



**CORPORATE
ACCOUNTABILITY
LAB**

FOUNDER'S LETTER

“In fact, our lab has been more productive than we could have imagined.”



Charity Ryerson
Founder

Dear Friends,

When we launched Corporate Accountability Lab in early 2017, we had a vision that was outrageously ambitious. We wanted to use strategic legal and market interventions to shape global supply chains, across every industry and every region, in pursuit of human thriving and a clean environment. Given the complexity of the problems we sought to address, we developed a “social lab” model, giving us the flexibility to experiment and the permission to learn from failure.

At less than two years in, we have made extraordinary progress. Developing the lab model itself was an accomplishment, as it is the first legal lab of its kind. This model could be replicated by other groups of attorneys and advocates, who could use it to tackle anything from mass incarceration to immigrant rights. But the lab model is only a success if it creates innovative, replicable legal strategies with the potential for broad impact.

I am happy to report that we have. In fact, our lab has been more productive than we could have imagined. We are now rolling out three active projects, each with the potential to improve the lives of hundreds of thousands of people around the world. We are creating new, legally enforceable rights for workers and victims of environmental abuse, disrupting the market for forced labor, and giving Global North tech workers and creatives new tools to demand a more ethical economy. In the pages that follow, we will describe these projects and other ideas we have been working with in our lab, providing insights into how we think, what we hope for, and how we will get there.

We couldn't have done this without your support. You are our volunteers, interns, donors, pro bono attorneys, advisors, board members, friends and confidants. Our staff is lean, but our community is abundant.

Thank you for joining us on this journey.

A handwritten signature in black ink that reads "Charity Ryerson".

Charity Ryerson
Legal Director, Founder

HOW LEGAL DESIGN WORKS

Each of our projects is a product of CAL's human-centered Legal Design Lab, where we research and develop new legal strategies for human rights in the global economy. Not every idea makes it out of the lab--only those that are replicable, have the potential for big impact, and are consistent with the strategies of our partner organizations and affected communities. Here's how it works:

We bring an idea to our legal interns, law school clinic partners, and pro bono attorneys. Together, we research whether the theory is legally sound by digging into case law. The product of that research goes to our advisors, human rights experts, and attorneys in the relevant legal field. They help us refine our strategy and broaden our vision.

We test the theories. This might be entering a contract, filing a case, or finding a user for a license. Following the test, we analyze the tool, with an eye toward replicability, unintended consequences, and impact on affected communities.

After testing our theories, we bring our tools to the people that need them most. Delivery of the tool, and ensuring that adoption is as widespread as possible, varies greatly depending on the strategy. For some projects, CAL will quickly recede into the background, and for others CAL will have a role for years to come.

OUR PROJECTS

We bring together design thinking, human rights expertise, and hard work to solve the world's most complex social problems.

Our work is always changing. Here are a few of our current projects:

CORRECT the COST



The prices consumers pay for goods like these fail to reflect the actual cost of production, undermining workers' access to fair wages and safe conditions.

While many brands embed labor and environmental codes into manufacturing and licensing contracts, making a legally-enforceable commitment, they take no legal action against their suppliers for code violations. This system puts those harmed in a peripheral role, and makes workers and affected communities reliant on the benevolence of foreign brands. As a result, conditions remain poor on farms and in factories across the globe, even where top brands and retailers have adopted strong standards. CAL developed an amendment to these codes to allow those harmed in supply chains to bring contract violation actions as third party

beneficiaries of supplier agreements. The purpose of this innovation is to give workers and impacted communities direct access to remedy for human rights, labor, and environmental violations. As a legally-binding contract, this highly-efficient mechanism will operate in US courts, and promises to streamline the process of obtaining compensation and remedy for workers and others harmed in supply chains. This same strategy could be implemented in almost any supply chain in the world. CAL is currently working on its first test case, with plans to scale up to other companies and industries in the next year.

Transform TRADE

CAL has developed a novel litigation strategy to disrupt the market for forced labor-produced goods, using the International Trade Commission (ITC), a US administrative agency currently used primarily for patent disputes. The ITC statute contains a little-used provision prohibiting the importation of goods made with “unfair methods of competition” into the US. For an ethical company, forced and child labor are unfair methods of competition, as these practices fill the market with unsustainable, cheap products. CAL has secured a firm who will litigate the test case pro bono, and is currently working with advocates and members of the relevant affected community to design a settlement agreement proposal that will disrupt the forced labor market in the targeted region. If successful, this case will create a model to undercut the market for forced labor-produced goods in multiple industries across the globe.



The Harvard Human Rights Clinic and CAL teamed up in November 2018 to convene a legal “hack-a-thon” to advance CAL’s litigation strategy to undercut the market for goods produced with forced labor. An interdisciplinary group of experts gave us feedback and helped guide our strategy in a process facilitated by Harvard Law students.

Unite CREATORS



Tech workers, artists, inventors, engineers, and other creatives generate valuable intellectual property every day. CAL’s Ethical IP program allows these creatives to ensure that their work is used ethically, in support of a sustainable economy. By placing human rights, environmental and other conditions in IP licensing agreements, creators can protect themselves and others from corporate abuse. CAL’s IP licenses restrict human rights abusers and polluters from using this valuable IP, and provide those harmed in supply chain abuses the right to sue the abuser for violating those terms. Possible applications include tech workers restricting their employers from participating in illegal surveillance, ICE or Pentagon contracts; visual artists and musicians ensuring that the companies that use their art in promotional materials are ethical; and inventors stopping an invention from being leveraged to harm people and the environment.



Google's AI Principles and the Battle for Humanity

Earlier this year, advocates and tech workers successfully lobbied Google to abandon a project with the Pentagon, code-named “Project Maven.” Google’s role in the project was to provide artificial intelligence (AI) that would analyze massive amounts of surveillance data for drones. I imagine if you did a survey of human reactions to enlisting artificial intelligence to figure out who to kill with a drone, the average person would check the box next to “dystopic hellscape.”

This seems to be the response of the many humans working over at Google, over 3,000 of which signed a letter opposing the contract, saying “Google should not be in the business of war.” In response to the controversy, Google’s CEO Sundar Pinchai penned a rather long list of “AI Principles” to provide some basic benchmarks for Google’s engagement in the sector and canceled the Project Maven contract.

Too bad nobody liked Pinchai’s principles. One author, writing for Bloomberg, noted that “[w]e’re in a golden age for hollow corporate statements sold as high-minded ethical treatises.” Techcrunch found the principles “fuzzy,” and wrote that Google gave itself “considerable leeway with the liberal application of words like ‘appropriate’” throughout the principles.” One particularly colorful article on thenextweb.com says “Pichai’s blog post is nothing more than thinly-veiled trifle aimed at technology journalists and other pundits in hopes we’ll fawn over the declarative statements like ‘Google won’t make weapons.’ Unfortunately there’s no substance to any of it.” Presumably this is because, as it is only a statement of principles, Google is not binding itself to any action in an enforceable way.

But let’s give Google some credit for taking a step here, even if, as the above authors suggest, they’ve been in the AI business way too long for a set of vague principles to impress us in 2018. That may be true, but Google now has an opportunity to put its money where it’s blog post is and make these

principles (or a more specific, actionable version of them) a condition on all of the intellectual property it creates.

What I’m saying is that if Google is truly committed to ensuring that its technology is not a part of a dystopic future in which the AIs pick which humans deserve to die, it needs to make its ethical commitments legally binding. And it can.

By embedding human rights conditions in their IP licenses, Google can stop itself (including its future self) and others from using the technology it creates for evil.

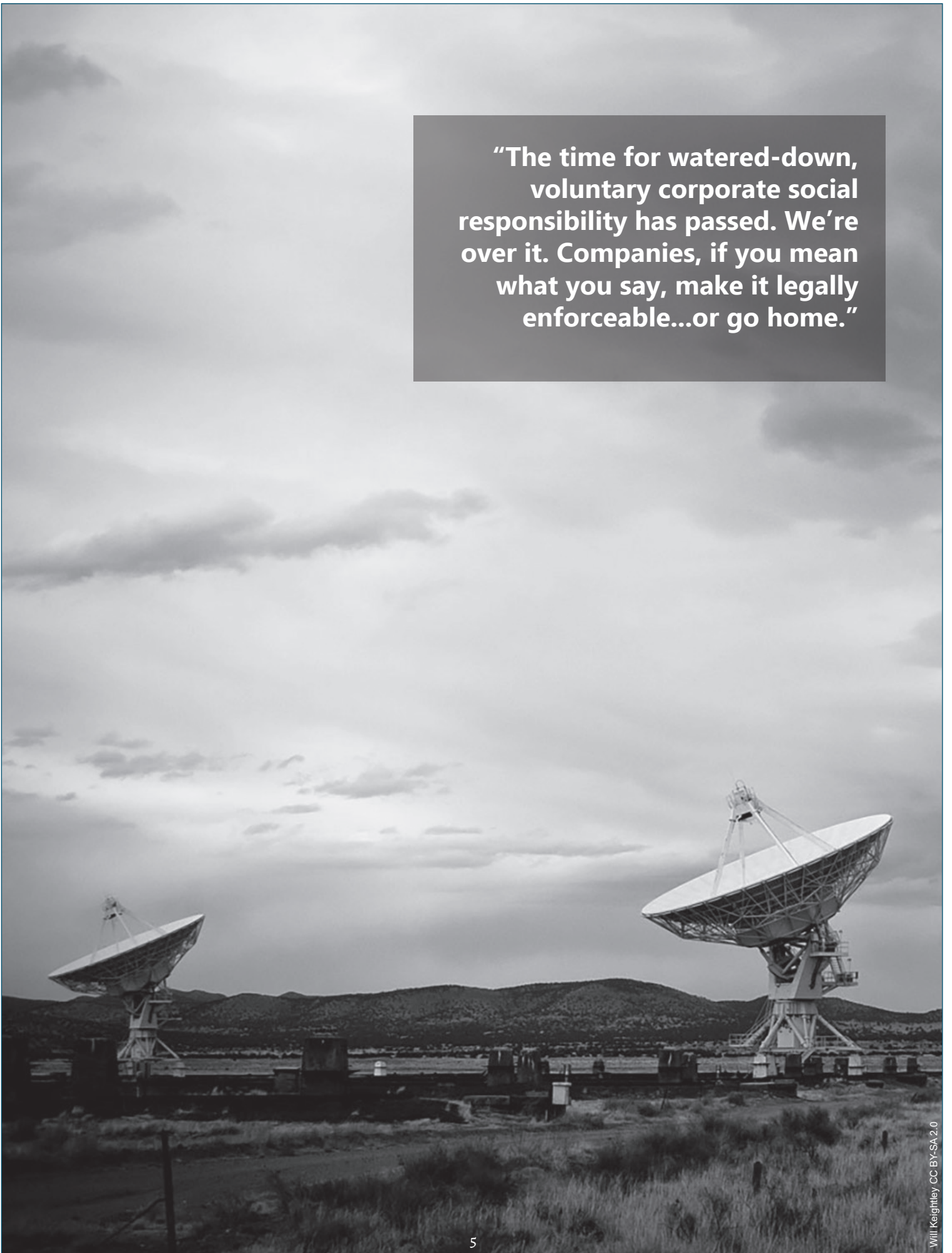
This also works for any open source technology Google creates. Do they use the MIT or GPL license? Great, just add in a “morals clause” that stops any future user (licensee) from using the technology if they fail to comply with these terms.

There are different ways this can be done. At CAL, we have designed licenses for artists and freelance software developers that are geared toward stopping human rights abuses in supply chains. But this concept is highly portable. Google’s AI principles are probably too general to be used as licensing terms, except for the prohibition on using their tech in weapons development. But if Google made a list of concrete restrictions that uphold Pinchai’s principles, those could become terms of the license, requiring Google to live up to its promises. As an example, Google could restrict the use of its IP for use by certain government agencies or types of companies (ie no use by or in contract with the Pentagon, ICE, or defense contractors).

The time for watered down, voluntary corporate social responsibility has passed. We are over it. Companies, if you mean what you say, make it legally enforceable. Bind yourself to that promise, or go home.

Charity Ryerson is a co-founder and Legal Director for Corporate Accountability Lab.

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Is the California Transparency in Supply Chains Act Doing More Harm than Good?

Since its passage in 2010, human rights advocates have wondered whether they could use the California Transparency in Supply Chains Act (CTSCA) to litigate against companies that use forced labor abroad. Hailed as ushering in a new era of legal corporate accountability, the CTSCA obligates any large company doing business in California to publicly disclose its efforts to eradicate forced labor and human trafficking in its supply chain. Here, we take a closer look at the CTSCA and how it has been used to date, and investigate whether a creative litigator could use it to benefit any of the estimated 21 million forced laborers around the world.

The CTSCA went into effect in January 2012, and it requires a company to disclose on its website to what extent, “if any,” it:

1. engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery
2. conducts audits of suppliers
3. requires direct supplies to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the countries in which they are doing business
4. maintains accountability standards and procedures for employees or contractors that fail to meet company standards regarding slavery and human trafficking
5. provides employees and management training on slavery and human trafficking.

The stated purpose of the CTSCA is to enable consumers to “force the eradication of slavery and trafficking by way of their purchasing decisions.” By this logic, if we don’t know who uses forced labor, or what measures companies are taking to avoid forced labor in their supply chains, we can’t “vote with our dollar” and buy a more ethical product.

Of course, we know consumers do not routinely go to companies’ websites to see their CTSCA disclosures prior to making a purchase. One sustainable consumption blogger recently made a compelling case that even when we do make more ethical consumption choices, the benefit is

more personal than systemic. We’re not recommending that you quit recycling and start shopping at Wal-Mart (please don’t), but rather suggest that our personal purchasing decisions are insufficient to change a global economy in which none of us can have clean hands, no matter how careful we are about what we buy. So long as forced labor-produced products come into the U.S. market, we will unwittingly (or even wittingly) buy them, and the cycle will continue.

But beyond our doubts about the rationale for the statute, the CTSCA has some other structural flaws. First, it does not consider whether companies are disclosing accurate and up-to-date information, and there are no penalties for non-compliance. So even the most scrupulous consumer may not get the necessary information to make good purchasing decisions as a result of this statute. Second, the Act excludes smaller businesses from its purview, applying only to those companies that identify as “manufacturers” and “retail sellers” on their tax returns and that generate worldwide annual revenues of \$100 million or more. That’s a pretty big loophole.

If the CTSCA isn’t going to stop forced labor through influencing personal consumption decisions, does it contain any other mechanism to stop forced labor?

There are a few other uses of the statute human rights advocates have explored, but without much traction.

Litigation by victims of forced labor is off the table because this is fundamentally a consumer protection statute, written to protect consumers from being duped into buying forced labor-produced products, and does not criminalize or create civil liability for actual engagement in forced labor.

Litigation by consumers is also off the table, for two reasons. First, private individuals lack standing to bring claims under the CTSCA, whose exclusive remedy is an action for injunctive relief brought by the California Attorney General. Second, as mentioned above, compliance with the CTSCA only requires companies to make certain disclosures on their websites—a company can meet CTSCA standards even if it makes no effort to abolish slavery and trafficking from its supply chain. By simply acknowledging their current inaction, or, even worse, the transparency and accountability practices they ‘aspire’ to put in place, companies are let off the hook.

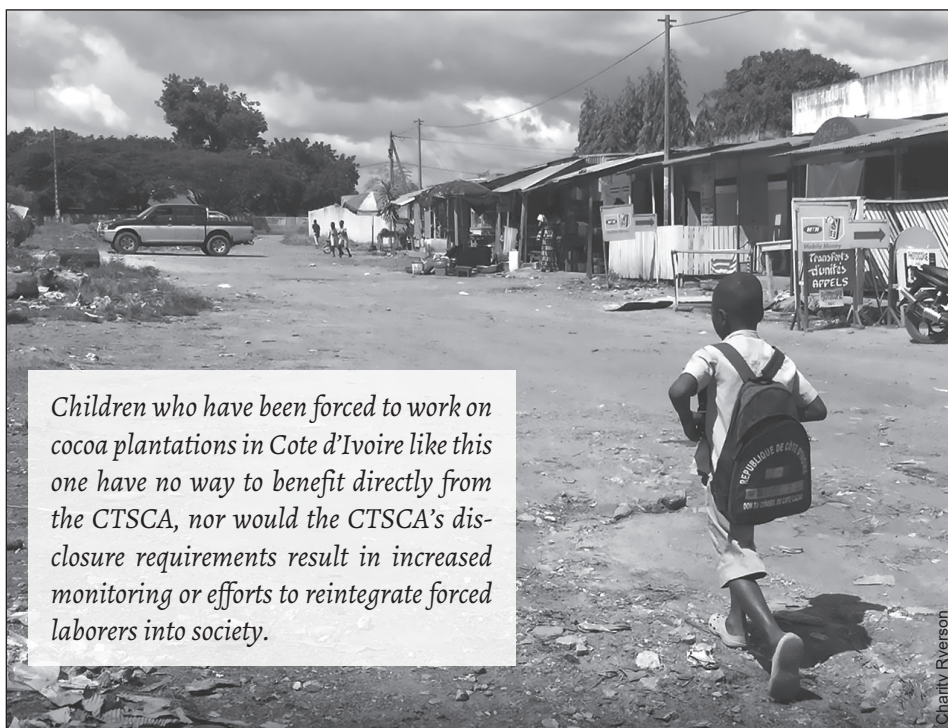
Nevertheless, although they lack standing to personally enforce the CTSCA, consumers have attempted to incorporate the spirit of the Act into class action lawsuits brought under other California consumer protection laws. Seven of the eight cases that have made substantive reference to the CTSCA have been brought in federal district courts in California, and they resemble one another closely: consumer class-action lawsuits brought against companies on the basis of California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and the California Legal Remedies Act (CLRA). These consumers argue that companies have a duty to inform consumers at the point of sale (i.e., on product labels) that their products may have been sourced with forced labor. However, in each case, the courts have held that the FAL, UCL, and CLRA do not require point-of-sale or product label disclosures of the sort the plaintiffs seek. Moreover, even if plaintiffs had standing to sue on the basis of the Supply Chains Act itself (which they don’t), the CTSCA also does not “clearly speak to product labels.”

What if plaintiffs stay within the bounds of what the CTSCA requires, instead arguing that a company’s online dis-

closures are false or misleading? In Barber, where plaintiffs were suing Nestlé over the manufacture of cat food, that argument was met with the court’s observation that the disclosures on Nestlé’s website are clearly “aspirational,” and that “no reasonable consumer who reads the . . . documents Plaintiffs identify in context could conclude that Nestlé’s suppliers comply with Nestlé’s requirements in all circumstances.” Here, the court’s reasoning also aligns with the CTSCA’s lax requirement that companies merely disclose their efforts, or lack thereof, to eradicate forced labor and human trafficking from their supply chains.

Is the CTSCA helping or hurting human rights goals?

Not only is the CTSCA yet to be used effectively in litigation, it may create a legal “safe harbor” for companies being sued for their failure to disclose inhumane labor practices on the basis of other consumer protection laws. “Safe harbors” are created where a legislature has expressly permitted specific conduct or has considered a situation and



Children who have been forced to work on cocoa plantations in Cote d'Ivoire like this one have no way to benefit directly from the CTSCA, nor would the CTSCA's disclosure requirements result in increased monitoring or efforts to reintegrate forced laborers into society.

Charity Ryerson

concluded that no legal action should lie. Safe harbors are often a risk when passing new legislation, and in this case, may mean the CTSCA results in a net loss for the movement to eradicate forced labor by insulating companies from the need to disclose more than what the CTSCA very minimally requires.

Because of this, in most cases, the CTSCA has appeared not in support of plaintiffs’ consumer protection claims, but as a possible—and usually successful—defense. Four out of

“[T]he CTSCA doesn’t monitor whether companies are disclosing accurate information, and there are no penalties for non-compliance... without attaching mandatory due diligence and independent monitoring, disclosure alone may create more problems than it solves.”



ILO in Asia and the Pacific CC BY-NC-ND 2.0

the seven CTSCA-related claims brought in California federal district courts have been dismissed on the grounds that the Act creates a safe harbor that protects companies that comply with the requirements of the CTSCA from other actions under California consumer protection statutes. The safe harbor doctrine has been applied to the UCL, the FAL, and the CLRA. For example, the plaintiffs in Barber did not allege that Nestlé failed to comply with the CTSCA; rather, they argued that Nestlé is obligated to make additional disclosures at the point of sale regarding the likelihood that its cat food contains seafood caught by forced labor. Nestlé argued, and the court agreed, that the California Legislature already considered which disclosures are required by large

companies, and specifically elected to not require point-of-sale disclosures.

Fortunately, this issue remains unsettled. Other cases have expressed doubt as to whether the CTSCA creates a legal safe harbor—a view that may be adopted by the Ninth Circuit when the above appeals are heard:

[A]mbiguity remains regarding how to determine whether the legislature “considered a situation and concluded no action should lie.” Here, for example, although there is evidence suggesting the legislature considered how to provide consumers with “reasonable access to basic information

to aid their purchasing decisions,” the legislative history is silent about whether the legislature contemplated disclosures on labels. Finally, if a safe harbor exists here, an anomalous situation arises: businesses earning less than \$100,000,000 in gross receipts worldwide may be subject to liability under the UCL and CLRA, while large corporations are not. In light of the absence of a duty to disclose as set forth above, these safe harbor issues need not be reached on this record. *Hodsdon v. Mars*, 162 F. Supp. 3d at 1029.

So, while the risk of creating a safe harbor for companies using forced labor is real, we’ll have to watch how this plays out in the courts.

Is the CTSCA a dead letter?

Alexandra Prokopets suggests areas of improvement for the CTSCA including creating more sufficient disclosures, a standardized disclosure format, and adequate enforcement mechanisms. For example, the CTSCA requirements are vague in ways that may lead to insufficient disclosure. CTSCA section (3)(c)(3) asks companies to disclose whether and to what extent they require their “direct suppliers” to verify that their products are made in compliance with anti-slavery laws in the “country or countries in which [the companies] are doing business.” But what is a direct supplier? Whose countries’ laws do the supplier factories follow? And what kind of verification is required? The CTSCA also provides no standardized format for making disclosures, which makes it difficult for consumers to compare company to company—which is the entire reason the statute was created. Moreover, there’s no requirement to update CTSCA compliance information. Making disclosures on company webpages is less than ideal, because, for example, subsidiary companies may post their CTSCA disclosures on their parent company website, which consumers may not be familiar with. Like, do I have to check Unilever’s website if I’m considering buying a Lipton iced tea or a Klondike bar?

However, would further specificity of this sort actually help the CTSCA become a more viable right of action for either consumers or the Attorney General? Probably not, because the statute has a very weak enforcement mechanism: the CTSCA doesn’t monitor whether companies are disclosing accurate information, and there are no penalties for non-compliance. This problem doesn’t have to plague every disclosure program, but without attaching mandatory due diligence and independent monitoring, disclosure alone may create more problems than it solves. Given that that there’s a Federal bill modeled off of the CTSCA in the works, addressing the problems and efficacy of the CTSCA—and

of disclosure regimes in general—seems especially timely. Despite all of this, our job is to find constructive uses of statutes and not just to critique. In that spirit, here are a couple of ideas for how the CTSCA could be used to address the use of forced labor in the global economy:

1. The Attorney General has standing to enforce the Act. Could we put pressure on Xavier Becerra, the current California Attorney General, to go after some of most notorious corporate users of forced labor? Nestle has been accused of using trafficked labor (and even trafficked children) in their pet food and chocolate supply chains. Becerra is in the best position to make good use of this Act, so regular old issue campaigning may have some effect here.
2. What about creating a plug-in that allows online shoppers to see the CTSCA disclosure data automatically when they go to purchase products, even through third-party vendors like Amazon? This isn’t a bad idea, though a major flaw is that the actual disclosures made are pure public relations for these companies. For this to be even remotely effective (and again, as stated above, we don’t view personal purchasing decisions as the answer to forced labor in global supply chains), we would need to include data by watchdog organizations that independently monitor these companies. There is nowhere that this data is aggregated, so while the tech is doable, the data collection and aggregation would be a beast.
3. Amend the statute. What if the statute gave consumers standing to sue, or victims of forced labor? Legislatively, this would be a hard sell, but hey, we can dream, can’t we?
4. Convince the people of California to initiate a ballot proposition to amend the CTSCA. Politicians may be tough to convince, but all of those concerned consumers won’t be. C’mon, Californians, you only need 365,880 signatures!

So, on the whole, we’re unimpressed by the potential of the CTSCA to have any concrete impact on the use of forced labor in global supply chains, but we’d love to hear alternate perspectives. Can anyone sell us on why the CTSCA is a great thing, or how it could be leveraged to benefit either consumers or victims of forced labor?

Emma Cusumano is a J.D. candidate at the University of Richmond School of Law. Charity Ryerson is a co-founder and Legal Director for Corporate Accountability Lab.



Shell in Nigeria: Why We Need New Legal Strategies for Corporate Accountability

One of the most thoroughly-documented and long-standing cases of corporate abuse in the world is that of Shell petroleum's decades-long conflict with the Ogoni people in the Niger Delta. This article reviews several of the cases filed by the Ogoni community to obtain remedy from Shell, as an example of the challenges that face even the most activist of affected communities. This article accompanies a July 3, 2018 webinar on human rights and business, co-hosted by Corporate Accountability Lab and the Peruvian human rights organization Ankawa Internacional.

As a multinational oil company, Shell has subsidiaries across the world, with extraction sites from Australia to Venezuela. While Shell has made billions off of these enterprises, many of the communities in which they operate have been left impoverished and contaminated. The Ogoni case is so extreme that Amnesty International has called upon the UK, Dutch and Nigerian governments to initiate a criminal investigation into their activities there.

For those not familiar with this case, the human and environmental impact of Shell's repeated oil spills, in addition to the political violence against activists who challenged Shell, is massive.

The Ogonilands were historically characterized by great biological diversity, rich soil, and abundant fishing. The unique mangroves of the Niger Delta formed an ideal habitat for several species of fish, which lived in close proximity to the fishing and farming communities there. In the 1950's, Nigeria gained independence from Great Britain, just after Royal Dutch Shell and the Nigerian government entered a joint venture to begin oil exploration in the Niger Delta.

Oil spills began as early as the 1960s. By the 1970s, gas flar-

ing, repeated spills, and acid rain began to kill off or contaminate the fish, or drive them to cleaner waters, and undermine the soil's ability to support agriculture. As the food became scarce and the water unpotable, the Ogoni organized the Movement for the Survival of the Ogoni People (MOSOP) to nonviolently resist Shell. In the mid-1990s, Nigerian soldiers, allegedly at the behest of Shell, began murdering Ogoni activists at protests and dragging them from their homes in the night, burning houses and raping women. Nine high profile Ogoni activists, including Ken Saro-Wiwa, the leader of MOSOP, were falsely accused of murder, arrested, and publicly hanged in 1995. Over 3,000 Ogoni fled to Benin, where they lived, sometimes for years, in refugee camps.

Today, the crisis continues. While the Ogoni succeeded in their efforts to stop drilling in their territory, the oil pipelines running above ground, as well as improperly decommissioned oil infrastructure, continue to spill oil into the soil. In 2011, the United Nations Environmental Program conducted a study and determined that "oil spills continue to occur with alarming regularity," despite Shell's supposed absence from the territory. It also found that the water was contaminated with carcinogenic benzene (including one well that tested at 900 times WHO-approved levels), con-

taminated air and soil, and disintegrating wetlands. The health effects of this contamination have been insufficiently studied, but residents of the Ogonilands report extraordinary rates of premature death and miscarriage.

The US government has used the Foreign Corrupt Practices Act (FCPA) to go after Shell for their notorious and repeated bribery of Nigerian officials, but FCPA cases don't do anything for the victims of the company's misdeeds.

In the midst of this, the Ogoni have been extraordinary advocates for their cause. They have traveled the world seeking justice, from the African Commission on Human and Peoples' Rights, to UK, US and Dutch courts, to even using the OECD non-judicial grievance mechanism. Because of this, they provide an excellent case study in the availability of remedy for victims of corporate abuse.

So, did the Ogoni obtain justice? The answer is complicated, so we break it down here:

African Commission on Human and Peoples' Rights

In 1996 a Nigerian and a US NGO filed a complaint with the African Commission on Human and Peoples' Rights, alleging that the Nigerian government, in collaboration with its national oil company and Shell, engaged in irresponsible oil development practices, polluting the Ogoni territory. In addition to the spills, the complaint dealt with the Nigerian government's protection of Shell's economic interests by destroying homes, burning crops, killing protesters and exposing the Ogoni to a climate of terror, in violation of seven articles of the African Charter.

The Nigerian government failed to participate in the process, and the Commission found a violation of all seven articles. The Commission ordered the government to stop the attacks on Ogoni communities, conduct an investigation into the human rights violations and prosecute officials of the security forces as well as the national Nigerian oil company, to pay compensation to victims, including resettlement assistance, to clean up the land and rivers, and to inform the population about health risks. It appears that little, if any, of this was done. In addition, Shell was not a part of this case, because as a general matter, there is no corporate liability in these human rights tribunals.

While the court did find the Nigerian government responsible for many of these harms, it was not able to force Nigeria to comply with the judgment, to hold Shell accountable, or to obtain remedies for the victims. The regional human rights bodies have been successful in obtaining compliance with judgments in many cases, but they still do not have the same enforcement abilities as domestic courts.

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises have a non-judicial grievance mechanism. Using the UK and Dutch National Contact Points (NCP), Friends of the Earth and Amnesty international filed OECD complaints against Shell related to their misrepresentations about the Niger Delta crisis. Specifically, Shell had greatly exaggerated the sabotage of its pipelines and the contribution of that sabotage to the environmental crisis in the region. After going through a process with Shell in which both sides submitted evidence, and some findings were produced by the NCP, both Amnesty and Friends of the Earth withdrew their second complaint, finding that the process was fruitless. The complainants' assessment of the mechanism at that time was that the NCP had little ability to influence Shell's actions or the actions of its subsidiary in the Niger Delta.



*Charles Wiwa fled the Ogonilands after the execution of his uncle, Ken Saro-Wiwa, and the persecution of his family. He was one of the plaintiffs in *Kiobel v. Royal Dutch Petroleum* in the US, as well as a petitioner in the case before the African Commission.*

Kiobel and other US Cases

As quick background, the Alien Tort Statute (ATS) gives aliens (non-US citizens) the ability to sue in US federal courts for violations of international law. This has been interpreted to include a narrow set of offenses, including genocide, torture, extrajudicial killing and crimes against humanity. This is an old law, possibly created to deal with crimes against ambassadors and crimes on the high seas (think piracy), but there is little legislative history to provide context. After two hundred years of very rare use, the statute was dug back up in the 1970s, and by the 1990s was being used to sue companies for human rights abuses around the world.

One of the first uses of the ATS against a corporation was a case filed by a group of Ogoni against Shell in the US second circuit, challenging Shell's participation in the ex-

ecution of the nine Ogoni activists mentioned above. The plaintiffs in this case, *Wiwa v. Royal Dutch Petroleum*, were represented by the Center for Constitutional Rights and Earthrights International, and settled for \$15.5 million in 2009. Note that the actions challenged here were only those that rise to that very high ATS standard, and so do not include the widespread oil contamination of the territory, or related health effects, because these harms are not sufficiently egregious to create a claim under the ATS. There is no environmental harm that has risen to this level to date, even though the effects of the repeated oil spills in the Ogonilands on human life has been devastating.

In 2009, a similar case was filed in the US, representing a group of Ogoni relatives of the Ogoni 9: *Kiobel v. Royal*

was present in the US and the plaintiffs were present in the US, the crimes that the plaintiffs alleged occurred outside of the US, so federal courts lacked jurisdiction to hear those claims.

As if this wasn't bad enough, the Court went even further this year. In a case called *Jesner v. Arab Bank*, the US Supreme Court ruled that foreign corporations can not be held liable under the ATS, even though they do business in the US or are otherwise present there.

This has a huge impact, not just for the Ogoni, but for victims of human rights abuse around the world, and particularly those who are harmed by a US company. What the ATS offered was a way to bring international legal norms into the US legal system. Following the *Kiobel* and *Jesner* decisions, victims of corporate human rights abuse overseas will have to look elsewhere for justice.

UK Cases

Shell is UK and Dutch company, so members of the Ogoni community have pursued remedy from the company in both countries. The biggest success has been the Bodo case in UK courts. The case arises from two specific oil spills in 2008 and 2009. After the spills, Shell failed to take appropriate steps to stop the spills in a timely manner, among other violations of Nigerian law. These were massive, well-documented spills affecting the land of thousands of Ogoni people. 15,000 plaintiffs sued Royal Dutch

Shell (parent) and Shell Petroleum Development Corporation (SPDC). In exchange for an agreement to drop the parent company, SPDC accepted personal jurisdiction in the UK court and settled the case for 55 million pounds and a remediation plan. This is the most successful legal effort by the Ogoni to date, and provides some compensation for a small percentage of the harmed community members.

Another case, brought by 45,000 Bille and Ogale farmers from Western Ogoniland, goes after the generalized harm to the community in the most direct manner of any of the cases. The Ogale based their claims off of the 2011 UNEP report, showing that the Ogale community had the most serious case of groundwater contamination in the territory, including drinking water containing carcinogenic ben-



The United Nations Environment Program (UNEP) conducted an environmental assessment in Nigeria in 2010.

Dutch Petroleum. This case, essentially identical to *Wiwa*, did not settle. Instead, it wound up before the US Supreme Court. The Court dismissed the case on jurisdictional grounds, saying that the ATS could not be applied outside of the US, based on a doctrine called the "presumption against extraterritoriality." This doctrine stands for the idea that if the legislature that passed a law did not intend for it to apply outside of the US, it doesn't. I won't get into the arguments for why, in this case, the legislature did not intend for it to apply outside of the US (recall that the Supreme Court has opined that it was created for piracy), but this decision had an almost immediate impact on a significant percentage of international human rights cases under consideration in US courts. In this case, even though Shell

zenes at over 900 times the WHO guidelines, as mentioned above.

One interesting facet of this case is the type of harm they are attempting to remedy: the 45,000 farmers seek damages for the broad effects on their community of over 50 years of repeated spills, widespread contamination, and the effects of that contamination on the health and livelihoods of the residents of that area. Generally, this type of generalized harm can be difficult to address through legal mechanisms because of difficulty in showing causation, or who was at fault, exactly when the wrongdoing occurred. But this is also the crux of the problem: the Ogoni people, and the people of the Niger Delta more generally, have been victims of such a long-standing abuse that nearly every aspect of their lives has been negatively impacted: from their individual incomes, the economy in general, the natural environment, their health and the future of their children. This case looked at the whole picture and attempted to challenge that harm.

The other piece of this case that is interesting is that the Ogale plaintiffs wanted to focus on Royal Dutch Shell, the parent company, rather than the Nigerian subsidiary. From a global human rights perspective, there are good reasons to do this. Companies who reap profits from their overseas operations should have some responsibility for the harms their various legal entities produce in the course of producing those profits. But as a practical matter, the corporate shell game is extremely effective. In this case, the court found that RDS did not have a duty of care toward the Ogale farmers. While the Nigerian subsidiary likely would have a duty of care toward the Ogale, the British court lacked personal jurisdiction over the subsidiary. So long as companies can keep the responsibility assigned to an entity in the corporate family over which the relevant court lacks jurisdiction, they can avoid liability in their supply chains nearly all of the time. This type of ruling has caused some scholars to advocate for an expanded duty of care to deal with transnational corporate abuse.

The plaintiffs appealed, and the appeals court upheld the dismissal of their case.

Dutch Cases

Ogoni members of the Oruma, Goi and Ikot Ada Udo communities filed suit in the Netherlands based on a specific oil spill that polluted their farm land and fish ponds. In addition, Ester Kiobel, the widow who was the named plaintiff in the Kiobel case in the US, filed suit there for the murder

of her husband and the other Ogoni 9. These cases remain pending.

Litigation in Nigeria

Hundreds of cases have been filed against Shell in Nigerian courts over the past 25 years. Without getting into details on these cases, plaintiffs have had little success. There are a number of reasons for this, including the way the relevant statutes are written, but the position taken by many in the affected communities is that Shell's notorious corruption, including bribery that has resulted in two FCPA investigations, makes them impervious to suit. As one of the Ogoni Kings, King Emere Okpabi put it "You can never, never defeat Shell in a Nigerian Court. A case can go on for very many years. You can hardly get a judgment against an oil company in Nigeria. Shell is Nigeria and Nigeria is Shell."

The Western Legal System Has Failed the Ogoni

Incredibly, these efforts, spanning four countries as well as international fora, have not resulted in a restoration of the Ogonilands to their prior state, nor have many of the victims been compensated monetarily for the extraordinary losses they have suffered. The primary barriers to justice have been procedural, dismissing cases on jurisdictional grounds. While these cases have represented groups of Ogoni, the harms they suffered have been translated through individualistic, Western legal systems. The collective harms suffered by the community, including the human impacts of the harms to the environment, have been neither remediated nor compensated.

This is a striking illustration of the current state of legal regulation in the global economy, showing that transnational corporations enjoy the rights afforded them by domestic and international legal regimes (including those that protect their assets and real property, intellectual property and enforce their contracts), while evading responsibilities that would attach were they natural persons. While the Ogoni people suffer starvation, poverty and displacement, Shell continues to thrive as the world's second largest oil company.

Charity Ryerson is a co-founder and Legal Director for Corporate Accountability Lab. This article is an adaptation of a longer piece, authored by Bro. Anthony Kote-Witah, MDiv, OFM Capuchin, Elizabeth Deligio, MDiv, PhD Candidate, Chris Byrnes, MTS, JD, and Charity Ryerson, JD, pending publication in the online version of the Harvard Human Rights Journal.

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