

# Universal Periodic Review United States of America

## Stakeholder Submission on United States Obligations to Respect, Protect and Remedy Human Rights in the Context of Business Activities

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## **Executive Summary**

1. This joint stakeholder submission analyzes the United States' record in discharging its obligations to respect, protect and remedy in the context of human rights abuses involving business enterprises acting abroad and on or near indigenous lands in the United States.<sup>1</sup> Businesses under U.S. domestic and extraterritorial jurisdiction (herein "businesses," "business enterprises," "corporations," or "companies") across the spectrum of industries have been implicated in, or found culpable for, *inter alia*, child labor, forced labor, extrajudicial killings and torture, abuses to the right to information, labor rights abuses, environmental abuses, gender discrimination, severe impacts to human health, and abuses to indigenous peoples' rights. During the period of review, the U.S. has taken some noteworthy legislative, adjudicative, administrative and policy measures to address these concerns. However, its approach has been at best piecemeal. The State party is not doing enough to ensure that government agencies monitor and respect human rights in their dealings with private business projects. Moreover, the State party is not taking adequate measures to prevent companies from abusing human rights, nor is it living up to its obligations to allow victims of such human rights abuses to exercise their right to effective remedy.

2. The submission concludes with a series of inter-related recommendations broadly consistent with the "Respect, Protect and Remedy" framework welcomed by the Human Rights Council in 2008.<sup>2</sup> If adopted, these steps would help the U.S. in upholding its commitments to human rights in the face of ongoing abuses by, or involving, businesses under its jurisdiction. In sum, the State party should refrain from directly or indirectly supporting business activities which fail to respect internationally-recognized human rights norms. This includes assuring effective and independently-verified policies and procedures to monitor and prevent human rights abuses. The State party should also take appropriate legislative, adjudicative and/or administrative measures to effectively prevent negative human rights impacts by business, including the rights of indigenous peoples and economic, social and cultural rights. This may entail additional legislative measures to make such human rights abuses punishable under U.S. law regardless of where the incident occurs and what type of private enterprise it is. Finally, the State party must take serious measures to ensure that victims of human rights violations involving business enterprises are able to exercise their right to effective remedy by *inter alia* supplementing or clarifying certain aspects of the current legislative framework, reversing executive branch positions protecting businesses from legal accountability for human rights abuses, and adopting policies that assist victims in accessing judicial remedies.

### **I. Current Normative and Institutional Framework**

3. Despite some noteworthy exceptions, the United States' normative and institutional framework is at best piecemeal and incoherent as regards its duties to respect, protect and provide effective remedy for business-related human rights abuses. Following is a brief overview of the current framework.

### *Legislative and regulatory framework*

4. With regard to its duty to respect, the U.S. has enacted a law requiring the Overseas Private Investment Corporation (OPIC), a State entity, to respect internationally-recognized human rights in the private projects it supports.<sup>3</sup> This is not yet in effect, and it is unlikely that rights such as indigenous peoples' rights and economic, social and cultural rights will be included.

5. The legislative framework in the U.S. also provides some limited examples of implementation of the duty to protect against, and ensure the right to effective remedy for victims of, human rights abuses involving businesses. The Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides a statutory basis for foreign nationals to sue private actors, including businesses, for breaches of international law, including certain fundamental human rights. The Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§78dd-1, et seq., has also been used to hold companies accountable for failures to ensure transparency and avoid corruption. Notably, both the ATS and the FCPA bestow jurisdiction over business actors acting extraterritorially. Yet, there is neither a counterpart to the FCPA which allows for equivalent causes of action for activities within the U.S., nor a counterpart to the ATS for U.S. citizens. The Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, note, does allow U.S. citizens to sue for extrajudicial killing and torture, but courts have disagreed about its applicability to business actors. The U.S. also has statutes that allow prosecution for war crimes, genocide, and a small number of other abuses committed abroad, and the U.S. Department of Justice (DOJ) recently established a new Human Rights and Special Prosecutions Section of the Criminal Division tasked with enforcing these statutes. Overall, however, the U.S. has no general statutes that require U.S. businesses to observe internationally-recognized human rights. A variety of national and state-level statutes generally prohibit businesses from practices such as racial discrimination and toxic pollution, for example, but these statutes often do not apply to such abuses abroad and/or do not incorporate the full spectrum of internationally-recognized human rights standards.

6. On the regulatory side, the U.S. has in place the Securities and Exchange Commission (SEC), which is responsible for ensuring reporting and oversight over U.S.-listed businesses, domestically and abroad. Although the SEC could be used to monitor situations where companies are alleged or have been found to engage in human rights violations, or to require reporting on operations in or near indigenous lands, there have been no serious efforts to date to incorporate such mechanisms into this regulatory framework.

### *National jurisprudence*

7. U.S. courts generally observe the principle that victims of legal violations worldwide may access them to sue companies involved in such violations. This applies to ordinary claims as well as to violations of international law pursuant to the ATS. As discussed below, however, many obstacles to justice exist, such as judicial doctrines that allow courts to deny victims a remedy for business-related human rights abuses.

### *Policy measures*

8. The stated policy of the United States is to promote human rights. The United States reports on human rights abuses in countries around the world annually. There are, however, some notable exceptions to this policy, such as the repeated failure of the U.S. to recognize and support human rights treaties and declarations specific to indigenous peoples' rights and economic, social and cultural human rights.

9. The U.S. has signed onto certain policy initiatives related to corporate accountability and human rights. It has promulgated the Voluntary Principles on Security and Human Rights (VPs), a non-binding, non-enforceable set of guidelines for oil, gas and mining companies in their security arrangements. The U.S. is also part of the Organization for Economic Cooperation and Development (OECD), and as such supports the OECD's Guidelines for Multinational Enterprises, similarly non-binding measures which include some human rights principles. The Director of the Office of Investment Affairs within the State Department is currently the U.S. National Contact Point (NCP) for the OECD Guidelines, tasked with promoting the Guidelines and discussing with the parties any alleged breaches of the Guidelines by U.S. businesses.

#### *Human rights infrastructure*

10. Outside of the regularly constituted courts, no national infrastructure or institution exists within the United States to hear claims of human rights abuses. Likewise, no U.S. government entity is expressly charged with monitoring or investigating human rights abuses by U.S. businesses. Furthermore, no mechanism exists to transmit the recommendations of human rights treaty bodies from the State Department, which receives them, to the administrative, legislative or adjudicative bodies at the federal and state level which would implement them.

## **II. Implementation and Efficiency of the Normative and Institutional Framework**

11. The above-noted measures, while laudable, are isolated and lack overall coherency. As a result, the framework has led to serious gaps, and is thus inadequate in satisfying the State's obligations, as described below.

#### *Legislative and administrative framework*

12. Whereas the U.S. has enacted legislation to prevent one of its public export credit agencies, OPIC, from supporting projects which have adverse human rights impacts, it has yet to extend the same sorts of protections in a similar body, the Export-Import Bank (ExIm). Furthermore, the State party has not enacted legislation which would ensure that other business activities which it finances, supports or has considerable influence over—whether through direct government support, government contracting, development or reconstruction projects, or through decisions taken in the context of the World Bank Group or other inter-governmental institutions—respect internationally-recognized human rights standards.

13. Failures to implement the duty to protect and provide remedy are numerous. While the U.S. Congress has conducted hearings on corporate responsibility and the rule of law to consider whether the legislature should take steps to create explicitly legal responsibilities for corporations to respect human rights,<sup>4</sup> an overwhelming number of measures taken by other branches of the government, as well as Congress, undermine the efficacy of any such positive actions. Examples of this domestic incoherence include Executive positions vis-à-vis litigation against business actors, obstacles for victims to access justice through the courts, judicial hostility to lawsuits to remedy alleged business abuses, and other ineffective policy measures.

#### *Executive positions*

14. In lawsuits brought under the ATS and TVPA, the Executive Branch has failed to demonstrate a commitment to protecting human rights vis-à-vis business, frequently filing court submissions urging the dismissal of such suits involving allegations of serious violations of international law. The arguments raised by the Executive generally seek to protect business

interests and promote free trade at the expense of human rights protections and the right to a remedy, even when core rights violations are alleged.<sup>5</sup> The Executive has argued that to allow ATS claims against corporations to proceed could threaten foreign policy interests, in that it would discourage foreign governments or entities from contracting with U.S. businesses for fear of facing an ATS lawsuit.<sup>6</sup> It has also argued that to allow particular corporate cases to proceed could undermine its ability to secure the nation's safety and security.<sup>7</sup> Moreover, in a case brought against a company for its participation in CIA-operated "extraordinary renditions," both the Bush and Obama Administrations have invoked the "state secrets" doctrine to argue that the case should be dismissed, effectively denying remedy to victims of torture.<sup>8</sup>

15. The Executive has embraced other arguments that are inconsistent with protecting human rights, including that the ATS does not apply to acts outside the U.S., and that the ATS does not provide a remedy against those who aid and abet abuses.<sup>9</sup> Courts have generally rejected both arguments, finding that a primary purpose of the ATS was to provide a remedy for violations that occurred outside the territory of the U.S.,<sup>10</sup> and that those who are complicit in the violation of human rights may be held liable.<sup>11</sup> Nonetheless, if accepted, these arguments would undermine the ability of victims of egregious human rights violations committed with the knowledge and substantial assistance of U.S. businesses to seek redress for the harms done to them. The Executive has also invoked the "political question" doctrine in an effort to have other ATS corporate cases dismissed. One such case is *Corrie v. Caterpillar*,<sup>12</sup> in which the families of people killed in Palestinian home demolitions sued the U.S. company that provided militarized bulldozers to the Israeli army, alleging that Caterpillar aided and abetted war crimes. The U.S. government argued that to allow the case to proceed would intrude upon the political branches' foreign policy decisions because Israel's purchase of the bulldozers was reimbursed by U.S. foreign aid. The federal court of appeals accepted this argument and dismissed the case.<sup>13</sup>

#### *Obstacles to access to justice*

16. Apart from the Executive Branch's positions, judicial procedures and legal doctrines often pose nearly insurmountable barriers to victims of business-related abuses seeking justice in US courts. Financial and logistical challenges can make lawsuits difficult if not impossible in practice. Due to the numerous challenges raised by corporate defendants with almost unlimited resources to jurisdiction, or the viability of legal theories of limited liability for businesses active extraterritorially, litigation can be a slow vehicle for achieving justice. US courts have employed the doctrine of *forum non conveniens* to dismiss extraterritorial cases, even where there is no practical ability to litigate the case elsewhere, leading to an outright denial of effective remedy. In considering *forum non conveniens*, courts do not take into consideration whether a similar case has ever been brought or successfully litigated in a foreign forum. Moreover, some courts have concluded that business actors may not be sued under the TVPA, and one court has questioned whether businesses may be sued for violations of international law under the ATS.

17. Lastly, regarding the legislative framework, although the U.S. does have criminal statutes that could be used to prosecute businesses, aside from prosecutions under the FCPA, these statutes have never been used against U.S. companies, and the Department of Justice (DOJ) has yet to show an interest in prosecuting businesses.

#### *Ineffective policy measures*

18. U.S. policy measures, likewise, have not been effectively translated into concrete action in order to effectively deter and/or correct adverse business behavior. The U.S., for example, does

not routinely incorporate business-related human rights abuses into its annual human rights reporting. Although the United States has encouraged businesses to join the VPs, the U.S. has not taken steps to strengthen them, such as by including an enforceable complaints mechanism or by requiring public reporting by member companies. As they stand today, therefore, the U.S.’ sole policy initiative on business and human rights—the VPs—are highly unlikely to provide effective deterrents to induce companies to conform their behavior to human rights standards.

19. The NCP for its part has not been effective in implementing the OECD guidelines. NCPs in other countries have successfully brought the parties to a mutually agreed solution, but no successful resolution of any U.S. NCP complaint is known. The U.S. NCP rarely responds to complaints in a timely manner, and has insufficient resources to do its job. The position of the NCP within the Office of Investment Affairs—whose primary task is protecting U.S. investment abroad rather than protecting human rights—may be partly to blame for its poor performance.

### **III. Cooperation of the U.S. with Human Rights Mechanisms**

20. In the context of business-related human rights abuses, the U.S. has consistently failed to cooperate with international human rights mechanisms by failing to implement the recommendations of UN treaty bodies and other institutions. This has been particularly true with respect to the failure of the State party to meaningfully enforce human rights standards in the operation of private security contractors in detention facilities at Guantanamo Bay, Iraq, Afghanistan, and elsewhere. The Human Rights Committee and Committee against Torture, for example, identified major failures in the U.S.’s obligation to protect against and punish allegations of torture by contract employees in detention facilities, and recommended remedial measures.<sup>14</sup> The UN Working Group on mercenaries voiced concern over the limited scrutiny of private security contractors by the State party, urged greater transparency to prevent impunity for human rights violations and called for a global oversight and monitoring body.<sup>15</sup> During his 2008 visit to the U.S., the UN Special Rapporteur on extrajudicial, summary and arbitrary executions also expressed serious concern over the U.S. record of impunity for killings by private security contractors in Afghanistan and Iraq. While he pointed to some positive steps, for example, in the adoption of statutes to expand and clarify jurisdiction over offences committed by contractors, he urged the State party to enact comprehensive legislation on criminal jurisdiction over contractors, and declared that the DOJ—tasked with prosecuting private security contractors—has “failed miserably” due to a lack of political and prosecutorial will.<sup>16</sup>

21. Other UN human rights institutions have criticized the U.S. for its failures to protect workers, indigenous peoples, and immigrants from abuses by business actors. The Committee on the Elimination of Racial Discrimination (CERD) expressed concerns about continuing failures to ensure legal protection and redress for workplace racial discrimination,<sup>17</sup> and about failures to take meaningful legislative or administrative measures to prevent acts of U.S. corporations which encroach upon the rights of indigenous peoples in territories within and outside the United States.<sup>18</sup> Confirming a Final Report issued by the Inter-American Commission on Human Rights in a strongly-worded Urgent Action Decision, CERD expressed serious concerns regarding the ongoing allowance of private corporations posing destructive and irreparable harms to the lands and resources of the Western Shoshone peoples. The U.S. was told to “stop”, “desist” and “cease” the permitting of such activities.<sup>19</sup> Finally, the Special Rapporteur on the human rights of migrant workers strongly urged the U.S. in 2007 to create legally binding human rights standards

governing the treatment of immigration detainees in all facilities, including those operated by private companies.<sup>20</sup>

#### **IV. Promotion and Protection of Human Rights on the Ground**

22. These failures to respect, protect, and remedy negative impacts on human rights by or involving businesses have arguably opened the door for a full range of abuses. A wide variety of different business industries have been implicated, including manufacturing, agriculture, oil and natural gas, pharmaceutical, mining, food and beverage, retail trade, automotive, private security and contractor services, water services, construction, and information and communications. Companies under U.S. jurisdiction are alleged to have been involved in—or were found culpable for—child labor,<sup>21</sup> forced labor,<sup>22</sup> torture and violations of the rights to life and security of person,<sup>23</sup> abuses to the right to information,<sup>24</sup> labor rights abuses,<sup>25</sup> gender discrimination,<sup>26</sup> severe impacts to human health,<sup>27</sup> and abuses of indigenous peoples rights.<sup>28</sup> U.S. performance on the duty to provide a remedy for human rights violations is only slightly better. Once abuses have been committed by U.S. businesses, they are only rarely remedied by U.S. institutions, further compounding the original abuses through the denial of an effective remedy. Some specific examples of incidents brought to U.S. courts follow.

##### *Fundamental human rights in the workplace*

23. Serious allegations that businesses are committing violations of international labor standards have arisen. For example, claims have been brought alleging forced labor and child labor against Bridgestone for its operations in Liberia. Drawing on ILO standards, UN reports, and citing the United States' Fair Labor Standards Act, a U.S. court allowed the child labor claims to proceed, finding that they met the threshold of a violation of specific, definable and universally recognized norms required for ATS claims.<sup>29</sup> Other labor-related claims have been brought against corporations for human trafficking, including a case filed on behalf of Nepali laborers trafficked to Iraq against an American contractor, Kellogg Brown & Root for its own acts and that of its subsidiary.<sup>30</sup> Numerous cases have been filed on behalf of trade unionists who have suffered retaliatory torture or even murder for involvement in trade union activity, especially in Colombia.<sup>31</sup> Claims have also been brought under the ATS alleging labor violations in the supply chain.<sup>32</sup> Some of these cases are still proceeding, while others have been dismissed.

##### *Extrajudicial killings and torture*

24. Numerous cases of extrajudicial killings and torture by private military contractors have been reported.<sup>33</sup> Contractors have been hired at unprecedented rates to work with the military or civilian government officials in Iraq and Afghanistan. Contractors have been tasked with what are generally considered core governmental functions, including participation in interrogations of prisoners and intelligence gathering. Violations in which contractors have been implicated include the killing, torture and other abuses of Iraqi civilian detainees at U.S. run detention centers.<sup>34</sup> To date, however, no contractor has been prosecuted or held responsible for these grave crimes. Civil actions brought on behalf of former Iraqi detainees are on-going, but have faced challenges due to the invocation of derivative immunity or the so-called “government contractor defense.” By claiming government contractor immunity, business actors claim that they are shielded from liability because they were hired by the U.S. government – even for actions that violate state, federal and international law, and fall outside the scope of their contract.<sup>35</sup> A petition for certiorari in one of these cases, *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), is being filed in April, 2010. It is expected that the Supreme Court will give the Executive

the opportunity to take an official position on the issue. Certain steps have been taken to close the impunity gap, notably the adoption of the Military Extraterritorial Jurisdiction Act, which allows for prosecution of serious crimes by military contractors. Yet, the recent dismissal of charges against private security contractors employed by Blackwater for the killing of Iraqi civilians in the notorious Nisoor Square, Baghdad shooting in September 2007 demonstrates<sup>36</sup> that a more robust legal regime is needed to hold contractors criminally accountable, matched by a serious commitment from the DOJ to prosecute and punish contractors who violate the law.

25. As another example, Chiquita admitted illegally funding paramilitary groups in Colombia who have carried out extrajudicial killings throughout the country. Chiquita pled guilty to U.S. criminal charges<sup>37</sup> and has since been sued in U.S. court by numerous victims of paramilitary violence, alleging complicity in war crimes and crimes against humanity pursuant to the ATS.<sup>38</sup> Because the U.S. government's plea agreement apparently includes confidentiality provisions, however, this has hindered criminal prosecution of Chiquita's executives in Colombia, and the U.S. government has not yet disclosed all of the evidence in its possession relating to Chiquita's crimes.<sup>39</sup>

#### *Environmental abuses*

26. U.S. businesses have often been implicated in environmental pollution that threatens the rights to life and to health, among others. While the U.S. regulatory and judicial system provides some remedies for such violations inside the United States, the U.S. has failed to provide an effective remedy when such pollution occurs abroad. For example, in *Flores v. Southern Peru Copper Corp.*,<sup>40</sup> members of a Peruvian community alleged that a mining company's operations had caused severe lung disease and death. The federal court, however, determined that the victims could not sue under the ATS, because the "‘right to life’ and ‘right to health’ are insufficiently definite to constitute rules of customary international law."<sup>41</sup> At present, these rights cannot be vindicated in U.S. courts. The victims' claims in *Flores* were also dismissed on the basis of *forum non conveniens*,<sup>42</sup> which courts often invoke in cases involving pollution. In another case, for example, a group of indigenous Peruvians brought suit against a U.S. oil company for polluting their lands and waters, causing severe human health impacts including an epidemic of heavy metal poisoning. Even though the company was sued in its hometown, and despite the fact that the Peruvian courts had never provided a remedy against a corporation for toxic pollution, the U.S. court concluded that it would be "inconvenient" to litigate the case in the United States, and dismissed the case.<sup>43</sup> The dismissal is currently being appealed.

#### *Forced relocation, forced labor, and murder in the oilfields*

27. Several oil and gas companies have been sued under the ATS for their direct participation or complicity in serious international law violations, including forced relocation, forced labor and murder.<sup>44</sup> For example, in the landmark ATS corporate accountability case *Doe v. Unocal*, fifteen Burmese plaintiffs alleged that the U.S. oil company jointly participated with Burmese government officials in forced labor, rape, torture and murder in connection with a gas pipeline project. The evidence showed that Unocal paid the Burmese military to provide security for the Yadana Pipeline, that Unocal knew of the high likelihood that human rights violations would be committed in relation to the pipeline project, and knew that such violations were in fact occurring. Among other findings that corporations can be held liable for violations of international law, the federal appeals court found that Unocal could be held liable for aiding and abetting the abuses by the Burmese soldiers, including forced labor, murder and rape.<sup>45</sup> The victims ultimately were compensated in a confidential settlement, representing one of the few



times when the U.S. legal system has resulted in a remedy for such victims. But the legal system has not stopped the continuation of similar abuses committed by soldiers providing security for the pipeline project, as documented in reports as recently as 2009.<sup>46</sup>

#### *Nonconsensual medical experimentation*

28. In *Abdullahi v. Pfizer, Inc.*, Nigerian children and their guardians sued the pharmaceutical company for failing to seek informed consent before including children in a trial of a new drug that the company knew caused serious joint and liver damage, leading to eleven deaths and many injuries. The claim was brought under the ATS as a violation of domestic and customary international law.<sup>47</sup> The Obama Administration, through the Solicitor General of the United States, has been invited to submit its views in a petition for certiorari currently pending before the Supreme Court. It remains to be seen whether the Obama Administration will advance the same arguments in this case as its predecessor did in other cases, as described above.

#### *Violations of Indigenous Peoples' Rights*

29. The United States was one of only four member States who opposed adoption of the Declaration on the Rights of Indigenous Peoples. Concurrently, U.S. Federal Indian Law and Policy falls far short of recognized international human rights standards as exemplified by the ongoing case of the Western Shoshone peoples, both at the CERD and the Inter-American Commission on Human Rights.<sup>48</sup> Businesses, therefore, have no incentive to change existing standards and activities when operating in or near indigenous lands, both in the U.S. and abroad. Furthermore, the antiquated General Mining Law Act of 1872 (30 U.S.C) gives private mining concerns primacy over considerations for the rights of indigenous peoples and the environment. Human rights violations caused by business activities include severe environmental damages, and rights to health, land, and culture. For example, the Western Shoshone have documented the involvement of corporations with respect to concerns regarding open pit mining, nuclear waste disposal and military testing, and new efforts to pipe massive quantities of water from under their traditional land base to water the growing metropolitan area of Las Vegas, Nevada.<sup>49</sup>

## **V. Key Recommendations**

### ***Recommendations related to the State Party's Obligation to Respect***

- Refrain from supporting business activities which fail to respect internationally-recognized human rights standards, including the human rights of indigenous peoples, whether through direct government support, through government contracting (particularly of private security companies), through development or reconstruction projects, or through measures taken in the context of the OPIC, ExIm, the World Bank Group or other inter-governmental institutions. Requirements to prevent support for business-related abuses should be binding and enforceable, and should assure effective and independently-verified policies and procedures to prevent human rights abuses. The U.S. should state clearly that it will cease from contracting with or supporting those companies with a history of violating human rights or domestic laws enacted to protect human rights.

### ***Recommendations related to the State Party's Obligation to Protect***

- Reverse executive branch positions protecting businesses from legal accountability for human rights abuses, such as positions that defendants should not be liable for aiding and abetting

violations of international law, that the political question doctrine can shield businesses from liability for their violations of fundamental international law norms, and that defendants may not be sued in the U.S. for human rights violations that occurred outside of U.S. Clarify, if and as necessary, that contracting with the U.S. does not provide businesses who abuse human rights with immunity from criminal or civil liability.

- Take immediate measures to investigate and where appropriate prosecute and punish any business entity and their personnel, such as private military contractors, for involvement and/or complicity in killings, torture, and cruel, inhuman or degrading treatment or punishment, genocide, or war crimes.
- Take appropriate legislative, regulatory and/or policy measures to prevent the acts of transnational businesses under U.S. jurisdiction which negatively impact human rights, including the rights of indigenous peoples and economic, social and cultural rights. This should entail additional legislative or regulatory measures to make human rights abuses by businesses punishable under U.S. law regardless of where the incident occurs and what type of private enterprise it is.
  - Ensure that companies conduct adequate human rights due diligence. Regular, effective and independently-monitored reporting of information bearing on risks of human rights abuses by U.S.-registered companies must be required under law. The DOJ in this context should work collaboratively with other government agencies to enforce these provisions.
  - Incorporate business-related human rights abuses into its annual human rights reporting by the State Department.
  - Enact legislation to ensure that businesses, especially extractive industries, do not contribute to human rights abuses and promote transparency, such as through the Energy Security through Transparency Act and the Congo Conflict Minerals Act.
- Cease the outsourcing of government functions related to security, particularly in light of the gaps in accountability. As a first step, Congress is encouraged to adopt the Stop Outsourcing Security Act.
- Restructure and reform the U.S. NCP and the OECD Guidelines so that they clearly reflect human rights principles, laws and norms (as expressed more fully in the U.S. UPR submission by Accountability Counsel).
- Take steps to bolster the implementation of the Voluntary Principles on Security and Human Rights, including developing a mechanism for accepting complaints for violations of the Voluntary Principles from affected communities, requiring that members publically report on their implementation of the Voluntary Principles, and consulting with affected communities to gauge the effectiveness of such implementation. Ensure and where required provide the necessary resources for those government agencies responsible for preventing business complicity and negative impacts on human rights abuses worldwide to ensure they carry out their mandates effectively.
- Reform antiquated laws, such as the General Mining Act of 1872, which place private mining on public lands at a higher priority than any other concern.

### ***Recommendations related to the State Party's Obligation to Provide Effective Remedy***

- Ensure that victims of human rights violations involving business enterprises are able to exercise their right and access to effective remedy by supplementing or clarifying certain aspects of the current legislative framework and adopting policies that assist victims in accessing available judicial remedies. This accountability framework could be strengthened by providing greater support (technical, logistical, financial, and psychological) for victims in

exercising their right to remedy. This could include provision of a financial support fund for juridical costs of foreign victims of businesses under U.S. jurisdiction.

- Take appropriate adjudicative measures to prevent the acts of businesses under U.S. jurisdiction which negatively impact on the enjoyment of human rights, including the rights of indigenous peoples and economic, social and cultural rights.
- Ensure that measures taken by other countries to hold businesses and their personnel accountable for human rights abuses are respected in the United States, including the enforcement of judgments, the appearance of businesses before foreign courts, and the extradition of individuals to face prosecution. Where courts have jurisdiction over a case, they should guarantee the existence of an effective remedy by refraining from dismissing the case under *forum non conveniens* and other doctrines if those affected by business-related human rights abuses by state and non-state actors cannot access effective remedies in a third-party State.

### ***Recommendations related to the International Framework on Business and Human Rights***

- Affirm and operationalize the normative primacy and centrality of human rights law, and commit to giving human rights considerations priority in formulation of economic and antiterrorism policies.
- Articulate a clear position that, pursuant to international law, business actors bear certain human rights responsibilities wherever they are active, including legal responsibilities for their direct participation and complicity in abetting or otherwise contributing to violations of internationally-recognized human rights. Clarify that the U.S.—through its executive, legislative, administrative, adjudicative and/or policy tools—will hold companies accountable to these responsibilities.
- Commit to developing a stronger, clearer and more efficient regulatory framework and accountability infrastructure at the international level, as is necessary to ensure the positive duty to respect human rights is fully enforceable on companies and their directors in all their activities.

## ADDENDUM

### A. Scope and Nature of International U.S. Obligations vis-à-vis Business Actors under its Jurisdiction

The United States' obligations to respect, protect and provide effective remedy for human rights in the context of business activities arise from the United Nations Charter, the human rights treaties it has ratified, as well as applicable international humanitarian law and customary international law.

The duty to **respect** under international human rights law requires the State party to refrain from being involved in human rights violations. This duty to respect in the context of business activity requires that the State party prevent any of its institutions, departments or agencies from becoming complicit in or otherwise responsible for human rights violations in their relationships with business enterprises, at the behest of private interests, or to facilitate business activity. The State party may also violate its respect-bound obligations when enabling and/or effectively controlling a company or certain private activities—through the use of public agencies or public funds, for example—whose acts and omissions can be attributable to the State through general rules of State responsibility. These are in essence public organs, and can be treated as such under customary international law when analyzing their obligations, and bringing claims against them.<sup>50</sup>

In addition, the United States has the duty to **protect** against human rights abuses by third parties within their jurisdiction—be they business, banks, commodity traders, or any other non-state actors. The duty to protect implies that the State party must put in place measures and institutions to prevent business-related abuses, provide **effective remedies** for those harmed, and hold those responsible to account. Treaty bodies have generally affirmed the right to a remedy for all types of human rights' violations irrespective of who has committed the act.<sup>51</sup> Protection measures can be judicial, legislative or administrative in nature, and include duties to investigate, monitor, and regulate business, adjudicate when necessary as well as facilitate compensation for victims. Failure to act to protect against third party abuse equates to a violation under international human rights law.

While the primary responsibility to protect human rights rests with the State party in which the company operates, the duty to protect against abuse by business actors also implies an **extraterritorial dimension** in cases where the actions, decisions or failures of companies under the US' domestic or extraterritorial jurisdiction lead to human rights abuses in other countries. The extraterritorial nature of the duty to protect also finds a strong legal basis in the United Nations Charter, several well-respected and established jurisdictional bases under international law<sup>52</sup> and has been acknowledged by various UN treaty monitoring bodies.<sup>53</sup> Furthermore, the extension of extraterritorial jurisdiction is already quite developed in practice, in such areas as crimes under international law, financing of terrorism, corruption and bribery, human trafficking, sex tourism, and other human rights concerns. The failure to take adequate and reasonable measures—judicial, legislative or administrative—to prevent decisions and actions taken within the state's jurisdiction from impinging on the human rights of people outside the state's territory

may, in some cases, represent a breach of the State party's international legal obligations. Relatedly, the States party's duties to prevent and protect against human rights abuses of private actors remain operative when the State acts within inter-governmental institutions, such as the World Bank Group, which fund private sector projects which risk impinging on the realization of human rights.

## **B. Information on the Corporate Accountability Working Group Coalition**

The submitting Corporate Accountability Working Group coalition was formed in 2004 to advocate for national and international corporate accountability for human rights abuses. The following organizations are herein submitting this report as a key input to the UN Office of the High Commissioner for Human Rights and the Human Rights Council as part of the basis of review of the United States under the Universal Period Review process in November, 2010.



### ***Center for Constitutional Rights***

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR has litigated several significant international human rights cases under the Alien Tort Statute (ATS), including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) and *Doe v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995). It has represented victims of egregious human rights violations involving the direct participation or complicity of transnational business actors in case brought under the ATS, including *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000); *Doe I v. Unocal Co.*, 395 F.3d 932 (9th Cir. 2002); *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007); *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. Sept. 11, 2009); *In Re: Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009). CCR has also been involved in non-litigation corporate accountability advocacy.



### ***EarthRights International***

EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of earth rights. ERI specializes in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, ERI seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment. ERI's legal program seeks to apply domestic and international law to hold corporations and others accountable for their actions, often using the Alien Tort Statute, which allows lawsuits in federal courts for violations of international law. ERI has represented the

plaintiffs in lawsuits including *Doe v. Unocal*, *Wiwa v. Royal Dutch Petroleum*, *Bowoto v. Chevron*, and *Maynas Carijano v. Occidental*, among others.



### ***Western Shoshone Defense Project***

The Western Shoshone Defense Project (WSDP) is a non-profit indigenous organization formed in 1992. It is an affiliate of the Seventh Generation Fund for Indian Development. The WSDP's mission statement is to affirm Newe (Western Shoshone) decision-making within Newe Sogobia (Western Shoshone homelands) by protecting, preserving, and restoring Newe rights and lands for present and future generations based on cultural and spiritual traditions. The WSDP is guided by a Western Shoshone advisory board and executive director, Carrie Dann. Working to protect Western Shoshone homelands, the WSDP is engaged in one of the longest standing indigenous rights struggles in the U.S. The land base is one of the largest gold producing areas in the world wherein the 1872 Mining Law allows virtually unrestricted mining despite ongoing protests of the local Shoshone people. Hand in hand with the mining impacts are threats by ongoing military testing, nuclear waste storage and extractive industries expansion. The WSDP works with ally organizations and networks to ensure that such actions are monitored and where necessary, appropriate action taken to stop activities that will harm the land, air or water. The work is accomplished through domestic litigation, ongoing international legal work, corporate engagement strategies and direct action. The WSDP draws upon numerous networks, volunteer legal assistance and thousands of volunteer supporters to accomplish its mission statement.



### ***Corporate Accountability Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net)***

ESCR-Net—an ECOSOC-accredited non-governmental organization—is a global collaborative initiative serving organizations and activists from around the world working to secure economic and social justice through human rights. Its Corporate Accountability Working Group advocates for national and international corporate accountability for human rights abuses, involving support for international human rights standards for business. Throughout, the Working Group seeks to strengthen the voice of communities and grassroots groups who are challenging company abuses of human rights by documenting and highlighting particular cases, and by facilitating broad-based participation in United Nations and other international consultations. The Working Group also seeks to build the capacity of its participants by creating space for the exchange of information and strategies, connecting groups to one another, and providing resources for advocacy.

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## Endnotes

<sup>1</sup> For a summary of the United States' international obligations to respect, protect and provide effective remedy vis-à-vis the activities of business actors within its jurisdiction, see Addendum A. The primarily transnational focus of this report should not be understood to ignore or in any way discount the serious examples of domestic business-related abuses, such as discriminatory treatment in the workplace, or adverse impacts of business in healthcare, housing and the election system.

<sup>2</sup> See *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008.

<sup>3</sup> See H.R. Consolidated Appropriations Act, 2010, H.R. 3288, 6 Jan 2009, stating that “the President of the Overseas Private Investment Corporation is hereby authorized and directed to issue, not later than 9 months after the date of enactment of this Act, a comprehensive set of environmental, transparency and internationally recognized worker rights and human rights guidelines with requirements binding on the Corporation and its investors that shall be consistently applied to all projects, funds and sub-projects supported by the Corporation...”, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3288enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3288enr.txt.pdf) (p. 363)

<sup>4</sup> See Senate Judiciary Committee, Sub-Committee Human Rights and the Law, “Extracting Natural Resources: Corporate Responsibility and the Rule of Law,” September 24, 2008, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3572>

<sup>5</sup> For a discussion on Executive submission in human rights cases against corporate defendants, see B. Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 Brooklyn J. Int'l L. 773 (2008).

<sup>6</sup> See, e.g., *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005).

<sup>7</sup> See, e.g., *Doe v. Exxon Mobil Corp.*; *Mujica v. Occidental Petroleum Corp.*; *Arias v. Dynacorp*, 517 F. Supp. 2d 221 (D.D.C. 2007).

<sup>8</sup> See *Mohamed v. Jeppessen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009), *rehearing en banc granted*.

<sup>9</sup> See, e.g., Amicus Brief filed by the United States in *Corrie v. Caterpillar*, available at [http://ccrjustice.org/files/us\\_amicus\\_brief-AS-FILED.pdf](http://ccrjustice.org/files/us_amicus_brief-AS-FILED.pdf).

<sup>10</sup> See, e.g., *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).

<sup>11</sup> Notably, the UN Special Representative of the Secretary General on Business and Human Rights has found, after conducting a comprehensive study of the legal regimes in a number of countries, that complicity, including aiding and abetting, is an appropriate means for defining corporate liability. He has further clarified that the *mens rea* for aiding and abetting is knowledge, and the *actus reus* is providing practical assistance that has a substantial effect on the commission of the violation.

<sup>12</sup> For more information on this case and for the case filings, see: <http://www.ccrjustice.org/ourcases/current-cases/corrie-et-al.-v.-caterpillar>.

<sup>13</sup> See 503 F.3d 974 (9th Cir. 2007).

<sup>14</sup> See (1) International Covenant on Civil and Political Rights Report 2006, CCPR/C/USA/CO/3/Rev.1; and (2) Committee Against Torture Report 2006 CAT/C/USA/CO/2.

<sup>15</sup> See UN News Center, “US must ensure that private contractors do not infringe rights – UN experts,” (3 Aug. 2009), available at <http://www.un.org/apps/news/story.asp?NewsID=31667&Cr=human+rights&Cr1=experts>.

<sup>16</sup> See Press Statement, Philip Alston, Special Rapporteur on extrajudicial, summary and arbitrary executions, visit to USA, (30 June 2008), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8815&LangID=E>.

<sup>17</sup> See CERD Report 2008, CERD/C/USA/CO/6, para. 28, p. 9.

<sup>18</sup> See (1) *Id.*, para. 30, p. 10; (2) and CERD Urgent Action Procedure 2006, CERD/C/USA/DEC/1.

<sup>19</sup> See IACHR, Final Report 75/02, Case No. 11.140 and CERD Decision 1 (68).

<sup>20</sup> See Mission to the United States of America (30 April-18 May 2007), A/HRC/7/12/Add.2.

<sup>21</sup> See (1) International Labor Rights Forum (ILRF), *Firestone Rubber & Latex Company: Prospering from Child Labor and Enslavement in Liberia*, Jamie Menutis (4 Dec. 2007) available at <http://www.laborrights.org/stop-child-labor/stop-firestone/news/11244> (Liberians file class action suit under ATS against Firestone claiming forced child labor); (2) Germanwatch, Coalition against Bayer Dangers and Global March against Child Labour, *Organisation for Economic Cooperation and Development (OECD) Complaint Against Bayer because of Child Labour in India, Current Investigation: Children die due to poisoning by pesticides at Cotton Seed farms in India* (11 Oct. 2004) <http://www.germanwatch.org/presse/2004-10-11e.htm> (Emergent Genetics and Monsanto allegedly responsible for child labor in Indian cottonseed farms); and (3) Human Rights Watch (HRW), *Turning a Blind Eye: Hazardous*

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*Child Labor in El Salvador's Sugarcane Cultivation* (Jun. 2004), available at <http://www.hrw.org/reports/2004/elsalvador0604/elsalvador0604.pdf> (Coca-coca allegedly uses sugar from an El Salvadorian mill supplied with sugarcane from child labor plantations).

<sup>22</sup> See EarthRights International (ERI), Supplemental Report: Forced Labor along the Yadana and Yetagun Pipelines, available at <http://www.earthrights.org/files/Reports/supp.pdf> (Unocal allegedly responsible for forced labor conscripted by military units in Burma pipeline projects).

<sup>23</sup> See (1) Human Rights First, *Private Security Contractors at War, Ending the Culture of Impunity* (2008), available at <http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf> (Private security contractors are not held criminally responsible by the Department of Justice for wounding and killing innocent civilians, as well as other excessive acts of violence and aggression); (2) Center for Constitutional Rights, *Current Cases: Saleh v. Titan*, available at <http://www.ccrjustice.org/ourcases/current-cases/saleh-v.->

titan (Class action lawsuit brought by about 250 Iraqi plaintiffs against Titan International and CACI International Inc for committing torture and other illegal acts of violence against detainees at various facilities including Abu Ghraib prison); (3) Earth Rights International, Factsheet: What Happened at Parabe?”, available at [http://www.earthrights.org/legalrelated/factsheet\\_what\\_happened\\_at\\_parabe.html](http://www.earthrights.org/legalrelated/factsheet_what_happened_at_parabe.html) (Chevron’s Nigerian subsidiary participated in shooting, murder and torture of Nigerian villagers involved in an environmental protest against the company); (4) Cohen, Milstein, Hausfeld and Toll, *International Human Rights Cases, ExxonMobil – Aceh, Indonesia, Doe v. ExxonMobil*, available at [http://www.cmht.com/cases\\_exxonmobilaceh.php](http://www.cmht.com/cases_exxonmobilaceh.php) (Eleven Indonesian citizens filed lawsuit against ExxonMobil for contracting security guards from the Indonesian military to commit kidnapping, torture and murder); and (5) Earth Rights International, *EarthRights International Launches New Law Suit Against Chiquita for Funding, Arming, and Supporting Colombian Terrorists* (17 Jul. 2007), available at [http://www.earthrights.org/legalpr/eri\\_launches\\_lawsuit\\_against\\_chiquita.html](http://www.earthrights.org/legalpr/eri_launches_lawsuit_against_chiquita.html) (Federal class-action lawsuit charging Chiquita Brands International, Inc., with funding and arming known terrorist groups in Colombia in order to sustain its profitable control of Colombia’s banana growing regions starting in the mid-1990s).

<sup>24</sup> See (1) Human Rights Watch, “*Race to the Bottom*”, *Corporate Complicity in Chinese Internet Censorship*, Volume 18, No. 8(c) (2006), available at <http://www.hrw.org/reports/2006/china0806/china0806web.pdf> (China’s ongoing Internet censorship being aided by corporate companies such as Yahoo!, Google, Microsoft and Cisco); (2) *People’s Republic of China, State Control of the Internet in China* available at <http://www.amnestyusa.org/document.php?lang=e&id=50A38A55EB758C0C80256C72004773CD> (Chinese authorities have implemented several regulations restricting freedom of expression and circulation of information); (3) Justice Initiative, ARTICLE 19, Libertad de Información Mexico, Asociación Civil, Instituto Prensa y Sociedad (IPYS) of Peru and Access Info Europe. *Amicus brief* (Brief presented before the IACtHR, Case No. 12108, *Marcel Claude Reyes and others v. Chile*, in Mar. 2006), available at [http://www.justiceinitiative.org/db/resource2?res\\_id=103162](http://www.justiceinitiative.org/db/resource2?res_id=103162) (Amicus brief asking the Inter-American Court of Human Rights guarantees a general right of citizens to access information held by public authorities, and that Chile must improve its law regarding access to information); (4) *Petición de Caso ante la Comisión Inter-Americana de Derechos Humanos – Comunidad de La Oroya*, (Dec. 2006), available at [http://www.earthjustice.org/library/legal\\_docs/human-rights-petition-on-la-oroya-to-iachr.pdf](http://www.earthjustice.org/library/legal_docs/human-rights-petition-on-la-oroya-to-iachr.pdf) at 61 (Petition made to the Inter-American Court of Human Rights to ask Chile to comply with standards set in the American Convention of Human Rights); and (5) Baby Milk Action, *Help the Philippines stand up to company bullying* at <http://www.babymilkaction.org/CEM/cemnov06.html> (Baby food companies in Philippines mislead consumers).

<sup>25</sup> See (1) War on Want (WoW), *ASDA Wal-Mart, the Alternative Report* (Sep. 2005), available at <http://www.waronwant.org/download.php?id=369> (Rights of workers in Asda Wal-Mart stores increasingly violated due to costcutting); Clean Clothes Campaign (Europe), Oxfam Community aid Abroad (Australia), Oxfam Canada, Global Exchange (USA) and the Maquila Solidarity Network (Canada), *We are not machines: Nike and Adidas workers in Indonesia* (Mar. 2002), available at [http://www.cleanclothes.org/documents/we\\_are\\_not\\_machines.pdf](http://www.cleanclothes.org/documents/we_are_not_machines.pdf) (Report discussing lack of improvement in working conditions in sport shoe factories producing for Nike and Adidas); (3) War on Want, *Coca-Cola, The Alternative Report* (Mar. 2006) at 8-9, available at <http://www.waronwant.org/downloads/cocacola.pdf> (Exposes Coca-Cola’s adoption of anti-union tactics and its’ involvement in death and disappearances of trade union activists across the globe); (4) Gladys Manzanarez Tercero, Zenayda Torrez Aviles, Harling Bobadilla, and Felix Rosales Sanchez v. C&Y Sportswear, Inc., Nien Hsing Textile Co., Ltd. and Chentex Garments, S.A., Complaint, available at [http://www.nlcnet.org/campaigns/archive/sweatingforkohls/history.shtml#court\\_complaint](http://www.nlcnet.org/campaigns/archive/sweatingforkohls/history.shtml#court_complaint) (C&Y Sportswear officials and their subordinates were involved in attacks and intimidation against union leaders in Nicaragua); (5) Terry Collingsworth, *Summary of International Labor Rights Fund Cases Under the Alien Torts Claims Act*,



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American Civil Liberties Union (ACLU) International Civil Liberties Report (2003), available at [http://www.sdsbh.com/ICLR/ICLR\\_2003/16\\_Collingsworth.pdf](http://www.sdsbh.com/ICLR/ICLR_2003/16_Collingsworth.pdf) (Guatemalan trade union leaders brought case under Alien Tort Claim Act against Fresh Del Monte Produce Inc for complicity in security forces' execution of human rights violations); (6) *Doe v. Chiquita Brands Official Complaint* (2007), available at [http://www.earthrights.org/cbi\\_final\\_complaint.signed.pdf](http://www.earthrights.org/cbi_final_complaint.signed.pdf) (Plaintiffs brought class action suit against Chiquita Brands International Inc for arming and supporting paramilitary groups that targeted and killed banana workers and trade unionists); and (7) Global Policy Forum, *DaimlerChrysler Sued Over Alleged Argentine Abuses*, Pablo Bachelet (14 Jan. 2004), available at <http://www.globalpolicy.org/intljustice/atca/2004/0114daimler.htm> (DaimlerChrysler AG was sued over role in disappearance and torture of union leaders and Mercedes-Benz plant workers in the suburbs of Buenos Aires).

<sup>26</sup> See (1) Equal Rights Advocates, *6 Women Sue Wal-Mart, Charging Bias*, Reed Abelson (20 Jun. 2001), available at [http://www.equalrights.org/media/nytimes\\_walmart.asp](http://www.equalrights.org/media/nytimes_walmart.asp) (Six female employees file lawsuit against Wal-Mart for engaging in widespread discrimination against women); (2) The New York Times, *Limbo for US Women Reporting Iraq Assaults*, James Risen (13 Feb. 2008), available at [http://www.nytimes.com/2008/02/13/world/middleeast/13contractors.html?\\_r=1&oref=slogin](http://www.nytimes.com/2008/02/13/world/middleeast/13contractors.html?_r=1&oref=slogin) (Female Ohio resident employed as a military contractor in Iraq accuses KBR Inc workers of sexual assault and harassment of women); (3) International Labor Rights Forum, Rights for Working Women Campaign, *Sexual Harassment in the Workplace: A Report from Field Research in Thailand*, Ubon Kompipote (Jun. 2002), available at <http://www.laborrights.org/files/Thailand.pdf> (A research study conducted in Thailand revealed that women workers in export industries in Thailand endure violent sexual abuse and discrimination); and (4) Human Rights Watch, *No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector* (1996), available at <http://hrw.org/reports/1996/Mexi0896.htm> (Women working in Mexico's maquilas are required to have pregnancy tests done as a condition for employment, and can be dismissed or denied work if pregnant).

<sup>27</sup> See (1) Terra de Direitos, *Fumo: servidão moderna e violação de direitos humanos*, Guilherme Eid Gonçalves de Almeida, (Curitiba: 2005), available at <http://www.terradedireitos.org.br/wp-content/uploads/2008/02/livro-fumo1.pdf> (Addresses misuse of pesticides and effect on health of farmers); and (2) Germanwatch, Coalition against Bayer Dangers and Global March against Child Labour, *Organisation for Economic Cooperation and Development (OECD) Complaint Against Bayer because of Child Labour in India, Current Investigation: Children die due to poisoning by pesticides at Cotton Seed farms in India* (11 Oct. 2004), available at <http://www.germanwatch.org/presse/2004-10-11e.htm> (Children exposed to pesticides while working on cotton seed farms dying).

<sup>28</sup> For detailed descriptions of each of these incidents involving U.S. companies, see ESCR-Net, "Collective Report on Business and Human Rights: Submission to the 8<sup>th</sup> Session of the United Nations Human Rights Council," June 2008, available at: [http://www.escri-net.org/actions\\_more/actions\\_more\\_show.htm?doc\\_id=693486](http://www.escri-net.org/actions_more/actions_more_show.htm?doc_id=693486)

<sup>29</sup> See *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007). (children's claims that their working conditions on the Firestone Plantation in Liberia violated international law were allowed to proceed). The case is still proceeding in the district court.

<sup>30</sup> See *Adhikari v. Daoud*, 09-cv-1237, 2009 U.S. Dist. LEXIS 126195 (S.D. Tex. Nov. 3, 2009.) (granting in part and denying in part defendant's motion to dismiss). Plaintiffs' case is proceeding in the district court.

<sup>31</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 578 F.3d 1283 (11th Cir. Aug. 13, 2009) (affirming dismissal of Guatemalan plaintiffs alleging inter alia plaintiffs' claims of torture in retaliation for labor union activities on *forum non conveniens* grounds); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. Aug. 11, 2009) (affirming dismissal of claims for murder and torture of Colombian trade unionists; finding they did not sufficiently allege state action); and *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (affirming summary judgment dismissal of claims against Colombian subsidiary of an Alabaman coal mining company for torture and assassination of leaders of a Colombian trade union). See also *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (finding that rights to associate and organize were actionable under the ATS). The *Rodriguez* plaintiffs lost at trial in 2007. Another case brought against Drummond by Colombian plaintiffs is currently pending defendant's motion to dismiss. *Doe v. Drummond*, 7:09-CV-01041 (N.D. Ala. Nov. 9, 2009) (permitting plaintiffs to amend their complaint with regard to aiding and abetting).

<sup>32</sup> See, e.g. *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000) (dismissing plaintiffs' allegations that Adidas subsidiary in China conspired with Chinese government officials to operate forced labor camps); and *Does 1 v. Gap, Inc.*, 2001 U.S. Dist. Lexis 25035 (Dist. N. Mariana Islands 2001.) (permitting garment workers' claims for labor violations in Saipan to proceed). The case settled in 2002.

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<sup>33</sup> See, e.g., “HUMAN RIGHTS FIRST, *Private Security Contractors at War: Ending the Culture of Impunity*,” Human Rights First (2008).

<sup>34</sup> See (1) Taguba Report with annexes (AR 15-6 investigation of the 800th Military Police Brigade), available at <http://www.dod.gov/pubs/foi/detainees/taguba/> and (2) Fay/Jones Report: Investigation of Intelligence Activities At Abu Ghraib available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>

<sup>35</sup> See e.g. *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. Sept. 11, 2009); *Al Shimari v. CACI Premier Technology, Inc.*, 2009 U.S. Dist. LEXIS 29995 (E.D. Va. Mar. 18, 2009); and *Al-Quraishi v. Nakhla and L-3 Services, Inc.*, (summary of pleadings available at: <http://ccrjustice.org/ourcases/current-cases/al-quraishi-et-al-v.-nakhla-et-al>).

<sup>36</sup> See *United States v. Slough et al.* 2009 U.S. Dist. LEXIS 121809 (D.D.C. Dec. 31, 2009). Civil actions were also brought against Blackwater and its founder, Erik Prince. Seven cases, which included violations of international law brought under the ATS, were recently settled pursuant to a confidential settlement agreement. For more information on these cases, see *In Re: Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009) reflects the consolidated cases against Xe (formerly Blackwater Worldwide) including *Abtan, et al. v. Prince, et al.* (alleging inter alia war crimes for killings and other serious injuries sustained by Iraqi civilians following shooting in Nisoor Square) and *Albazzaz et al v. Prince et al* (alleging inter alia war crimes for killing of Iraqi civilians following shooting in al Watahba Square).

<sup>37</sup> See Factual Proffer, *United States v. Chiquita Brands Int'l, Inc.*, Crim. No. 07-055 (D.D.C. Mar. 19, 2007), available at <http://law.du.edu/images/uploads/corporate-governance/international-us-chiquita-factual.pdf>

<sup>38</sup> See *Chiquita Brands Int'l, Inc., Alien Tort Statute & Shareholders Derivative Litig.*, No. 08-MD-01916 (S.D. Fla.); see also Business and Human Rights Resource Centre, “Case profile: Chiquita lawsuits (re Colombia),” available at: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ChiquitalawsuitsreColombia>

<sup>39</sup> See e.g. Colectivo de Abogados José Alvear Restrepo, “Chiquita Board Members: Total Identification,” (July 23, 2008) available at: [http://www.colectivodeabogados.org/IMG/pdf/0807\\_chiquita\\_id\\_eng.pdf](http://www.colectivodeabogados.org/IMG/pdf/0807_chiquita_id_eng.pdf)

<sup>40</sup> See *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

<sup>41</sup> *Id.* at 254.

<sup>42</sup> *Id.* at 266.

<sup>43</sup> See *Maynas Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823 (C.D. Cal. 2008).

<sup>44</sup> Other cases brought against the extractive industries include: *Wiwa v. Royal Dutch Petroleum/Shell* (brought by Nigerians who were injured or had family members killed in relation to Shell’s activities in the Niger Delta; after more than 12 years of litigation, resulted in \$15.5 million settlement); *Mujica v. Occidental Petroleum Corporation*, 564 F.3d 1190 (9th Cir. May 11, 2009) (American oil company operating in Colombia); *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. Oct. 2, 2009) (Canadian oil company alleged to have aided and abetting war crimes and crimes against humanity committed in Sudan); *Doe v. Exxon Mobil Corporation* (claims by Indonesian villagers bringing claims of for killings and torture committed by military security forces paid by ExxonMobil Oil Indonesia); and *Bowoto v. Chevron Corporation* (Nigerian plaintiffs brought claims against Chevron, including torture and summary execution).

<sup>45</sup> See *Doe I v. Unocal Co.*, 395 F.3d 932 (9th Cir. 2002).

<sup>46</sup> EarthRights International, *Total Impact* (September 2009), available at <http://www.earthrights.org/sites/default/files/publications/total-impact.pdf>.

<sup>47</sup> See *Abdullahi v. Pfizer, Inc* 562 F.3d 163, 175-188 (2d Cir. 2009) (finding that “prohibition in customary international law against nonconsensual human medical experimentation” can be enforced through the ATS because it is (i) universal and obligatory, (ii) specific and definable, and (iii) of mutual concern).

<sup>48</sup> See Decision 1 (68) (United States of America), U.N. ESCOR, CERD, 68<sup>th</sup> Sess., U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006); Concluding Observations of the Committee on the Elimination of Racial Discrimination: (United States of America) U.N. Doc. No. CERD/C/59/Misc.17/Rev.3, para. 5 (August 2001); Concluding Observations of the Committee on the Elimination of Racial Discrimination (United States of America), U.N. ESCOR, CERD, 72<sup>nd</sup> Sess., U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008); *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002) available at <http://www.cidh.org/annualrep/2002/eng/USA.11140.htm>.

<sup>49</sup> See Western Shoshone Defense Project, “Update To The Committee on the Elimination of Racial Discrimination 76th Session In Relation To Early Warning And Urgent Action Procedure Decision 1(68) & Concluding Observations 6(72) (United States)” (March, 2010)

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<sup>50</sup> See International Law Commission, *Draft Articles on State Responsibility*, Art. 5: “the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

<sup>51</sup> See, for example, Human Rights Committee General Comment 31, para. 8.

<sup>52</sup> These include the principles of active personality, passive personality and universality.

<sup>53</sup> Treaty bodies are increasingly recognizing extraterritorial obligations in relation to the meaning of international cooperation under international law. See for example, GC 19 of the CESCR at para. 54: “States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.”