-corona>.

¹⁴⁷ The crime of genocide is defined at 18 U.S.C. 1091. The definition was most recently updated through the Genocide Accountability Act of 2007.

¹⁴⁸ The crime of torture is defined at 18 U.S.C. 2340. The torture statute has only been used in two cases: the prosecution of former Liberian president Charles Taylor and the extradition of a Bosnian commander.

¹⁴⁹ War crimes are defined at 18 U.S.C. 2441.

¹⁵⁰ The crime of recruiting and using child soldiers is defined at 18 U.S.C. 2442. This language was adopted in the Child Soldiers Accountability Act of 2008.

¹⁵¹ Human trafficking and modern slavery are defined in the provisions beginning at 18 U.S.C. 1581.

¹⁵² Piracy is defined at 18 U.S.C. 1651.

¹⁵³ Acts of terrorism are defined in the provisions beginning at 18 U.S.C. 2332.

¹⁵⁴ U.S. government offices are involved in enforcing these laws include the DOJ’s Human Rights and Special Prosecutions Section, the FBI’s International Human Rights Unit, the State Department’s Office of Global Criminal Justice, and the Department of Homeland Security’s Immigration and Customs Enforcement Human Rights Violators and War Crimes Center. FBI, “What We Investigate: International Human Rights Violations,” <https://www.fbi.gov/investigate/civil-rights/international-human-rights-unit>; David Rybicki, Deputy Assistant Attorney General, Criminal Division, Department of Justice, Testimony before the Tom Lantos Human Rights Commission, Hearing on “Pursuing Accountability for Atrocities,” June 13, 2019, <https://www.justice.gov/criminal-hrsp/file/1173576/download>.

¹⁵⁵ In 2010, the DOJ created the Human Rights and Special Prosecutions Section, which has played an important role in bringing perpetrators of human rights atrocities to justice using federal human rights statutes and U.S. civil immigration and naturalization laws. According to public information available on the DOJ’s website, the HRSP has not prosecuted any corporations for human rights violations. DOJ, “Human Rights and Special Prosecutions Section,” <https://www.justice.gov/criminal-hrsp>; see also, Statement of David Rybicki, *ibid*; DOJ, Criminal Division, Human Rights and Special Prosecutions Section, *Guide to Human Rights Statutes* (Oct. 2017), <https://www.justice.gov/criminal-hrsp/file/1002896/download>.

¹⁵⁶ The FCPA applies to businesses listed on U.S. stock exchanges, and thus has global reach beyond just regulating American businesses. Any business that wants to take advantage of U.S. capital

markets and consumer markets must comply. The law includes anti-bribery provisions, making it a crime to bribe foreign officials to obtain or retain business. It also requires businesses to keep records and maintain internal accounting controls. The DOJ and SEC jointly enforce the FCPA. For more information, see U.S. Department of Justice, Justice Manual, 9-47.000 - Foreign Corrupt Practices Act Of 1977, Oct. 2016, <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>; U.S. Domestic Security Alliance Council, “Foreign Corrupt Practices Act (FCPA) Resources,” <https://www.dsac.gov/topics/foreign-corrupt-practices-act-resources>; Akin Gump Strauss Hauer & Feld LLP, “Roundtable: Compliance and Litigation Issues As Foreign Corrupt Practices Act Enforcement Is On The Rise,” The Metropolitan Corporate Counsel, Nov. 2010, https://www.akingump.com/a/web/8884/aogS4/18_11_01_akin_cover.pdf. In 2019, the DOJ and SEC fined corporations a record \$2.9 billion for FCPA violations, driven in part by two large-scale enforcement actions against Russian and Swedish telecommunications companies. Gibson Dunn, “2019 Year-End FCPA Update,” Jan. 6, 2020, <https://www.gibsondunn.com/2019-year-end-fcpa-update>.

¹⁵⁷ Hurd Baruch, “The Foreign Corrupt Practices Act,” *Harvard Business Review*, Jan. 1979, <https://hbr.org/1979/01/the-foreign-corrupt-practices-act>.

¹⁵⁸ Jocelyn E. Strauber, “DOJ Policies Aim to Reduce Enforcement Burden on Cooperating Entities,” *Skadden*, Jan. 17, 2019, <https://www.skadden.com/insights/publications/2019/01/2019-insights/doj-policies-aim-to-reduce-enforcement-burden>.

¹⁵⁹ Congress added whistleblower incentives as part of the 2002 Sarbanes-Oxley Act and the 2010 Dodd-Frank Act. For more information, see DOJ and Securities and Exchange Commission, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” Nov. 2012, p. 82, <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

¹⁶⁰ Amendments to the FCPA in 1998 made it apply to foreign companies. Richard L. Cassin, “In Search Of the Level Playing Field,” The FCPA Blog, Oct. 2, 2008, <https://fcpablog.com/2008/10/02/in-search-of-the-level-playing-field>.

¹⁶¹ Richard L. Cassin, “Is the SEC targeting foreign companies?” The FCPA Blog, Nov. 6, 2017, <https://fcpablog.com/2017/11/06/is-the-sec-targeting-foreign-companies>.

¹⁶² Gibson Dunn, “2019 Year-End FCPA Update,” note 156; DLA Piper, “Shareholder efforts to bootstrap FCPA violations into private securities cases meet with mixed success – key takeaways,” July 10, 2019, <https://www.dlapiper.com/en/us/insights/publications/2019/06/shareholder-efforts-to-bootstrap-fcpa-violations>.

¹⁶³ See e.g., Cherepanova, “Get ready for mandatory human rights due diligence,” note 145.

¹⁶⁴ Crimes against humanity are not punishable under U.S. federal law. As described by Professor Beth Van Schaack of Stanford Law School: “A massacre of civilians outside of a state of armed conflict, an act of enforced disappearance where there is no proof that the victim was tortured, or an ethnic cleansing campaign without evidence that the perpetrators intend to destroy a protected group in whole or in part cannot be easily prosecuted under these existing authorities.” Van Schaack, “Tom Lantos Commission: Enhancing U.S. Ability to Pursue Accountability for Atrocities,” *Just Security*, June 17, 2019, <https://www.justsecurity.org/64579/tom-lantos-commission-enhancing-u-s-ability-to-pursue-accountability-for-atrocities>. In 2010, a Crimes Against Humanity bill introduced by Senator Durbin, S. 1346, attempted to fix these loopholes, but the bill did not advance after a provision was added to give the Secretary of State, Secretary of Defense, and Director of National Intelligence veto power over whether the prosecutions went forward.

¹⁶⁵ For more information about the Global Magnitsky Act, please see Human Rights First, “Targeted Human Rights and Anti-Corruption Sanctions Resources,” <https://www.humanrightsfirst.org/topics/global-magnitsky/resources>. The Global Magnitsky Act sunsets in December 2022 and will require Congressional reauthorization. The U.S. government also uses Section 7031(c) visa restrictions to respond to corruption and human rights abuses. Increasingly, both sanctions and visa restrictions are imposed together. Section 7031(c) visa restrictions, along with several other types of visa restrictions under Section 212 of the Immigration and Nationality Act or Presidential Proclamation 7750, allow the U.S. government to prohibit individuals and their immediate family members from entering the United States. The State Department issues 7031(c) visa restrictions on a foreign official involved directly or indirectly in a

“gross violation of human rights” or “significant corruption.” Some visa designations are made public, while others are kept confidential. For more details about Section 7031(c) visa restrictions, see Congressional Research Service, *FY2020 Foreign Operations Appropriations: Targeting Foreign Corruption and Human Rights Violations*, Apr. 2020, <https://www.hsdl.org/?view&did=837107>.

¹⁶⁶ Executive Order 13818, available at <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-persons-involved-serious-human-rights-abuse-corruption>.

¹⁶⁷ Human Rights First, “Targeted Human Rights and Anti-Corruption Sanctions Resources,” note 165.

¹⁶⁸ William Clowes et al., “Tesla Deal Could Make US Blacklisted Israeli Billionaire Richer,” *Al Jazeera*, July 22, 2020, <https://www.aljazeera.com/economy/2020/7/22/tesla-deal-could-make-us-blacklisted-israeli-billionaire-richer>; Thomas Wilson, “Glencore Tests U.S. Sanctions Resolve with Gertler Payments,” *Bloomberg*, June 14, 2018, <https://www.bloomberg.com/news/articles/2018-06-15/glencore-to-restart-payments-to-sanctioned-billionaire-gertler>.

¹⁶⁹ Scott Patterson, “Glencore to Resume Payments to Sanctioned Billionaire Gertler,” *Wall Street Journal*, June 15, 2018, <https://www.wsj.com/articles/glencore-to-resume-payments-to-israeli-billionaire-gertler-despite-u-s-sanctions-1529052213>.

¹⁷⁰ Jaclyn Jaeger, “Swiss AG Latest Investigating Glencore for Corruption,” *Compliance Week*, June 23, 2020, <https://www.complianceweek.com/anti-corruption/swiss-ag-latest-investigating-glencore-for-corruption/29102.article>; Ben Chapman, “Glencore: US Money Laundering Subpoena Wipes £5bn off Mining Giant’s Value in an Hour,” *Independent*, July 3, 2018, <https://www.independent.co.uk/news/business/news/glencore-share-price-falls-money-laundering-subpoena-us-doj-a8428336.html>.

¹⁷¹ U.N. Office of the High Commissioner for Human Rights, “UN Guiding Principles on Business and Human Rights at 10: Business and human rights: towards a decade of global implementation,” <https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10.aspx>.

¹⁷² See S.2955 – Targeting Environmental and Climate Recklessness Act of 2019, introduced by Senator Ed Markey, <https://www.congress.gov/bill/116th-congress/senate-bill/2955/text>. In January 2020, Congresswoman Veronica Escobar (TX-16) and Congresswoman Nydia M. Velázquez (NY-07) introduced companion legislation in the House.

¹⁷³ For example, the U.S. Department of Justice announced in July 2020 that it was pursuing civil forfeiture of U.S. assets of the former leader of the Gambia, who has been implicated in grand corruption. DOJ, “Department of Justice Seeks Recovery of Approximately \$3.5 Million in Corruption Proceeds Linked to Ex-President of The Gambia,” July 15, 2020, <https://www.justice.gov/opa/pr/department-justice-seeks-recovery-approximately-35-million-corruption-proceeds-linked-ex>.