No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,
Petitioner,
v.

BARBARA BAUMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* GERMAN INSTITUTE FOR HUMAN RIGHTS AND OTHER GERMAN LEGAL EXPERTS IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The **German Institute for Human Rights** (*Deutsches Institut für Menschenrechte*, DIMR or "the Institute") is Germany's accredited independent National Human Rights Institution in compliance with the United Nations Paris Principles.[1] The Institute's function is to contribute to the promotion and protection of human rights in Germany and internationally. Since its founding in 2001, the Institute has played an active role in shaping politics and public opinion on all human rights issues at the national as well as on the U.N. and European level. Furthermore, it monitors the human-rights-sensitive activities of the German government outside the country. The Institute has the power and responsibility to submit to any competent body on an advisory basis legal opinions on any matter concerning the promotion and protection of human rights. In particular, it has an interest in the present case because Germany has been identified as a potential alternative forum for the dispute, and the Institute wishes to highlight before this Court the significant hurdles that plaintiffs face in German courts when seeking compensation for human rights violations. Additionally, the Federation of German Industries,

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[1] Pursuant to rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no such counsel or a party has made a monetary contribution to its preparation or submission. No party has made a monetary contribution to this brief other than the *amici curiae*, their members, or their counsel. The parties' letters consenting to the filing of this brief have been filed with the clerk's office.

the German Chambers of Industry and Commerce, and individual German firms have, in their amicus curiae briefs in support of petitioner, invoked legal and policy arguments which are not representative of German legal opinion at large and merit a response before this Court.

Amici are also **German legal experts** and scholars from leading institutions of higher learning and independent and non-profit institutions in Germany. They have extensive knowledge and experience in international law, human rights law, and comparative law. In addition to researching and teaching these subjects, they regularly advise governments, organizations, and individuals on international legal issues. As legal experts working in Germany, they consider it their responsibility to respectfully submit this brief in order to assist the Court in coming to an understanding that better reflects the opinions of German legal scholarship on the important issues raised in this case. Short summaries of their biographies are appended in the Appendix to this brief.

SUMMARY OF ARGUMENT

Faced with the choice between having a case heard in a court in the United States and another forum, U.S. jurisdiction rules recognize that the U.S. court is the proper venue if the other forum offers a remedy that is so clearly inadequate that it is no remedy at all.

For the respondent victims of serious violations of internationally-recognized human

rights in this case, and for others like them, Germany is an inadequate alternative forum. German courts would apply the harsh limitation period of the *lex loci damni*, and German law imposes additional logistical and financial hurdles on non-European plaintiffs that effectively close off the German courts to the respondents in this case.

The Ninth Circuit has set forth a standard for the exercise of personal jurisdiction that recognizes both the need to provide a forum to victims of serious human rights violations making claims against a company who, at the time the claims were filed, was jointly headquartered and continuously and systematically doing business in the United States, while at the same time protecting foreign parent companies from standard commercial disputes when those companies' presence in the United States is limited to mere investment.

The test developed by the Ninth Circuit is in line with United States personal jurisdiction law, its commercial interests, its foreign policy, and international human rights standards. It should be upheld.

ARGUMENT

I. Germany is not a reasonable alternative forum for this dispute.

It is a fundamental principle of international law that the same acts "may lawfully be within the ambit of more than one jurisdiction." *See* Brownlie, *Principles of Public International Law* (7th ed., 2008) at 312. When faced with two plausible forums for the litigation of a claim, United States law

recognizes the right of the defendant to seek a dismissal of the action in U.S. courts e.g. under the *forum non conveniens* doctrine when a trial in the foreign jurisdiction would be more convenient. Such a motion cannot be defeated by a mere showing that the foreign law would be less favorable to the plaintiffs. *See Canada Malting Co. v. Paterson Steamships, Ltd.,* 285 U. S. 413 (1932).

However, this Court recognized in *Piper Aircraft Co. v. Reyno* that when choosing between the United States and the other potential forum, "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight" in the determination of which forum is appropriate for trying the action. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 (1981).

The same principle is reflected in the Ninth Circuit's assessment of whether it would be reasonable to exercise general personal jurisdiction over petitioner when it considered the existence of an alternate forum in which to adjudicate this matter. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 928–29 (9th Cir. 2011).[2] Because of the law

[2] Assessment of other reasonableness factors is beyond the scope of this brief. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). *Amici*, however, make the following observations with regard to two factors, sovereignty of foreign nations and interests of the forum state: On the first, Germany has not entered an appearance in this litigation nor has it expressed its concern that allowing this case to proceed impinges upon German sovereignty. On the second, the United States generally, and California specifically, has demonstrated its interest in providing a

German courts would apply to such an action and the procedural, technical, and financial hurdles they impose upon non-European plaintiffs, the German courts would not provide any remedy at all to the respondents in this case or others similarly situated.

A. German courts would apply substantive law that bars any claims against the German parent company arising out of these human rights abuses.

Upon the filing of a civil claim, German courts engage in a *sua sponte* examination of whether they have personal and subject-matter jurisdiction over the matter at hand, as required by §§ 1, 12, and 17 of the Zivilprozessordnung [Code of Civil Procedure] [ZPO] (Ger.). German courts have both personal and subject-matter jurisdiction over Daimler AG, since it is domiciled in Stuttgart, Baden-Württemberg, but the conflict of laws rules that German courts would then apply to a claim based on human rights abuses committed in Argentina render that jurisdiction useless to the respondents.

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forum for adjudication of serious human rights violations, particularly when U.S. interests are implicated in the suit. This Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), in which the Court held that the presumption against extraterritorial application of the Alien Tort Statute, 28 U.S.C. § 1350, could be displaced when "the claims touch and concern the territory of the United States…with sufficient force," reflects and affirms that interest.

1. Under any of the available conflicts rules, German courts would apply Argentine law.

German courts decide non-contractual liability claims according to their own procedural law, but they apply substantive law as dictated either by Art. 40 of the Einführungsgesetz zum bürgerlichen Gesetzbuch [Act Introducing the Civil Code] [EGBGB] (Ger.) or by EC Regulation 864/2007 (E.U.) (the 'Rome II' regulation). The Rome II Regulation, however, only applies to events arising on or after January 11, 2009. It is not open to the parties to waive this time limit, even by mutual agreement. *See* Case C-412/10, *Homawoo v. GMF Assurances S.A.,* [2012] I.L.Pr. 2 (Court of Justice of the European Union).

Under Art. 40 EGBGB, the substantive law applied is that of the territory where the tortfeasor committed the tortious conduct. As an alternative, the plaintiff can demand that the law of the territory where the injurious effect of the conduct is felt: Art. 40(1) EGBGB. Under either of these alternatives, a German court would apply the substantive law of Argentina as it was in force at the time the alleged human rights abuses occurred.

2. Applying Argentine law bars respondents' claims.

This conflict of laws rule effectively bars a claim in Germany because German courts must apply substantive Argentine law, which either entirely refuses to recognize these types of claims or has declared such claims barred by the Argentinian

limitation period.[3] As the Ninth Circuit made clear, Article 3980 of the Código Civil de la República Argentina [Argentine Civil Code] (Arg.) imposes an extremely tight limitation period of two years and three months on such civil claims,[4] meaning that they would be time-barred under the applicable law. *See Bauman,* 644 F.3d at 928; Corte Supreme de Justicia de La Nacion [CSJN] [Supreme Court of Justice of Argentina], 30/10/2007, "Larrabeiti Yanez, Anatole Alejandro y otro c/Estado Nacional/ proceso de concocimiento" L.L. (2008-F-23) (Arg.).

3. None of the possible exceptions to this conflicts rule could be invoked by the respondents.

Because of the strict time limit contained in the Rome II Regulation, respondents would be forced to rely on exceptions to the conflicts rule in Art. 40 EGBGB.[5] *See Homawoo v. GMF Assurances*

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[3] In German law, the statute of limitations (*Verjährungsfrist*) is a matter of substantive law, which has the potential to produce irrational results when applying the substantive law of systems which treat the limitation question as one of procedure. German conflicts rules thus always treat the statute of limitations as belonging to substantive law, regardless of the position in the foreign legal system. See Kegel/Scheurig, *IPR* (2004), p. 636.

[4] Although there is no statute of limitations for criminal proceedings in respect of these claims, neither do criminal proceedings have any prospect of securing monetary compensation for the respondents.

[5] If the conduct at the core of the respondents' suit had occurred after January 11, 2009, it would be open to them to plead the "mandatory overriding provision" exception under Art. 16 of the Rome II Regulation and potentially apply

S.A. These amount essentially to (a) mutual agreement to apply German law, *see* Art. 42 EGBGB, or (b) a finding by the court that in all the circumstances of the case, the facts were much more closely related to German law than they were to Argentinian law. Such a finding would require e.g. a prior existing legal relationship between the parties governed by German law or that both parties be domiciled in Germany even if the tortious conduct took place elsewhere. *See* Art. 41 EGBGB; Palandt/Thorn, *BGB* (69th ed., 2010) EGBGB 40 para. 6–7. Neither of these exceptions applies here.[6]

B. Proceedings in Germany are not viable because of the extremely high costs imposed upon non-European plaintiffs.

1. Non-European plaintiffs must cover their opponent's costs in advance.

German tort law, which recognizes a tort-law claim for human rights violations under § 823(1) of the Bürgerliches Gesetzbuch [Civil Code] [BGB] (Ger.) that can lead to direct compensation under the damages provision of § 253(2) BGB.

[6] Even if it were open to the German court to apply German substantive law, courts have routinely applied the default three-year statute of limitations (§ 195 BGB) to claims of serious human rights violations, despite the apparent availability of a 30-year statute of limitations for intentional torts of bodily injury (§ 199(2) BGB). *See* Franke, "Zum zivilrechtlichen Schadenersatzanspruch bei sexuellem Missbrauch" FamRZ 2012, 1535. This has lead the German legislator to explicitly extend the statute of limitations to 30 years for all intentional torts resulting in of bodily injury, wrongful death, or sexual assault via a revision to § 197(1)(1) BGB which took effect on July 1, 2013 – too late to come to the assistance of the respondents in this case.

German courts differentiate in the costs they impose upon plaintiffs between European and non-Europeans. Non-Europeans are required to pay a sum into court sufficient to cover their opponents' costs should the claim fail: § 110(1) ZPO. This deposit is due at the filing of the claim, and its amount is determined by the court's estimate of the defendant's potential legal fees and expenses. Should the defendant's actual costs exceed this estimate, the court stays the proceedings until the plaintiffs pay into court an additional amount sufficient to cover those costs: § 112(3) ZPO; *see also* Bundesgerichtshof [BGH] [Federal Supreme Court] Jun. 30, 2004, NJW-RR 2005, 148 (Ger.); Zöller/Herget, *ZPO*, § 112 para. 2 (26th ed., 2007).

2. German law does not recognize discovery, and plaintiffs in German courts face massive translation costs for non-German evidence.

German law provides no means of court-supported evidence collection similar to e.g. 28 U.S.C. § 1782 to compel opposing parties to hand over documents even if these might be detrimental to their position. The inadequacy of this situation was recognized by the Seventh Circuit in *Heraeus Kulzer GmbH v. Biomet*, in which Judge Posner pointed out that a plaintiff in German proceedings "cannot obtain even remotely comparable" discovery under German rules of procedure, where plaintiffs can only demand the production of evidence if they can specifically describe it and set forth the basis of their belief that it is under the defendant's control. *See Heraeus Kulzer GmbH v. Biomet, Inc,* 633 F.3d

591, 596 (7th Cir. 2011), §§ 420–430 ZPO; Baumbach *et al.*, *ZPO* (68th ed., 2010), §§ 421–426. What documents or evidence the plaintiffs might have or be able to produce would all have to be translated into German at enormous up-front cost to the plaintiffs. *See* § 184 Gerichtsverfassungsgesetz [Act Constituting the Courts] [GVG] (Ger.).

3. Measures to assist impoverished plaintiffs come too late in the process and are entirely inadequate to cover the risk of litigation.

Plaintiffs in Germany can be granted leave to proceed *in forma pauperis*, but this leave does not cover two preliminary hurdles: first, legal aid (*Prozesskostenhilfe*) itself is only available after plaintiffs survive a preliminary examination of the merits and the court declares that the action has the "prospect of success": §§ 114, 117–118 ZPO. For complex cases of serious human rights violations, the assistance of counsel will be required to meet even this threshold, making litigation inaccessible to non-European plaintiffs living in poverty. Secondly, German law only enables the court to grant plaintiffs legal aid for their own costs, not those of the defendants. Non-European plaintiffs are still required to pay the same amount of deposit in cash under § 110 ZPO whether or not they are eligible for or receive legal aid. *See* §§ 114 *et seq*. ZPO.

Furthermore, the unavailability of class actions under German procedural law and the limited scope of the joinder provisions mean that

each victim would have to seek compensation individually and would be individually subject to the requirement to pay the aforementioned security. In the wrongful death claims at the core of this case, each of the individual claimants, many of them living in poverty, could be required to pay as much as roughly € 30,000 to proceed. *See* § 59 ZPO; § 39 *et seq.* Gerichtskostengesetz [Court Costs Act] [GKG] (Ger.); §§ 22 and 23 Rechtsanwalts-vergütungsgesetz [Attorneys' Compensation Act] [RVG] (Ger.); and Baumbach *et al.*, *ZPO*, § 59 *et seq*.

II. The Ninth Circuit's personal jurisdiction test, if applied correctly, protects international trade and investment and is in line with U.S. foreign policy.

In their briefs as amici curiae in support of the petitioners, Viega GmbH & Co. KG, the Federation of German Industries, and the Association of German Chambers of Industry and Commerce raise the spectre of international investors being deterred from investment in the United States as a result of the Ninth Circuit's agency test: *See Bauman*, 644 F.3d at 920–24, Brief for Viega GmbH & Co., *et al.* as Amicus Curiae 16–17 [hereinafter *Viega Br.*], Brief for the U.S. Chamber of Commerce, *et al.* as Amicus Curiae 18 *et seq*. [hereinafter *Chamber of Commerce Br.*] However, proper application of the Ninth Circuit's test only covers systematic and continuous business activity amounting to a corporation being essentially at home in the jurisdiction. It would not cover the facts in the *Viega* litigation, *Waterfall*

Homeowners Ass'n v. Viega, Inc., et al., 2:11-cv-01498-RCJ-GWF (D. Nev.), where a homeowner's association brought suit against a German company for claims arising from defective plumbing parts, or other situations where a foreign corporation merely invested in a U.S. jurisdiction.[7]

Moreover, unlike in *Bauman*, the *Viega* plaintiffs do not allege that the "defective high-zinc-content [ ] brass fittings and potable-water-delivery systems," Viega Br. 10, in that case violate their human rights or constitute a crime against humanity for which no other court will accept jurisdiction.

A. The *Viega* litigation raises a distinct and more attenuated claim of general jurisdiction than *Bauman*.

The parent company defendant in this case, Daimler AG, is the successor-in-interest to DaimlerChrysler, which existed at the time of service of process as a joint German and American corporation with operational headquarters and CEOs in both the United States and Germany. *See Bauman,* 644 F.3d at 912–13, 914 n. 6. In substance, this is a case of United States courts

[7] The parties in *Viega* are currently awaiting the outcome of a decision of the Supreme Court of Nevada concerning certain aspects of state law including jurisdiction arising out of mere investment by a parent company. *See Viega GmbH et al. v. Eighth Judicial Dist. Court* (*Aventine-Tramonti Homeowners' Assoc.*), No. 59976 (Nev. filed Jan. 4, 2012); *Viega GmbH et al. v. Eight Judicial Dist. Court (La Paloma Homeowners' Assoc.*), No. 60015 (Nev. filed Jan. 10, 2012).

exercising jurisdiction over a United States company for the conduct of one of its subsidiaries abroad.

In the *Viega* litigation, the Nevada District Court invoked both *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846 (2011), and *Bauman, supra,* in its jurisdiction determination, considering itself bound by both decisions. *Waterfall Homeowners Ass'n v. Viega, Inc.*, 2:11-cv-01498-RCJ-GWF, 2012 U.S. Dist. LEXIS 167875, at *9–10 (D. Nev. Nov. 26, 2012). However, a proper application of both cases adequately protects companies operating as mere investors in the United States.

In *Goodyear*, the parent company conceded that North Carolina could exercise jurisdiction over it based on its systematic contacts with that state. The issue in *Goodyear* was whether North Carolina could exercise general jurisdiction over the parent company's foreign subsidiaries, which had no contact with the forum state other than their products entering its stream of commerce through no intended actions of their own. *See Goodyear*, 131 S. Ct. at 2852–2853. In *Viega*, the issue at hand is whether the forum state can exercise general jurisdiction over a foreign parent company that has a subsidiary in that state. Viega Br. 10–11. However, the mere presence of a subsidiary in a territory was not the basis of the Ninth Circuit's test in *Bauman* and is not being advanced before this Court as an appropriate basis for the exercise of general jurisdiction. All of the potential bases for exercising personal jurisdiction in U.S. courts are more stringent, and international investors would

still be protected from liability based entirely on bare ownership of a subsidiary with no further systematic or continuous contacts with a U.S. jurisdiction.

Unlike Mercedes-Benz USA and Daimler AG, Viega's contacts with Nevada are neither systematic nor continuous. Whereas Viega's brief explains that its contacts are limited to the ownership of a single subsidiary in a state where there is no authorized person to accept service of process, Viega Br. 11–12, Daimler maintains permanent counsel in California. *Bauman*, 644 F.3d at 925. Viega's Nevadan subsidiary distributes and sells products manufactured not by Viega but by a third party. Viega Br. 10. Viega neither employs nor controls any distribution system in Nevada, nor does it engage in advertising, solicitation, or sales activities there. By contrast, the Ninth Circuit in *Bauman* examined in detail the close nature of the relationship between Daimler's California subsidiary and the German-American parent, as well as the foreign parent's overall contacts with California.

B. There is nothing unclear or deterrent for foreign corporations about "doing business" as a basis for jurisdiction.

Amici agree with the United States that, in the determination of whether the exercise of general jurisdiction is justified and reasonable, a parent company's direct contact with the forum jurisdiction weighs more heavily than contacts merely attributed to the parent company through one of its subsidiaries in the forum state. Brief for the United

States as Amicus Curiae 16–17. But both types of contacts play a role, and Daimler has extensive contacts with California under both analyses.

Daimler profits enormously from its contacts with California, a fact which is overlooked or downplayed by the petitioners and the United States in its brief amicus curiae. U.S. Am. Br. 17. Daimler AG draws 2.4% of its global revenue from California alone. *See Bauman*, 644 F.3d at 914. Apart from Mercedes-Benz USA, Daimler maintains another wholly-owned, tightly-controlled subsidiary domiciled in California, Mercedes-Benz Research and Technology North America, Inc. *Id.,* at 925. And, as mentioned, Daimler retains permanent counsel at all times in California.

Daimler long ago crossed the line at which every corporation, American or foreign, can expect to encounter the general jurisdiction of a forum with which it has such extensive contacts. Daimler reserved the right to control every aspect of Mercedes-Benz USA's operations. *See Bauman,* 644 F.3d at 924–25. Daimler routinely avails itself of California courts to pursue intellectual property and regulatory cases. *See id*., at 925; *see also*, *e.g.*, *DaimlerChrysler AG v. Feuling Advanced Techs.*, 276 F. Supp. 2d 1054 (S.D. Cal. 2003). When the claims in question concern crimes against humanity and violations of internationally-recognized human rights, Daimler should not be permitted to hide from a trial on the merits of such claims behind a fig-leaf subsidiary.

The very purpose behind *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and

Goodyear, *supra*, was to give sufficient notice to corporations whose commercial activities extend to a particular jurisdiction about the point at which those activities intensify so as to subject the corporation to general personal jurisdiction there. The standards for parent companies in International Shoe and Goodyear are entirely predictable and fair. Even in light of both cases, companies have continued to do business across state and international borders in and with the United States in the nearly seventy years since *International Shoe* was decided. The Federation of German Industries and the Association of German Chambers of Industry and Commerce are thus unconvincing in arguing that a straightforward application of existing American jurisdictional rules would scare off potential foreign trade partners.

C. Making foreign corporations who seek access to the U.S. market adhere to certain international human rights standards does not undermine U.S. foreign policy.

The Federation of German Industries and the Association of German Chambers of Industry and Commerce additionally raise in their amicus curiae brief the potential detrimental effect that the exercise of jurisdiction over the petitioners could have on the foreign relations of the United States. Chamber of Commerce Br. 20-22; Brief for Economiesuisse, *et al.* as Amicus Curiae 4 *et seq*. This argument has little merit. As asserted above, this case should be viewed as American courts exercising jurisdiction over an American company, since Daimler was at the time of service of process

DaimlerChrysler, a joint German and American corporation. Even if the litigation is viewed as the exercise of jurisdiction over a German corporation, it is consistent with the expressed foreign policy of Congress and the President, and the German government has never objected to the proceedings.

The United States requires companies seeking access to its markets – even foreign companies – to comply with certain human rights and corporate governance standards worldwide as a condition of that market access. *See*, *e.g.*, Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249B); *Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n*, Civil Action No. 13-cv-635 (RLW), 2013 U.S. Dist. LEXIS 102616 (D.D.C. Jul. 23, 2013) (affirming the constitutionality of the Conflict Minerals Rule promulgated by the Securities and Exchange Commission pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)). Under the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78dd-1 *et seq*., the United States routinely enforces anticorruption standards against foreign corporations doing business in third jurisdictions simply because they are listed on U.S. stock exchanges. *See*, *e.g.*, Criminal Information, *United States v. Marubeni*, 12-cr-022 (S.D. Tex. Jan. 17, 2012). The United States Government has even proceeded against Daimler in civil litigation for bribery in Europe, Africa, and Asia. *See* Compl., *Sec. & Exch. Comm'n v. Daimler AG*, No. 10-cv-473 (D.D.C. Apr. 1, 2010).

It defies logic to suggest that United States foreign policy countenances the holding of Daimler

and similarly situated corporations to the letter of its anticorruption laws worldwide but that that same foreign policy would be undermined by allowing the application of existing tort law and jurisdictional rules against international corporations doing substantial business in the United States.

CONCLUSION

For the foregoing reasons, as well as those offered by the respondent, the Ninth Circuit's decision should be affirmed.

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August 26, 2013

APPENDIX

Appendix – List of *Amici Curiae* German Legal Experts

Alexander Graser holds a chair of public law and policy at the University of Regensburg, Germany. He is also a fellow of the Hertie School of Governance in Berlin. His research is in the fields of comparative constitutional law and theory, fundamental rights, and social regulation.

Miriam Saage-Maass is the Deputy Legal Director and the Program Coordinator for Business and Human Rights at the European Center for Constitutional and Human Rights (ECCHR), an independent, non-profit legal organization dedicated to protecting civil and human rights. The ECCHR also works to ensure that transnational companies are held to account for their operations in third countries where their operations lead to or are complicit in serious human rights violations. Her work concentrates on building and filing strategic litigation cases for human rights violations and training human rights organizations, lawyers, and communities in countries of the global South negatively affected by transnational corporations.

Christopher Schuller is a human rights lawyer in Berlin, where he is a legal advisor at the German Institute for Human Rights. He is Assistant Editor of the *Oxford University Comparative Law Forum* and has held lecturerships at the Humboldt University of Berlin and the University of Osnabrück.