

## Seeking Justice: The State of Transnational Corporate Accountability

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**ABSTRACT.** Corporations have dramatically expanded their transnational political and economic influence since World War II, primarily through investment, litigation, and lobbying. Domestic and foreign legal systems, meant to uphold human rights and sanction bad actors, have not evolved adequately to address the magnitude of corporate power or the realities of transnational business operations and corporate abuse of human rights. Historically, workers in global supply chains and communities located near multinational business operations have borne the brunt of this unbalanced dynamic, paying handsomely for the shattering consequences of corporate externalities and enjoying few, if any, effective means of redress. Creative and resilient victims and their counsel, however, have over the last few years made headway in several respects against corporate impunity for transnational human-rights abuses. This may usher in a new era characterized by greater accountability, as the corporate duty of care expands and real consequences for human-rights due-diligence failures are imposed.

This Essay highlights selected opportunities and challenges in the evolving landscape for corporate accountability for human-rights abuse in transnational supply chains. It focuses on legislation and litigation in Global North countries, paying particular attention to the emergence of due-diligence legislation across Europe and diverging trends in civil litigation.

### INTRODUCTION

Perhaps the most emblematic case of corporate impunity for transnational human-rights abuse involves the Indigenous Ogoni people of the Niger Delta and their struggle against the Dutch and British oil giant, Shell (formerly known as Royal Dutch Petroleum). The Ogoni people claim that Shell's Nigerian operations have severely damaged the environment and robbed residents of food sources and income. In the 1990s, Nigerian soldiers, allegedly at the behest of Shell, sowed terror through physical, sexual, and psychological violence across Ogoni communities opposing Shell's operations. This repression culminated in 1995, with the Nigerian government leveling false accusations of murder and

other crimes against Ken Saro-Wiwa and eight other Ogoni activists, for which they were publicly hanged.<sup>1</sup> These tragic deaths set off a decades-long search for justice that would take members of the Ogoni community to courts across the globe. Saro-Wiwa's family and their organization, the Movement for the Survival of the Ogoni People, have diligently fought to compel Shell to clean up the thousands of oil spills that have polluted the Ogoni people's ancestral lands and for reparations to compensate victims of human-rights violations.<sup>2</sup> Over the course of nearly three decades, this struggle has come to symbolize both the extraordinary difficulties plaintiffs face in these kinds of cases and the sometimes novel opportunities that are available to those who nevertheless remain undaunted in seeking justice.

This Essay explores the evolving landscape for corporate accountability across the globe and the challenges and opportunities for survivors who, like the Ogoni, are resilient, adaptive, and steadfast. Affected communities pursuing vindication of their rights quickly encounter a paradox: we live in an economically interconnected world where commercial activity knows no borders,<sup>3</sup> but the practice of law is largely domestic. Despite some international tribunals with limited jurisdiction<sup>4</sup> and some cases in domestic courts premised on

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1. Charity Ryerson, *Shell in Nigeria: The Case for New Legal Strategies for Corporate Accountability*, CORP. ACCOUNTABILITY LAB (July 5, 2018), <https://corpaccountabilitylab.org/calblog/2018/7/5/shell-in-nigeria-the-case-for-new-legal-strategies-for-corporate-accountability> [<https://perma.cc/2D6G-XRFN>].
  2. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria Ltd.* [2014] EWHC (TCC) 1973 (Eng.); *His Royal Highness Emere Godwin Bebe Okpabi v. Royal Dutch Shell PLC* [2017] EWHC (TCC) 89 (Eng.); *Shell Lawsuit (Re Executions in Nigeria, Kiobel v Shell, Filed in the Netherlands)*, BUS. & HUM. RTS. RES. CTR. (June 29, 2017), <https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-executions-in-nigeria-kiobel-v-shell-filed-in-the-netherlands> [<https://perma.cc/S9LY-UVA4>]; *Nigeria: Shell Complicit in the Arbitrary Execution of the Ogoni Nine as Writ Served in Dutch Court*, AMNESTY INT'L (June 29, 2017), <https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court> [<https://perma.cc/UG4U-5TD5>].
  3. See Gary Clyde Hufbauer & Zhiyao (Lucy) Lu, *The Payoff to America from Globalization: A Fresh Look with a Focus on Costs to Workers*, PETERSON INST. FOR INT'L ECON. 2 (2017), <https://www.piie.com/publications/policy-briefs/payoff-america-globalization-fresh-look-focus-costs-workers> [<https://perma.cc/3YMP-TWJD>].
  4. These include the International Criminal Court, which adjudicates genocide, crimes against humanity, war crimes, and crimes of aggression against individuals and states; the International Court of Justice, which adjudicates disputes between states; various regional human-rights adjudicatory bodies; and arbitral bodies like the International Center for Settlement of Investment Disputes. See *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> [<https://perma.cc/8T8K-8GAA>]; *Jurisdiction*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/jurisdiction> [<https://perma.cc/BM4G-DTYS>]; *Inter-American Human Rights System*, INT'L JUST. RES. CTR., <https://ijrcenter.org/regional/inter-american-system> [<https://perma.cc/RM2W-3DSX>]; and *About ICSID*, INT'L CTR. FOR

international law (which often stop short of holding private actors accountable), most disputes are adjudicated in domestic courts, under domestic law. This leads to massive gaps in accountability, particularly where survivors are harmed in countries in which the perpetrator does not reside.

In these cases, victims often lack effective recourse against the corporation in their home country for reasons such as lack of personal jurisdiction over the corporation,<sup>5</sup> judicial corruption, underfunded courts, and the risk of physical danger.<sup>6</sup> On the other hand, when victims seek recourse in the jurisdiction where the corporation is based and personal jurisdiction is assured, courts often find a lack of subject-matter jurisdiction over harms that occurred abroad<sup>7</sup> or dismiss cases under discretionary doctrines like *forum non conveniens*.<sup>8</sup>

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SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/About/ICSID> [<https://perma.cc/9KU8-DEJP>].

5. See Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97, 101 (2019) (“[T]erritorial sovereignty considerations appropriately play a more significant role in international cases than in domestic ones.”); see also GWYNNE L. SKINNER, RACHEL CHAMBERS & SARAH MCGRATH, *Lack of In Personam Jurisdiction over TNCs and Their Affiliates*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY, 52, 52 (2020) (“[A] victim may try to seek damages against a parent company that was involved in the abuse where it conducts substantial business, has offices, or operates through a subsidiary or subsidiaries. It is in these situations, where the country may well provide a cause of action that would allow the victim to bring a claim, that courts might find they do not have personal jurisdiction over the proposed defendant entity, and thus cannot adjudicate the case.”).
6. See Lawrence Hurley, *U.S. Corporations Winning Fight over Human Rights Lawsuits*, REUTERS (Dec. 19, 2014), <https://www.reuters.com/article/us-usa-court-humanrights-insight-idUSKBN0JQoDC2o141212> [<https://perma.cc/V4H4-R8P5>] (“Bringing suit in a developing country where alleged violations occurred is often less appealing to plaintiffs, as such countries often have troubled judicial systems.”); *Corporate Strategies to Avoid Responsibility for Human Rights Abuses*, MIND THE GAP 2 (2020), <https://www.somo.nl/wp-content/uploads/2020/07/Mind-the-Gap-summary.pdf> [<https://perma.cc/XLE5-TAKA>] (“Corporations routinely use a range of judicial procedures to avoid liability for harms they have caused or contributed to, often leaving victims without proper remedy for the (on-going) harms they are facing.”).
7. See, e.g., *Kiobel*, 569 U.S. at 124 (explaining that Congress did not intend subject-matter jurisdiction under the Alien Tort Statute over a tort that occurs entirely outside of the United States).
8. Under this doctrine, a court can refuse to hear a case on the grounds that another forum would be more appropriate for trying the cause of action. See, e.g., *Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). U.S. courts apply a two-part balancing test in determining the appropriateness of the alternative forum, which can lead to the dismissal of claims made by nonresident aliens based on harms that occurred abroad. See *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002). *Forum non conveniens* doctrine is generally consistent among common-law jurisdictions. See, e.g., *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] S.C.R. 572, paras. 103-10 (Can.) (highlighting the application of the doctrine by the Supreme Court of Canada).

The rules and legal cultures that are relevant to transnational corporate accountability vary from country to country. Even if victims can surmount the physical, educational, and financial barriers to seeking recourse, they face the extraordinarily complex task of determining where to bring suit, finding lawyers to represent them, and choosing among myriad legal strategies that offer distinct types of remedy, highly varying odds of success, and, in all cases, significant uncertainty.

Adding to the ambiguity, legislation and evolving doctrine in the past fifteen years have transformed previously promising forums into dead ends and opened new opportunities in places that had been overlooked. Although the pace of change is accelerating, particularly with respect to the emergence of corporate due-diligence regulatory frameworks, civil-liability trends in the countries where multinational corporations are typically based are equivocal. In recent years, U.S. courts have resisted corporate accountability for transnational human-rights harms while courts in other jurisdictions have trended in more encouraging directions.

All of this is taking place in the context of increasingly favorable international legal norms (especially “soft law”), which in some instances are becoming jurisprudential reference points in domestic courts. In Part I of this Essay, we briefly discuss the roadblocks that have historically impeded corporate civil liability for transnational harms.<sup>9</sup> In Part II, we turn to new opportunities and challenges, including the evolution of soft law, the emergence of due-diligence laws and regulations, and landmark judicial rulings. In Part III, we explore promising new approaches for holding transnational corporations accountable.

## I. BARRIERS TO EFFECTIVENESS OF CIVIL LITIGATION

Primarily in common-law jurisdictions, civil litigation has been a useful tool in obtaining compensation for personal or economic injury. In a transnational human-rights context, however, civil litigation in domestic courts has seen highly variable results—both within and across jurisdictions. A key strategic consideration when bringing such cases is deciding whether to pursue claims based on customary international law (CIL), even when CIL squarely encompasses the claims.

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9. Corporate criminal cases for human-rights violations are beyond the scope of this Essay, as they are brought by states rather than the victims themselves. For more information, see Venimira Petrova, *Corporate Criminal Liability for International Crimes: Recent Developments* (Oct. 19, 2021), <https://coraxfoundation.com/2021/10/19/corporate-criminal-liability-for-international-crimes-recent-developments> [<https://perma.cc/ALE4-B24U>].

CIL is comprised of practices states enact “general[ly] and consistent[ly],” as well as “from a sense of legal obligation.”<sup>10</sup> Like treaty law, CIL is legally binding on states, although it can be difficult to determine what norms constitute CIL and how they should be enforced. CIL reflects substantial global consensus on a set of norms and is thus a promising tool for addressing gross transnational human-rights violations. At present, the set of CIL norms is limited but significant. CIL norms are generally understood to include prohibitions on slavery, the use of force, genocide, gross violations of the right to self-determination, and racial discrimination.<sup>11</sup>

CIL is potentially useful in reaching conduct occurring outside of the forum in which a case is brought, and unlike a treaty, CIL does not need to be signed and ratified by a country for that country to be bound by it internationally,<sup>12</sup> as both the *Restatement (Third) of Foreign Relations Law of the United States* and the International Court of Justice recognize.<sup>13</sup> However, although states’ human-rights obligations under CIL are the subject of a substantial body of scholarship and are debated and negotiated at the United Nations, they can be hard to enforce domestically, especially when national legislation has not established a cause of action for CIL claims.<sup>14</sup>

Notably, U.S. courts have typically required a statutory rationale for bringing claims of CIL norm violations,<sup>15</sup> despite the absence of any law precluding the direct pleading of violations of CIL norms.<sup>16</sup> In many cases, plaintiffs in U.S. courts have consequently turned to the Alien Tort Statute (ATS) as a vehicle for

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10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).
  11. PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 39 (7th ed. 1997), as reprinted in INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 75, 78 (Philip Alston & Ryan Goodman eds., 2013).
  12. See Brian D. Lepard, *Why Customary International Law Matters in Protecting Human Rights*, VÖLKERRECHTSBLOG (Feb. 25, 2019), <https://voelkerrechtsblog.org/de/why-customary-international-law-matters-in-protecting-human-rights> [<https://perma.cc/2ZFR-BHE2>].
  13. Philip Alston & Ryan Goodman, *Comment on the Role of Custom*, in INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 11, at 72-73.
  14. See, for example, *infra* Section II.B.1 for a discussion about the status of CIL and its direct enforceability in Canada.
  15. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 820-21 (1997); see also William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559, 1561-63 (2018) (describing the debate around enforcing CIL in U.S. courts).
  16. See Penny M. Venetis, *The Broad Jurisprudential Significance of Sosa v. Alvarez-Machain: An Honest Assessment of the Role of Federal Judges and Why Customary International Law Can Be More Effective Than Constitutional Law for Redressing Serious Abuses*, 21 TEMP. POL. & CIV. RTS. L. REV. 41, 68, 71 (2011).

bringing claims, given its provision of a cause of action based on certain international law norms.<sup>17</sup> The utility of that statute, however, has narrowed dramatically in recent years, particularly as it applies to alleged violations by companies.<sup>18</sup>

Civil litigation can be hampered by other jurisdictional and procedural restrictions as well. For example, the *forum non conveniens* doctrine has posed a significant obstacle for human-rights litigants in the United States.<sup>19</sup> In addition, plaintiffs can face very short statutes of limitations under ordinary tort law, regardless of whether a court applies the limitations period of a U.S. state, other country in the Global North, or country where the harm occurred.<sup>20</sup>

Corporations have used these restrictions in conjunction with substantive corporate law, as well as a regulatory environment that generally prescribes *voluntary* corporate social-responsibility measures rather than *mandates* backed by tangible consequences for noncompliance, to stand in the way of the most economically efficient means of addressing human-rights abuses: placing liability on the actor that is best situated to prevent abuse and to remedy it when it occurs. In other words, such doctrines enable impunity for acts that lie at the very heart of common patterns of abuse.

## II. NEW AND EMERGING OPPORTUNITIES AND CHALLENGES

By enacting new laws and developing domestic jurisprudence, some jurisdictions are creating opportunities for victims of human-rights abuse to seek recourse. The opportunities vary in terms of complexity and promise. In some cases, a victim can file a case under ordinary tort law in the jurisdiction where the relevant company is based, while in others the path is more circuitous.

The UN Guiding Principles on Business and Human Rights (UNGPs),<sup>21</sup> first introduced in 2011, reflected and reinforced a growing consensus around

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17. 28 U.S.C. § 1350 (2018) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

18. See *infra* Section II.C.

19. See, e.g., *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), *aff’d as modified*, 303 F.3d 470 (2d Cir. 2002); see also *supra* note 8.

20. See Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 229-30 (2014) (“State statutes of limitations are often fairly short, with many states imposing a one-year limit for intentional tort claims.”).

21. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy”*

human-rights norms that has spurred companies and governments to begin to come to terms with corporate responsibility for supply-chain harms. The UNGPs articulate the norm that companies should avoid infringing on human rights<sup>22</sup> and, to the extent that they fail to do so, have a responsibility to address the adverse impacts of their conduct.<sup>23</sup> To achieve this, businesses are expected to conduct due diligence<sup>24</sup> by identifying and assessing actual and potential adverse human-rights impacts associated with their operations, implementing measures to prevent and mitigate such impacts,<sup>25</sup> tracking the effectiveness of these measures,<sup>26</sup> and reporting<sup>27</sup> on their human-rights due-diligence efforts.

The UNGPs have gained significant traction with companies and are now widely accepted,<sup>28</sup> at least rhetorically. It is often expected that certain corporate activities (e.g., grievance mechanisms set up by companies under which human-rights complaints from workers, community members, and other stakeholders can be heard and potentially addressed) will be “UNGP compliant.”<sup>29</sup>

Although the UNGPs are not the sole driver of change, and in many ways now represent minimum standards, their influence is undeniable, particularly in relation to mandatory human-rights due-diligence legislation. It is therefore appropriate to view them in relation to more obligatory legal instruments. With the UNGP framework as a backdrop, the following sections highlight cases and legislative developments gaining attention in the field, with the caveat that even more significant shifts in the near-term are almost assured.

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*Framework*, U.N. Doc. A/HRC/17/31 (June 16, 2011); see Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).

22. Ruggie, *supra* note 21, at 13-16.

23. *Id.* at 24.

24. *Id.* at 17-24.

25. *Id.* at 20-22.

26. *Id.* at 22-23.

27. *Id.* at 23-24.

28. Marti Flacks & Madeleine Songy, *European Union Releases Draft Mandatory Human Rights and Environmental Due Diligence Directive*, CTR. FOR STRATEGIC & INT’L STUD. (Mar. 11, 2022), <https://www.csis.org/analysis/european-union-releases-draft-mandatory-human-rights-and-environmental-due-diligence> [<https://perma.cc/FMN7-3BM3>] (“Although not legally binding, the UN Guiding Principles have been widely accepted by governments and the world’s largest companies.”).

29. See Community-Driven Operational Level Grievance Mechanisms, EARTHRIGHTS INT’L 8 (Mar. 13, 2015), [https://earthrights.org/wp-content/uploads/final\\_ogm\\_report\\_2015.pdf](https://earthrights.org/wp-content/uploads/final_ogm_report_2015.pdf) [<https://perma.cc/WR2F-G3T3>].

### A. *European Due-Diligence Laws*

Mandatory human-rights and environmental due-diligence laws started in a few European countries but are poised to become the norm across the continent.<sup>30</sup> These laws take different forms from jurisdiction to jurisdiction. Although a due-diligence provision that would greatly expand corporate civil liability for human-rights and environmental abuses was formally proposed in one European country, it was not actually enacted.<sup>31</sup> Advocates have, however, begun to experiment in specific cases with ways that due-diligence requirements can give rise to tort liability, even absent an express right to remedy for victims.

These new laws are building a regulatory framework in Europe that will impact companies' activities around the world, no matter where they are based. Divergent rules for companies across jurisdictions may create uncertainty and difficulty with compliance, but companies might choose to comply with the most stringent rules covering any significant part of their operations because of the infeasibility of complying with different rules in different jurisdictions.<sup>32</sup>

Critics have raised concerns about the structure of the due-diligence model, arguing that it may allow companies to conduct merely performative sustainability practices.<sup>33</sup> This critique is rooted in the fact that the due-diligence model is process oriented, targeting the way supply chains are managed, rather than outcome oriented, which would hold companies accountable for abuses whenever they occur. The extent to which these laws will create new avenues, albeit indirectly, for civil claims by victims of corporate human-rights abuses remains to be seen.

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30. See Int'l Trade Ctr., *Making Mandatory Human Rights and Environmental Due Diligence Work for All: Guidance on Designing Effective and Inclusive Accompanying Support to Due Diligence Legislation*, EUR. COMM'N 10-11 (2022), [https://international-partnerships.ec.europa.eu/publications/making-mandatory-human-rights-and-environmental-due-diligence-work-all\\_en](https://international-partnerships.ec.europa.eu/publications/making-mandatory-human-rights-and-environmental-due-diligence-work-all_en) [<https://perma.cc/WL6F-3V9F>].

31. See *Human Rights Due Diligence Laws: Key Considerations* at 15-16, DANISH INST. FOR HUM. RTS. (2021), [https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Human\\_rights\\_due\\_diligence\\_laws\\_-\\_briefing\\_on\\_civil\\_liability\\_for\\_due\\_diligence\\_failures\\_2021\\_accessible.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Human_rights_due_diligence_laws_-_briefing_on_civil_liability_for_due_diligence_failures_2021_accessible.pdf) [<https://perma.cc/6F2U-KZT2>].

32. See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV 1, 5-6 (2012).

33. See Joseph Wilde-Ramsing, Ben Vanpeperstraete & David Hachfeld, *Legislating Human Rights Due Diligence: Respecting Rights or Ticking Boxes?*, CLEAN CLOTHES CAMPAIGN ET AL. 7 (2022), <https://www.somo.nl/wp-content/uploads/2022/01/Respecting-Rights-or-Ticking-Boxes.pdf> [<https://perma.cc/ZG67-4FQM>] (“[T]here is a significant risk that [human-rights due-diligence] law will become, at best, a paper tiger that yields no real positive impact for people and, at worst, a new greenwashing technique behind which businesses can hide while continuing to do harm.”).



This Section describes and assesses recent laws and the extent to which they live up to the potential of effective due-diligence models. We begin with a recent European Union (EU)-wide initiative and then explore legislation in France, Germany, and the Netherlands.

### 1. *The EU's Due-Diligence Directive*

On February 23, 2022, the European Commission moved a proposal forward for an EU-wide directive on corporate-sustainability due diligence.<sup>34</sup> The aim of the directive is to “translate the principles laid out in the UNGPs and the OECD Guidelines into legal requirements for companies.”<sup>35</sup> To that end, the directive imposes a legal obligation on certain companies to conduct environmental and human-rights due diligence.<sup>36</sup> Under the directive, each EU member state must incentivize compliance by establishing administrative penalties and a civil-liability regime for abuses, and businesses must address the adverse impacts of their actions regardless of where such impacts occur. As a result, this mechanism at least partially addresses critics’ concerns about failing to remedy harms to victims.

Even if one accepts the basic conceptual framework of the directive, which does not afford rightsholders a role in determining how businesses will address human-rights violations, it embodies significant compromises that may undermine its ultimate impact. First, limitations on the scope of application will make it easy for some companies to evade responsibility. The directive would only apply to those companies with whom the target company had an “established business relationship,” a concept that is vaguely defined, apparently subject to the

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34. See *Corporate Sustainability Due Diligence*, EUR. COMM’N, [https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en](https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en) [https://perma.cc/FUN5-PVBR].
35. Alison Berthet & Céline da Graça Pires, *Corporate Sustainability Due Diligence Directive: Seven Recommendations for Business*, BUS. SOC. RESP. (Mar. 17, 2022), <https://www.bsr.org/en/our-insights/blog-view/corporate-sustainability-due-diligence-directive-seven-recommendations> [https://perma.cc/498W-UQ2C].
36. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive*, at art. 2(1), COM (2022) 71 final (Feb. 23, 2022) [hereinafter *Proposal for Due-Diligence Directive*] (defining the directive’s coverage to include companies with more than 500 employees and a net worldwide turnover of more than EUR 150 million in the last year; more than 250 employees, a net worldwide turnover of more than EUR 40 million that operate in high-risk sectors; companies based outside the EU with over EUR 150 million turnover in the EU in the last year; and companies that generated over EUR 40 million in the past year in the EU in high risk sectors); see Jeffrey Vogt, Ruwan Subasinghe & Paapa Danquah, *A Missed Opportunity to Improve Workers’ Rights in Global Supply Chains*, OPINIO JURIS (Mar. 18, 2022), <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains> [https://perma.cc/US7K-FQKT].

company's own interpretation, and would likely exclude a significant number of suppliers.<sup>37</sup> Further, given the thresholds based on company size and profits, less than one percent of EU companies would be subject to the law.<sup>38</sup>

Second, while the directive does require member states to establish a private right of action for violations, it also creates a loophole when companies have taken certain due-diligence steps.<sup>39</sup> This may incentivize companies to conduct due diligence in a perfunctory manner, then use that as a shield from liability.

Finally, the directive allows companies to rely on third-party social auditors to monitor supply chains, despite significant data indicating that the social-auditing model is failing workers as well as impacted communities.<sup>40</sup> Social audits can afford companies the appearance of being concerned about human-rights violations in their supply chains while they avoid knowledge of, and responsibility for, egregious harms.

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37. See *Proposal for Due Diligence Directive*, *supra* note 36, at art. 3 (defining an “established business relationship” as “a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain”).

38. Vogt et al., *supra* note 36.

39. See *Proposal for Due Diligence Directive*, *supra* note 36, at art. 22(2) (“Notwithstanding paragraph 1, Member States shall ensure that where a company has taken the actions referred to in Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5), it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimize the extent of the adverse impact.”).

40. The civil-society critique of the social-auditing industry has gained significant traction over the past five years. See e.g., Ilona M. Kelly, Christie Miedema, Ben Vanpeperstraete & Ilana Winterstein, *Fig Leaf for Fashion: How Social Auditing Protects Brands and Fails Workers*, CLEAN CLOTHES CAMPAIGN 8 (Sept. 2019), <https://respect.international/wp-content/uploads/2020/01/Fig-Leaf-for-Fashion-How-Social-Auditing-Protects-Brands-and-Fails-Workers.pdf> [<https://perma.cc/4R7C-LBR4>], (arguing the social-audit industry has failed spectacularly to protect workers’ safety and improve working conditions); *Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform*, TRANSPARENTEM (Oct. 2021), <https://transparentem.org/wp-content/uploads/2021/09/Hidden-Harm-Audit-Deception-in-Apparel-Supply-Chains-and-the-Urgent-Case-for-Reform.pdf> [<https://perma.cc/U47W-3LPQ>]; *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, INST. FOR MULTI-STAKEHOLDER INITIATIVE INTEGRITY (July 2020), [https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf) [<https://perma.cc/W6L3-HH49>].

## 2. France's Duty of Vigilance Law

The directive follows the passage of several laws in European jurisdictions that relate to supply-chain due diligence. France's Duty of Vigilance Law introduced new provisions into the French Commercial Code requiring large companies (those with more than 5,000 employees in France or 10,000 worldwide, including subsidiaries) to establish, publish, and effectively implement vigilance plans.<sup>41</sup> The plans apply to the activities of suppliers and subcontractors where there is an "established commercial relationship."<sup>42</sup> Although the contours of how courts will enforce the Duty of Vigilance Law are still being defined, the law provides a preventive enforcement mechanism for injunctive relief to induce compliance with new requirements, notably including publication and adequate implementation of a "vigilance plan."<sup>43</sup> Under the law, vigilance plans should adequately identify risks and prevent serious human-rights violations and harm to the environment.<sup>44</sup> They apply to the company, companies under its control, and suppliers with which it has an "established commercial relationship."<sup>45</sup>

The first case under the Duty of Vigilance Law, filed in October 2019 against French oil giant Total, is ongoing. In that case, six nongovernmental organizations (NGOs) sought an order to compel Total to revise its vigilance plan, and implement an improved one, for a large oil project in a protected natural park in

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41. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27 2017 on Corporate Duty of Vigilance], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, no. 0074, art. L.225-102-4, translated in *French Duty of Vigilance Law – English Translation*, BUS. & HUM. RTS. RES. CTR. (Dec. 14, 2016), <https://www.business-human-rights.org/en/latest-news/french-duty-of-vigilance-law-english-translation> [<https://perma.cc/NZU3-5CJS>].

42. See *id.* at art. L. 225-102-4, L. 225-102-5; see also *French Duty of Vigilance Law: Frequently Asked Questions*, EUR. COAL. FOR CORP. JUST. 3 (Feb. 23, 2017), [https://media.business-human-rights.org/media/documents/files/documents/French\\_Corporate\\_Duty\\_of\\_Vigilance\\_Law\\_FAQ.pdf](https://media.business-human-rights.org/media/documents/files/documents/French_Corporate_Duty_of_Vigilance_Law_FAQ.pdf) [<https://perma.cc/C9KP-KD2Q>] (“[T]he concept of established business relationship covers all types of relations between professionals, defined as stable, regular relationships, with or without contract, with a certain volume of business, creating a reasonable expectation that such relation will last.”).

43. Sandra Cossart & Lucie Chatelain, *Human Rights Litigation Against Multinational Companies in France*, in HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE 230, 242-43 (Richard Meeran & Jahan Meeran eds., 2021).

44. *Id.* at 243.

45. *Id.*

Uganda.<sup>46</sup> The project's initial activities allegedly displaced thousands of people who, according to the plaintiff NGOs, had not been adequately compensated.<sup>47</sup>

The outcome of that enforcement action will be a strong indicator of whether the Duty of Vigilance Law successfully requires companies to create and implement effective vigilance plans.<sup>48</sup>

### 3. *Germany's Supply Chain Act*

Germany's Supply Chain Act arose from a robust civil-society effort to regulate transnational corporate activity, but the strength of the bill was significantly diluted before passage. Taking effect in January 2023, the Act requires companies to use best efforts to conduct certain due-diligence activities – including managing risks, remedying violations, and establishing grievance mechanisms – in several risk areas.<sup>49</sup> The law will initially apply only to German companies with more than 3,000 employees.<sup>50</sup> After the first year, it will apply to companies with more than 1,000 employees.<sup>51</sup> A company's obligations under the law apply to its own business operations and to those of its direct and indirect suppliers (from raw materials to finished goods for consumers), although the company's obligations extend to indirect suppliers only when the company has “substantiated knowledge” of human-rights or environmental violations.<sup>52</sup>

The law requires a company to terminate a business relationship with a supplier when a human-rights or environmental violation is serious, there is no feasible remedy, and there are no other mitigating measures available to the

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46. Press Release, Friends of the Earth Int'l, Oil Company Total Faces Historic Legal Action in France for Human Rights and Environmental Violations in Uganda (Oct. 23, 2019), <https://www.foei.org/oil-company-total-faces-historic-legal-action-in-france-for-human-rights-and-environmental-violations-in-uganda> [<https://perma.cc/53Y6-2TPW>].

47. Léa Kulinowski, Juliette Renaud & Thomas Bart, *Total Uganda: A First Lawsuit Under the Duty of Vigilance Law: An Update*, LES AMIS DE LA TERRE FR. 7 (2020), <https://www.amisdelaterre.org/wp-content/uploads/2020/10/total-uganda-legal-brief-foefrance-survie.pdf> [<https://perma.cc/AV9Z-392Q>].

48. See Cossart & Chatelain, *supra* note 43, at 244.

49. *Supply Chain Act (Lieferkettengesetz)*, FED. GOV'T GER. (Mar. 3, 2021), <https://www.bundesregierung.de/breg-en/federal-government/supply-chain-act-1872076> [<https://perma.cc/WGS4-FFZS>].

50. *Id.*

51. *German Parliament Passes Mandatory Human Rights Due Diligence Law*, BUS. & HUM. RTS. RES. CTR. (June 16, 2021), <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law> [<https://perma.cc/GL5H-YYDU>].

52. *Id.*

company.<sup>53</sup> Companies that fail to comply with the Act's due-diligence obligations can be fined and barred from public contracts.<sup>54</sup> Significantly, the Act allows German trade unions and NGOs to represent claimants before German courts in cases related to violations of human-rights and environmental standards in German supply chains.<sup>55</sup>

The Supply Chain Act's best-effort requirement is not precisely defined, and the Act does not require the company to be effective in preventing abuse.<sup>56</sup> In other words, the entire focus is on the quality, rather than the effectiveness, of the companies' efforts. Similarly, the "substantiated knowledge" standard that pertains to indirect suppliers could have the effect of limiting companies' efforts to root out abuses in their supply chains. They might intentionally avoid knowledge of the activities of their indirect suppliers and thereby attempt to evade responsibility for human-rights violations arising from those activities.

German civil-society organizations have called the final version of the law "a good start" but far from a "model" supply-chain law.<sup>57</sup> Strengths of the law include mechanisms for oversight and enforcement, the opportunity for NGOs to bring claims on behalf of impacted communities (through already-existing causes of action), and some environmental provisions based on international conventions.<sup>58</sup> Weaknesses have been identified as the failure to extend obligations to indirect suppliers, an absence of a civil cause of action for failure to comply, and gaps in protecting against gender-based violence and recognizing Indigenous rights.<sup>59</sup>

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53. See Robert Grabosch, *The Supply Chain Due Diligence Act: Germany Sets New Standards to Protect Human Rights*, FRIEDRICH-EBERT-STIFTUNG 5 (Dec. 2021), <http://library.fes.de/pdf-files/iez/18755.pdf> [<https://perma.cc/RSQ9-F857>]. The Federal Ministry for Economic Affairs and Export Control will monitor compliance with the Act, review companies' due-diligence reports, issue necessary orders, and even conduct onsite inspections at its discretion. The Ministry can receive requests to act. *Id.* at 6.

54. *Id.* at 6.

55. *Id.*

56. *Id.* at 4.

57. *Not There Yet, but Finally at the Start: What the New Supply Chain Act Delivers – and What It Doesn't*, INITIATIVE LIEFERKETTENGESETZ 2 (June 11, 2021), [https://lieferkettengesetz.de/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz\\_Analysis\\_What-the-new-supply-chain-act-delivers.pdf](https://lieferkettengesetz.de/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf) [<https://perma.cc/8YLU-XDQF>]; see also Press Release, Eur. Ctr. for Const. & Hum. Rts., German Parliament Passes Supply Chain Law: An Important Step – but Not Enough for Those Affected (June 11, 2021), <https://www.ecchr.eu/en/press-release/bundestag-verabschiedet-lieferkettengesetz> [<https://perma.cc/PH6N-Y7Y6>] (describing the Supply Chain Act as "an important and long overdue step" but criticizing it for "fall[ing] short of international human rights standards").

58. INITIATIVE LIEFERKETTENGESETZ, *supra* note 57, at 3-4.

59. *Id.* at 4-5.

#### 4. *The Netherlands' Child Labor Legislation*

In 2019, the Dutch Senate adopted a fairly narrow law establishing a corporate duty of care to prevent child labor.<sup>60</sup> That law is still subject to modification as well as refinement through implementing decrees.<sup>61</sup> Nevertheless, if the law is implemented more or less as currently formulated, it will require companies to investigate whether there is a “reasonable suspicion” that child labour occurs in their operations or in their supply chain and to set out a plan of action to prevent or combat it.”<sup>62</sup> In addition, companies would have to produce compliance statements to be made publicly available by the Dutch government.<sup>63</sup>

The child-labor law as adopted would apply to Dutch companies as well as foreign companies that deliver products or services to the Netherlands at least twice a year.<sup>64</sup> Companies could be fined for failing to produce compliance statements or failing to comply with their due-diligence duties.<sup>65</sup>

Not only is the coverage of this new law very limited – it does not cover human-rights violations other than child labor – but liability flows only from failure to establish or articulate a plan, and the law does not confer a remedy on victims.<sup>66</sup> The Dutch law is thus best characterized as a hesitant step in the direction of an effective human-rights compliance mechanism.

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Taken together, European efforts to regulate corporate behavior in global supply chains represent an important, if preliminary, step. Absent rules that create civil or criminal liability based on outcomes, and not just processes that may or may not function as advertised, some companies may invest more in the appearance of engagement than in preventing and remediating harm. The following section looks at the role of civil liability and import bans in changing corporate behavior across several jurisdictions.

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60. See *Dutch Child Labour Due Diligence Law*, AMFORI 1 (2020), <https://www.amfori.org/sites/default/files/amfori-2020-26-02-Dutch-Child-Labour-Due-Diligence-Law.pdf> [<https://perma.cc/5EEE-AXKF>].

61. *Id.*

62. Channa Samkalden, *Foreign Direct Liability of Multinational Corporations in the Dutch Legal Order*, in *HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE*, *supra* note 43, at 201, 212.

63. *Id.*

64. *Id.*

65. *Id.*

66. AMFORI, *supra* note 60, at 1-2.

### B. Landmark Global-North Cases

The corporate world—especially in Global-North countries—has established a record that is replete with human-rights abuses in Global-South countries, both in exploiting mostly Black and brown workers for cheap labor and causing devastating environmental and economic harm. Thus, from the thousands of oil spills and attacks against Ogoni advocates in the Niger Delta<sup>67</sup> to the internment of Uyghurs and other Turkic people in Chinese work camps,<sup>68</sup> evidence suggests that corporations have extracted value from the poorest corners of the world at great cost and with few consequences.

We discuss in this Section how courts in some Global-North jurisdictions have embraced principles of law that expand the potential for corporate accountability for harms across international supply chains. We do not discuss such cases in the Global South, as civil litigation for human-rights harms has not been used there historically (although that appears to be changing).<sup>69</sup> What follows is by no means an exhaustive list of the relevant Global-North cases. Rather, we have focused on cases that suggest the paths that appear most promising for transnational human-rights litigation.

#### 1. The Supreme Court of Canada's Landmark Nevsun Ruling

In 2020, the Supreme Court of Canada (SCC) decided *Nevsun Resources Ltd. v. Araya*,<sup>70</sup> a case in which a Canadian company was sued for alleged violations of CIL in Eritrea. A 5-4 majority of the SCC held that CIL norms are actionable under Canadian tort law.<sup>71</sup> This case shows that, unlike in jurisdictions where implementing legislation is thought necessary for a CIL norm to be actionable, litigants against Canadian companies can plead breaches of CIL directly.

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67. See generally Christopher Byrnes, Elizabeth Deligio, Anthony Kote-Witah & Charity Ryerson, 'We All Stand Before History': Corporate Impunity as a Colonial Legacy—The Case of the Niger Delta, HARV. HUM. RTS. J. ONLINE (Apr. 9, 2019), <https://harvardhrj.com/2019/04/we-all-stand-before-history> [<https://perma.cc/8GLZ-6M4T>] (studying Ogoni efforts to hold the oil industry accountable for environmental and human-rights abuses).

68. Joshua Lipes, *Expert Says 1.8 Million Uyghurs, Muslim Minorities Held in Xinjiang's Internment Camps*, GLOBALSECURITY.ORG (Nov. 24, 2019), <https://www.globalsecurity.org/wmd/library/news/china/2019/china-191124-rfa01.htm> [<https://perma.cc/YK2L-G3NS>].

69. See Ekaterina Aristova, *Civil Remedies and Human Rights in Flux*, BRIT. INST. OF INT'L & COMPAR. L. (Jan. 21, 2021), <https://www.biicl.org/blog/19/civil-remedies-and-human> [<https://perma.cc/4N2P-JZTL>].

70. *Nevsun Res. Ltd. v. Araya*, 2020 SCC 5, [2020] 443 D.L.R. 4th 183 (Can.).

71. *Id.* at para. 132.

The Eritrean plaintiffs alleged that they were indefinitely conscripted to work in the Bisha mine between 2008 and 2012 as part of the Eritrean government's obligatory National Service Program, which places individuals in direct military service or on construction projects purportedly for the national interest.<sup>72</sup> As a result, the plaintiffs sought damages for "forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity," which CIL prohibits.<sup>73</sup> The plaintiffs also sought damages for Canadian torts including conversion, battery, false imprisonment, conspiracy, and negligence.<sup>74</sup>

But the issue at the heart of the case was whether norms of CIL may form the basis of a tort claim under Canadian law. On that issue, the SCC held that the particular harms alleged likely rose to the level of *jus cogens*,<sup>75</sup> which are violations of norms from which there can be no derogation (that is, no discretion for the court to excuse the violation and no weight given to any conflicting laws). The SCC wrote: "Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the law of Canada in the absence of conflicting legislation."<sup>76</sup> Although this suggests that the decision is consistent with preexisting Canadian jurisprudence, the decision remains highly significant because the plaintiffs pled violations based directly on international law without relying on any statute to incorporate CIL into domestic law.

While promising, *Nevsun* was ultimately settled, leaving numerous questions unanswered. Chief among these are whether the legal characteristics of torts based on CIL differ from those of ordinary torts and whether the principles of liability for corporations mirror those applied to individuals.<sup>77</sup> The central holding in this case, however, opens the door for victims of transnational human-rights abuses to bring claims in Canadian courts based on violations of *jus cogens* norms.

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72. *Id.* at paras. 3-15.

73. *Id.* at para. 4.

74. *Id.*

75. *Id.* at para. 20.

76. *Id.* at para. 90.

77. See James Yap, Opinion, *Nevsun Resources Ltd. v. Araya: What the Canadian Supreme Court Decision Means in Holding Canadian Companies Accountable for Human Rights Abuses Abroad*, BUS. & HUM. RTS. RES. CTR. (Mar. 16, 2020), <https://business-humanrights.org/en/blog/nevsun-resources-ltd-v-araya-what-the-canadian-supreme-court-decision-means-in-holding-canadian-companies-accountable-for-human-rights-abuses-abroad> [<https://perma.cc/8YEQ-MRFK>].



## 2. *Vedanta and Other Civil Litigation in the United Kingdom*

In a seminal decision in April 2019 that demonstrated the growing willingness of U.K. courts to hold corporations accountable for human-rights violations, the U.K. Supreme Court decided in *Vedanta Resources PLC v. Lungowe* that English courts could hear a lawsuit against a Zambian mining company and its English parent, Vedanta Resources PLC, for environmental harm in Zambia.<sup>78</sup> The Court determined that the English parent company's liability for the harms associated with the negligence of the Zambian subsidiary would depend on various factors, including the extent to which the parent corporation controlled the actions of its subsidiary.<sup>79</sup> This finding was based in significant part on Vedanta's sustainability reports, through which, the Court found, the parent assumed responsibility for overseeing the subsidiary's environmental compliance through training, monitoring, and enforcement.<sup>80</sup>

More recently, in February 2021, the U.K. Supreme Court ruled in *Okpabi v. Royal Dutch Shell* that two Nigerian communities could bring their legal claims in U.K. courts against Shell and its Nigerian subsidiary.<sup>81</sup> This overturned a split decision by the Court of Appeal and led Shell to abandon its strategy of seeking to have the dispute resolved by Nigerian courts.

Expanding upon *Vedanta*, the court in *Okpabi* held that there is no presumption against a finding of liability against the corporate parent.<sup>82</sup> Moreover, for a parent to be held liable for the activities of its subsidiary, it does not need to control its subsidiary.<sup>83</sup> Rather, the central issue is the degree to which the parent took over, or shared in, the management of the *commercial operation in question*.<sup>84</sup>

Multinational companies have often benefited from a heavy presumption against finding a parent company liable for the negligence of its subsidiary.<sup>85</sup> *Vedanta* and *Okpabi*, however, may represent a new era for parent-company

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78. *Vedanta Res. PLC v. Lungowe* [2019] UKSC 20 (appeal taken from Eng.).

79. *Id.* at [49].

80. *Id.* at [61].

81. *Okpabi v. Royal Dutch Shell* [2021] UKSC 3, [153], [158-59] (appeal taken from Eng.).

82. *Id.* at [150] ("It would be wrong, however, to approach the issue of whether a duty of care is owed by reference to any generalised assumption or presumption.").

83. *Id.* at [147-49].

84. *Id.*

85. See Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1803-06 (2015) (discussing how the doctrine of limited liability prevents victims from seeking a remedy against the parent company, and providing examples).

accountability, by allowing claims against parent companies even where they are treated for other purposes as distinct from their foreign subsidiaries.

### 3. *Civil Litigation in the Netherlands*

Dutch courts have jurisdiction over transnational cases involving Dutch companies – as is the case across Europe. Unlike in the United States, there is no *forum non conveniens* principle in the Netherlands that might cause Dutch courts to refuse to hear such cases because a more appropriate forum is available.<sup>86</sup> Dutch courts also have jurisdiction against foreign defendants if they have jurisdiction over another defendant and the cases are so tightly connected that judicial efficiency requires aggregating them.<sup>87</sup> Companies can be held civilly liable where it is established that the tortious act – encompassing violation of the rights of another, acts or omissions in violation of law, and acts contrary to “proper social conduct” – is attributable to the perpetrator, and Dutch courts often look to soft-law provisions to determine what constitutes “proper social conduct” in relation to rightsholders.<sup>88</sup>

In 2017, widows of the executed Nigerian activists referenced in the introduction to this Essay sued Royal Dutch Shell in the Netherlands, claiming that the company aided the Nigerian government in violently repressing the 1993-1994 peaceful protests against oil exploitation in the Niger delta, which led to the extrajudicial killing of their husbands. The court accepted jurisdiction in May 2019 and ordered Shell to provide internal documents to the plaintiffs.<sup>89</sup> In March 2022, however, the Hague District Court dismissed the case, citing insufficient evidence linking Shell to the bribing of witnesses to provide false testimony at the “trial” leading to the activists’ executions.<sup>90</sup> It is noteworthy that

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<sup>86.</sup> Samkalden, *supra* note 62, at 208.

<sup>87.</sup> *Id.*

<sup>88.</sup> *Id.* at 209-12. For example, in Rb.-Den Haag 24 juni 2015, AB 2015/336 m.nt. Ch. W. Backes (Urgenda/Netherlands) (Neth.), the Hague District Court referenced the Kyoto Protocol and the Doha Amendment to the Protocol, as well as decisions from the Conference of Parties (COPs), such as the Bali Action Plan 2007 and the Cancun Agreements 2010. Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v the State of the Netherlands* 3-4 (Ctr. Int’l. Governance Innovation, Paper No. 79, 2015).

<sup>89.</sup> Rb.-Den Haag 1 mei 2019, ECLI:NL:RBDHA:2019:4233 (Kiobel/Royal Dutch Shell PLC) (Neth.); Kate Hodal, *Dutch Court Will Hear Widows’ Case Against Shell over Deaths of Ogoni Nine*, GUARDIAN (May 1, 2019, 8:33 AM EDT), <https://www.theguardian.com/global-development/2019/may/01/dutch-court-will-hear-widows-case-against-shell-over-deaths-of-ogoni-nine-esther-kiobel-victoria-bera-hague> [<https://perma.cc/SZH5-QCV4>].

<sup>90.</sup> Rb.-Den Haag 23 maart 2022, RAV 2022/47 (Kiobel/Royal Dutch Shell PLC) (Neth.); Laura Libertini, *Kiobel v. Shell: Hague District Court Rules Against Nigerian Human Rights Activists*,

this case was decided on the merits because, historically, many such cases have not made it to that stage of proceedings.<sup>91</sup>

In 2021, in a similar case alleging harms to land and livelihood arising from oil spills in the same region in 2006 and 2007, the Hague Court of Appeals ordered Shell to pay damages to three victims, accepting that Shell could be held liable for actions of its Nigerian subsidiary.<sup>92</sup> Taken together, these cases indicate that Dutch courts may offer a plaintiff-friendly forum for transnational corporate human-rights cases, but the body of case law remains limited.

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The cases from Canada, the U.K., and the Netherlands discussed in this section—in contrast to the approaches taken by many U.S. courts, discussed below—are helping to establish a strong framework in which corporations can be held liable for transnational human-rights harms.

### *C. The United States: What Remains After Kiobel, Jesner, and Nestlé?*

The approach in federal civil litigation taken by the U.S. Supreme Court to CIL violations is diametrically opposed to the approach taken by the SCC in *Nevsun*. The U.S. approach is, in some ways, the paradigmatic example of judicial efforts to restrict challenges to transnational corporate abuse. Victims will generally have to look elsewhere for relief.

#### *1. The Alien Tort Statute*

In the early 1990s, the ATS appeared to provide a promising basis for human-rights litigation, including against companies.<sup>93</sup> Since then, however, the U.S. Supreme Court has repeatedly narrowed the possibilities for the assertion of jurisdiction under the ATS, based largely on the presumption, which can be

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GLOB. HUM. RTS. DEF. (May 7, 2022, 11:12 AM), <https://ghrd.org/kiobel-v-shell-hague-district-court-rules-against-nigerian-human-rights-activists> [<https://perma.cc/BZS6-3932>].

91. For background on the difficulty of proceeding to the merits in such cases, see Lucas Roorda, *Wading Through the (Polluted) Mud: The Hague Court of Appeals Rules on Shell in Nigeria*, RTS. AS USUAL (Feb. 2, 2021), <https://rightsasusual.com/?p=1388> [<https://perma.cc/5TM9-WURY>].

92. Hof's-Den Haag 29 januari 2021, RAV 2021/38 (Vereniging Milieudefensie/Royal Dutch Shell PLC) (Neth.).

93. See, e.g., *Hilao v. Est. of Marcos*, 103 F.3d 767, 787 (9th Cir. 1996) (holding defendant estate of foreign dictator liable to the class for over \$766 million in compensatory damages and \$1.2 billion in exemplary damages).

rebutted by explicit statutory language, that U.S. federal statutes are not intended to govern extraterritorial conduct. First, in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>94</sup> the Court, applying this presumption, held that the ATS does not confer jurisdiction over violations that occur entirely outside of the United States.<sup>95</sup> In *Jesner v. Arab Bank, PLC*,<sup>96</sup> the Court further limited the statute, finding that foreign corporations may not be defendants in ATS suits.<sup>97</sup> Most recently, in *Nestlé USA, Inc. v. Doe*,<sup>98</sup> the Court did not find the alleged misconduct to be sufficiently connected to the territory of the United States to justify claims under the ATS, despite the fact that the defendant was a U.S. company.<sup>99</sup> In the absence of statutory reform, the ATS has functionally become a dead letter as a tool to address transnational human-rights violations by companies.

## 2. *Litigating Forced-Labor Claims in U.S. Courts*

Despite some concerning lower-court decisions, the Trafficking Victims Protection Reauthorization Act (TVPRA)<sup>100</sup> is currently the most promising avenue in the United States for imposing civil liability on corporations for forced labor and human trafficking. The TVPRA's civil-liability provision does not include any territorial limitations,<sup>101</sup> nor does it limit liability to natural persons or individuals, meaning that corporate defendants can be held liable for relying on trafficked labor outside the United States.<sup>102</sup> To recover under this provision, one

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94. 569 U.S. 108 (2013).

95. *Id.* at 124-25.

96. 138 S. Ct. 1386 (2018).

97. *Id.* at 1408.

98. 141 S. Ct. 1931 (2021).

99. *Id.* at 1936-37.

100. William Wilberforce Trafficking Victim Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; Trafficking Victims Protection Act of 2017, Pub. L. No. 115-392, 132 Stat. 5265 (2018) (reauthorizing the 2008 enactment).

101. In the 2008 enactment, Congress clarified prior versions of the law, specifying that the Trafficking Victims Protection Reauthorization Act (TVPRA) was intended to reach extraterritorial conduct. The new 18 U.S.C. § 1596 stated that “[i]n addition to any domestic or extraterritorial jurisdiction otherwise provided by law,” federal courts have jurisdiction to hear criminal and civil allegations of extraterritorial forced labor and other TVPRA violations committed by (1) U.S. nationals; (2) permanent resident aliens; or (3) anyone present in the United States. 122 Stat. 5044 at § 223(a).

102. 18 U.S.C. § 1595(a) (2018) (“An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.”)

must show the defendant knowingly benefitted from “participation in a venture” that the defendant knew or should have known violated the TVPRA.<sup>103</sup> The TVPRA also includes criminal provisions.<sup>104</sup>

In a case in which it upheld awards of \$1 million in compensatory damages and \$2 million in punitive damages<sup>105</sup> to an Ethiopian national subjected to egregious forced labor and trafficking abuses in Yemen, the U.S. Court of Appeals for the Fourth Circuit observed that “[v]iewed as a whole, the TVP[R]A represents a far-reaching congressional effort to combat transnational human trafficking on numerous fronts, including by expanding the civil claims and remedies available to its victims.”<sup>106</sup> The court went on to find that the conduct of the defendant, a U.S. national, met the requirements for a private right of action under the TVPRA.<sup>107</sup> This marked the first time a U.S. appellate court has exercised extraterritorial jurisdiction in a federal civil trafficking case.<sup>108</sup>

Some federal courts, however, have narrowly construed the TVPRA, limiting its efficacy for transnational human-rights violations. For example, in the 2021 case *John Doe v. Apple Inc.*, the District Court for the District of Columbia dismissed a complaint filed against several major technology companies on behalf of children who were victims of hazardous child labor in cobalt-mining activities in the Democratic Republic of the Congo.<sup>109</sup> The court held that the plaintiffs could not bring their claims because they failed to adequately identify the defendants’ conduct that caused the injury.<sup>110</sup> This was in spite of the fact that the defendants’ products were alleged to be manufactured under precisely the kinds of conditions that are proscribed by the TVPRA, including forced and trafficked child labor.<sup>111</sup>

This outlier decision was based on several findings which, if not overturned on appeal, could have significant negative implications for the future of TVPRA litigation. First, the court found that “a ‘global supply chain’ is not a ‘venture,’”

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103. *Id.*; see also *Doe v. Red Roof Inns, Inc.*, 21 F.4th 714, 719 (11th Cir. 2021) (“[T]o state a claim for beneficiary liability under the TVPRA, a plaintiff must plausibly allege that . . . the defendant had constructive or actual knowledge that the undertaking or enterprise violated the TVPRA . . .”).

104. 22 U.S.C. § 1591 (2018).

105. *Roe v. Howard*, 917 F.3d 229, 238, 247 (4th Cir. 2019).

106. *Id.* at 242.

107. *Id.* at 243-45.

108. See *Extraterritorial Jurisdiction Victory in the United States*, FREEDOM FUND (Mar. 12, 2019), <https://freedomfund.org/blog/extraterritorial-jurisdiction-victory-in-the-united-states> [<https://perma.cc/2ZWA-JT2W>].

109. *Doe v. Apple Inc.*, No. 19-cv-03737, 2021 U.S. Dist. LEXIS 237710 (D.D.C. Nov. 2, 2021).

110. *Id.* at \*33-38.

111. Complaint at 8, *Doe v. Apple Inc.*, 2021 U.S. Dist. LEXIS 237710.

despite allegations of a continuous business relationship between the defendant companies and the Congolese cobalt-mining companies.<sup>112</sup> Second, the court held that the statute did not apply extraterritorially.<sup>113</sup> Third, the court rejected the plaintiffs' argument that, as minors, they could not consent to work.<sup>114</sup>

Restrictive interpretations of personal jurisdiction and related requirements can also present challenges to actions filed under the TVPRA. In *Ratha v. Phatthana Seafood Co.*, Cambodian villagers alleged that they had been trafficked and forced into labor by foreign seafood-production companies working with a U.S. entity and its affiliate.<sup>115</sup> The Ninth Circuit, however, held that the foreign seafood producers lacked minimum contacts with the U.S. forum sufficient to establish personal jurisdiction and that the plaintiffs did not show that the other defendant entities knowingly benefitted from the alleged labor violations.<sup>116</sup> Despite the U.S.-based entity's attempts to import the seafood, the court emphasized that the product had been rejected by the retail seller and was never sold in the United States.<sup>117</sup>

Unless *Ratha* is overturned, its reading of the TVPRA effectively eliminates attempt liability, meaning liability for attempting to benefit from forced labor. The TVPRA's ability to serve as a robust deterrent for proscribed conduct would be substantially undermined if this kind of liability is unavailable. Moreover, the ruling in *Ratha* is out of step with various U.S. forced-labor laws, including the Tariff Act of 1930 (specifically section 307),<sup>118</sup> the Uyghur Forced Labor Prevention Act (UFLPA),<sup>119</sup> and the Countering America's Adversaries Through Sanctions Act,<sup>120</sup> which prevent the importation into the United States of goods produced with forced labor when fully enforced.

Despite these restrictive rulings, the TVPRA is still one of the few statutes with the potential to provide a civil remedy for transnational forced and trafficked labor violations, including violations committed by corporations. Because the referenced rulings may well be overturned on appeal, the TVPRA remains a

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112. *Doe v. Apple Inc.*, 2021 U.S. Dist. LEXIS 237710, at \*31.

113. *See id.* at \*38-44.

114. *Id.* at \*35-36 ("No doubt, child labor is abhorrent. Yet the mere fact that children performed the labor does not mean that the Defendants or their agents 'knowingly . . . obtain[ed] the labor . . . by means of serious harm or threats of serious harm.'" (citing 18 U.S.C. § 1589(a)(2))).

115. *Ratha v. Phatthana Seafood Co.*, 26 F.4th 1029, 1034-35 (9th Cir. 2022).

116. *Id.* at 1039-41.

117. *Id.* at 1041.

118. 19 U.S.C. § 1307 (2018).

119. Pub. L. No. 117-78, 135 Stat. 1525 (2021) (to be codified at 22 U.S.C. § 6901).

120. Pub. L. No. 115-44, 131 Stat. 886 (2017) (codified as amended at 22 U.S.C. § 9401).

promising, if uncertain, option for plaintiffs seeking a civil remedy for transnational human-rights violations.

While the civil provisions of the TVPRA are an important tool to redress forced labor, civil-society organizations and victims of transnational corporate abuse are increasingly also looking to section 307 of the Tariff Act to leverage the United States's key role as an importer of goods and disrupt the flow of forced-labor products in the global economy. Although section 307 does not provide remedy to victims directly, it does raise the specter of a significant adverse commercial consequences for companies that import goods made with forced labor.<sup>121</sup>

The U.S. forced-labor import ban was recently strengthened by the UFLPA for certain goods.<sup>122</sup> In contrast to the due-diligence requirements that govern internal policies and practices of companies, import bans are based on supply-chain realities and can apply even where a company's internal processes are not faulty. This approach is beginning to gain traction in other jurisdictions.<sup>123</sup>

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We have noted some significant setbacks at the federal level in the United States for transnational corporate accountability. There are certain federal statutes, however, that offer promising opportunities, including the TVPRA, section 307 of the Tariff Act, and the UFLPA. In addition, as discussed in Part III, the corporate-accountability community is working to develop and test new approaches to address and remediate transnational human-rights violations.

### III. NEW FRONTIERS: SUPPLY-CHAIN CONTRACTING AND CONSUMER-PROTECTION TOOLS

Plaintiffs may have alternative, innovative ways to obtain relief or deter corporate misbehavior. Supply-chain contracting and consumer-protection litigation represent relatively new methods for improving human-rights conditions along supply chains, although their effectiveness cannot yet be fully evaluated.

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121. See CHRISTOPHER A. CASEY & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR (2022). That report points out, however, that such import restrictions could be more strongly enforced by the United States.

122. Pub. L. No. 117-78, 135 Stat. 1525 (2021) (establishing a rebuttable presumption that certain goods were produced with forced labor and should be denied entry into the United States).

123. See *EU Model Law on Corporate Accountability in Global Value Chains*, EUR. COAL. FOR CORP. JUST. 1, 7 (Jan. 2022), [https://corporatejustice.org/wp-content/uploads/2022/01/ECCJ\\_Model\\_Law\\_Redesigned\\_final.pdf](https://corporatejustice.org/wp-content/uploads/2022/01/ECCJ_Model_Law_Redesigned_final.pdf) [<https://perma.cc/73TY-UZ6X>].

### A. Supply-Chain Contracting

Many companies that source goods internationally now use supplier codes of conduct and sustainability clauses in their supply-chain contracts.<sup>124</sup> This follows a general trend toward contractualizing human rights through business arrangements.<sup>125</sup> Supplier codes of conduct can address issues like forced and child labor, working hours, health standards, environmental and sustainability standards, discrimination, and freedom of association. Sustainability clauses often include similar social and environmental provisions. At least on paper, where supplier codes of conduct and sustainability clauses are incorporated into purchase orders or standing contracts with international suppliers, they create a legal obligation for suppliers to respect human rights.<sup>126</sup> These contracts can, and often do, provide substantive rights that exceed those provided under local law. However, because only buying companies have historically been able to enforce these clauses and often have financial incentives not to do so, they are rarely enforced.

In a series of pilot projects with institutional buyers, Corporate Accountability Lab (CAL) is experimenting with inserting express “third-party-beneficiary” clauses into transnational supply-chain contracts.<sup>127</sup> These clauses name workers as third-party beneficiaries, recognizing their own independent legal right to sue the supplier when the sustainability clauses in the contract are violated. Because intended third-party beneficiaries can sue for contract enforcement,<sup>128</sup> workers can enforce such contract provisions without relying on any action by the buying company. New contracts in the most recent pilot, in which the City of San Francisco is considering the incorporation of third-party beneficiary

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124. See, e.g., Niklas Egels-Zandén, *Revisiting Supplier Compliance with MNC Codes of Conduct: Recoupling Policy and Practice at Chinese Toy Suppliers*, 119 J. BUS. ETHICS 58, 61, 69 (2014); Katerina Peterkova Mitkidis, *Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements*, 1 NORDIC J. COM. L. 1, 5 (2014).

125. Robert McCorquodale, Lise Smit, Stuart Neely & Robin Brooks, *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. & HUM. RTS. J. 195, 215 (2017).

126. Lise Smit, Arianne Griffith & Robert McCorquodale, *When National Law Conflicts with International Human Rights Standards: Recommendations for Business*, BINGHAM CTR. FOR THE RULE OF L. & BRIT. INST. OF INT’L & COMPAR. L. 8 (2018), [https://www.biicl.org/documents/3\\_1930\\_biicl\\_bn\\_report\\_web.pdf](https://www.biicl.org/documents/3_1930_biicl_bn_report_web.pdf) [<https://perma.cc/VFT7-XU9H>].

127. See Bettina Braun, Avery Kelly & Charity Ryerson, *Worker-Enforceable Supplier Codes of Conduct as a Tool for Access to Justice in Global Supply Chains*, 1 GLOB. LAB. RTS. REP. 1, 9 (June 30, 2021), <https://www.ilawnetwork.com/wp-content/uploads/2021/01/GLRR-English-FINAL.pdf> [<https://perma.cc/QA4R-FB5N>].

128. RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304 (AM. L. INST. 1981).



language into apparel procurement contracts, will likely go into effect starting in 2023.<sup>129</sup>

Key challenges for this approach include incentivizing companies (and public buyers) to adopt third-party-beneficiary provisions, making workers aware of their status as beneficiaries, and ensuring that workers have the resources (including legal resources) and security necessary to vindicate their contract claims. Nevertheless, the possibility of worker enforceability could improve supplier compliance in regard to human rights terms, and it could enhance workers' access to justice — particularly when local courts in the jurisdiction where the harm occurred are unable to remediate the harm.

### B. Consumer-Protection Litigation

Plaintiffs in at least four recent cases have brought claims under state or local law alleging deceptive product labeling with respect to human-rights standards. Two of those cases relate to the West African chocolate industry, an industry in which hazardous child labor is widespread.<sup>130</sup> In *Walker v. Nestlé USA, Inc.*,<sup>131</sup> the plaintiff alleges under California state law that Nestlé mislabeled its chocolate products as produced in accordance with environmentally and socially responsible standards when Nestlé actually sourced its cocoa from plantations that rely on child labor and forced child labor, contributed to deforestation, and employed other practices harmful to the environment.<sup>132</sup> Similarly, in a complaint filed in the District of Columbia Superior Court, CAL makes false-and-deceptive-advertising claims under the D.C. Consumer Protection Procedures Act

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129. In December 2021, San Francisco's Sweatfree Procurement Advisory Group passed a resolution to recommend that the Board of Supervisors incorporate third-party-beneficiary-language into San Francisco's sweatfree procurement contracts to enable workers to directly enforce sweatfree contract terms against contractors with San Francisco. *Sweatfree Procurement Advisory Group – December 13, 2021 – Minutes*, OFF. OF LAB. STANDARDS ENF'T (Dec. 13, 2021), <https://sfgov.org/olse/meeting/sweatfree-procurement-advisory-group-december-13-2021-minutes> [https://perma.cc/A8X7-8P3U].

130. Santadarshan Sadhu, Kareem Kysia, Letitia Onyango, Clifford Zinnes, Sarah Lord, Alexandre Monnard & Ingrid Rojas Arellano, *NORC Final Report: Assessing Progress in Reducing Child Labor in Cocoa Production in Cocoa Growing Areas of Côte d'Ivoire and Ghana*, NORC AT THE UNIV. OF CHI. 10 (2020), [https://www.norc.org/PDFs/Cocoa%20Report/NORC%202020%20Cocoa%20Report\\_English.pdf](https://www.norc.org/PDFs/Cocoa%20Report/NORC%202020%20Cocoa%20Report_English.pdf) [https://perma.cc/HKX4-MYAE] (finding that, in 2018/2019, 1.56 million children from agricultural households in the cocoa growing areas of Côte d'Ivoire and Ghana were engaged in child labor in cocoa production and 1.48 million children were exposed to hazardous child labor).

131. 2022 U.S. Dist. LEXIS 56178 (S.D. Cal., Mar. 28, 2022).

132. *Id.* at \*2-3.

against Hershey, as well as its social auditor Rainforest Alliance.<sup>133</sup> If successful, these cases may result in greater transparency and more accurate public-facing information from companies. Even if they are not successful, the prospect of such litigation may deter corporate sustainability misrepresentations.

The weakness of this approach is that consumer-protection litigation was not designed to create remedies for the victims of human-rights abuses themselves. Indeed, companies could respond to such litigation by changing their representations rather than remedying the underlying practices. Despite that possibility, such litigation has the potential to create leverage for better supply-chain due diligence. Moreover, by addressing both false advertising and “greenwashing,” proactive litigation can foster competition among companies to improve performance with respect to human rights.<sup>134</sup>

## CONCLUSION

In Global-North courts, much remains unsettled for those seeking to hold corporate actors responsible for supply-chain human-rights abuses. There are positive litigation developments in both Canada and Europe, as well as new European legislation that has the potential to require that companies address human-rights violations in their supply chains. Meanwhile, in the United States, there have been some litigation setbacks amidst promising regulatory developments. The key goals for advocates will be stronger civil-liability provisions against abuses, new and enhanced prohibitions on imports tainted by human-rights violations, and the establishment of an effective remedial mechanism for rightsholders. The legal environment can, and indeed must, be shaped to address these goals.

Advocates should continue to employ and expand upon existing mechanisms for imposing liability on corporate perpetrators of human-rights abuses, restricting companies' ability to trade in goods produced by means of such abuses, and requiring that companies exercise human-rights due diligence. In addition, newly adapted mechanisms such as private contractual language intended to benefit third-party rightsholders and consumer-protection litigation are available (or potentially available) to that end. All of these tools and more are needed

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133. Complaint & Demand for Jury Trial, Corp. Accountability Lab v. Hershey Co., No. 21-cv-03225 (D.C. Super. Ct. Oct. 27, 2021), [https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/618167d28dd7f307c9oda0e4/1635870679248/CAL+v.+Hersheys+and+RA\\_Stamped+Complaint.pdf](https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/618167d28dd7f307c9oda0e4/1635870679248/CAL+v.+Hersheys+and+RA_Stamped+Complaint.pdf) [<https://perma.cc/6EC3-LSUN>].

134. “Greenwashing” is cloaking harmful environmental practices in false claims of environmentally friendly practices. Carlyann Edwards, *What Is Greenwashing?*, BUS. NEWS DAILY (Aug. 5, 2022), <https://www.businessnewsdaily.com/10946-greenwashing.html> [<https://perma.cc/58Q8-WWRF>].

to address what continues to be a very substantial gap in corporate accountability, which directly causes and contributes to dire circumstances faced by individuals and communities around the world.

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