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## Utilizing Foreign Legal Assistance Actions to Promote Corporate Accountability for Human-Rights Abuses

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**ABSTRACT.** This Essay provides the perspective of a human-rights practitioner who has litigated human-rights lawsuits against multinational corporations for transnational human-rights abuses. Litigating transnational human-rights cases against multinational corporations in U.S. courts can be challenging for jurisdictional reasons. While it is crucial for practitioners to continue to litigate transnational human-rights cases in U.S. courts despite these challenges, attorneys should also be mindful of creative tools for promoting corporate accountability in the forum where the human-rights violations occurred. The U.S. Foreign Legal Assistance statute, 28 U.S.C. § 1782, serves as a promising strategy for assisting human-rights cases before courts in other countries. Under this statute, a petitioner may obtain discovery from a U.S. multinational corporation to strengthen the quality of evidence available for a human-rights lawsuit that is connected to corporate accountability.

### INTRODUCTION

As a human-rights attorney at EarthRights International, I have worked with Indigenous and *campesino*<sup>1</sup> communities in South America. Those communities, often marginalized by the state because of their Indigenous or *campesino* identity,<sup>2</sup> are frequently located near industrial or proposed industrial sites, such as large mines or concessions for oil exploitation and extraction.<sup>3</sup> The community's proximity to the industrial site means that community members will very likely

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1. In Peru, *campesinos* are considered indigenous communities who primarily reside in the Andes. Charis Kamphuis, *Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru*, 37 BROOK. J. INT'L L. 529, 531 n.12 (2012).

2. *Id.* at 532.

3. Gina Cosentino, *Governing the Global Commons: How UNSR Anaya's Study on Extractive Industries Can Inform a New Global Human Rights Regulatory Regime for Transnational Conservation NGOs Operating on or near Indigenous Territories*, 32 ARIZ. J. INT'L & COMP. L. 209, 210 (2015).

face human-rights abuses.<sup>4</sup> Indeed, many communities face the destruction of their livelihoods and traditional systems of subsistence.<sup>5</sup>

One community struggle that has stood out in my professional career is the Conga conflict, considered one of the largest social conflicts in Peru.<sup>6</sup> There, *campesinos* in the Cajamarca region of the country have for years dealt with aggressive open-pit gold mining.<sup>7</sup> The operator of these mines is Minera Yanacocha—a joint venture, a majority of whose shares are owned by the U.S.-based Newmont Mining Corporation.<sup>8</sup> Minera Yanacocha has proposed expanding its operations through the Conga project despite massive local opposition.<sup>9</sup> The Conga conflict raises a variety of human-rights concerns. These include environmental contamination, the destruction of traditional territory, cultural heritage, and property, and violence against peaceful protestors.<sup>10</sup>

One family in particular, the Chaupes, have been engaged in a land dispute with Minera Yanacocha for over ten years.<sup>11</sup> Máxima Acuña-Atalaya de Chaupe and her family, *campesino* subsistence farmers, live on a plot of land known as Tragadero Grande.<sup>12</sup> Minera Yanacocha has wanted the Conga expansion to include Tragadero Grande and has claimed that it legally owns the land.<sup>13</sup> The Chaupes deny that any land sale occurred and have reported that Minera Yanacocha has engaged in a campaign of intimidation to evict the family forcibly.<sup>14</sup> Family members have alleged that Minera Yanacocha's security has physically assaulted the family, destroyed their property, killed their livestock, and violated their privacy through expansive surveillance.<sup>15</sup>

The Conga conflict and the Chaupe family's dispute with Minera Yanacocha raise the question of whether Newmont can be held accountable for the conduct

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4. *Id.*

5. *Id.*

6. Lynda Sullivan, *Peru's Conga Mine Conflict: Cajamarca Won't Capitulate*, UPSIDE DOWN WORLD (May 1, 2014), <https://upside-downworld.org/archives/peru-archives/perus-conga-mine-conflict-cajamarca-wont-capitulate> [<https://perma.cc/Z929-GBRM>].

7. *Id.*

8. *Id.*; *Acuña-Atalaya v. Newmont Mining Corp.*, 838 F. App'x 676, 678 (3d Cir. 2020), *cert. denied*, 142 S. Ct. 461 (2021).

9. Sullivan, *supra* note 6.

10. *Id.*

11. Brief in Support of Motion for a Preliminary Injunction at 1, *Acuña-Atalaya v. Newmont Mining Corp.*, 308 F.3d 812 (D. Del. 2018) (No. 17-1315), 2020 U.S. Dist. LEXIS 41132.

12. Complaint at 1, *Acuña-Atalaya*, 308 F.3d 812 (No. 17-1315), 2020 U.S. Dist. LEXIS 41132.

13. *Id.*

14. *Id.*

15. *Id.*

of its subsidiary. Identifying a legal strategy is not easy. No binding international enforcement mechanism exists to hold a corporation like Newmont accountable for transnational human-rights abuses. The global human-rights movement has traditionally focused on the state's responsibility to realize and protect human rights.<sup>16</sup> Indeed, any binding human-rights treaty can only be enforced against a state for failing to protect human rights or committing human-rights abuses.<sup>17</sup> There is thus a gap in human-rights enforcement when the perpetrators of abuses are multinational corporations.

Because of these limitations, practitioners around the world rely primarily on domestic legal mechanisms to promote transnational corporate accountability. In the United States, however, there are no federal or state statutes that specifically provide a private right of action for human-rights abuses committed by U.S. corporations abroad. Human-rights practitioners have traditionally relied on the Alien Tort Statute (ATS), Torture Victim Protection Act (TVPA), and tort law to bring claims. But in recent years, unfavorable Supreme Court decisions have limited the scope of ATS and TVPA claims<sup>18</sup>; while transitory tort claims are always available, some courts use discretionary doctrines to dismiss such claims when the injuries arise outside the United States.<sup>19</sup> In the case of the Chaupes, EarthRights filed a federal suit in Delaware against Newmont to stop Minera Yanacocha's intimidation campaign and hold Newmont accountable for the conduct of its subsidiary.<sup>20</sup> The court, however, dismissed the case for *forum non conveniens*, despite serious concerns about corruption in Peruvian courts favorable to Newmont.<sup>21</sup>

Given the fact that there are many cases – even cases involving U.S. companies – that may not be able to be litigated in the United States, human-rights attorneys should consider complementary strategies to promote corporate accountability in the fora where human-rights violations occur. First, the U.S. Foreign Legal Assistance statute (FLA) serves as a promising strategy for doing so.<sup>22</sup>

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16. *Developments in the Law – International Criminal Law*, 114 HARV. L. REV. 1943, 2030-31 (2001).

17. Jena Martin Amerson, “*The End of The Beginning?*”: A Comprehensive Look at the U.N.’s Business and Human Rights Agenda from a Bystander Perspective, 17 FORDHAM J. CORP. & FIN. L. 871, 878-79 (2012).

18. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 126 (2013); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018); *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 452-53 (2012).

19. *Acuña-Atalaya v. Newmont Mining Corp.*, No. 17-1315, 2020 U.S. Dist. LEXIS 41132, at \*2-3 (D. Del. Mar. 10, 2020), *aff’d as modified*, 838 F. App’x 676 (3d Cir. 2020), *cert. denied*, 142 S. Ct. 461 (2021).

20. *Acuña-Atalaya*, 2020 U.S. Dist. LEXIS 41132, at \*2-3.

21. *Id.*

22. 28 U.S.C. § 1782 (2018).

Under the FLA, a petitioner may obtain discovery from a U.S.-based multinational corporation to strengthen the quality of evidence available for a foreign human-rights proceeding.<sup>23</sup> Although the FLA was not originally conceived of as advancing human-rights litigation,<sup>24</sup> FLA petitions can strengthen the outcomes of foreign human-rights cases involving corporations with connections to the United States. Human-rights attorneys abroad can obtain crucial evidence through FLA petitions that would otherwise be unavailable to them. And in the case of the Conga conflict, discovery obtained through the FLA has helped shed light on how the violent suppression of protestors serves corporate interests. Second, suing international financial institutions (IFIs) is another promising, albeit less-developed, avenue for plaintiffs seeking relief for human-rights abuses. IFIs, which play a critical role in development finance, can be complicit in economic activity, such as providing loans to countries, that contribute to human-rights violations.<sup>25</sup>

This Essay reflects my observations and lessons learned through human-rights litigation. Part I examines the international human-rights movement and its shortcomings in addressing corporate accountability. Part II discusses trends in transnational human-rights litigation, courts' hesitancy in exercising jurisdiction over human-rights cases, and my experience with litigating a human-rights lawsuit against Newmont on behalf of the Chaupes. Part III discusses the FLA and lessons learned from filing FLA cases to support human-rights litigation and social movements abroad, and Part IV discusses the FLA's shortcomings. Part V examines how litigation against international financial institutions might also play a role in promoting corporate accountability.

## I. LIMITATIONS OF INTERNATIONAL HUMAN-RIGHTS LAW

To appreciate why human-rights practitioners must rely on domestic law to address transnational corporate human-rights abuses, it is important to understand the shortcomings of the international human-rights system. To date, there

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23. *Id.*

24. The Foreign Legal Assistance statute (FLA) was originally conceived as a tool for promoting judicial cooperation between the United States and other countries. *In re Application for an Ord. for Jud. Assistance in a Foreign Proc. in the High Ct. of Just., Chancery Div., Eng.*, 147 F.R.D. 223, 226 (C.D. Cal. 1993), *overruled by* *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664 (9th Cir. 2002).

25. Antonio Morelli, *International Financial Institutions and Their Human Rights Silent Agenda: A Forward-Looking View on the "Protect, Respect and Remedy" Model in Development Finance*, 36 AM. U. INT'L L. REV. 51, 64-65 (2020); Juan Pablo Bohoslavsky, *Complicity of International Financial Institutions in Violation of Human Rights in the Context of Economic Reforms*, 52 COLUM. HUM. RTS. L. REV. 203, 246 (2020).

are no binding human-rights treaties providing mechanisms to hold multinational corporations accountable for human-rights violations.<sup>26</sup> Historically, international human-rights enforcement mechanisms have focused on the responsibility of state perpetrators.<sup>27</sup> To provide avenues to address corporate behavior at the international level, human-rights advocates started the business-and-human-rights movement.<sup>28</sup>

But efforts to promote enforcement of corporate obligations in the business-and-human-rights movement have had limited success. In 2000, the United Nations (UN) formed the Global Compact, a voluntary initiative where businesses pledge to honor various human-rights principles.<sup>29</sup> Although over 16,500 companies worldwide have pledged to align their operations with respecting human rights,<sup>30</sup> there is no way to ensure that these companies are honoring their commitment. Roughly ten years after the Global Compact was formed, the UN Human Rights Council voted to endorse the Guiding Principles on Business and Human Rights (UNGPs), the first global standard aimed at addressing human-rights violations connected to business activity.<sup>31</sup> The UNGPs created standards for preventing and addressing human-rights abuses in the context of corporate conduct.<sup>32</sup> These standards include corporate responsibility for respecting human rights and effective remedies for human-rights violations.<sup>33</sup> The UNGPs were the first global standard that connected protecting human rights to business activity.<sup>34</sup> Although the UNGPs are a positive step toward including corporations in the broader human-rights discourse, they do not provide a mechanism for their enforcement.<sup>35</sup>

The shortcomings of existing enforcement mechanisms are clear, especially in the context of transnational human-rights violations. In countries with weak human-rights protections – due to political instability, widespread impunity, or

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26. Amerson, *supra* note 17, at 878-79 (2012).

27. *Id.* at 879.

28. *Id.* at 887-88; Arvind Ganesan, Sarah McGrath & Cindy Woods, *Approaching and Enabling Access to Remedy in the Extractive Sector*, in ROCKY MOUNTAIN MINERAL LAW FOUNDATION, SPECIAL INSTITUTE ON HUMAN RIGHTS LAW AND THE EXTRACTIVE INDUSTRIES (2016).

29. Amerson, *supra* note 17, at 890.

30. UNITED NATIONS GLOB. COMPACT, <https://www.unglobalcompact.org> [<https://perma.cc/L9LG-WK89>].

31. Amerson, *supra* note 17, at 873; Larry Catá Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All*, 38 FORDHAM INT'L L.J. 457, 460-61 (2015).

32. Backer, *supra* note 31, at 460-61.

33. *Id.* at 461.

34. *Id.*

35. Amerson, *supra* note 17, at 874-75.

the government's own participation in human-rights violations – those who experience human-rights abuses by a multinational corporation have little opportunity for recourse under domestic legal processes.<sup>36</sup> Even if a country where a corporation is headquartered has laws that could be applied to transnational human-rights violations, finding an avenue to sue can be difficult given the structure of many multinational corporations. For example, corporations frequently operate in different countries through subsidiaries established under the laws of the relevant host country.<sup>37</sup> In certain circumstances this structure may mean that multinational corporations operate through various distinct legal entities, with each entity subject to a different set of laws.<sup>38</sup> Holding a parent company responsible for human-rights violations committed by a subsidiary abroad thus requires connecting a subsidiary's conduct to the parent company – potentially a challenge for would-be litigants.

In the United States, companies can benefit from the “corporate veil,” which protects parent corporations from liability connected to the conduct of their subsidiaries, if the parent had no role in the wrongful conduct.<sup>39</sup> Courts may “pierce the corporate veil” if a party can demonstrate that the subsidiary is an alter ego of the parent corporation.<sup>40</sup> In establishing whether subsidiaries operate as alter egos of their parent corporation, courts consider various factors, including whether it would be “fundamentally unfair” to allow the parent company to escape liability; the extent to which the parent company controls the operations of the subsidiary; the commonality of officers and directors; and the undercapitalization of the subsidiary.<sup>41</sup> However, for a community facing human-rights violations, obtaining the information necessary to prove an alter ego theory may be difficult due to resource constraints.

A transnational human-rights lawsuit against a company is inherently resource and time intensive.<sup>42</sup> Depending on how a case will advance, lawyers may

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36. *Id.* at 875.

37. *Id.* at 880.

38. *Id.*

39. See Mary Elisabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381, 387-89 (1998).

40. E.g., Allen Sparkman, *Will Your Veil Be Pierced? How Strong Is Your Entity's Liability Shield? – Piercing the Veil, Alter Ego, and Other Bases for Holding an Owner Liable for Debts of an Entity*, 12 HASTINGS BUS. L.J. 349, 350, 352 (2016).

41. *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 65 (4th Cir. 1989).

42. See Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1, 67-68 (2012).

have to travel extensively to the country where the human-rights violations occurred and find local partners on the ground.<sup>43</sup> Clients may also have to apply for visas to travel to the United States for court proceedings and discovery. Discovery itself can lead to the disclosure of thousands, or even millions, of pages of documents on convoluted information. Additionally, even if such cases survive motions to dismiss, they often take many years to litigate. For example, in 2007, Chiquita Brands International (Chiquita) pled guilty to prohibited transactions with a Colombian paramilitary group in the Urabá region.<sup>44</sup> Numerous victims and family members of victims of paramilitary violence sued Chiquita for financing paramilitaries in various U.S. courts that year.<sup>45</sup> Many of those cases are still ongoing after fifteen years of litigation.<sup>46</sup>

## II. TRENDS AND PROCEDURAL BARRIERS TO TRANSNATIONAL HUMAN-RIGHTS LITIGATION

Even in circumstances where a human-rights attorney has access to the necessary resources and facts to sufficiently allege that a U.S. corporation is liable for human-rights abuses abroad, the attorney must face increased hostility by some courts to exercising jurisdiction over transnational human-rights violations. Traditionally, human-rights attorneys have brought claims under the ATS, TVPA, and transitory torts to litigate transnational human-rights cases.<sup>47</sup> As discussed below, recent trends in U.S. courts indicate that successfully litigating some of these cases is becoming more difficult.

### A. Alien Tort Statute

The ATS,<sup>48</sup> enacted in 1789, grants “[t]he district courts . . . original jurisdiction of any civil action by an alien for a tort only, committed in violation of

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43. *Id.*

44. See Judgment, United States v. Chiquita Brands Int’l, Inc., No. 07-cr-00055 (D.D.C. Sept. 24, 2007); Factual Proffer at 4-5, Chiquita Brands Int’l, Inc., No. 07-cr-00055 (D.D.C. Mar. 19, 2007).

45. See Class Action Complaint for Damages, Doe v. Chiquita Brands Int’l, Inc., No. 2:07-cv-03406 (D.N.J. July 19, 2007).

46. See Docket, *In re Chiquita Brands Int’l, Inc., Alien Tort Statute & S’holder Derivative Litig.*, No. 08-md-01916 (S.D. Fla.) (ongoing case first docketed on February 20, 2008).

47. See Heidi Frostestad Kuehl, *Global Legal Ethics and Corporate Social Responsibility: Where’s the Beef?*, 46 N.C. J. INT’L L. 111, 141 (2021); Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 34 (2013).

48. I will only briefly discuss the Alien Tort Statute (ATS), given that Professor Tyler Giannini’s Essay in this Collection provides a comprehensive overview of its history and jurisprudence.

the law of nations or a treaty of the United States.”<sup>49</sup> The law remained largely obscure for almost two hundred years after its passage.<sup>50</sup> The ATS became a tool for human-rights advocates in 1980, following the Second Circuit’s landmark decision in *Filartiga v. Pena-Irala*.<sup>51</sup> In *Filartiga*, the Second Circuit held that U.S. federal courts had jurisdiction to consider a case filed by Paraguayan nationals related to torture committed by government officials in Paraguay because torture violated the law of nations.<sup>52</sup> The Second Circuit provided clarity on what constitutes the “law of nations,” confirming that international law, such as norms created by international human-rights treaties, is part of federal common law and subject to ATS jurisdiction.<sup>53</sup> In 2002’s *Doe I v. Unocal Corp.*, the Ninth Circuit did not question whether a company could be held accountable under the ATS.<sup>54</sup> Within the last decade, however, the Supreme Court has issued a series of opinions that have greatly diminished a victim’s ability to hold a foreign multinational corporation accountable for injuries abroad under the ATS. In *Kiobel v. Royal Dutch Petroleum Co.*, the Court held that the ATS does not necessarily apply extraterritorially and that a viable ATS case must sufficiently “touch and concern” the United States.<sup>55</sup> In *Jesner v. Arab Bank, PLC*, the Court held that there is no jurisdiction against the conduct of foreign corporations under the ATS.<sup>56</sup> And last year, in *Nestlé USA, Inc. v. Doe*, the Court found that U.S.-based “general corporate activity” does not establish ATS jurisdiction.<sup>57</sup> Notably, Justice Gorsuch’s concurrence rejected the notion that the ATS could not apply to corporations.<sup>58</sup>

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Tyler R. Giannini, *Living with History: Will the Alien Tort Statute Become a Badge of Shame or Badge of Honor?*, 132 YALE L.J.F. 814 (2022).

49. 28 U.S.C. § 1350 (2018).

50. Kedar S. Bhatia, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT’L L. REV. 447, 451-52 (2013).

51. 630 F.2d 876 (2d Cir. 1980).

52. *Id.* at 878-80.

53. *Id.* at 880, 885.

54. See *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated on reh’g en banc*, 403 F.3d 708 (9th Cir. 2005) (mem.).

55. 569 U.S. 108, 124-25 (2013).

56. 138 S. Ct. 1386, 1407 (2018).

57. 141 S. Ct. 1931, 1937 (2021).

58. *Id.* at 1942.



*B. Torture Victim Protection Act of 1991*

The Supreme Court has also limited the scope of the TVPA in the context of corporate conduct. The TVPA allows courts to review claims for torture or extrajudicial killing committed by foreign state actors.<sup>59</sup> Federal courts have jurisdiction over circumstances in which the torture and extrajudicial killing operated under foreign authority or color of law.<sup>60</sup> The TVPA clearly provides an avenue of relief for international human-rights violations that involve torture and extrajudicial killings. Although the statute defined “torture” and “extrajudicial killing,” it did not provide a definition for an “individual” subject to TVPA liability.<sup>61</sup>

Until *Mohamad v. Palestinian Authority*,<sup>62</sup> human-rights attorneys filed TVPA claims against multinational corporations for their role in torture and extrajudicial killings abroad.<sup>63</sup> In *Mohamad*, the relatives of Azzam Rahim filed a lawsuit against the Palestinian Authority and the Palestinian Liberation Organization for imprisoning, torturing, and killing Rahim in the West Bank.<sup>64</sup> The district court dismissed the lawsuit, concluding that liability under the TVPA only applied to natural persons – rather than legal persons such as corporations.<sup>65</sup> The D.C. Circuit affirmed the dismissal.<sup>66</sup>

The Supreme Court granted certiorari to resolve a circuit split on whether the TVPA applied to corporate defendants.<sup>67</sup> The Court, affirming the D.C. Circuit’s ruling, held that the term “individual” in the TVPA only applied to natural – not legal – persons.<sup>68</sup> In reviewing the statutory text, the Court concluded that “the ordinary meaning of the word, fortified by its statutory context, persuades us that the Act authorizes suit against natural persons alone.”<sup>69</sup>

Although the Supreme Court’s ruling dealt a blow to efforts to promote corporate accountability for human-rights abuses, TVPA claims can still be used

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59. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)).

60. *Id.*

61. *See id.*

62. *Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012).

63. *See, e.g.*, Class Action Complaint for Damages, *Doe v. Chiquita Brands Int’l, Inc.*, No. 07-cv-03406 (D.N.J. July 19, 2007).

64. *Mohamad*, 566 U.S. at 452-53.

65. *Mohamad v. Rajoub*, 664 F. Supp. 2d 20, 21-22 (D.D.C. 2009).

66. *Mohamad v. Rajoub*, 634 F.3d 604, 605 (D.C. Cir. 2011).

67. *Mohamad*, 566 U.S. at 452-53.

68. *Id.*

69. *Id.* at 453-54.

against corporate officials. For example, in *Doe v. Drummond Co.*, the Eleventh Circuit acknowledged that the plaintiffs' TVPA claims could be applied to Drummond officials if plaintiffs could show the officials had "active participation" in judicial killings in Colombia.<sup>70</sup> This requires demonstrating that a relevant official gave knowing substantial assistance to the perpetrators of human-rights violations.<sup>71</sup>

### C. Transitory Tort Doctrine

Barriers to litigating ATS and TVPA claims against multinational corporations present the possibility of pursuing transitory tort-law claims instead. State tort law allows plaintiffs to address human-rights violations through personal-injury claims, and the transitory-tort doctrine enables state tort claims to be used transnationally. Under the transitory-tort doctrine, a state or federal court may adjudicate torts that arise in another jurisdiction—either another state or abroad.<sup>72</sup> The doctrine provides that the tortious conduct may be enforced wherever the tortfeasor is located.<sup>73</sup>

Although human-rights cases incorporating a transitory-tort theory of liability are filed where a court has personal jurisdiction over a corporate defendant, many defendants in human-rights cases seek dismissal under *forum non conveniens*.<sup>74</sup> A court has discretion for *forum non conveniens* dismissal.<sup>75</sup> Before dismissing a case, a court must find that "an alternative forum has jurisdiction to hear [the] case," and that "trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant" that is "out of all proportion to plaintiff's convenience," or that "the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."<sup>76</sup>

In order to secure *forum non conveniens* dismissal, the defendant must show that there is an alternative forum abroad that is adequately suited to hear the

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70. 782 F.3d 576, 604 (11th Cir. 2015).

71. *Id.*

72. See Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 430-31 (2018).

73. *Id.*; see also *id.* at 431 n.197 ("The action is transitory, and the defendant may be sued wherever found; otherwise, a person might in some cases escape such liability by simply going into another state." (quoting *Roberts v. Dunsuir*, 16 P. 782, 782 (Cal. 1888))).

74. Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 44 (1998).

75. See *id.* at 429-30.

76. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994) (alterations in original) (quoting *Piper Aircraft Co. v. Reno*, 454 U.S. 235, 241 (1981)).

case.<sup>77</sup> Courts will consider an alternate forum to be inadequate in certain circumstances, including when the foreign court system imposes excessive delays;<sup>78</sup> when attorneys and plaintiffs filing a lawsuit in the alternative forum face the risk of reprisals;<sup>79</sup> and when the alternative forum has high levels of corruption.<sup>80</sup> If there is an adequate foreign forum, a court considering a *forum non conveniens* motion will then balance both private- and public-interest factors.

I can personally attest to the difficulty of overcoming a *forum non conveniens* challenge. In 2017, my colleagues at EarthRights and I filed the lawsuit *Acuña-Atalaya v. Newmont Mining Corp.*<sup>81</sup> This case concerned Minera Yanacocha's intimidation campaign against the Chaupes to obtain land for the Conga expansion project. According to the Chaupes, Minera Yanacocha and its agents dug up the Chaupes' crops, destroyed their property, killed their livestock, threatened family members, blinded one of their dogs, stabbed another dog, and detained the Chaupes against their will.<sup>82</sup> According to Máxima, the matriarch of the family, "[W]e have suffered physically and psychologically. It is very traumatic for me to recall all of the attacks against me. I fear for my life and the life of my family."<sup>83</sup>

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77. *Piper Aircraft Co.*, 454 U.S. at 254 (“[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.”).
78. See, e.g., *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995) (finding that, because having the proceedings in India would result in excessive delay (up to twenty-six years), India was an inadequate forum).
79. See, e.g., *In re Chiquita Brands Int’l Alien Tort Statute & S’holder Derivative Litig.*, No. 08-MD-01916, 2016 U.S. Dist. LEXIS 203531, at \*15-16 (S.D. Fla. Nov. 29, 2016) (denying in part a motion to dismiss on *forum non conveniens* grounds because plaintiffs and human-rights attorneys would face grave danger litigating cases connected to paramilitary crimes in Colombia).
80. See *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) (finding the Bolivian forum inadequate in part because corruption in Bolivian courts would affect the outcome of the case).
81. Complaint for Damages and Equitable Relief, *Acuña-Atalaya v. Newmont Mining Corp.*, No. 17-1315, 2020 U.S. Dist. LEXIS 41132 (D. Del. Mar. 10, 2020).
82. Plaintiffs’ Brief in Support of Motion for Preliminary Injunction at 5, *Acuña-Atalaya*, 838 F. App’x 676 (No. 20-1765) [hereinafter Plaintiffs’ Brief], <https://www.courtlistener.com/docket/6154722/28/acuna-atalaya-v-newmont-mining-corporation> [https://perma.cc/K7N2-JCYQ].
83. Declaration of Plaintiff Máxima Acuña-Atalaya in Support of Plaintiffs’ Motion for a Preliminary Injunction at ¶ 38, *Acuña-Atalaya*, 2020 U.S. Dist. LEXIS 41132, <https://www.courtlistener.com/docket/6154722/27/1/acuna-atalaya-v-newmont-mining-corporation> [https://perma.cc/E6W8-ELXJ].

We filed a lawsuit and a request for preliminary injunction against Newmont because the company controls the security operations for Minera Yanacocha.<sup>84</sup> Newmont has made its interest in Minera Yanacocha's treatment of the Chaupes very clear, going so far as to commission an independent human-rights investigation into potential abuses.<sup>85</sup> The investigative report concluded that "the human rights of the Chaupes have been at risk when they are on [the disputed land]" and that Newmont had not conducted appropriate human rights due diligence on the situation.<sup>86</sup>

After we filed our lawsuit, Newmont moved to dismiss on *forum non conveniens* grounds, claiming that Peru was the appropriate forum for the case.<sup>87</sup> We responded with the argument that Peru was an inadequate forum because Newmont had a history of improperly influencing Peruvian courts—including in cases involving the Chaupes—and that Peru was facing an unprecedented judicial crisis.<sup>88</sup> In 2018, the Peruvian Executive Judicial Council declared a state of emergency over widespread corruption within the judiciary, including on the part of Supreme Court judges, the Attorney General, and members of the National Magistrates Council.<sup>89</sup> Despite our arguments, the judge dismissed the lawsuit.<sup>90</sup> He concluded that Peru was an adequate forum because historic corruption by Newmont was unlikely to recur and because the Peruvian government swiftly addressed the corruption crisis.<sup>91</sup> The judge did impose conditions on Newmont, namely that they "submit to the jurisdiction of the appropriate court in Peru"; "that any judgment entered in Peru qualif[y] as legally adequate under Delaware law"; and that they "agree not to directly or indirectly raise objections to any of its agents testifying or providing evidence relevant to the claims asserted by Plaintiffs, whether such evidence is sought [in the United States] or in Peru."<sup>92</sup>

The dismissal of the case was a great disappointment. Not only was the lawsuit a way to obtain corporate accountability for human-rights violations, but it

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84. Plaintiffs' Brief in Support of Motion for Preliminary Injunction, *supra* note 82, at 11-14.

85. Report of the Independent Fact Finding Mission, *Tragadero Grande: Land, Human Rights, and International Standards in the Conflict Between the Chaupe Family and Minera Yanacocha*, RESOLVE ix (2016), <https://www.resolve.ngo/docs/yiffm-final-report-english.pdf> [<https://perma.cc/KFF4-RWFM>].

86. *Id.*

87. *Acuña-Atalaya*, 2020 U.S. Dist. LEXIS 41132, at \*2-3.

88. *Id.* at \*7-9, \*17-18.

89. *Id.* at \*14-16.

90. *Id.* at \*25-26.

91. *Id.*

92. *Id.* at \*22.

was also a way to support the broader social struggle related to the Conga conflict. I felt like I had failed the Chaupes and the numerous *campesinos* in Cajamarca whose rights were sacrificed for Newmont's financial interests. I also felt greatly discouraged because my colleagues and I spent endless hours obtaining documents and declarations to support our arguments on corruption in Peru. The specific allegations about corruption related to Newmont and a well-publicized judicial crisis should have been enough to overcome the *forum non conveniens* argument.

### III. FOREIGN LEGAL ASSISTANCE PETITIONS: A COMPLEMENTARY STRATEGY

The Newmont lawsuit is a helpful case study on the challenge of litigating transnational human-rights cases in U.S. courts. The numerous obstacles to successful litigation established by courts call attention to the need for alternative methods of promoting corporate accountability. Using domestic fora to support human-rights litigation abroad represents one potential option. The Foreign Legal Assistance statute, for example, authorizes federal courts to grant discovery in support of a foreign or international tribunal.<sup>93</sup> The law “is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals.”<sup>94</sup> Congress first passed a provision to aid foreign tribunals in 1855 and granted federal courts jurisdiction to conduct foreign judicial assistance in 1948 via the FLA.<sup>95</sup> Congress enacted the FLA in order to promote judicial cooperation between the United States and foreign countries and to ensure compliance by U.S. citizens with foreign proceedings.<sup>96</sup> In the 1950s, Congress recognized the need to modernize judicial assistance in light of the increase in cases concerning international commerce, trade, and finance.<sup>97</sup> As a result, the current iteration of the FLA reflects the goals of liberalizing U.S. discovery procedures to advance global business and exchange.<sup>98</sup> Indeed, reforming the statute was inspired by a desire to bring “the United States to the forefront of nations adjusting their procedures to those

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93. 28 U.S.C. § 1782 (2018).

94. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

95. *Id.*

96. *See In re Application for Ord. for Jud. Assistance in Foreign Proc.*, 147 F.R.D. 223, 226 (C.D. Cal. 1993).

97. *But see* Kenneth Beale, Justin Lugar & Franz Schwarz, *Solving the § 1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 58 (2011).

98. *Id.* at 60.

of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.”<sup>99</sup>

In *Intel Corp. v. Advanced Micro Devices, Inc.*, the Supreme Court held that the scope of FLA was broader than courts had previously concluded.<sup>100</sup> The Court concluded that there are no “categorical limitations” on the availability of judicial assistance; courts have the discretion to decide whether to grant discovery.<sup>101</sup> Additionally, district courts have the discretion to create a discovery procedure if an FLA petition is granted.<sup>102</sup> A court may choose to follow the procedure of the foreign tribunal or apply the Federal Rules of Civil Procedure.<sup>103</sup>

Given that the FLA was enacted to promote judicial cooperation,<sup>104</sup> the statute was not originally envisioned as a strategy for promoting human-rights accountability. EarthRights first took notice of the statute after Chevron used the tactic to assist its efforts to avoid liability for oil pollution in Ecuador.<sup>105</sup> Chevron filed numerous FLA applications to assist with defending litigation in Ecuador on oil contamination in the Ecuadorian Amazon.<sup>106</sup> Chevron then used the documents obtained through FLA actions to challenge the judgment of the Ecuadorian court.<sup>107</sup> Inspired by Chevron’s tactics, EarthRights then filed an FLA petition on behalf of five villagers in the Niger Delta who sought records from Chevron to assist with their lawsuit against Chevron’s Nigerian subsidiary.<sup>108</sup> The villages wanted records on the impact of gas flaring in their communities

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99. S. REP. NO. 88-1880, at 12-13 (1964).

100. 542 U.S. 241; Beale et al., *supra* note 97, at 65-66.

101. *Intel*, 542 U.S. at 255 (2004).

102. See Andrew Scappaticci Brickfield, Note, *Use or Abuse of § 1782 Discovery in Less-Developed Legal Systems*, 57 COLUM. J. TRANSNAT’L L. 357, 364-65 (2019).

103. *Id.* at 365.

104. *In re Application for Ord. for Jud. Assistance in Foreign Proc.*, 147 F.R.D. 223, 226 (C.D. Cal. 1993).

105. Press Release, EarthRights Int’l, Nigerian Villagers Seek to Open Chevron’s Files on Gas Flaring, [https://earthrights.org/media\\_release/nigerian-villagers-seek-to-open-chevrons-files-on-gas-flaring](https://earthrights.org/media_release/nigerian-villagers-seek-to-open-chevrons-files-on-gas-flaring) [<https://perma.cc/TT3C-8HLZ>]; see *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300 (2d Cir. 2011) (describing Chevron’s FLA petition to obtain the raw footage of a documentary commissioned by an attorney representing plaintiffs who sued Chevron for environmental contamination in the Amazon rainforest).

106. Press Release, EarthRights Int’l, Chevron Settles with Nigerian Villagers Seeking Information on Gas Flaring Harms, [https://earthrights.org/media\\_release/chevron-settles-with-nigerian-villagers-seeking-information-on-gas-flaring-harms](https://earthrights.org/media_release/chevron-settles-with-nigerian-villagers-seeking-information-on-gas-flaring-harms) [<https://perma.cc/93Z9-NQDY>].

107. *Id.*

108. *Id.*

because that lawsuit argued that Chevron Nigeria was liable for health impacts and environmental harms.<sup>109</sup> After EarthRights filed the FLA request, the Nigerian villagers reached a confidential settlement with Chevron with respect to the FLA action.<sup>110</sup> This was likely the first FLA case in which a public-interest group requested discovery from a U.S. multinational corporation on behalf of a community facing corporate environmental abuses.<sup>111</sup> Since that first case, EarthRights has filed FLA actions in support of legal proceedings all over the world including Tanzania,<sup>112</sup> Peru,<sup>113</sup> Mexico,<sup>114</sup> and the Netherlands.<sup>115</sup>

Although FLA actions in themselves do not seek corporate accountability, they can be a valuable tool for promoting corporate accountability in foreign proceedings. Numerous countries have a limited record of successful human-rights cases due to political instability, widespread impunity, or the state's own participation in human-rights violations.<sup>116</sup> Additionally, for human-rights cases involving a corporate actor, many countries lack the discovery mechanisms necessary for obtaining sufficient evidence — especially if the company is the subsidiary of a multinational, U.S.-based corporation.<sup>117</sup> The FLA can thus serve as a valuable tool for mitigating some of these shortcomings and for creating stronger human-rights precedents abroad.

One helpful example of the FLA's utility is how the statute supported environmental defenders involved in the Conga conflict. On November 29, 2011, protestors convened at the site of the proposed Conga mine.<sup>118</sup> The Peruvian National Police, acting under a security contract with Minera Yanacocha, responded to the peaceful protest with violence.<sup>119</sup> At least twenty-four protestors were injured, including Elmer Eduardo Campos-Álvarez, who lost a kidney and

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109. *Id.*

110. *Id.*

111. *Using U.S. Courts to Obtain Information for Foreign Legal Cases: Foreign Legal Assistance Actions Under 28 U.S.C. § 1782*, EARTHRIGHTS INT'L & CORP. ACCOUNTABILITY LAB 8, <https://earthrights.org/wp-content/uploads/FLA-Guide-English-2020-004-ERI-brand.pdf> [<https://perma.cc/96TH-CNG3>].

112. *Minis v. Thomson*, No. 14-91050, 2014 U.S. Dist. LEXIS 54220, at \*1 (D. Mass. Apr. 18, 2014).

113. *Campos-Álvarez v. Newmont Mining Corp.*, No. 14-cv-00208, 2015 WL 1228262, at \*1 (D. Colo. Mar. 16, 2015).

114. *Salcido-Romo v. S. Copper Corp.*, No. CV-16-01639, 2016 U.S. Dist. LEXIS 76584, at \*1 (D. Ariz. June 10, 2016).

115. *In re Kiobel*, 16 Civ. 7992, 2017 U.S. Dist. LEXIS 9746, at \*1 (S.D.N.Y. Jan. 24, 2017).

116. *See supra* Part I.

117. EARTHRIGHTS INT'L & CORP. ACCOUNTABILITY LAB, *supra* note 111, at 2.

118. *Campos-Álvarez*, 2015 WL 1228262, at \*1.

119. *Id.*

his spleen and became paralyzed.<sup>120</sup> Due to Mr. Campos-Álvarez's grave injuries, a local prosecutor investigated the shooting, and Mr. Campos-Álvarez filed a civil action against various Peruvian agencies.<sup>121</sup> To assist with the investigation and civil lawsuit, Mr. Campos-Álvarez concurrently filed an FLA petition against Newmont in the United States, seeking to obtain documents and a deposition related to the security operations of Minera Yanacocha.<sup>122</sup> The court granted discovery, and Mr. Campos-Álvarez received over five hundred documents, photos, and videos about the protest and Minera Yanacocha's security operations.<sup>123</sup> The prosecutor in Peru formally charged two commanding officers for the injuries, and the Cajamarca Superior Court added Minera Yanacocha as a third-party defendant because of its security contract with the police.<sup>124</sup> Documents obtained through the FLA action were considered by the Peruvian courts.<sup>125</sup> Unfortunately, the higher court decided to exclude Minera Yanacocha from the criminal proceedings.<sup>126</sup> The decision to exclude Minera Yanacocha is being appealed at the Peruvian Constitutional Court.<sup>127</sup>

Although it is unclear whether the Constitutional Court will reinstate Minera Yanacocha as a third-party defendant, the utility of the FLA documents in Mr. Campos-Álvarez's case is still significant. Peru is considered one of the most dangerous countries for environmental defenders.<sup>128</sup> Extractive companies and the Peruvian National Police have signed roughly 138 private security agreements

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120. *Id.*; Press Release, EarthRights Int'l, U.S. Federal Court Action Requests Information from Newmont Regarding Repression of Protests at its Conga Mine Project, [https://earthrights.org/media\\_release/u-s-federal-court-action-requests-information-from-newmont-regarding-repression-of-protests-at-its-conga-mine-project](https://earthrights.org/media_release/u-s-federal-court-action-requests-information-from-newmont-regarding-repression-of-protests-at-its-conga-mine-project) [https://perma.cc/M57T-MVM5].

121. See *Campos-Álvarez*, 2015 WL 1228262, at \*1.

122. *Id.*

123. *Campos-Alvarez v. Newmont Mining*, EARTHRIGHTS INT'L, <https://earthrights.org/case/campos-alvarez-v-newmont-mining> [https://perma.cc/P7RZ-9SK8].

124. *Id.*

125. Order Concerning Certification of Authenticity at 2, *Campos-Álvarez*, No. 14-cv-00208 (D. Colo. Mar. 23, 2018).

126. *ISHR and RFK Intervene in Human Rights Defender Case Before Peruvian Superior Court*, INT'L SERV. FOR HUM. RTS. (May 18, 2022), <https://ishr.ch/latest-updates/ishr-rfk-intervene-in-hrd-case-before-peruvian-superior-court> [https://perma.cc/UKS6-VV57].

127. *Id.*

128. Mark Worth, *Shields Up: Peru's New Effort to Defend the Defenders*, WHISTLEBLOWER NETWORK NEWS (Oct. 29, 2021), <https://whistleblowersblog.org/global-whistleblowers/shields-up-peru-new-effort-to-defend-the-defenders> [https://perma.cc/UM5Q-Q9N5].



signed between 1995 and 2018.<sup>129</sup> A professor from the Technological University of Peru estimates that through these contracts, the Peruvian National Police have received more than \$18 million.<sup>130</sup> From a human-rights perspective, these agreements are concerning because they obligate the police to private interests and undermine the public function of the police.<sup>131</sup> Two laws provide legal immunity to the Peruvian National Police if they injure or kill someone in the “fulfillment of their duty.”<sup>132</sup> This means that, theoretically, extractive companies receive private security from forces that have legal immunity. Indeed, there are numerous mining conflicts in Peru that involve private security agreements with the Peruvian National Police.<sup>133</sup> In the face of such widespread violence, the UN has expressed concern over Peru’s criminalization of environmental defenders.<sup>134</sup>

FLA petitions have supported other types of human-rights proceedings related to the repression of environmental defenders who interfere with corporate interests. For example, in *In re Cáceres*, the children of Berta Cáceres, a Honduran human-rights activist who was murdered in 2016, sought discovery to assist with the criminal trial of David Castillo Mejia, the man charged with murdering Ms. Cáceres.<sup>135</sup> Ms. Cáceres was known for her activism challenging the Agua Zarca dam on the Gualcarque River and for “defending indigenous . . . territory and

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129. Charis Kamphuis, *Can Resource Extraction Companies Contract the Police?*, JUST. & CORP. ACCOUNTABILITY PROJECT 3 (Dec. 21, 2020), [https://media.business-humanrights.org/media/documents/Police-Company\\_Contracts\\_Case\\_Summary\\_Dec\\_2020.pdf](https://media.business-humanrights.org/media/documents/Police-Company_Contracts_Case_Summary_Dec_2020.pdf) [<https://perma.cc/U3K7-EMFS>].
130. Luis Enrique Pérez, *Mining and Oil Companies Paid More than US \$18 Million to the Peruvian Police for Private Security*, SIGMA AWARDS (Nov. 11, 2021), <https://sigmaawards.org/mining-and-oil-companies-paid-more-than-us-18-million-to-the-peruvian-police-for-private-security> [<https://perma.cc/6NA3-62EZ>].
131. *Executive Summary Report: Agreements Between the National Police and the Extractive Companies in Peru*, EARTHRIGHTS INT’L & INSTITUTO DE DEFENSA LEGAL & COORDINADORA NACIONAL DE DERECHOS HUMANOS 12-13 (Mar. 2019), <https://earthrights.org/wp-content/uploads/Executive-Summary-Agreements-between-Perus-National-Police-and-extractive-companies.pdf> [<https://perma.cc/R8X6-WQ99>].
132. *Peru: Serious Police Abuses Against Protesters*, HUM. RTS. WATCH (Dec. 17, 2020, 12:00 AM EST), <https://www.hrw.org/news/2020/12/17/peru-serious-police-abuses-against-protesters> [<https://perma.cc/Q8W7-YY7R>].
133. Javier Urizar, *ISHR and RFK Intervene in Human Rights Defender Case Before Peruvian Superior Court*, INT’L SERV. FOR HUM. RTS. (May 18, 2022), <https://ishr.ch/latest-updates/ishr-rfk-intervene-in-hrd-case-before-peruvian-superior-court> [<https://perma.cc/UKS6-VV57>].
134. See Press Release, Off. High Comm’r for Hum. Rts., Peru: Criminalisation of Environmental Human Rights Defenders Must Stop – UN Experts (May 18, 2021), <https://www.ohchr.org/en/press-releases/2021/05/peru-criminalisation-environmental-human-rights-defenders-must-stop-un> [<https://perma.cc/PC2Y-V4VE>].
135. No. 1:19-mc-00405-KS-RHW, 2020 U.S. Dist. LEXIS 86760, at \*2-3 (S.D. Miss. May 18, 2020).

natural resources.”<sup>136</sup> She was murdered in 2016 after facing many threats about her activism.<sup>137</sup> Ms. Cáceres’s children used the FLA petition to request records that could help prove that Castillo had a strong financial incentive to murder Cáceres.<sup>138</sup> The district court granted the FLA petition.<sup>139</sup> Currently, eight people have been charged and sentenced for Ms. Cáceres’s murder.<sup>140</sup>

Although it is impossible to predict how many FLA petitions in the future will support human-rights litigation abroad, FLA cases have increased greatly over the last ten years.<sup>141</sup> Based on one law firm’s analysis, the number of FLA cases dramatically increased in 2017.<sup>142</sup> From 2012 to 2016, there were roughly twenty-five to forty-five FLA applications filed each year.<sup>143</sup> In 2017, approximately 60 applications were filed, and these numbers increased to roughly 80 in 2018, more than 90 in 2019, and around 120 in 2020.<sup>144</sup> The increase in FLA petitions may be due, at least in part, to the Second Circuit’s opinion in *In re del Valle Ruiz*.<sup>145</sup> In that case, the Second Circuit concluded that “there is no per se bar to the extraterritorial application of [the FLA], and the district court may exercise its discretion as to whether to allow such discovery.”<sup>146</sup> This ruling is significant because the Second Circuit opened the door to an FLA petitioner obtaining documents located outside of the United States. It seems likely that, in keeping with the broader trend of FLA litigation, human-rights FLA petitions will also increase in the wake of the Second Circuit’s ruling. From a corporate-accountability perspective, the possibility of obtaining discovery of corporate materials located outside of the United States makes FLA petitions even more useful for human-rights practitioners.

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136. Nina Lakhani, *Honduras: Man Who Planned Berta Cáceres’s Murder Jailed for 22 Years*, GUARDIAN (June 20, 2022, 6:08 PM EDT), <https://www.theguardian.com/world/2022/jun/20/honduras-man-who-planned-berta-caceress-jailed-for-22-years> [https://perma.cc/8XQ9-F9KZ].

137. *Id.*

138. *In re Cáceres*, 2020 U.S. Dist. LEXIS 86760, at \*2-4.

139. *Id.* at \*23-24.

140. Lakhani, *supra* note 136.

141. Edward F. Maluf, Eddy Salcedo & Owen R. Wolfe, *The Expanding Use of 28 USC § 1782*, SEYFARTH (June 7, 2021), <https://www.seyfarth.com/news-insights/the-expanding-use-of-28-usc-1782.html> [https://perma.cc/A7YV-JWXX].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *In re del Valle Ruiz*, 939 F.3d 520, 524 (2d Cir. 2019).

#### IV. SHORTCOMINGS OF FLA ACTIONS

FLA petitioners have a high chance of achieving at least some success when applying. Since 2012, courts have granted approximately fifty-four percent of FLA petitions in full and granted a further nineteen percent at least partially, meaning almost three-fourths of FLA petitioners obtain some form of discovery.<sup>147</sup> But even if an FLA petition succeeds, it is not guaranteed that discovery will help vindicate human rights. It is worth noting that companies could similarly use FLA petitions to target human-rights groups in a manner similar to the FLA strategy employed by Chevron.<sup>148</sup> Additionally, discovery obtained through FLA may not provide constructive information to advance a human-rights case. For example, EarthRights filed an FLA request on behalf of Mexican communities engaged in litigation against the Southern Copper Corporation.<sup>149</sup> Those communities had sued over a 2014 toxic-waste spill from the Buenavista del Cobre mine complex, owned by a subsidiary of Southern Copper.<sup>150</sup> More than 24,000 people in Mexico were affected by the spill.<sup>151</sup> The affected communities filed lawsuits in Mexico to prevent further damage from the mine.<sup>152</sup> Through EarthRights's FLA petition, some plaintiffs requested documents related to the spill from Southern Copper.<sup>153</sup> Even after the court granted the FLA petition, Southern Copper produced very few documents.<sup>154</sup> The court granted sanctions for this conduct but the petitioners never received more documents.<sup>155</sup>

Although FLA actions are usually granted, courts have discretion over whether to grant or deny a petition. Even if a petitioner meets all the statute's requirements, a court can still deny the petitioner's FLA request if it finds that discretionary factors weigh against granting discovery.<sup>156</sup> Given the level of discretion granted to courts under the statute, there is a high bar for overturning the denial of an FLA petition.<sup>157</sup>

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<sup>147</sup>. Maluf et al., *supra* note 141.

<sup>148</sup>. See *supra* notes 105-110 and accompanying text.

<sup>149</sup>. *Salcido-Romo v. Southern Copper Corp.*, EARTHRIGHTS INT'L, <https://earthrights.org/case/salcido-romo-v-southern-copper-corp> [<https://perma.cc/KXH6-YXC9>].

<sup>150</sup>. *Id.*

<sup>151</sup>. *Id.*

<sup>152</sup>. *Id.*

<sup>153</sup>. *Id.*

<sup>154</sup>. *Id.*

<sup>155</sup>. *Id.*

<sup>156</sup>. EARTHRIGHTS INT'L & CORP. ACCOUNTABILITY LAB, *supra* note 111, at 3.

<sup>157</sup>. *Id.* at 4.

Even more rarely, appellate courts also may overturn *successful* FLA applications. One notable example is Esther Kiobel's FLA petition against the law firm Cravath, Swaine & Moore, LLP. Ms. Kiobel was the plaintiff in *Kiobel v. Royal Dutch Petroleum*, in which the Supreme Court limited the ATS's applicability to international human-rights violations.<sup>158</sup> Dr. Barinem Kiobel, Ms. Kiobel's husband, was part of the "Ogoni Nine": nine Ogoni leaders who organized protests of Shell's operations in Nigeria.<sup>159</sup> The Nigerian military worked with Shell to suppress the protests through deadly force and violent raids.<sup>160</sup> This repression ultimately culminated in the military's execution of the Ogoni Nine.<sup>161</sup> Ms. Kiobel tried to obtain justice by filing a lawsuit against Shell under the ATS. After her case was dismissed in light of the Supreme Court's interpretation of the ATS, Ms. Kiobel filed a civil action against Shell in the Netherlands, where the company is headquartered.<sup>162</sup> EarthRights filed an FLA petition on behalf of Ms. Kiobel against Cravath, Swaine & Moore to obtain nonprivileged documents procured through discovery in the U.S. proceeding where the firm represented Shell.<sup>163</sup> The district court granted the FLA petition,<sup>164</sup> but the Second Circuit reversed,<sup>165</sup> finding that the district court's decision to allow discovery was an abuse of discretion due to concerns about a confidentiality order applicable to the documents.<sup>166</sup> This was the only time the Second Circuit had ever reversed a district court's grant of discovery under the FLA.<sup>167</sup>

Courts have also reversed successful FLA petitions or denied FLA discovery in human-rights cases if discovery would require the disclosure of confidential information. For example, in *United States v. Zubaydah*, the Supreme Court reversed a Ninth Circuit decision that would have granted discovery to the applicant who had a Polish criminal proceeding related to the torture he received at a Central Intelligence Agency facility in Poland.<sup>168</sup> In that case, the United States

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158. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).

159. *Kiobel v. Cravath, Swaine & Moore, LLP*, EARTHRIGHTS INT'L, <https://earthrights.org/case/kiobel-v-cravath-swaine-moore-llp> [<https://perma.cc/V4LG-PRUL>].

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *In re Kiobel*, No. 16 Civ. 7992, 2017 WL 354183 (S.D.N.Y. Jan. 24, 2017).

165. *Kiobel ex rel. Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 244-48 (2d Cir. 2018).

166. *Id.*

167. Petition for Writ of Certiorari at 4, *Kiobel*, 895 F.3d 238 (No. 18-706).

168. *United States v. Zubaydah*, 142 S. Ct. 959, 965, 972 (2022).

refused to grant information to Polish prosecutors under the Mutual Legal Assistance Treaty, citing national-security grounds.<sup>169</sup> Following that denial, the applicant used an FLA petition in an attempt to obtain the relevant information.<sup>170</sup> The Supreme Court, however, ultimately held that national-security concerns barred the discovery.<sup>171</sup>

In another human-rights case, *Republic of the Gambia v. Facebook, Inc.*, The Gambia sought information from Facebook for a proceeding before the International Court of Justice about the genocide of the Rohingya in Myanmar.<sup>172</sup> The Gambia argued that Myanmar officials used Facebook and Instagram accounts to “spread ‘anti-Muslim, anti-Rohingya, and anti-activist sentiment.’”<sup>173</sup> In 2018, recognizing the role its platform potentially played in violence against the Rohingya, Facebook removed numerous Facebook and Instagram accounts, Facebook groups, and Facebook pages associated with coordinated inauthentic behavior that pushed the messages of the Myanmar military.<sup>174</sup> But Facebook preserved the deleted content on its servers.<sup>175</sup> Although Facebook had access to the information from the deleted content, the court denied the FLA petition while citing the Stored Communications Act,<sup>176</sup> which prohibits disclosure of private accounts and private communications.<sup>177</sup>

In light of the potential challenges that may arise in an FLA case, human-rights practitioners should be careful about framing an FLA application to avoid seeking information normally prohibited under discovery. Even though there is no guarantee that an FLA application will lead to the disclosure of helpful information or documents, the high rate of successful FLA cases merits initiating such actions. Further, the Second Circuit’s ruling that the FLA may apply to extrajurisdictional discovery<sup>178</sup> further demonstrates how FLA cases can strengthen human-rights litigation abroad.

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169. *Id.* at 965.

170. *Id.* at 965-66.

171. *Id.* at 968-72.

172. 575 F. Supp. 3d 8, 9 (D.D.C. 2021).

173. *Id.*

174. *Id.* at 10.

175. *Id.*

176. *Id.* at 11-16.

177. *Id.*

178. *In re del Valle Ruiz*, 939 F.3d 520, 524 (2d Cir. 2019).

**V. INTERNATIONAL FINANCIAL INSTITUTIONS: ANOTHER APPROACH FOR CORPORATE ACCOUNTABILITY**

Although this Essay focuses on transnational litigation against multinational corporations for human-rights abuses, another strategy that can complement these human-rights goals is litigation against IFIs. IFIs, such as the World Bank Group, European Bank for Reconstruction and Development, and the African Development Bank,<sup>179</sup> play a critical role in international development.<sup>180</sup> IFIs may work with a government or company to promote development through providing technical assistance and loans to these entities.<sup>181</sup> For example, the World Bank practices the “Maximizing Finance for Development” approach, in which the Bank invests in the private sector – including corporations – instead of the public sector to promote sustainable development.<sup>182</sup> The World Bank Group’s International Finance Corporation (IFC) finances private-sector development projects.<sup>183</sup> This approach to development, however, raises human-rights concerns when IFIs provide resources to the perpetrators of human-rights violations.<sup>184</sup>

A significant example of IFI and human-rights abuses is IFC’s and IFC Asset Management Company LLC’s (IFC-AMC’s) investment in Corporación Dinant S.A. de C.V. (Dinant).<sup>185</sup> IFC and IFC-AMC provided tens of millions of dollars in funding to Dinant, a Honduran palm-oil company.<sup>186</sup> An internal IFC office that audits IFC’s compliance with environmental and social safeguards found

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179. Trillium Chang, *A Functional Framework to Balance Accountability with the Needs of International Organizations: International Organization Immunity Post-Jam*, 9 PENN. ST. J.L. & INT’L AFFS. 124, 134 (2021).

180. Antonio Morelli, *International Financial Institutions and Their Human Rights Silent Agenda: A Forward-Looking View on the “Protect, Respect and Remedy” Model in Development Finance*, 36 AM. U. INT’L L. REV. 51, 52-53 (2020).

181. *See id.* at 64-65; Juan Pablo Bohoslavsky, *Complicity of International Financial Institutions in Violation Of Human Rights in the Context of Economic Reforms*, 52 COLUM. HUM. RTS. L. REV. 203, 210 (2020).

182. Bohoslavsky, *supra* note 181, at 220-21.

183. *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 765 (2019).

184. Bohoslavsky, *supra* note 181, at 207-08.

185. Complaint at 1, *Doe v. IFC Asset Mgmt. Co.*, No. 17-cv-01494 (D. Del. Oct. 24, 2017), <https://storage.courtlistener.com/recap/gov.uscourts.ded.63506/gov.uscourts.ded.63506.1.0.pdf> [<https://perma.cc/H6GM-4DMH>]; *CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras*, COMPLIANCE ADVISOR OMBUDSMAN 2 (Dec. 20, 2013), [https://www.cao-ombudsman.org/sites/default/files/downloads/DinantAuditCAORefC-I-R9-Y12-F161\\_ENG.pdf](https://www.cao-ombudsman.org/sites/default/files/downloads/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf) [<https://perma.cc/W235-WX7Q>].

186. COMPLIANCE ADVISOR OMBUDSMAN, *supra* note 185, at 2.

that there allegations that Dinant security forces committed violence against local farmers.<sup>187</sup> The audit concluded that the IFC inadequately supervised its investment, failed to investigate credible allegations of violence by Dinant security personnel, and continued to allow Dinant to breach safeguards.<sup>188</sup> Although IFIs are distinct from corporations, as the Dinant case study demonstrates, they can play a role in human-rights violations.

Traditionally, IFIs were considered immune to human-rights litigation in the United States.<sup>189</sup> The International Organizations Immunities Act of 1945 (IOIA) grants international organizations, including IFIs, the “same immunity from suit . . . as is enjoyed by foreign governments.”<sup>190</sup> But notably, foreign governments are not immune from actions based on certain commercial activity.<sup>191</sup> Until *Jam v. International Finance Corp.*,<sup>192</sup> many assumed that the limited immunity applicable to foreign governments did not extend to IFIs.<sup>193</sup> But in *Jam*, the Supreme Court held that IFIs can be accountable for certain types of commercial activity, thus paving the way for transnational litigation against IFIs for contributing to corporate human-rights abuses.<sup>194</sup>

In *Jam*, Indian farmers, fisherman, and a local village filed a lawsuit against IFC for damages and injunctive relief connected to a coal-fired power plant operated by Coastal Gujarat Power Limited in Gujarat, India.<sup>195</sup> IFC loaned \$450 million to Coastal Gujarat to help finance the construction of the plant.<sup>196</sup> Coastal Gujarat was required to comply with environmental and social safeguards as part of the loan agreement.<sup>197</sup> Unfortunately, the plant polluted the water, destroying the livelihood of the plaintiffs.<sup>198</sup> The plaintiffs sued IFC for, among other things, negligence, nuisance, trespass, and breach of contract.<sup>199</sup>

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187. *Id.* at 27-28.

188. *Id.* at 53.

189. See Bryce Hollander, *Jam v. International Finance Corporation: The End of Absolute International Organizational Sovereign Immunity and the Argument for a Functional Immunity Regime*, 35 MD. J. INT'L L. 202, 202-03 (2020).

190. 22 U.S.C. § 288a(b) (2018).

191. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 764 (2019).

192. *Id.*

193. Hollander, *supra* note 189, at 202-03.

194. See *Jam*, 139 S. Ct. at 772.

195. See *id.* at 764, 767.

196. *Id.* at 767.

197. *Id.*

198. See *id.*

199. *Id.*

The IFC argued that it “was immune from the lawsuit under the IOIA and motioned to dismiss for lack of subject matter jurisdiction.”<sup>200</sup> The Supreme Court disagreed, concluding that international organizations are subject to the same theory of restrictive immunity governing the FSIA and may be liable for certain commercial activity.<sup>201</sup>

Although it is still unclear to what extent *Jam* has paved the way for human-rights litigation against IFIs, the Supreme Court cautioned against exercising wide-reaching oversight over entirely foreign conduct.<sup>202</sup> Rather, the hook for accountability in U.S. courts must be “based upon” commercial activity or acts performed in the connection with commercial activity that sufficiently concerns the United States.<sup>203</sup> In the Court’s words, “Restrictive immunity hardly means unlimited exposure to suit for international organizations.”<sup>204</sup> Human-rights advocates may see *Jam* as a point from which to develop litigation to challenge human-rights violations connected to an IFI’s financial investment in a multinational corporation, but doing so would likely require a specific fact pattern in which the relevant conduct sufficiently impacted the United States.

## CONCLUSION

Communities around the world face a David-and-Goliath battle in seeking to hold multinational corporations accountable for human-rights violations. Nevertheless, communities have sought to hold corporate actors liable for a host of alleged violations, including committing violence against protestors in Peru,<sup>205</sup> polluting waterways critical to the livelihood of Indigenous communities in the Amazon,<sup>206</sup> or financing paramilitaries orchestrating a campaign of terror against local farmers and labor activists.<sup>207</sup> International human-rights law provides no direct path to accountability for such actors, and some U.S. courts are hesitant to exercise jurisdiction over foreign claims. The FLA, how-

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200. *Id.*

201. *See id.* at 772.

202. *Id.*

203. *Id.*

204. *Id.*

205. *See Campos-Álvarez v. Newmont Mining Corp.*, No. 1:14-cv-00208-REB, 2015 WL 1228262, at \*1 (D. Colo. Mar. 16, 2015).

206. *See Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1222-23 (9th Cir. 2011).

207. *See In re Chiquita Brands Int’l Alien Tort Statute & S’holder Derivative Litig.*, No. 08-MD-01916-MARRA, 2016 U.S. Dist. LEXIS 203531, at \*2 (S.D. Fla. Nov. 28, 2016).



ever, may offer a glimmer of hope. While there is no guarantee that an FLA petition will be granted or that it will procure helpful information, examples like Mr. Campos-Alvarez's demonstrate the FLA's potential utility. The FLA can thus be seen as a complementary tool, employed alongside broader social movements challenging corporate human-rights and environmental abuses. Human-rights activists may also seek to hold international financial institutions accountable for circumstances in which they finance a corporation that has committed human-rights abuses.

While continuing to support human-rights cases in foreign fora is important, I am also not suggesting that human-rights practitioners disregard the value of filing human-rights cases in the United States. Not every corporate human-rights case involving the ATS, TVPA, or transitory tort claims is dismissed.<sup>208</sup> Successful cases, when they occur, serve as a helpful reminder that litigating human-rights cases in the United States can be worthwhile.

*Climate Justice Attorney at EarthRights International. I would like to thank Marco Simons for his valuable feedback and suggestions. This essay is dedicated to all of the human rights defenders around the world who challenge the abuses of corporate power.*

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<sup>208</sup> See, e.g., *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) (allowing ATS suit to proceed against a government contractor for torturing Iraqi nationals at Abu Ghraib prison); *In re Chiquita Brands*, 2016 U.S. Dist. LEXIS 203531, at \*44 (allowing some Torture Victim Protection Act and tort claims against Chiquita Brands International for allegedly financing Colombian paramilitaries to proceed).