



FIGHTING GLOBAL POVERTY

Righting Corporate Wrongs?

Extractivism, corporate impunity
and strategic use of law

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1. Introduction

The ‘extractive-export model’ is now the Global South’s primary mode of integration into world markets. Referred to as ‘extractivism’ in Latin American critical thought, this model includes industries like mining and oil extraction, alongside an array of activities that appropriate nature for the accumulation of capital: such as large-scale hydroelectric dams and agribusinesses producing cash crops. Just like during the colonial era, the bulk of profits go to foreign investors – these days through the operations of transnational corporations. Meanwhile, the costs are born by populations living in the areas from which resources are exploited. Across the Global South, activists contesting the harmful effects of extractivism now constitute the majority of victims of assassination and forced ‘disappearance’.¹

Social movements and lawyers have pursued a number of legal tactics in an attempt to hold transnational corporations to account and limit their power. Litigation against companies for human rights abuse is often talked about as a means of addressing ‘corporate impunity’ – although people often understand very different things by this. For many international NGOs and lawyers, addressing impunity simply means forcing companies to make redress to victims, or securing prosecutions with the aim of deterring future abuses. These aims often coincide with the desires of victims and the social movements of which they are part.

Nevertheless, for victims and social movements, the aim of litigation very often goes beyond the pursuit of ‘justice’ or ‘remedy’, as they are legally defined. Existing frameworks for redress suffer from numerous shortcomings, such as high thresholds of individual culpability and restricted understandings of ‘justice’ – as the prosecution of perpetrators or financial compensation to victims. Existing legal frameworks largely fail to address victims’ understanding of the social and environmental harm perpetrated by extractivism. In the Global South, social movements often talk of the importance of ‘strategic

litigation' against transnational corporations: law is used strategically – and often innovatively – towards a broader goal of social change.²

This short book aims to contribute to collective learning between scholars, lawyers and activists in the Global North and South on the politics and pitfalls of these law-based tactics. It is the end-product of a project called *Righting Corporate Wrongs: Building Mutual Capacity to Address Extractivism and Human Rights*, a collaboration between the University of Sussex and War on Want in the UK, and the Universidad Libre and Aury Sará Foundation in Colombia, between 2016 and 2019. The project emerged from War on Want's participation with Colombian NGO COSPACC and UK solicitors Deighton Pierce Glynn in a previous project called Oil Justice, which was focused on developing a unique community-led approach to obtaining justice for crimes committed by BP and other oil companies in Colombia.³ The coordinator of *Righting Corporate Wrongs* in Colombia was Gilberto Torres, whose London High Court case against BP for kidnap and torture was a major focus of the Oil Justice campaign.⁴

BP's operations in Colombia are highly significant in the story of transnational corporations and human rights. In 1997, after international attention to BP's role in a campaign of threats and murders targeting community leaders, environmental activists and trade unionists, BP became one of the first companies to establish a dialogue with NGOs about human rights. BP then began to lead the way with the idea that responsibility for human rights was an integral part of companies' performance, becoming one of the first signatories of the Voluntary Principles on Security and Human Rights for the extractive sector. The UN Special Rapporteur on Business and Human Rights, John Ruggie praised BP, saying that the Voluntary Principles had been implemented most fully around BP's Colombia oilfields.⁵ Nevertheless, the murders, threats and 'disappearances' continued. In a court in Colombia, Torres' kidnappers stated that they had been paid forty thousand dollars by 'the company' to abduct and kill him.⁶

It is widely accepted that voluntary corporate responsibility for human rights was developed to avoid litigation and binding regulations on corporations.⁷

The UN *Respect, Protect, Remedy* framework has since emphasised that voluntary measures should be complemented by access to judicial remedy, although most campaigners would say this doesn't go nearly far enough.⁸ In June 2014, the UN Human Rights Council adopted a resolution put forward by Ecuador and South Africa, committing it to developing a legally binding human rights instrument for corporations. Nevertheless, rich countries' governments and the corporate lobby have pushed for a 'soft touch' treaty that doesn't go far beyond voluntary self-regulation. International campaigning around the problem of 'corporate impunity' continues, with an increased focus upon the possible development of corporate criminal law.⁹

Strategic use of law: a social movement perspective

Discussion of 'corporate impunity' is often focused upon the enormous obstacles to achieving compensation or prosecution through the courts. Comparatively little attention is given from a social movement perspective to the question of how litigation and other law-based activism can support (or undermine) wider struggles against corporate power and for alternatives to the extractive-export model.

One common mistake, from the perspective of many social movements, is to talk as if law straightforwardly defined justice, or as if what is needed to prevent human rights abuse is an effective 'rule of law'. It is, in fact, law that provides the infrastructure that enables a minority to profit at the expense of the majority. The legal form of the corporation – defined by separate legal personhood and limited liability of shareholders – has been described as 'a structural form of impunity'¹⁰. In addition, neoliberal globalisation has been accompanied by a shift in prevailing understandings of the rule of law, away from the idea that law exists as a protection against tyranny. Devastating neoliberal policies have been based on an idea of the rule of law that privileges property rights and contracts over social and environmental rights. In both the Global North and South, transnational corporations have taken an increasingly direct role in writing law and policy for governments, through mechanisms that bypass national legislatures and democratic debate.¹¹ On top

of this, international investment tribunals overwhelmingly protect corporate interests and rarely examine host state arguments based on human rights.¹²

Nevertheless, social movements, critical legal theorists and practitioners of law also emphasise the flexibility of law. Legal categories are sometimes malleable enough to accommodate social movement understandings of harm, justice and liability, and much law is itself the product of social movement struggles.

2. Extra-territorial litigation: using the courts of rich countries

Traditionally, international law is not considered to impose human rights obligations on corporations. Until the mid-1970s, states alone were deemed responsible for ensuring that actors within their territories respected human rights. Meanwhile, Western governments and the corporate lobby have systematically opposed attempts to develop enforceable international regulatory frameworks.¹³ From the 1990s, the promotion of voluntary corporate social responsibility as a core part of companies' performance has been at the heart of the business lobby's efforts to fix the meaning of responsibility.¹⁴ Governments in the Global North and international institutions have largely supported this move. For instance, the UK Department for International Development has rejected proposals for 'internationally legally binding frameworks for multinational companies' on the basis that this 'may divert attention and energy away from encouraging corporate social responsibility and towards legal processes'.¹⁵ The 2011 UN *Guiding Principles on Business and Human Rights* likewise emphasise voluntary mechanisms with only limited provision for remedy for victims of violations.

Nevertheless, governments are often unwilling – or unable – to impose legal regulations on transnational corporations. Legislation (in both the Global North and the Global South) is often written through the advocacy activities of the corporate lobby. Central here are the reforms of countries' domestic law upon which International Financial Institutions have conditioned aid. These have been based on a specific understanding of the 'rule of law', in which property rights and private contracts are sacred. As a result, neoliberal policies have been constitutionalised at a global level. The aim – as legal

scholars Ugo Mattei and Laura Nader put it – ‘is to globally structure a model of rule of law considered as a universal minimum legal system, capable of harsh control of the individual threatening the bottom line of property rights and incapable of limiting corporate actors. A control of the weak is created by the strong, both domestically in the relationship of the state towards individuals and internationally in the relationship between states’.¹⁶

The story often told about this is that countries in the Global South have a ‘weak’ rule of law. This fails to address the legal mechanisms that enable corporations to violate human rights.¹⁷ For centuries, colonialism has been justified on the basis that colonised territories ‘lack’ the rule of law or adequate governance, in comparison with colonial powers. In practice, colonial legal orders were actively constructed so that the absence of provision for social welfare was accompanied by weak courts as passive enforcers of rights. This was accompanied by recurrent use of emergency measures to justify the suspension of rights altogether.¹⁸

Minimal mechanisms to hold corporations to account are part of this wider scenario. Even where the legal frameworks exist, the political will is often absent when government policy is to seek foreign direct investment. What is more, where Southern courts have tried to hold corporations to account for harm caused to their populations, corporations have retaliated with legal threats and counter-litigation. In 2011, indigenous and peasant communities won a landmark judgement when Chevron was found guilty by three layers of courts in Ecuador of having dumped billions of gallons of toxic waste in the Amazon rainforest, causing an epidemic of cancer.¹⁹ Chevron had initially spent significant resources arguing that the case should be heard in Ecuador rather than the US. Then, after years of litigation, it refused to accept the Ecuadorian court’s ruling and pay the compensation that the court ordered, instead filing civil proceedings against the victims’ lawyers for ‘a fraudulent litigation and PR campaign’.²⁰

Extraterritorial tort litigation: seeking damages against TNCs

Given the absence of a binding corporate human rights mechanism in international law, only individuals can be subject to prosecution for human rights abuses. A company can be held accountable for a civil offence (known in legal terms as a ‘tort’). This means that tort law has had to be used to take proceedings against companies for harms associated with the violation of human rights. Most tort cases against corporations ‘allege harm caused by “negligence” arising from breach of a “duty of care” (rather than, for example, torture or violation of the right to life etc.).²¹

Tort litigation against corporations has to grapple with a series of legal obstacles:²²

Jurisdiction: First, courts are constrained in terms of geography with regard to what they can adjudicate on (this is known as ‘jurisdiction’). Criminal cases for some human rights violations can be taken under the principle of ‘universal jurisdiction’, which allows courts to claim jurisdiction over an accused person regardless of where the alleged crime was committed and regardless of that person’s nationality or country of residence. This is not the case when a civil offence (tort) is involved. If the alleged civil offence did not occur within the territory over which a court normally has jurisdiction, then the court needs to have some ‘contact’ with the case. In European jurisdictions bound by the ‘Brussels Regulation’, the company cannot challenge the jurisdiction of the court in the country where it is domiciled.²³ In common law jurisdictions outside of Europe, the main procedural means of restricting the exercise of extraterritorial jurisdiction in cases against TNCs has been the principle of *forum non conveniens*: i.e. that there is a ‘more appropriate forum’ in which the ends of justice can be served than the courts of the country in which the TNC is domiciled.²⁴ Even in jurisdictions bound by the Brussels Regulation, matters become complicated when litigants seek to add a foreign subsidiary of a TNC to the case because the subsidiary may challenge the court’s jurisdiction to hear

the case against it. In these circumstances, if the parent company is willing to submit to the foreign jurisdiction then under English law, the victims would have to demonstrate not only that they have an arguable case against the parent and subsidiary company, but also that there is a substantial risk they would not have access to justice in the foreign jurisdiction.²⁵

Parent company liability: the consequence of the above is that jurisdiction in the courts where a company is domiciled often depends on establishing parent company liability in relation to the activities of an operating subsidiary. Central to the legal construction of the corporation is the idea of ‘limited liability’, which means that investors will not be held responsible for financial losses to the company beyond the sum invested, nor for the social harms produced by the corporation. The idea of separate legal personhood of the corporation makes the company a singular entity, a separate legal ‘person’ from persons who are shareholders.²⁶ Under the principle of separate corporate personality, companies are not legally liable for the actions of companies in which they invest as shareholders, or to which they franchise out operations. Parent companies often argue that they are not responsible for the actions of subsidiaries (known as the ‘corporate veil’). Lawyers in cases in the UK courts have attempted to get around this by focusing on the ‘direct negligence’ of the parent company in relations to functions for which it was responsible or over which it had control. This involves arguing that the parent company had a ‘duty of care’ towards individuals affected by its overseas operations (for example to workers employed by subsidiaries) and that the breach of this duty resulted in harm.²⁷

Which country’s law should apply?: European jurisdictions generally demand the application of the substantive law of the place the tort was committed. The extent to which this is an obstacle depends upon the nature of the law in question. For example, when human rights law is less stringent in the host country than the home country, application of the host state’s law could be argued to endorse ‘double standards’.²⁸ Nevertheless, it is often the case that equally stringent (or even more stringent) laws do exist in TNC’s countries of operation but that they are not enforced.²⁹ The more practical obstacle that can be generated by this requirement is the need for lawyers in

home and host countries to collaborate in the case, often at additional expense and across barriers of language and legal doctrine and culture.

Time limitation periods: Most legal actions are subject to time limitation periods for proceedings to be filed. The rationale is that plaintiffs should not 'sleep on their rights' and that courts are not agencies to judge history.³⁰ The question of which country's substantive law is applied can be very important when it comes to questions such as time limits for issuing tort claims. For example, the limitation period is three years under English law, compared with two years under the Peruvian Civil Code and ten years under the Colombian civil code (reduced from 20 years in 2002).³¹

Costs: Unlike criminal proceedings, tort litigation is conducted upon the premise that the plaintiff seeking redress must finance intervention through the courts. This is a structural problem for victims of corporate-backed human rights abuses who rarely have the funds for lengthy legal proceedings (tens, if not hundreds, of thousands of US dollars). Victims and their representatives normally have to raise the money to litigate. A great deal of evidence may be required in advance, just in order to establish that the court has jurisdiction over the matter, meaning that a huge amount of work is necessary prior to a case even being allowed to proceed.

Torres et al vs. BP et al

In 2012, proceedings were filed with the High Court in London on behalf of Gilberto Torres, a Colombian former trade unionist who had been kidnapped and tortured by paramilitaries in 2002 as a result of his activities as a trade union leader. In a trial in Colombia, the paramilitaries acknowledged that they had been contracted by BP's oil pipeline company OCENSA.

Torres' case illustrates many of the principal obstacles with tort litigation against TNCs.

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The problem of jurisdiction did not arise here, but it was a matter than had to be considered from the start. Like other TNCs, BP had set up various subsidiaries over which it had varying levels of shareholding and operational control, all of which had to be determined at the outset in order to establish parent company liability. The case was initially brought against a number of BP subsidiaries.

The case had to be taken under Colombian tort law, requiring extensive coordination and translation between British and Colombian lawyers. This difficulty was exacerbated by a lack of clarity in Colombian law over the correct limitation period: reduced from 20 years to 10 years the year that Torres was kidnapped.

Given that the matter concerned human rights violations (for which there is no time limit under criminal law), it might have been possible to argue to no limitation period should apply. However, the case confronted other obstacles.

The major problem was the need to establish 'attributability' – i.e. a seamless chain of causation between the paramilitaries who kidnapped Torres and the conduct of the defendant. It was insufficient that Torres was kidnapped in a van belonging to the pipeline company OCENSA, as was the testimony of paramilitaries saying that they had been paid by 'the company'.

It is possible that the case will be revisited if new evidence emerges in the course of transitional justice in Colombia (see below). However, even in this case, the above obstacles would still have to be confronted.

The case also faced the problem of costs, as Torres could not get legal aid in the UK. His case proceeded under a Conditional Fee Agreement (meaning that the client does not need to pay lawyers' fees until costs are recovered from the other party in the event of the case being successful). It was also partially funded by the Crowd Justice crowd-funding platform for public interest cases.

Pressure to settle the dispute: A further difficulty when litigation is being used to draw attention to the harmful conduct of corporations (a key concern of many victims' organisations and social movements) is that the court system encourages parties to settle early and privately to reduce costs and there are often penalties for not having settled earlier if the claimant ends up with a remedy inferior to what the defendant offered earlier. In addition, settlement often includes a non-disparagement clause, which means the victims can no longer speak out about – or campaign against – the defendant's conduct.

The US Alien Torts Statute

Until recently, the Alien Torts Statute (ATS) in the United States was considered the most promising mechanism for holding TNCs to account in the absence of a binding international human rights mechanism. The great advantage of ATS was that, unlike conventional tort law, it allowed claims for civil redress for human rights violations *per se* against corporations (whether as direct perpetrators or on the grounds of complicity with state perpetrators). In comparison, the use of conventional tort litigation for cases of human rights abuses has been widely regarded as diminishing the significance of the harm or alleged misconduct.

The reason that claims were admitted for human rights abuse *per se* was that ATS allows US courts 'to declare the valid human rights norms of international law and apply them to events that took place in other countries'. The ATS is a statute from 1789, originally intended to demonstrate US neutrality with regard to warring European countries. It gives US Federal Courts jurisdiction over any civil offence 'committed in violation of international law or a US treaty of the United States'.³³ During the first decade of this century, ATS became a popular vehicle for US-based public interest lawyers hoping to support victims of human rights abuses in which transnational corporations were implicated.

Use of ATS has had 'two major indirect positive effects: the "limelight effect", bringing publicity towards the issue of corporate accountability for human rights abuses, and the "leverage effect", improving the bargaining position of

victims and increasing the possibility of out of court settlements'.³⁴ However, an article from 2012 shows that none of the 60 cases in which defendants used ATS had a successful outcome in the court process itself.³⁵ Most cases filed against corporations under ATS came up against technical challenges that inhibited this possibility, as the case of *Sinaltrainal vs. Coca-Cola* illustrates:

Sinaltrainal vs. Coca-Cola

In 2001, lawyers acting on behalf of the Colombian Foodworkers' Union (Sinaltrainal) brought suit in the Southern Florida District Court under (*inter alia*) the Alien Torts Statute and the Torture Victims' Protection Act. The plaintiffs demanded relief and damages against the Coca-Cola Company, two Colombian bottlers, and named directors of those companies, alleging that their employers collaborated with paramilitaries to murder and torture union leaders.

In 2003, the Court partially accepted the Defendants' Joint Motion to Dismiss on the basis of lack of Subject Matter Jurisdiction. It allowed the case to proceed against the bottlers, but not against the Coca-Cola Company. At this point, the obstacle was Coca-Cola's 'corporate veil' argument that the Coca-Cola Company was not responsible for the actions of its bottlers, which operate under a franchise system.

In September 2006, the case against bottlers was also dismissed on the basis of lack of Subject Matter Jurisdiction because the plaintiffs had been unable to 'sufficiently plead a violation of the law of nations'. This is where we confront technical difficulties specific to ATS. Corporate liability for human rights violations is not a recognised norm of international law. So, for the matter to count as a violation of 'the law of nations' and be admissible under ATS, the plaintiffs were required to establish one of two things:

Either (a) that the acts of the paramilitaries constituted war crimes (an international crime that would have given the Court jurisdiction over private actors). The Court ruled that the plaintiffs had not satisfactorily pleaded that the acts of the paramilitaries constituted war crimes.

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Or (b) that responsibility for the paramilitaries' actions could be imputed to the Colombian state and thus count as violations of international human rights law. The court did not accept the argument of the victims' lawyers that the actions of the paramilitaries should be imputed to the Colombian state through what is known in US law as 'color of law' analysis – i.e. that abuses by paramilitaries in Colombia are carried out with the semblance of legality, given their well-documented, institutionalised links with official state forces.

Standards and timing of evidence: it was insufficient to demonstrate the links between the Colombian state and right-wing paramilitary groups in general, and then show the paramilitaries who had killed and threatened trade unionists had close relations with the bottling companies. The plaintiffs were also required to provide this evidence in advance, just to establish the Court's jurisdiction, creating enormous costs before litigants even know if the case can proceed.

Pressure to settle: The case also illustrates the wider problems with tort litigation generated by pressure to settle and the nature of remedy. The attempt at litigation was accompanied by a high-profile international campaign against Coca-Cola, which may have influenced the company's willingness to offer a substantial settlement even after the court ruled that the case could not proceed. The union eventually refused a substantial settlement from Coca-Cola because it included a non-disparagement clause that would have made them unable to speak of their allegations in future.

The issue of the jurisdiction of US Courts over allegations of human rights abuse by corporations under the ATS has become more complicated over recent years. Chances of using the Alien Torts Statute to hold corporations to account for human rights violations have been all but obliterated by a 2013 ruling of the US Supreme Court in the matter of *Koibel vs. Royal Dutch Petroleum Co.* that the ATS should not be applied extraterritorially at all, except where the defendant is a US national or their conduct substantially affects a US interest.³⁹

Kiobel vs. Royal Dutch Petroleum Co.

Plaintiffs filed suit under ATS, alleging that a subsidiary of Royal Dutch Petroleum Co. had enlisted the Nigerian military to repress protest.

In 2010, a two-judge majority of the US Second Circuit Court of Appeals ruled that the court did not have jurisdiction on the basis that 'corporate liability is not a discernible – much less universally recognised – norm of customary international law that we may apply pursuant to the [Alien Tort Statute].'

In 2012, the case was re-argued with the Court asking the parties to focus on whether or not the ATS applied extraterritorially. On April 17, 2013 the Court ruled unanimously against the plaintiffs.

The five justices in the majority opinion invoked the 'presumption against extraterritoriality', i.e. 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'.

The four justices who signed onto Justice Breyer's concurring opinion did not invoke the principle against extraterritoriality on the basis that such private actions are like piracy: they fall within the jurisdiction of the nation whose flag it flies. However, it was argued that the Alien Torts Statute was meant to address foreign affairs and that, if the tort did not occur on American soil, it at least had to affect an important US national interest (which includes preventing the US from becoming a safe harbour for perpetrators of serious human rights violations), or the defendant had to be an American national.

The ruling thus ended any extraterritorial litigation where there is no connection to the US.

The debate about the extra-territorial use of the ATS hinges upon the issue of whether or not lawyers can justify the extension of US law to seek remedies against corporations for human rights abuse elsewhere, given that existing international law does not provide for such remedies. Many lawyers and human rights activists responded with dismay to the *Kiobel* ruling on moral grounds, arguing that it would seriously limit the possibility of holding transnational corporations to account for human rights violations. However, many lawyers would concur that international law does not provide a basis for extraterritorial civil jurisdiction for even the most serious human rights violations committed by corporations. Hence, the ATS has been used as a mechanism for *applying a mixture of US and international law* to the most severe human rights violations, at best enforcing *unilaterally* decided norms internationally'.⁴¹

Extra-territorial litigation: concluding reflections

In response to the *Kiobel* ruling, it is often argued that 'there is a strong moral need to fill governance gaps in the field of corporate social responsibility'.⁴² There is a longstanding tradition in US law, going back to the eighteenth century that underpins the claim of US Courts to the global adjudicators.⁴³ The Nuremberg tribunal established the idea of an international legality capable of enforcement through US-style courts of law. After the Cold War, as neoliberalism became the global economic orthodoxy under the hegemony of the United States, the idea emerged that the national system of US courts might perform this function worldwide. Claims on behalf of Holocaust victims for events arising out of World War Two set the scene here, with plaintiffs' lawyers arguing that various procedural mechanisms of US courts made them the best forum for hearing these claims.⁴⁴ This was subsequently extended to include civil claims against transnational corporations for human rights violations.

Nevertheless, we need to exercise caution. US imperialism has long favoured legal domination. Today, indirect legal domination is imposed by means of the rhetoric of democracy, good governance and the 'rule of law', fuelled by the

old colonial myth that colonised countries ‘lack’ rule of law.⁴⁵ This calls into question the idea that corporate impunity is the product of ‘governance gaps’ can be filled by the benevolent action of US courts.

This does not mean that we should romanticise courts in countries of the Global South. Extra-territorial litigation may be vital, not only to drawing attention to the abuses in the country where a TNC is domiciled, but also because a legal claim in the country where the abuses took place may not be possible. Lack of funding for costs and lack of capacity to handle large cases is a particular obstacle in many jurisdictions of the Global South. In addition, as is the case in Colombia, persecution of lawyers and victims, corruption and the institutionalisation of impunity within the justice system create very significant risks. Companies often try to take advantage of this, arguing against extra-territorial jurisdiction in the hope that this will advantage them.⁴⁶

Nevertheless, the cases above illustrate the profound difficulties and power inequalities that victims encounter when they attempt to seek damages against corporations for human rights abuse extraterritorially. Extraterritorial litigation (even when unsuccessful) can draw attention to the immense harm caused by the operations of transnational corporations. However, law is a product of the unequal power relations that have shaped it over centuries. This includes legal categories such as ‘corporate person’, the definition of legal liability, human rights violation, war crime, tort, ‘duty of care’ and so on. The structure of the law can actually be a means of securing impunity for transnational corporations.

These power inequalities extend to the structuring of a justice system so that victims of limited resources have to fund litigation as an essentially ‘private’ dispute and come under pressure to settle privately and early. Even where settlements have been achieved, the structure of law means that these effectively become externalities that corporations have to pay so that they can continue business-as-usual.

3. New avenues: legal innovation and proposals for reform

A binding corporate human rights treaty?

In June 2014, the UN Human Rights Council adopted a resolution put forward by Ecuador and South Africa, and signed by Bolivia, Cuba and Venezuela, committing it to develop a legally binding human rights instrument for corporations. Social movements, who had been advocating for a legally binding instrument for decades, welcomed this as an important step towards addressing the ever-increasing asymmetry of power between transnational corporations, states, workers and communities. The resolution led to the creation of international coalitions like the Global Campaign to Dismantle Corporate Power, a network representing more than 200 movements, NGOs, trade unions, peasant organisations, indigenous peoples, and communities affected by the activities of TNCs.⁴⁷ Another network, the Treaty Alliance, which was co-established by the Global Campaign, is also mobilising groups at the national level and the European level to pressure governments to support the process.

The 2014 resolution was staunchly opposed by the US and the EU. Delegates from the Global South reported intense US lobbying in their capitals, which included the threat of a loss of US aid and investment if they voted in favour of the treaty. The EU also stated repeatedly that its member states would not only vote against the Ecuadorian and South African resolution but would also refuse to participate in the process of drafting the resolution.⁴⁸ On several occasions both the EU and the US have tried to stifle the process through

‘questionable manoeuvres’ based on procedural concerns.⁴⁹ More recently, a leaked document revealed the European Commission’s decision to pull out from the talks altogether.⁵⁰ Northern states and the corporate lobby have pushed for a “soft-touch” treaty, involving little more than non-financial reporting, despite mounting pressure for a strong treaty providing for civil and criminal remedies in both national and international courts.⁵¹

The Zero Draft of the treaty, published by the UN Intergovernmental Working Group in July 2018 has disappointed social movements and lawyers seeking to combat corporate impunity. The draft does not include provisions on social participation or a gender approach, or anything on the role of international financial institutions or international trade and investment agreements that have a real and direct impact on human rights violations committed by TNCs. Social movements have cried foul, as the current draft doesn’t consider key debates on these very subjects that were held during the first two sessions of the Intergovernmental Working Group meetings. Nor does it consider the Elements Paper presented by the chair of the Working Group, which brought together the multiple submissions presented by states, social movements and lawyers outlining critical content and provisions for a Binding Treaty.⁵² Social movements argue that the binding treaty is the beginning of a necessary process to guarantee human rights, and have vowed to continue pressuring their own governments to make sure they engage fully and in good-faith with the process. As the process enters a new phase of negotiation and consultation, they believe affected communities and workers must participate fully, as this is essential to ensure that whatever is included in the treaty guarantees their rights and effectively holds states and corporations accountable when those rights are violated.⁵³

There are some provisions of the Zero Draft which in theory have potential to lower the legal and procedural obstacles to judicial remedy that we discussed in Chapter Two. The draft builds critically on the ‘human rights due diligence’ principles of the existing (voluntary) UN Guiding Principles on Business and Human Rights, potentially extending and globalising the parent company duty of care principles currently provided for only under English law. As such, it indicates the possibility of civil liability for foreseeable harm arising

from due diligence failures by a transnational corporation in respect of operations over which it 'had control or was sufficiently closely related'. It is still necessary for victims to prove 'proximity' under a tort law duty of care, although the victim is relieved of the responsibility to establish that the parent company had a legal due diligence obligation.⁵⁴

Nevertheless, the draft does not deal substantively with the issue of costs or the inequalities in litigation. There is only vague provision for a victims' fund. What is more, one clause emphasises non-intervention in the domestic affairs of other states in a way that could be interpreted so as to discourage the establishment of extra-territorial jurisdiction.⁵⁵ Significantly, the Zero Draft avoids the direct corporate human rights obligations advocated, dealing only with the international obligations of states, which campaigners argue would limit the effectiveness of the mechanism and make it difficult to prosecute corporations.⁵⁶ It also avoids the move backed by some as a middle ground between direct human rights obligations for corporations: corporate criminal responsibility under international law.⁵⁷ The developments once again indicate the influence that the corporate lobby and powerful Northern states have on the development of international law.⁵⁸

In the remainder of this chapter, we consider other areas of innovation and proposals for reform which have been put forward by lawyers and victims' organisations. First, we address the issue of corporate criminal liability – including developments relating to prosecution of corporations for human rights abuse in some states. While campaigners on the Binding Treaty argue that it will not be possible to prosecute transnational corporations without binding obligations on them, there have been developments in specific jurisdictions in the absence of any binding obligation on corporations in international law.⁵⁹ We then go on to consider proposals for reform regarding the civil liability for corporations, including important proposals that go beyond moral ideas of 'due diligence' and 'duty of care' to link liability direct to the profit companies extract from a risky activity, and to the fact that the company created the risk.

Problems of Corporate Criminal Liability

In many jurisdictions, particularly those with a system of common law (such as England, and former British colonies, including the US, Canada, and Australia), the laws necessary for corporate criminal liability already exist. British NGO Traidcraft noted in a 2015 report that the problem is that the political will to enforce these norms is absent.⁶⁰

However, here too we must also consider how the law itself is structured by powerful interests. The legal form of the corporation – with its key aspects such as the profit mandate, separate corporate legal personhood, limited liability and indefinite lifespan – has been constructed so that decision makers within corporations need not consider the human costs of their actions.

Throughout the twentieth century, common law courts (such as the English and US courts) put forth the notion that a corporation could be responsible for a criminal act only if it can be shown that a senior member of the company had the requisite knowledge for the commission of the crime and requisite responsibility within the organisation to be considered to represent the ‘controlling mind’ of the company. This is known as corporate *mens rea* or the corporate state of mind.

The idea of *mens rea* emerged in English law during the eighteenth and nineteenth centuries (at the same time that the corporation was being constructed in law as a separate legal person), in the context of industrialisation and the mass migration of dispossessed rural populations forced into penury and often theft. In this context, as we discuss further below, ‘criminal law became chiefly interested in the psychological state of the *individual* – a psychological state of the ability to reason as to an act’s commission, rather not any form of motivation for the act... or any other concept that could have revealed the social content of a criminal act’.⁶¹ At the same time, ‘the notion of “collective” crimes generally, and those applying to partnerships and corporations particularly, were absented from the new economy of punishment’.⁶²

Combined with the legal fiction of the corporate as a separate person, this focus on the individual state of mind, gave rise to the idea of corporate *mens rea*, which evolved in the English courts and was replicated by other common law jurisdictions throughout the twentieth century. The result was what is known as the ‘identification doctrine’, which establishes that before declaring the responsibility/culpability of a corporation, it is necessary to identify a real person with the required degree of knowledge and sufficient command of the acts that caused the crime.⁶³ Very few cases have applied the identification doctrine in practice (three cases used it in the English courts in the 1940s and one in the 1960s). The problem is not just an absence of political will but problems with the form of law itself. It is very difficult to identify a single individual – particularly where cases of complicity with human rights abuses are alleged. Where corporate criminal liability is alleged, this tends not to be for crimes requiring intent (such as direct killing, defined in law as murder) but for crimes defined in terms of other mental states captured by *mens rea* (knowledge, recklessness or criminal negligence). Often in the case of corporate crime, acts are undertaken in the knowledge that harm is likely to occur, or the harm is the result of omission, or the result of decisions across a chain of action.⁶⁴ Thus, as Tombs and Whyte have argued, criminal law functions as a second *de facto* ‘corporate veil’ that shields directors and managers from liability.⁶⁵

Outside of the English-speaking world, the main form of legal system is civil law. The distinguishing feature of the civil law system is that its legal authority is organised into written codes (rather than being based on ‘legal precedent’ developed over time in court judgements). Traditionally, the criminal codes of civil law jurisdictions have not made provision for corporate criminal liability, but only for prosecution of individual corporate functionaries. Nevertheless, there have been reforms in this regard. In Italy, for instance, changes introduced from 2001 have introduced a particular form of administrative responsibility of legal persons, triggered when a functionary of that entity commits a criminal offence.⁶⁶ Italian law refrains from providing for a form of direct criminal liability of legal persons. Such a provision would have upset the constitutional principle according to which criminal liability is personal, in the sense that both no entity can answer for an offence perpetrated by someone else (*vicarious liability*) and the criminal offence must be psychologically

attributable to an individual (*mens rea*).⁶⁷ By contrast, the French Criminal Code attributes *criminal* liability to companies on whose behalf a crime has been committed.⁶⁸

In general, where these provisions have been used, this has not been for human rights abuse. Significantly, given our focus on innovation regarding corporate complicity in human rights abuse below, Argentina's Criminal Code was recently amended to include the *criminal* responsibility of legal entities. Again, this was part of a global initiative to fight corruption. The so-called 'anti-corruption law', Law 27.401, which entered into force on 1 March 2018, determines that private legal persons, whose capital can be owned by either national or foreign investors and whose shareholders can include the state, may be held directly criminally responsible for a number of criminal offences listed in its Article 1.⁶⁹ In order to hold the company responsible, the criminal offence must have been committed by a functionary of the company or even a third party, provided that the company ratified – even tacitly – the conduct, and that the criminal offence was committed with the intervention, or in the interest or for the benefit of the company itself.⁷⁰

Corporate criminal liability for human rights abuse was proposed at the Rome Conference on the International Criminal Court but eventually rejected. Likewise, as noted above, provision for corporate criminal liability has not been included in the Zero Draft of the binding treaty. Although, the idea of corporate criminal liability is moving towards wider acceptance in international law, innovations to date have remained focused upon the prosecution of individual functionaries. Key here have been legal innovations in Argentina, in the context of mechanisms to address large scale human rights violations that took place during the military dictatorship that was in power between 1976 and 1983.⁷¹

Transitional justice in Argentina

'Transitional justice' refers to measures implemented to address 'large-scale or systematic human rights violations so numerous or so serious that the

normal justice system will not be able to provide an adequate response'.⁷² The prosecution of representatives of corporations has been part of transitional justice processes since the Nuremberg trials. Bruno Tesch, owner of the largest supplier of Ziklon B, the gas used in the Nazi concentration camps, was sentenced to death in 1946. Forty more corporate executives were sentenced for their involvement in crimes such as slave labour, theft of Jewish goods and the commercialisation of weapons of extermination.⁷³ However, this was an example of 'victor's justice': complicit corporate representatives from the allied countries escaped prosecution.⁷⁴

The Argentinean transitional justice process has involved judicial and non-judicial mechanisms. Judicial mechanisms have included criminal prosecutions as well as amnesty laws. This has been a departure from other such processes in Latin America which have largely relied upon truth commission reports and amnesties.⁷⁵ In Argentina, non-judicial mechanisms included the first truth commission in the world, established immediately after the military dictatorship ended in 1983. The commission's report included a section on trade unionists, naming 11 companies involved in detentions and forced disappearances.⁷⁶ However, persistent activism by victims' organisations, alongside the opening generated by the Kirchner governments from 2003, led to further pioneering initiatives, including the Truth Commission on Economic Complicity (*Comision de la Verdad sobre Complicidad Económica*) established in 2015. The same year, the Ministry of Justice and Human Rights published a report in which 900 cases of corporate responsibility in human rights violations were documented. The report shows that corporations were involved in 354 cases of enforced disappearance and 65 assassinations. Along with local companies such as Ledesma and Dálmine, other transnational companies such as Mercedes, Ford and Fiat are also mentioned.⁷⁷

As a result, Argentina has more trials on corporate complicity in human rights abuses than any other country, with fourteen criminal trials and four civil investigations underway at the time of writing.⁷⁸ Representatives of nearly all the companies mentioned in the 2015 report now face proceedings. The majority of cases have been pursued by victims and their relatives before domestic courts.

The Ledesma Case

Ledesma Sociedad Anónima Agrícola Industrial (SAAI) is a large sugar-producing company in Argentina in the province of Ledesma, where it is one of the dominant actors in the political and economic life of the region. It currently has more than 40,000 hectares of sugar cane, as well as 2,000 hectares of citric fruits and has also expanded into the oil industry. In the 1970s, the company collaborated with the military in the persecution of trade unions and workers.

Between 1974 and 1976, many workers, students and other political militants in the area were kidnapped by the military. It has been difficult to calculate the exact number of victims, due the mass nature of the arrests. In July 1976 alone, when the repression reached its zenith, more than 200 people were arrested. Of all those arrested, 25 currently remain 'disappeared'. A key part of the allegations against the company centres on the company's economic and political control of the region, the fact that many of those arrested were trade unionists, and that it was clear that the military had a policy of crushing the trade union. Also, the company provided material aid to the military, investing in military companies and in the particular case of those who were kidnapped, it provided the vehicles used.

In 2012, a case was taken against Carlos Blaquier, the owner of the company and President of the Board, and Alberto Lemos the General Manager of the sugar plant. However, both of them were found not guilty. This was because the Federal Court of Cassation found that whilst it had been proven that they had provided the vehicles used in the kidnappings, it had not been proven that they were aware or had knowledge of the use to which the vehicles would be put.

This type of judgement highlights a problem faced in such cases: companies and their agents are able, through various mechanisms, to place a certain distance between themselves and the crimes, by alleging that they were unaware or by delegating direct operational control over events to others. In the Ledesma case, this even applied where one of the accused was also the owner and wielded immense political and economic power in the region and must have been aware of what was happening.

A potentially more significant case is that of Ford, where two senior employees were found to be 'Necessary Participants' in the illegal detention and mistreatment of workers i.e. the crime could not have proceeded without their cooperation.⁸¹ The case was taken against employees of the company, and not the company as such, even though there is ample evidence that their actions could not be limited to them as individuals.

The Ford Case

US multinational car manufacturer Ford has been accused of various crimes under Argentina's military dictatorship. The accusations centred on the General Pacheco Plant, which at the time employed around 7,500 workers. The 1970s were years of intense struggle against not only the policies and working conditions at the Ford company, but also against the economic policies being implemented at the time by the state, struggles in which Ford workers played their part.

As part of the repression unleashed against the workers and trade unionists, the police intelligence unit (DIPBA) installed itself in the Ford plant spying and monitoring the activities of activists. The police concentrated their efforts on union delegates, 24 of the victims at the Ford plant were union delegates. They were arrested and tortured at the company's own sports field. The company itself drew up a list of workers to be interrogated along with photos and handed it to the military. Many of those arrested were arrested within the plant.

continued

In December 2018, two functionaries of the Ford company in Argentina were found guilty for their role in the illegal detention and ill-treatment of prisoners. The two were Pedro Mueller, the former head of manufacturing at the plant, who was sentenced to 10 years in prison and Héctor Sibilla, the former head of security at the plant who was sentenced to 12 years. Alongside them, Santiago Riveros, a former military officer, was sentenced to 15 years for his part in the events. They were found to be Necessary Participants, i.e. the crime could not have proceeded without their cooperation. A similar legal figure was used in the trials of the military Juntas.

The creative legal arguments made for prosecuting corporate actors in the context of transitional justice in Argentina have been important in a number of respects:

- Reference has been made to the Nuremberg trials in order to argue that complicity constitutes criminal behaviour. The prosecution argued against companies such as Ledesma and Ford that the distinction between executor and accomplice was not necessary when crimes against humanity are investigated.
- These arguments are also based upon an extension of the notion of crime against humanity to include *any systematic practice related to the commission of a crime against humanity*. This allows prosecutors to bring cases against private actors whose illegal behaviour would otherwise not fall within the category of a crime against humanity in itself.

A team at the University of Oxford has identified four prosecution models against corporate functionaries on the basis of the Argentine experience:

- Direct participation (e.g. managers' involvement in disappearances or torture).
- Blending labour law, domestic law and international human rights law to bring proceedings before labour courts alleging companies' breach of their duty to protect workers.

- Trials against banks that financed the military regime, using the argument that these loans were crucial for abuses of human rights and that the banks knew the money was going to be used for this purpose.
- Companies' participation in the transactions that permitted the illegal acquisitions of property that belonged to the victims of the dictatorial regime.⁸⁴

Transitional justice and corporate complicity in Colombia

At the Oslo launch of the peace process between the Colombian state and FARC guerrilla, the government's chief negotiator famously retorted to the FARC commander Iván Márquez, that the economic model would not be touched. 'Peace' in Colombia has largely served to consolidate and legitimate a neoliberal model imposed through armed violence.⁸⁵ The publication of a draft justice accord in 2016 did generate initial concern in the business community that some of them might actually face imprisonment. However, the then president Santos immediately sought to reassure them, stating in a speech given to the Colombian Oil Producers Association some months before the final agreement was signed that

... if there is a sector that will benefit from this peace agreement it is this one... allow me to briefly explain why you are the ones that should be most interested in this, and what it is about and why the only thing it does to you, is benefit you. For you and any businessperson in the country... we designed a very clear road map, with red lines, with certain conditions. And we were not going to cross those red lines. We were not going to negotiate our economic model ... We weren't even going to allow it to be discussed... If you carefully read the agreements we have reached you will realise there is not a single point, a comma that negatively affects you, not one... That is what we have set up, a Tribunal that is not going after the businesspeople, as some are saying. What it is, is that if a company, yesterday or a few years ago, paid an extortion to a guerrilla or paramilitary group, then is the Tribunal

going to go after that company or functionaries. No. That witch hunt, which some are saying the Tribunal is going to set up, is not going to happen here.⁸⁶

The actual peace agreement allows those who have made payments to armed groups to make the defence that they were ‘coerced’. Santos, in his declaration on justice for civilians (including businesspeople) alleged to have committed crimes related to the armed conflict, stated quite clearly that this was a means for businesspeople to avoid punishment.⁸⁷

The limits on pursuing companies and businesspeople through the Special Jurisdiction for Peace (JEP) were further restricted by Colombia’s Constitutional Court, which decided in August 2018 that this fell under the remit of the Prosecutor’s Office in the Ordinary Justice System. Following that decision, the Chief Prosecutor’s Office decided to issue charges against 13 former directors of Chiquita for financing illegal armed groups – a case that had until then languished in its archives since 2007.⁸⁸ The case had not previously been pursued, despite the fact that Chiquita Brands admitted in a US Securities and Exchange Commission investigation to having paid 1.7 million dollars to state-linked paramilitaries in the Urabá region of Colombia between 1997 and 2004, as well as to supplying paramilitaries with weapons.⁸⁹ What is more, although there are foreign nationals amongst the accused, all of the accused operated in Colombia at the time and no directors of the parent company have been accused, even though some of them played a key role in the process.⁹⁰

Although the JEP deals with the area in which Chiquita operated, covering a time span from January 1st 1986 to December 1st 2016, the JEP investigation focuses exclusively on the actions of the FARC guerrilla and state forces, with no mention made of Chiquita. Likewise, despite the fact that palm oil companies were also involved in major human rights abuses over that period, which have been well-documented, the only reference made to palm oil is that it is one of the economic activities of the region.⁹¹ According to the JEP’s own website, those who can appear before it are; demobilised members of the FARC; members of the armed forces of the state who have been

charged with or committed crimes related to the armed conflict; people implicated in crimes committed in the context of social protests; and lastly third parties, who are defined as agents of the state who were not members of the armed forces and those civilians who have been charged with or have committed crimes related to the armed conflict. The appearance of 'third parties' before the court is entirely voluntary: they cannot be subpoenaed to appear. The result is no company or business person is likely to appear before the JEP.⁹²

Under an earlier transitional justice mechanism, the 2005 Justice and Peace Law, which dealt with the 'demobilisation' of Colombia's state-backed paramilitaries, numerous paramilitaries in the Spontaneous Declarations who were part of the process, named numerous TNCs and national companies having links with paramilitary groups. There has only been one prosecution as a result of those declarations, and that is the case of Urapalma S.A.⁹³

Urapalma SA: a landmark case in Colombia

In October 2014, 16 businesspeople from nine different local oil palm companies were convicted by a court in Medellin, after being found guilty of having links with an illegal armed group and of forced displacement, a human rights violation according to Colombian law. The businessmen were proven to have links with paramilitaries who had displaced Afro-Colombian communities of Curvaradó and Jiguamiandó in the resource-rich region of Chocó. The Curvaradó and Jiguamiandó were collective territories that the communities had inhabited for a long time and whose right to the land was recognised by the Colombian state in 2000 (under Law 70 of 1993, which acknowledged the territorial rights of Black Communities for the first time). However, the companies' lawyers had used various strategies to obtain legal titles to use the territory, while paramilitaries provided 'security' to businesspeople. By 2005, oil palm companies owned half of the territories.

continued

The communities had struggled for their livelihoods and territorial rights for nearly a decade. They began by returning to their territories with the support of local NGOs, such as Commission Intereclesial de Justicia y Paz (CIJP). At some point, they cut palm oil trees as a symbolic act of protest. In order to put pressure on the Colombian government, Urupalma's victims had used international networks of activism (for instance the black caucus from the US) and the Inter-American System of Human Rights. These actions represent a strategic use of the "governance gap", which occurs when victims consider that 'all judicial and non-judicial channels' available in their country are blocked and therefore it restoring to transnational networks and international justice bodies becomes necessary. The Inter-American Commission of Human Rights granted precautionary measures to the communities after visiting the area. The case moved to the Inter-American Court of Human Rights, which in 2003 granted provisional measures asking the Colombian state to investigate the abuses against the communities, guarantee the restitution of the territories and guarantee the recognition of the concept of humanitarian refugee zones.

The judicial decision from Medellín sentenced 16 businesspeople. The sanctions included ten-year prison sentences, a fine of 270,000 USD and compensations of 20 million Colombian pesos to each member of the community who suffered displacement. The court also ordered the restitution of the collective territories to the Afro-Colombian communities of Curvaradó and Jiguamiandó in the resource-rich region of Chocó.

As things currently stand, there is little hope of the JEP being a vehicle for justice and truth in relation to corporate crime, as has also been the case with similar processes in other parts of the world, such as Guatemala and South Africa. The exception of Argentina indicates the extent to which the possibility of prosecuting corporate actors is a matter of political will and political mobilisation. The political opening generated by a left-of-centre government, alongside persistent campaigning by victims' organisations three

decades after the end of the military dictatorship, were the context in which these cases were brought. Compare this to the situation in Colombia, where lawyers and social movements confront a right-wing government and an ongoing dirty war.

Nevertheless, even in this context, legal innovation is possible. Although Colombia's Criminal Code only provides for liability of individuals, a draft anti-corruption Bill which deals with corporate criminal responsibility is to be put to the Colombian Congress in the course of 2019. The Colombian Bill emulates legislative solutions adopted in other civil law countries, mentioned above. Its stated aim is to 'set out measures to promote administrative probity, provide for the criminal responsibility of legal persons, combat and punish various forms of corruption and impunity'.⁹⁷

Chapter V of the Colombian draft Bill provides for the direct criminal liability of legal persons. In particular, Paragraph 2 of Article 100A, which the Bill seeks to introduce in the Criminal Code, establishes that this form of criminal liability should be determined in accordance with the general principles of criminal law and adapting these to the specific purpose of the draft Bill. The psychological attributability of the criminal conduct (*mens rea*) to the legal person is replaced by a form of *vicarious liability*, according to which the legal person would be held responsible when the crime has been perpetrated *in its interest or for its benefit* by one of its employees.⁹⁸ The Bill provides for the suspension or cancellation of the legal personhood of companies and for confiscation of the assets of a legal person in cases of criminal responsibility.

Another notable feature of the Colombian draft Bill is that it limits the scope of corporate criminal liability to a restricted catalogue of offences, namely those against the public administration, the environment, the social and economic order, and the crimes of financing terrorism and organised crime, as well as managing resources related to terrorist or organised crime activities, and more generally all criminal offences that are detrimental to the public purse. This legislative technique, which restricts criminal liability to only certain crimes, has been transplanted from legal systems such as the US

or Italy, where there exist lists of offences that can be attributed to corporations.⁹⁹ Significantly, the list provided by the Colombian draft Bill appears to be particularly narrow and geared towards protecting quintessentially public state interests. In contrast, for example, Italian Legislative Decree No. 231 provides for a much wider list, including offences against the person and, thanks to more recent amendments, several offences against the environment. Given the explicit purpose of the Colombian draft Bill to fight corruption, and the possible watering down of its scope during the legislative process, it is unlikely that it might become a valuable tool to counter unlawful corporate practices in Colombia.

The provision of criminal liability for corporations found to have financed terrorism or other criminal organisations or to have managed resources related to activities carried out by such actors might offer some avenues for accountability, but Santos' words in relation to the prospect of accountability for corporations, within the transitional justice framework, appear to weaken such possibility. Indeed, even within the Italian legal system, legal proceedings under Legislative Decree No. 231/2001 against corporate giants such as ENI S.p.a. and Royal Dutch Shell PLC have been brought only for offences against the public administration even where there are allegations of serious environmental offences perpetrated by both companies.¹⁰⁰

In sum, while the Colombian draft Bill appears to constitute a step in the direction of holding companies accountable for offences committed in their interest or for their benefit by their employees, it remains to be seen whether it will withstand parliamentary scrutiny or if it will be substantially weakened in this process. Furthermore, considering that the express purpose of the law is to fight corruption, the chances that it will be used to tackle corporate human rights or environmental abuses are slim and will depend on how public prosecutors will use it.

Civil liability of corporations: proposals for reform

There are also proposals for reform of the criteria for the civil liability of corporations, designed to mitigate the accountability gap created by separate corporate personhood and limited liability.¹⁰¹

A number of proposals focus upon the parent company's control over the activities of a subsidiary, either as a result of having a controlling stake in its operations or because of the *de facto* control the parent company has over the subsidiary as a result of its stake. This line of argument shields minority shareholders from liability. It has also included proposals that the burden of proof should be on the parent company to show that it did not exercise such control (which would alleviate the burden on claimants to demonstrate control early in proceedings, but risk then giving control of the narrative to the company before proceedings reach a stage where this evidence can be put to a rigorous test). Alternatively, it has been argued that a common-law duty to exercise 'due diligence' over the human rights impact of subsidiaries' operations should be attached to parent companies on the basis of their control. In France in 2017, the first legislation along these lines entered into force. This establishes a duty on large French companies to produce a transparent plan for vigilance over all human rights implications and other risks of serious harm within their supply chains and – crucially – to implement this plan effectively. Another line of argument, which has been applied by the Indian courts, is that, where legal persons are under common control, they constitute one enterprise.¹⁰²

The trouble with control-based approaches is that they serve, in effect, to 'impose an artificial moralism on an entity that is pre-ordained to obey only economic motives'.¹⁰³ As Paul Dowling argues on the basis of his professional experience acting for victims, the likely effect of this is that it will encourage corporations to further decentralise their activities and/or to carefully construct an image of decentralisation, to avoid liabilities.¹⁰⁴ The problems do not stop here. As Lara Montesinos Coleman points out, the very idea of the

ethical corporation plays into a colonial ideology whereby transnational corporations are represented as well-meaning actors who make mistakes. This obscures the systemic violence of extractivism. Worse still, the flip side of this narrative is that the sources of violence are predominantly ‘local’ (i.e. with the host country and local populations), represented as being in need of civilising interventions through corporate-backed efforts to promote ‘peace’ or ‘civil society’. These representations can have deadly effects by actively legitimising the armed repression of local populations mobilising for alternatives.¹⁰⁵

There are, however, alternative proposals for reform which avoid imposing a false moralism on corporations. These centre on the idea that liability should be based, not upon control (with its associated concepts of ‘due diligence’ and ‘duty of care’), but on the profit or benefit derived from risky activities. These proposals draw upon a theory derived from French jurisprudence, which connects civil liability to performance of a risky activity (without the need to demonstrate fault). Some jurisdictions have developed this into the theory that anyone benefitting from a risky activity must compensate the resultant harm. This, in turn, has been extended to the theory that anyone who created the risk would be liable for the harm, regardless of profit. Liability here does not rely upon a moral concept of fault but is what is called ‘strict liability’. Simply creating the risk through investment is sufficient.¹⁰⁶

Argentina is a pioneering example of the application of profit-risk/created risk theories. Article 1113 of Argentina’s civil code states that ‘the obligation of the person who caused harm extends to the harm caused by his dependents or by those things from which he benefits have been used, or which he has in his care’. This has been used to impose liability on a shareholder on the basis that its investment was part of a ‘strategic union of companies’ designed to further the company’s profit.¹⁰⁷

The benefit of profit-risk/created risk theory compared with control-based approaches is that it does not impose a false moralism on corporations through the concepts of fault or duty of care. In addition, the evidential burden for claimants is reduced by the fact that such an approach does not require the factual investigation into the shareholder’s investment required to

demonstrate control. The concept of created risk also shields minority passive investors on the basis that they did not create the risk and they do not extract enough profit to provide a basis for liability on its own.¹⁰⁸

New avenues: concluding reflections

Despite the obstacles generated by corporate legal personhood, limited liability and the doctrine of identification (corporate *mens rea*), developments in legal theory and practice have expanded the avenues through which criminal prosecution of corporate wrongdoing take place. Particularly significant are innovations in Argentina expanding the definition of crime against humanity to include any systematic practice related to the commission of such crimes, as well as the shifts in corporate criminal law in civil law jurisdictions to include the vicarious liability of corporations for crimes committed on their behalf. In addition, while it is an important step to prosecute company directors for crimes against humanity, it is vital that this moves beyond transitional justice scenarios and that crimes occurring in the context of 'normal' capitalism are prosecuted.

The proposals for reform of the criteria for attributing civil liability to corporations are also significant. The focus on control and the extension of the duty to exercise due diligence in the Zero Draft of the binding treaty represent potentially helpful developments, consistent with the general direction of travel towards imposing greater duties on corporations to exercise due diligence over subsidiaries. These developments have potentially transformative consequences to the extent that the duty cuts across legal personalities and can help eliminate the corporate veil. However, given the systematic harm generated by extractivist capitalism, the problems associated with imposing a false moralism on an entity designed purely for the pursuit of profit should not be understated. It is also vital that sanctions upon corporations are sufficient to deter abuses.

Proposals for the strict liability of corporations under profit-risk/created risk theories provide a possible alternative. Another potential benefit of the

application of profit-risk theory is that, by linking liability for harm to profit, there is scope for arguing that the level of damages payable should be linked to the level of profit. This would mitigate against one of the problems raised in Chapter Two: that, in the context of vastly unequal economic resources, any damages payable to victims are mere externalities for which corporations have to account and are insufficiently substantial to deter harmful activity. The idea that corporate personhood can be cancelled where a company is found guilty of a crime is also significant, as it represents a risk that could not simply be externalised in corporate cost-benefit calculations, nor does it lend itself to the scapegoating of individual personnel.

4. Beyond the letter of the law

Law is not an unproblematic means of addressing harm, particularly systemic forms of harm generated within the everyday operations of corporations. As noted in the introduction, legal frameworks for seeking corporate accountability are rarely able to grasp victims' understandings of the social and environmental harm perpetrated by extractivism. Nor can legal provision for justice capture what social movements would consider 'justice', which might include a reversal of social and environmental harm, full and public acceptance of liability for that harm, and an alternative economic model able to respect both people and the planet.¹⁰⁹

Some organisations – such as Colombian environmental NGO CENSAT Agua Vida, who were involved in the drafting of this book – have avoided litigation precisely because law is part of the social power relations generating systematic human and environmental harm.¹¹⁰ Law is, after all, what enables extractivism and consequent damage to human and non-human life. Only after rights are violated, and often when 'users' of the legal system pay for legal proceedings, are human, social and environmental rights vindicated. In this scenario, 'the perpetrators of plunder are guaranteed by "reactive institutions" (such as courts)', which cannot carry out any affirmative action.¹¹¹ There is a risk that legal accountability-seeking – including the emergence of international definitions of corporate crime – will strengthen the existing economic system, rather than undermining it.¹¹² Compensation to victims is an externality that can easily fit into corporate cost-benefit analyses and dominant legal narratives tend to treat corporate complicity in human rights and other abuses as the exception rather than the norm.

On the other hand, many social movements are critical of the law and the power relations underpinning it, but do engage in ‘strategic litigation’. They use legal activism, not just to achieve remedy or protect legally-defined rights, but in the context of struggles for alternatives to capitalism/neoliberalism/neo-colonialism. To this end, they often seek to navigate between two extremes: employing existing legal and political concepts and rejecting a human rights or law-based approach outright. As we have seen in relation to Argentina, legal categories can be stretched and extended to accommodate moral and social concerns. At the same time, even when litigation is unsuccessful, the exposure it generates can be an important deterrent to ongoing abuse. What is more, given that the existing economic model has been made possible through law, law-based struggles and legal innovation are, arguably, vital to the pursuit of alternatives.

In order to think in more depth about how and when law can be used strategically in the struggles of social movements, it is necessary to consider two problematic aspects of dominant legal narratives: (1) how harm and responsibility are defined and (2) how we think about justice.

Harm and responsibility

From the perspective of many social movements, dominant legal narratives offer a very limited understanding of harm and fail to address the violence of capitalism and colonialism. At the heart of modern legal theory is a very culturally specific idea of the human agent that emerged in Europe in the seventeenth and eighteenth centuries: the idea that humans are individuals with free will and the capacity for mastery over themselves and their property, who make self-interested choices, and can be held accountable and punishable for that choice.¹¹³ The exercise of defining the nature of human beings in this way was inseparable from justifications for colonialism (made on the basis that indigenous peoples did not quite fit into the category of ‘human’ so could be subjugated by force or – at the very least – needed the colonisers’ guiding hand to ‘civilise’ them). It was also part and parcel of the rationalisation of capitalism and essential to the maintenance of a capitalist society.

Human rights discourse is an important part of today's territorial struggles of indigenous communities challenging extractive projects that jeopardise their livelihoods and worldviews. However, mainstream understandings of the 'human' subject do not capture the historical experience and struggles of colonised peoples. The "human" in the human rights theory developed in the modern era is a sovereign individual who can use nature at their disposal. As a result, practices such as land dispossession and associated depredations against nature are not fully questioned. For most indigenous communities, nature is not something to be possessed nor something external to the human. Indigenous understandings of humanity's relationship to the land, which also has spiritual connotations, is not fully valued when it comes to legal interpretation and rights adjudication. This limits the ability of human rights mechanisms to respond to the struggles of indigenous peoples, as the example of the Wayuu indigenous people's struggle against the Cerrejon open-cast coal mine shows.

The Cerrejon mine

Cerrejon is an open-cast coal mine in the North of Colombia. Over the past decade, the ecological impacts of the mine, forced relocation of the population and the resultant scarcity of water and food has caused the deaths of at least 4,770 Wayuu children from malnutrition, while the British, Australian and Swiss companies who own the mine made skyrocketing profits – almost two billion dollars in 2014 alone. In 2015, the Inter-American Human Rights Commission ordered precautionary measures to protect Wayuu children and adolescents, ruling that the Colombian state must put in place strategies to ensure access to adequate food and drinking water in areas affected by Cerrejon. Following the ruling, however, the deaths have continued. In part, this reflects systematic difficulties with the enforcement of progressive judicial decisions. However, these difficulties are themselves inseparable from how harm is recognised in dominant legal narratives.

continued

From the perspective of the Wayuu's struggle, however, this recognition of their humanity was violent in its own way – largely as a result of the limited conceptualisation of harm. The ruling did not engage with the plaintiffs' complaint that the Ranchería river, which had been diverted and dammed to provide water for use by the mine and agribusiness, had been privatised when it was meant to be an asset for public use. It was unable to contend with the particular harm for the Wayuu people of the deaths of mothers, whose deaths have an important meaning within their matrilineal cosmology. Nor could it challenge the idea of 'natural resources' as commodities available for extraction and large-scale commercialisation. For indigenous peoples of the Americas, the land is a living being, to be respected and protected. Land itself is a Mother, not a thing to be appropriated as a commodity. Land is not to be defended as mere property but as part of life itself.

The question of indigenous rights under ILO Convention 169 has often been held up as a tool to fight multinationals in terms of stopping them appropriating land in the first place. However, the provision for 'Prior Consultation' of indigenous communities is a contested term. For example, it has always been the Colombian government's contention that the Convention did not give the indigenous or black communities a veto over any project. The result is that Prior Consultation has been used to rubber stamp decisions rather than challenge them. The obligation to Prior Consultation is also problematic in the sense that it is reduced to indigenous and recognised black communities and does not apply to peasant farmer or other communities, where many of the crimes committed by multinationals also occur.

We should also bear in mind that the concept of the human as rational, sovereign subject ruling over nature was developed, not only in the context of modern colonialism but – concurrently – in the context of the transition to capitalism.¹¹⁶ Many non-indigenous movements, environmental, feminist and queer activists, philosophers and natural scientists now also contest the colonial understanding of 'Man' in the context of climate change and large-scale

ecological destruction, and indigenous struggles have inspired numerous other struggles to protect land and nature.¹¹⁷

There are innovative developments in law – including human rights law – that seek to bring this critique into the legal field. For instance, the People’s Permanent Tribunal Colombia Session deployed indigenous thought alongside existing international law to link crimes against humanity and crimes against nature.¹¹⁸ Although it is an alternative justice mechanism unable to enforce its judgements, ‘international law is an incomplete project and raises concerns about the fact that judicial bodies such as the International Criminal Court do not include within their jurisdiction economic crimes perpetrated by complex networks including transnational corporations and states’.¹¹⁹

Within some jurisdictions, laws have been brought into force, which do recognise the rights of nature. In Ecuador and Bolivia, for example, nature in its broad sense is granted legal rights by the constitution or specific pieces of legislation.¹²⁰ However, such legislative guarantees are not clearly enforceable because no specific authority or actor is empowered to act on behalf and in the interest of nature. In contrast, more recently, novel approaches have been implemented in Australia, New Zealand and India, where either through legislation or case law, specific environmental elements, namely rivers, have been granted legal personhood. Such arrangements also provide for the empowerment of specific quasi-corporate actors or governing bodies acting on behalf and in the interest of rivers. For example, in New Zealand, the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, passed in March 2017 following several years of negotiations between the Whanganui Iwi indigenous community and the Crown, grants legal personhood to the Whanganui River and establishes a peculiar governing entity composed of two members, one appointed by the Crown and the other by the Whanganui Iwi. This body is entrusted with representing the well-being and health of the river, which is recognised as a legal entity endowed with rights, duties and liabilities as much as a legal person.¹²¹ In Colombia itself, the Constitutional Court has granted rights to the Atrato River, which is severely contaminated due to illegal gold mining. The decision resulted from a litigation process advanced by the Colombian lawyers’ group *Tierra Digna* in Collaboration with

Foro Interétnico Solidaridad Chocó and different Afro-Colombian Community Councils located in the river basin. In a landmark verdict reached in November 2016, but only announced in May 2017, Colombia's Constitutional Court has recognised the Atrato River basin as having rights to protection, conservation, maintenance and restoration. The decision aims to offer protection to the Atrato River and guarantee the fundamental rights of the communities that inhabit its banks from a new perspective called "biocultural rights". Under this new paradigm, the court has reasoned that the most effective way to protect ethnic communities' rights is through biodiversity conservation and ecosystem restoration on the Atrato River.¹²²

The question of who is responsible or liable for harm is inseparable from the question of how harm is understood. Human rights violations are – like other criminal acts – defined as acts for which individuals are responsible. It is a well-worn claim that a consequence of capitalism is widespread, predictable and often entirely *legal* premature death. Such deaths are the result of factors such as poverty, disease, and a lack of access to safe water, food and shelter. These factors, in turn, are products of the largely avoidable production of unequal life chances via existing socio-economic and political systems. In 1845, Friedrich Engels described this phenomenon as 'social murder': that is, when individuals are placed

in such a position that they inevitably meet a too early and an unnatural death...when it deprives thousands of the necessaries of life, places them under conditions in which they cannot live – forces them, through the strong arm of the law, to remain in such conditions until that death ensues which is the inevitable consequence – knows that these thousands of victims must perish, and yet permits these conditions to remain.

Such deaths, Engels laments, are not considered murder because there is no single murderer, the deaths seem natural, and the crime is one of omission – the failure to act – rather than commission. Particularly within common law jurisdictions, modern criminal law has been designed precisely in order to exclude the harm caused by capitalism from being a form of injury that can be legally recognised and redressed.¹²³ The harmful effects of privatisation and

property are protected by the law. For instance, after the English Enclosure Acts that drove peasants from public land in the 1800s, many landless and destitute people resorted to theft to survive. Defendants charged with theft would often try to justify their actions through their abject poverty. Sometimes, defendants would even claim in open court that the true crime was not the theft to which they stood accused; rather it was the unequal distribution of wealth in society. Were such claims permissible, an act of theft could be justified as part of, rather than a crime against, the public interest. In this context, a systematic exercise of legal reform was undertaken, reaffirming the legitimacy of the suffering produced by enclosure and by hanging the thieves for the injury that *they* caused to ‘the common good’ (defined in terms of private property and ‘free’ market relations between individuals).

The focus on individual responsibility in law is the product of a long lineage of legal thinking designed to prevent the attribution of responsibility for human suffering that results from lawful behaviour. Innovation derived from vicarious liability, as we note in Chapter Three, is one of the few means through which this irresponsibility can be challenged. In the absence of such avenues, however, capitalism’s damage is not an injury (in-juria, injustice) because it is not illegal.

This line of argument was central to liberal reformers of public law in the eighteenth century, who argued that, as long as the individual is *compos mentis*, crime is a choice. Based on the argument that the essence of humanity is to make self-interested choices based upon rational calculation of pros and cons, the law reformers argued that an individual committing an offence would have considered the benefits of the crime to outweigh the likelihood of punishment.¹²⁴ A person can be considered responsible when, ‘an infraction has been committed...the author knows the rules, and ... he is in control of his acts to the point of having been able to have acted differently’.¹²⁵ The crime is neatly reduced to an infraction committed (*actus reus*) and an agent in control while both knowing the rules and able to act differently (*mens rea*). Yet the assertion that the actor is ‘able to act differently’ conceals both the social and historical constituents of the thief’s motives.¹²⁶ The reformers claimed that even abject poverty, for which we might otherwise be sympathetic, must not be an excuse for destroying the ‘interests and bonds of society’.¹²⁷

The flip side of this is widespread impunity for what would otherwise be crimes of the powerful. What if those so-called ‘interests and bonds of society’ (private property and free market relations) are complicit in constituting the circumstances in which some are driven into destitution and forced to steal to survive. By choosing to act within the law – the powerful subject can claim to bear no responsibility for the suffering inflicted. This problem came to the fore in public inquiries into allegations of institutional police racism and alleged deception by the British government in making the case for the 2003 invasion of Iraq. In both cases, the initial inquiry was accused of whitewash because it focused upon the intentions of actors involved and was therefore unable to hold any individual to account. In both cases, these complaints led to the appointment of a second inquiry that explained the phenomenon through *unintended* consequences. These inquiries then alluded to institutionalised and normalised cultures of behaviour that directly lead to harm, but for which no individuals can be held liable. Legal individualism makes it difficult to understand the complicity of powerful actors in systemic forms of harm, because it excludes an account of power relations and the endemic ways of thinking and acting that inform our agency.¹²⁸

The individualistic focus of modern law thus serves to exclude crimes perpetrated by complex networks and power structures including transnational corporations and states. This makes it very difficult to hold anyone to account for the harm generated by a socio-economic model in which corporations can operate almost unhindered in pursuit of profit. The same problem underlies the principle of corporate *mens rea* and the doctrine that a culpable individual must be found for a corporation to be held liable for a crime. Extending liability to a responsible corporate ‘person’ by means of this doctrine does not solve the problem. Indeed, it risks reinforcing existing economic power structures by contributing to the ideology of the corporation ‘emptied of individuals’ – further facilitating the relative risk-free accumulation of capital by the protected owners of the means of production.¹²⁹

Despite these barriers, recent innovations in legal theory and practice have provided avenues through which the suffering produced by corporate

wrongdoing can be addressed. The first of these has already been discussed in Chapter Three: in some civil law jurisdictions, the need to find *mens rea* can be disregarded, and instead responsibility for suffering can be located through vicarious liability. The second possibility is to argue that *mens rea* does exist where persons foresaw the death or serious harm of ‘social murder’ as a ‘virtually certain outcome’ of their actions. This second line of enquiry has been explored by Alan Norrie in relation to the deaths resulting from the fire at Grenfell Tower in London in 2017 in which 72 people died as a result of alleged failures by state actors to address a lack of fire safety precautions despite complaints from residents.¹³⁰ Norrie argues it is theoretically possible that such deaths could be considered by a jury to be crimes of murder, within the confines of common law.¹³¹ Within the UK, actors can be culpable for murder in cases where injuries were suffered, those injuries were intended and death resulted from those injuries. This raises two questions. The first question is whether actors, such as politicians or corporations could, through omission, be said to have intended to cause injury? Certainly, omission *can* lead to criminal liability if the actor can be said to be under an obligation to act.

Secondly, with regard to intent, Norrie suggests that an actor could be culpable without the prosecution having to show that she directly intended serious injury to follow her acts. It could be sufficient to show that ‘A foresaw death or serious injury as a virtual certainty of his or her acts or omissions’ such that ‘while it was never her purpose to kill, she had knowledge that death or serious injury would occur, such that one could say she foresaw it as virtually certain to happen.’¹³² This is a matter of judging the actor’s vantage point. Norrie gives the example of a reckless driver who, if asked, would consider that she is unlikely to harm anyone because she has behaved in the same way for months or years with no incident. However, suppose that the driver is stopped by an experienced police officer with knowledge of the long-term systemic effects of reckless driving. Suppose the officer advises the driver that, unless she changes her reckless behaviour, she will eventually injure someone. If the driver were to continue to drive recklessly having been warned, the driver is in a different normative position whereby she could be said to have foreseen that injury would be a virtual certainty.

Once this risk is brought to the attention of the actor, we can expect a different standard of behaviour.

What is the relevance of this to corporate wrongs? A state or corporate actor could be liable for wrongs, such as injury or death. This could be possible: if it can be shown that a state or corporate actor has, through acting or omission where there was an obligation to act, caused inquiry; if through their acts or omissions, they are complicit in a defective system wherein the risk of harm to individuals is a virtual certainty, even if the risk to specific individuals remains low and “even if it is not possible to say precisely to whom, where and when something will happen”; and if the actor is warned by knowledgeable parties of that systemic risk.

Norrie also suggests another route to the finding of murder in cases, which might even make it possible to disregard the criterion of virtual certainty. This is the flexibility given to juries in practice, which enables them to refuse to apply the virtual certainty rule in cases where the defendant had good motives (even though the defendant is technically guilty, the jury turns a blind eye). Norrie suggests that this flexibility could also be applied in the other direction: if the defendant ought to have foreseen the likelihood of death or serious injury *and*

if it were to be found there had been a reckless disregard for human life... if a flagrant danger was found to have been set loose in the world through decision-making that was judged callous as to the value of human life; if a meretricious motive of putting costcutting above lives was considered to have been at play; and if all this were put together with the analysis of system risk... then there could be a question as to whether the law of murder ought to reflect deaths that occur in such conditions.¹³³

The individualistic form of law developed in the context of modern capitalism is also at the heart of private law (law which deals with relations between individuals, rather than public law, which deals with relations between individuals and states). The Russian legal theorist Evgeny Paskukanis famously

argued that private law most fundamentally embodied the core function of law as the form of social regulation required to deal with disputes between formally equal individuals engaged in capitalist relations of exchange.¹³⁴ The legal fiction of the sovereign, formally-equal individual, each pursuing their own interests – informs not just legal theory and interpretation but the material power relations at play in the process of litigation.

We saw in Chapter Two how, in tort litigation, the victim seeking remedy must confront the corporate ‘person’ as an equal party, each side defending their own interests and – in principle – responsible for paying their own costs. The very form of law thus generates immense material obstacles for victims, who cannot match the financial resources of companies, while enabling companies to engage in cost-benefit analyses in which legal fees and compensation to victims are just further financial costs for which they need to account.¹³⁵ The proposals for reform discussed in Chapter Three could mitigate this to some extent. Control-based theories give some recognition to the unequal power relations involved. Proposals based on profit-risk/created risk theories go further in that they avoid treating corporations as potentially ‘moral’ individuals, focusing upon the benefit derived from investment in an activity that risks causing harm and arguing that companies are ‘strictly liable’ for such harm (whether or not fault was involved).

However, we also need to keep in mind that the legal category of strict liability is not neutral or innocent. As David Whyte points out, strict liability was developed in the context of the English Factory Acts in the nineteenth century, in order to normalise certain crimes against workers as a separate category of offence for which corporate persons can be held liable and fines imposed, without the need to find *mens rea*.¹³⁶ Unless the level of damages for which corporate actors are liable are made proportional to the profit derived from the risky activity, it is difficult to see how – even with the application of profit-risk/created risk theories – liability for damages would not continue to be merely one more potential cost for which companies need to account within the otherwise unhindered accumulation of profit.

The definition of 'justice'

Social movements often point out that a common error of lawyers is to equate 'justice' with success in litigation. Given the limitations to how law understands harm and liability, it is of little surprise that there are problems with legal definitions of justice.

At the November 2017 workshop in Bogota at which the first draft of this book was discussed, participants emphasised in particular that justice should not be thought of in terms of financial remedy for the individual victim. The Colombian NGO COSPACC – set up by peasant leaders displaced from the region around BP's oilfields, where over 12,000 people have been killed or disappeared since BP began its oil explorations in the 1990s – has been working with War on Want and UK law firm Deighton Pierce Glynn to shape an alternative model of justice. In addition to working on Gilberto Torres' case (above), the Oil Justice Project aims to 'develop a new and unique community-led model to obtain justice for the entire community, not just compensation for a minority'. This includes community-led research and evidence gathering on cases of human rights violation, as well as work to empower communities to also help develop proposals to change law and policy.¹³⁷ There can be no 'justice' without changes to unjust laws that allow harm to continue.

Social movements also talk about the idea of 'integral reparation'. From this perspective, reparation of the sort made possible by existing legal frameworks can never truly constitute justice, although it can help victims rebuild their lives. Full reparation would imply a reversal of the neoliberal reforms and the human and environmental damage caused by extractivism. This was a problem confronted by the Colombian Foodworkers' union, Sinaltrainal, in their litigation against Coca-Cola. While they were waiting for a decision on whether or not their lawsuit could proceed in the US, the union held three 'People's Public Hearings' – in Bogotá, Atlanta and Geneva. At the final hearing, participants agreed a series of demands that went far beyond what was possible through the courts. These included Coca-Cola

publicly acknowledging its responsibility for human rights violations, handing over plant managers to the Colombian justice system, full reparation for the damage caused (including through labour casualisation), observation of ILO conventions, Colombian labour law and the collective conventions agreed with the union and even a reversal of neoliberal reforms.¹³⁸

Mainstream theories of justice and conflict transformation generally accept that truth is an aspect of justice: victims need to have *recognition* of what has happened to them and some form of *reparation*. Public interest lawyers likewise tend to highlight that even litigation that is unsuccessful in the courts can have an important ‘limelight effect’: calling attention to the abuses that have been committed. However, we need to consider how the truth is narrated. What harm exactly is recognised? The need to unmask the reality of contemporary capitalism is a recurrent theme of social movements in Colombia who have been involved in human rights litigation against transnational corporations. When they took their case against Coca-Cola et al under ATS, the Colombian Foodworkers’ Union likewise emphasised that the case was a tool of ‘denuncia’ (which in Spanish both connotes making a complaint and making visible the matter for complaint): it was aimed at ‘exposing the empire behind the multinationals’. The process of litigation, which is focused on resolving a dispute between two formally equal parties, ultimately works against this by considering historical harm to be settled once an agreement is reached.

Conclusion: strategic use of law

A recurrent theme in discussions with activists and lawyers in Bogota in 2017 and at the Thematic Social Forum on Mining and Extractivism in 2018, is one of the failings of much litigation to date has been its distance from social movements in affected regions. If litigation is to be used *strategically* in the context of struggles for social and environmental justice, then those seeking to support victims and the social movements of which they are part need to focus on the wider aims of these struggles.

- Although many social movements are sceptical about what can be achieved through litigation, using law to hold corporations to account can further the aims of those seeking an alternative economic model. In immediate terms, human rights cases can put pressure on corporations and states so that the abuses against activists and communities cease.
- The threat of future prosecution is a powerful disincentive to would-be perpetrators of human rights abuse. The development of robust corporate criminal law would require piercing the corporate veil created by limited liability and the doctrine of identification, so that there are real material costs for the boards and shareholders of corporations – such as imprisonment of boards of directors or cancelling the legal personhood of companies.

There is also need to maintain a long term focus on stopping the harm from occurring, as part of a struggle for broader, social justice. Cases need to be linked into campaigns and social movements as part of a struggle against the dominant economic model. However, there is no escaping the fact that dominant legal narratives serve to reinforce and legitimise much of the harm generated by this existing economic model. This means that lawyers and campaigners need to give thought to how they tell the story of corporate human rights abuse. Colombian participants in this project emphasised the following:

- One challenge for human rights activists is to articulate a dialogue between the dominant language of human rights and the epistemic and political claims of historically marginalised peoples of the world. At stake is the recognition of other sites of knowledge production that can help us to understand the global structural dynamics of violence in the contemporary world. This includes approaching law, through another epistemology, according to which we are part of nature, and we need to talk about the rights of nature.
- Harm needs to be rethought, not as an act of free will but as a phenomenon with historical and structural roots. This would require a challenge to the modern or colonial ideology of individual, responsible, autonomous subject

and a greater focus upon the social structures and histories shaping actions and the field of possibility within which actions take place. The temporal nature of injury needs to be broadened. What might it mean to consider crime not as act committed in a momentary event but ever-present possibility with historical roots and conditions of possibility? Ultimately, this means work to reshape law itself. However, campaigners can still be attentive to this by narrating the harm that has occurred in language that raises awareness about its historical and structural origins.

- Recognition, as an aspect of justice, needs to involve unmasking the reality of what is happening. This goes beyond the mainstream understanding of recognition that human rights violations have occurred. It is only the social movement that is able to reconstruct the story and recover historical memory of what has taken place. Campaigners and lawyers from outside can help by being attentive to the narratives of social movements, instead of using the dominant language of human rights.
- Alongside interventions in the international sphere, there is also a role for alternative justice mechanisms, such as the Peoples' Permanent Tribunal, in unmasking the systematic harm being committed – and passing judgement upon the economic model and the laws – from the perspective of different understandings the world. However, this needs to go beyond propagandistic pronouncements and should be accompanied by a pedagogy that can help build conscious and deepen collective thought in both North and South.
- The state must not be forgotten. States must also be held to account for their responsibility for crimes against humanity and complicity with corporations – including through legislation that enables systematic harm to occur.
- Alongside litigation over specific cases it is also necessary to challenge the international legal order constructed by and for the corporate elite. There are two aspects to this. Alongside concrete challenges and campaigning on specific aspects of law, it is important that lawyers and campaigners think about how they talk about law. In the conduct of litigation and wider

campaigning activities, it is important to undermine the colonial narrative that countries where extractive industries operate ‘lack’ rule of law and to actively highlight the structuring of a global legal order that enables widespread harm. It is important not to romanticise ‘rule of law’ as the opposite of impunity.

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Research 'impact' in a UK context is normally thought of in linear terms, whereby academics produce research and then develop a strategy whereby the finished product can impact the thinking of policymakers or wider publics.

This project has conceptualised impact in a different way. From the start, our analysis was the product of years of involvement in the struggles of social movements in Colombia and many of the questions we raise here emerged from discussions around the Peoples Permanent Tribunal (PPT) Colombia Session on Transnational Corporations and Crimes Against Humanity between 2006 and 2008.¹³⁹ *Righting Corporate Wrongs* has drawn upon authors' academic work in legal, political and social theory that was already shaping discussions taking place within social movements in Colombia, taking this back to those social movements for critique and debate. It has sought to use this process as a forum for collective learning within and between social movements and, crucially, as a vehicle through which lawyers, campaigners and policymakers in the Global North can learn from critical legal and political thought developed through engagement with struggles in the Global South.

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16 Mattei and Nader, *Plunder*, p.47

17 For a critique, see Coleman, 'Rights in a State of Exception', pp. 10-13.

18 See Mattei and Nader, *Plunder*, p. 140.

19 R. Wheyler, 'Chevron's Amazon Chernobyl Case Moves to Canada', *Deep Green*, 9 September 2017. Available at: <https://intercontinentalcry.org/chevrons-amazon-chernobyl-case-moves-canada/>

20 Chevron Press Release, 1 Feb 2011.

21 R. Meeran, 'Tort Litigation Against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States', *City University Hong Kong Law Review* 3:1 (2011) p. 3. In many jurisdictions, it is not possible to obtain civil redress for human rights violations per se directly against corporations. This depends to some extent on the governing law. For instance, the constitutions of Colombia and South Africa are 'horizontally' applicable meaning that corporations can be held liable for breaches of fundamental constitutional rights including the possibility of compensation awards. Thanks to Paul Dowling for this clarification.

22 For a more in-depth, conceptual discussion of these issues, see D.J. Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States*. Cambridge: Cambridge University Press, 2014, Chapter 3.

23 The Recast Brussels Regulation for defendants domiciled within the EU, Article 4.1 states that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

24 Meeran, 'Tort litigation against multinational corporations', p.11.

25 This was established in a April 2019 ruling of the Supreme Court For discussion see Leigh Day Legal Briefing, '*Lungowe & Others v Vedanta Resources Plc & KCM: Parent Company Liability Clarified*', 10 April 2019 <https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Zambia/Supreme-Court-final-brief-Zambia.pdf>

26 Tombs and Whyte, *The Corporate Criminal*, pp. 83-4.

27 *Ibid.*, p. 4. Under English law, whether or not a duty arises is dependent on a three-stage test: (a) was the harm foreseeable; (b) was there sufficient proximity between the parties; and (c) is it fair, just and reasonable to impose a duty of care?

28 Tombs and Whyte, *The Corporate Criminal*, p. 14ff.

29 For a discussion in relation to Colombia and the UK, see Coleman, 'Global Social Fascism'.

30 Mattei and Nader, *Plunder*, p.156.

31 Peruvian Civil Code 1984 art 2011(4); Colombian Civil Code art 41. (Law 153 stipulates 20 years, which was reduced to 10 years under Law 791 in 2002). Limitation periods are treated as matters of substantive law in the UK pursuant to the Foreign Limitation Periods Act 1984. Where the host country's

limitation period is shorter, it is possible to argue by virtue of the Foreign Limitation Periods Act 1984 that a foreign limitation period should be disregarded on the basis that it would cause 'undue hardship' or be 'contrary to public policy'. English Foreign Limitation Periods Act 1984 s 2(2); Meeran, 'Tort litigation against multinational corporations', p. 16.

32 The discussion of Torres case draws on Coleman and Rojas-Páez's own involvement in discussions around the case, conversations with Gilberto Torres and his lawyers in Colombia and the UK, and P. Parisi and G. Sims, 'Hindrances to Access to a Remedy in Business-Related Cases in Colombia: The Case of Gilberto Torres' (draft book chapter 2018).

33 R. Shamir, 'Between Self-Regulation and the Alien Torts Claim Act: On the Contested Concept of Corporate Responsibility', *Law and Society Review* 38:4 (2004): pp. 638-9. After barely being used for two centuries, it came to life in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980), in which the court held that alleged torture of Paraguayan citizen by Paraguayan official violated the "law of nations", which was directly incorporated into US federal law in accordance with article III of the US Constitution.

34 B. Thomson, 'Was *Kiobel* Detrimental to Corporate Social Responsibility? Applying Lessons Learnt from American Exceptionalism', *Utrecht Journal of International and European Law* 82 (2014).

35 M. J. Kelly, Prosecuting corporations for Genocide under International Law, *Harvard Law and Policy Review* 6:2 (2012): 339-367

36 See *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (*Sinaltrainal I*).

37 *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006) (*Sinaltrainal II*).

38 Conversations with Sinaltrainal leaders, 2006-2014.

39 Thomson, 'Was *Kiobel* Detrimental to Corporate Social Responsibility?', p. 84

40 *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), quoted in William S. Dodge, 'Understanding the Presumption Against Extraterritoriality', in *Berkeley Journal of International Law* 16:1 (1998), p. 85.

41 Thompson, 'Was *Kiobel* Detrimental to Corporate Social Responsibility', p. 85 (emphasis ours).

42 *Ibid.*, p. 92.

43 The US Constitution of 1787 reflects the natural law beliefs that dominated eighteenth century jurisprudence, according to which international law is understood not just as rules established by treaty but as the customary protection of 'natural' individual rights. Article III of the US Constitution has thus been interpreted to include international law claims based upon custom as the province of the federal judiciary. Congress further extended jurisdiction to US federal courts through the passage of a variety of statutes including the 1789 Alien Torts Statute.

44 Mattei and Nader, *Plunder*, p. 158.

45 *Ibid.* p.141.

46 For discussion of companies that have tried to do this, see P. Dowling, 'Limited Liability and Separate Corporate Personality in Multinational Corporate Groups: Conceptual Flaws, Accountability Gaps and the Case of Profit-Risk Liability', in L.F.H. Enneking (ed), *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains*. London and New York: Routledge, forthcoming.

47 The Global Campaign to Dismantle Corporate Power, Website, <https://www.stopcorporateimpunity.org/>

- 48** N. Mardirossian, 'US and EU Oppose Stronger Regulation of Corporations at HRC Despite Compatibility with Guiding Principles', UN Office in Geneva, 2014, republished by Network for Justice in Global Investment, 22 June 2014. Available at: <https://justinvestment.org/2014/06/us-eu-oppose-stronger-regulation-of-corporations-at-hrc-despite-compatibility-with-guiding-principles/>
- 49** War on Want, 22 December 2017, 'Attempt at Sabotage in New York: the European Union aims to Eliminate the Financing of the United Nations Intergovernmental Working Group Entrusted with Drafting a Legally Binding Treaty on TNCs and Human Rights', <https://waronwant.org/media/binding-treaty-statement>
- 50** C. Gueugneau, 'Human Rights and Multinationals: Europe is dragging its feet at the UN', 8 March 2019, <https://www.mediapart.fr/journal/international/080319/droits-humains-et-multinationales-l-europe-traine-les-pieds-l-onu>
- 51** M. Shahan and R. Subasinghe, 'Towards a Binding Treaty on Transnational Corporations and Other Business Enterprises', *Equal Times*, 17 March 2017. Available at: https://www.equaltimes.org/towards-a-binding-treaty-on?lang=en#.WqqJ_GZ0dZ2
- 52** United Nations Human Rights Office of the High Commissioner, 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights', 29 September, 2017, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf
- 53** The Global Campaign to Dismantle Corporate Power, 'UN Binding Treaty: Written Contribution Of The Global Campaign', February 2019, <https://www.stopcorporateimpunity.org/un-binding-treaty-written-contribution-of-the-global-campaign-march-2019/>
- 54** See R. Meeran, 'The "Zero Draft": Access to judicial remedy for victims of multinationals' ("MNCs") abuse', Business and Human Rights Resource Centre blog article <https://www.business-humanrights.org/en/the-%E2%80%9Czero-draft%E2%80%9D-access-to-judicial-remedy-for-victims-of-multinationals%E2%80%99-%E2%80%9Cmncs%E2%80%9D-abuse>
- 55** *Ibid.*
- 56** The Global Campaign to Dismantle Corporate Power, 'UN Binding Treaty: Written Contribution of The Global Campaign', p. 2.
- 57** D. Stoitchkova, 'Towards Corporate Liability in International Criminal Law' (Intersentia, 2010); N. Bernaz 'Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty Necessary but Insufficient', Business & Human Rights Resource Centre, available at <http://business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-rights-treaty-necessary-but-insufficient>
- 58** For discussion in relation to the ICC, see T. Krever, 'Dispensing Global Justice', in *New Left Review* 85 (2014), pp. 67-97.
- 59** The Global Campaign to Dismantle Corporate Power, 'UN Binding Treaty: Written Contribution Of The Global Campaign', p. 2.
- 60** Traidcraft, 'Two-thirds of British Business Leaders Agree', Press Release, 27 November 2015, available at <http://www.traidcraft.co.uk/campaign-blog-entry/two-thirds-of-british-business-leaders-agree-with-us>
- 61** Tombs and Whyte, *The Corporate Criminal* pp.80-1.
- 62** *Ibid.*, p. 82.
- 63** *Ibid.*, p.90.

64 Ibid, pp. 87-88.

65 Ibid, p. 91.

66 Legislative Decree No. 231 of 8 June 2001 and several successive amendments

67 Giovanni Fiandaca & Enzo Musco, *Diritto Penale. Parte Generale* (5th edn; Zanichelli Editore 2007) 160. More generally, and not limited to the Italian context, see Cristina de Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4(3) *Washington University Global Studies Law Review* 547, 548.

68 See Art 121-2 of the French Criminal Code, which states that 'Les personnes morales, à l'exclusion de l'Etat, sont responsables pénalement, selon les distinctions des articles 121-4 à 121-7, des infractions commises, pour leur compte [on their behalf], par leurs organes ou représentants' (emphasis added).

69 *Ley 27.401 de Responsabilidad Penal de las Personas Jurídicas*, also known as "Ley anticorrupción".

70 See also María del Sol Muñoz, 'Enfoque práctico de la nueva ley 27.401 de Responsabilidad Penal de las Personas Jurídicas' (2018) 14.411 *Diario de Doctrina y Jurisprudencia* 1.

71 Other transitional justice processes in Latin America differ widely from the Argentinean one, due to the fact that they only rely on the implementation of Truth Commission reports. The Guatemalan and Brazilian TJ processes, truth commission reports recorded important testimonies on the participation of corporations in gross human rights violations without accountability. In the Guatemalan genocide, 45 companies collaborated with the military regime and, in Brasil, 123 companies were involved in crimes such as kidnapping or enforced disappearances during the longest dictatorship in Latin America from 1964 to 1985. See J. van de Sandt and M. Moore (eds), *Peace, Everyone's Business! Corporate Accountability in Transitional Justice: Lessons for Colombia*. Utrecht: Pax, 2016.

72 Normally, this takes place in the context of a declared 'transition' from 'conflict and repression', to 'peace' or 'democracy'. However, the International Center on Transitional Justice insist that 'transitional justice' can be applied whenever an opportunity arises to address large scale human rights abuse.

73 L. Payne and G. Pereira "Corporate complicity in International human rights violations", *Annual Review of Law and Social Science*, 12 (2016), pp. 63-84

74 D. Zolo. *Victor's Justice: from Nuremberg to Baghdad*. London, Verso, 2009 General Motors built war tanks; IBM had a strong link with the Nazi regime and through their German subsidiary company Dehomag developed a sophisticated system to identify victims taken to the concentration camps. ITT (International, Telephone, Telegraph – initially) played a significant role in the management of Nazi telecommunications and the production of aircrafts for Hitler.

75 The Guatemalan and Brazilian TJ processes, truth commission reports recorded important testimonies on the participation of corporations in gross human rights violations without accountability. In the Guatemalan genocide 45 companies collaborated with the military regime and in Brasil 123 companies involved in crimes such as kidnapping or enforced disappearances during the longest dictatorship in Latin America from 1964 to 1985 See J. van de Sandt and M. Moore (eds), *Peace, Everyone's Business! Corporate Accountability in Transitional Justice: Lessons for Colombia*. Utrecht: Pax, 2016.

76 Ibid, p. 68.

77 Ibid, p. 69.

78 Ibid., p. 70.

79 See, M. Roble, & C. Vanin, *Responsabilidad empresarial en delitos de lesa humanidad: Represión a trabajadores durante el terrorismo de Estado* Tomo I, Infojus, Argentina, 2015.

- 80** See <http://www.cels.org.ar/especiales/empresas-y-dictadura/>
- 81** CELS 'Causa Ford: Condenas de 10, 12 y 15 años' <https://www.cels.org.ar/web/2018/12/causa-ford-condenas-de-10-12-y-15-anos/>
- 82** See Roble & Vanin, *Responsabilidad empresarial en delitos de lesa humanidad* pp 457-489
- 83** CELS, 'Causa Ford'
- 84** Van de Sandt and Moor (eds.), 'Peace: Everyone's Business', pp. 46-50.
- 85** See L. M. Coleman, 'Colombia: The Violence of the Peace', in *Alborada Magazine*, August 2017. <https://alborada.net/the-violence-of-the-peace/>
- 86** Speech to the congress of the Asociación Colombiana del Petroleo October 2015 cited in Sinaltrainal et al (2016) *Ambiguo y decepcionante acuerdo – itinerario para la impunidad de crímenes de Estado – Bogotá* p.23 <http://www.rebellion.org/docs/208980.pdf>
- 87** "...I want to be very clear at this point in time; civilians are above all, victims and we are not going to revictimise them, some were obliged to cooperate materially or economically with illegal armed groups... let's be very clear, those who cooperated or paid extortion under threat are victims and their behavior will not be subject to hearings by the special jurisdiction for peace... listen carefully: this is a justice system for the guilty, and not for any reason, for the innocent". Declaración sobre las bases para justicia para civiles cited in Sinaltrainal et al (2016) *Op.Cit* p. 26). It should be noted in response that, while people can be coerced into cooperating with or supporting an armed group, the coercion and duress argument cannot reasonably be applied to TNCs. A local small transport company could be forced to transport members of an armed group under pain of execution. They live in the region. The head of a TNC suffers no such immediacy in the case of threats. Even were we to accept that the support given was involuntary and it was the armed group that sought support from the TNC and not the other way around, the TNC makes a cost – benefit analysis weighing up payments against profit margins and potential disruption of their activities against profits.
- 88** See FGN (31/08/2018) Fiscalía dictó resolución de acusación contra exdirectivos de Chiquita Brands por presuntos nexos con grupos de autodefensas.
- 89** S. Brodzinsky 'Terrorism and Bananas in Colombia' in *Time Magazine*, 2 September 2007. D. Kovalik 'Lawyer for Chiquita in Colombia Death Squad Case May Be Next US Attorney General' in *The Huffington Post*, 6 November 2008.
- 90** As Michael Evans points out in his review of the evidence against the 13 named individuals who worked in Colombia as part of the work of the investigative journalism NGO National Security Archive, these 13 individuals 'all worked *in Colombia* for Chiquita's Colombian subsidiaries and related enterprises. None of the US- or Costa-Rica-based officials involved in the payments are named in the case. It would appear that for jurisdictional reasons the prosecutor's office is focusing only on crimes committed in Colombia by Chiquita's Colombia-based staff'. However, Evans goes on to note that '[t]he list of US-based executives not named in the indictment but who played key roles in developing, implementing and overseeing policies on making "sensitive payments" during that period includes John Ordman, Senior Vice President for European Banana Sourcing, Robert Kistingner, President of the Chiquita Fresh Group, Robert Thomas, Chiquita's senior counsel, William Tsacalis, the chief accounting officer, and Wilfred "Bud" White, Vice President of Internal Audit'. M. Evans. 'The Chiquita 13: Profiles of Banana Officials Accused of Crimes Against Humanity'. 21 December 2018 <https://nsarchive.gwu.edu/briefing-book/colombia-chiquita-papers/2018-12-21/chiquita-13-profiles-banana-officials-accused-crimes-against-humanity>

91 See Auto No. 040 de 2018, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas <https://www.jep.gov.co/Sala-de-Prensa/Documents/Intervenciones%20de%20la%20JEP%20ante%20la%20Corte%20Constitucional%20-%20SEP2018/auto%20040%20de%202018.pdf>

92 See <https://www.jep.gov.co/Infografas/queeslajep.pdf>

93 Surprisingly the case advanced due to the insistence of the paramilitary leader, rather than as a result any businessperson voluntarily coming forward.

94 Juzgado Quinto Penal del Circuito Especializado de Medellín. Sentencia 054 Rad. No. 05001 31 07 005 2011 01799 de 30 de octubre de 2014.

95 Resolutions 2809 & 2801 November 22nd, 2000, Instituto Colombiano de la Reforma Agraria.

96 Defensoría del Pueblo (2005) , Res 39 on Curvarado y Jiguamando , Siembra de Palma Africana

97 See Art. 1 <https://docs.google.com/viewerng/viewer?url=http://leyes.senado.gov.co/proyectos/images/documentos/Textos+Radicados/proyectos+de+ley/2018+-+2019/PL+117-18+Anticorrupcion.pdf>

98 This solution is akin to the culpability criterium adopted by the Italian legislation and, most importantly, the French Criminal Code, which, as noted above, attributes *criminal* liability to companies on this basis.

99 There are three ways in which the typology of offences that can be attributed to a corporation can be identified. First, by squarely equating natural and legal persons, which implies that legal persons can be held liable for the same offences as natural persons; second, by reference to the explicit wording of the definition of each criminal offence, thus avoiding a general rule; third, by providing for a list of criminal offences that can be perpetrated by legal persons, thereby legislating separately.

100 See the ongoing litigation before the Tribunal of Milan, Procura della Repubblica press oil Tribunale Ordinario di Milano, *Avviso di conclusione delle indagini preliminari ex Art. 415-bis c.p.p.* (Proc. No. 54772/13 R.G.N.R.)<https://shellandenitrial.org/wp-content/uploads/2018/09/notifica-conclusioni-indagini-Opl245-22.12.2016.pdf> .For allegations of environmental crimes perpetrated by Shell and ENI, see Amnesty International Italia, *Nigeria: scoperte gravi negligenze da parte di Shell ed Eni* (16 marzo 2018) <https://www.amnesty.it/nigeria-scoperte-gravi-negligenze-parte-shell-ed-eni/>.

101 For in-depth analysis of these see Dowling, 'Limited Liability and Separate Corporate Personality in Multinational Corporate Groups'.

102 Ibid.

103 Ibid.

104 Ibid.

105 See Coleman, 'Rights in a State of Exception', p. 893.

106 'Strict liability' means that liability can only be avoided if the claimant was exclusively at fault or on the basis of an extraordinary event or circumstance beyond the defendant's control (*force majeure*). See Dowling, 'Limited Liability and Separate Corporate Personality in Multinational Corporate Groups'.

107 Ibid.

108 Ibid.

109 For discussion in relation to alternative conceptions of justice and crime put forward at the Peoples Permanent Tribunal Colombia Session on Transnational Corporations and Crimes Against Humanity, see Coleman, 'Struggles, Over Rights', pp. 1070-1072; Rojas-Páez, 'Understanding Environmental Harm and Justice Claims in the Global South', pp. 77-80.

- 110** Representatives of CENSAT Agua Vida, comments in a workshop, Bogota, October 2017.
- 111** Mattei and Nader, *Plunder*, p. 139.
- 112** For an example of this argument, see Baars, 'Capital, Corporate Citizenship and Legitimacy'.
- 113** N. Lacey, 'Responsibility and modernity in criminal law', *Journal of Political Philosophy*, 9;3 (2001);, pp.249-276.
- 114** Resolution 60/15. Precautionary measures according to the IACHR "serve two functions related to the protection of fundamental rights recognized in the provisions of the inter-American system. They serve a 'precautionary' function in the sense that they preserve a legal situation brought to the Commission's attention by way of cases or petitions; they also serve a 'protective' function in the sense of preserving the exercise of human rights. In practice, the protective function is exercised in order to avoid irreparable harm to the life and personal integrity of the beneficiary as a subject of the international law of human rights. Precautionary measures have, therefore, been ordered for a wide array of situations unrelated to any case pending with the inter-American human rights system" (<http://www.oas.org/en/iachr/decisions/about-precautionary.asp>).
- 115** The discussion in this case study is drawn from Rojas-Páez, 'Understanding environmental harm and justice claims in the Global South'.
- 116** See inter alia. S. Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation*. Brooklyn NY: Autonomedia, 2004; Chapter 3; J. Suárez-Krabbe, *Race, Rights and Rebels: Alternatives to Human Rights and Development from the Global South*, London and New York: Rowman and Littlefield International, 2015, Chapter 6.
- 117** The literature in this area is extensive but, for an important discussion bringing indigenous thought and contemporary philosophy of science into dialogue, see Doerthe Rosenow, *(Un)Making Environmental Activism.: Beyond Modern/Colonial Binaries in the GMO Controversy*. London and New York: Routledge, 2017.
- 118** Coleman, 'Struggles, Over Rights', p. 1071; Rojas-Páez, 'Understanding Environmental Harm and Justice Claims in the Global South', pp. 77-80.
- 119** Rojas-Páez, 'Understanding environmental harm and justice claims in the Global South', p. 81.
- 120** The Constitution of the Republic of Ecuador 2008 grants constitutional protection to the nature ('naturaleza o Pacha Mama') at Articles 71-74; in Bolivia, Law 071 of the Rights of Mother Earth (*Ley de Derechos de la Madre Tierra*) grants a broad catalogue of rights to nature.
- 121** See Erin L O'Donnell and Julia Talbot-Jones, 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India' (2018) 23(1) *Ecology and Society* 7, 10.
- 122** Colombian Constitutional Court, Ruling T622/ 2016.
- 123** For in-depth discussion of the origins and contradictions of modern criminal law, see A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*. Cambridge: Cambridge University Press, 2014, chapter 3. See also S. Veitch, *Law and Irresponsibility: On the legitimation of human suffering*. London and New York: Routledge, 2007.
- 124** Norrie, 'Crime, Reason and History', p. 23
- 125** P. Ricoeur, *The Just*. Chicago: University of Chicago Press, 2003 p. 24
- 126** One of the firm rules of legal doctrine is that motive is irrelevant to responsibility qua criminal culpability. The idea of the free, rational individual responsible agent rejects from the outset any possibility that identity and rationality could come from outside the individual in the social realm and ignores the motives that explain why someone acted in a particular way. The exclusion of motive ensures that some behaviours in response to the forces of capitalism – such as the act of theft – become injuries

in legal terms because they can be rendered the free choice to breach a law. Norrie, 'Crime, Reason and History', p. 44. See also the discussion of damage without injury in Veitch, 'Law and Irresponsibility', pp. 85-92

127 Hume cited in Norrie, 'Crime, Reason and History', p. 44

128 O. Thomas, 'Blind to Complicity? Official Truth and the Hidden Role of Methods', in M. Neu, R. Dunford and A. Axfentiou (eds.), *Exploring Complicity: Concept, Cases and Critique*. London and New York: Rowman and Littlefield International, 2016.

129 G. Baars, 'Capital Corporate Citizenship and Legitimacy'.

130 On 14th June 2017, seventy-one people were killed when a fire broke out in a public housing block in North Kensington, London. Prior to the fire, the block had been covered in a cheap, flammable cladding. Resident had complained repeatedly about the use of hazardous materials in the block, violations of fire safety regulations, such as blocked fire escapes and an absence of fire extinguisher. Due to cuts in legal aid, residents were unable to avoid legal advice.

131 A. Norrie, "Legal and social murder: what's the difference", *Criminal Law Review* 7 (2018), pp.531-542.

132 *Ibid.*, p.532

133 *Ibid.*, p.540

134 E. Paskukanis, *Law and Capitalism: A General Theory*. London: Ink Links, 1978.

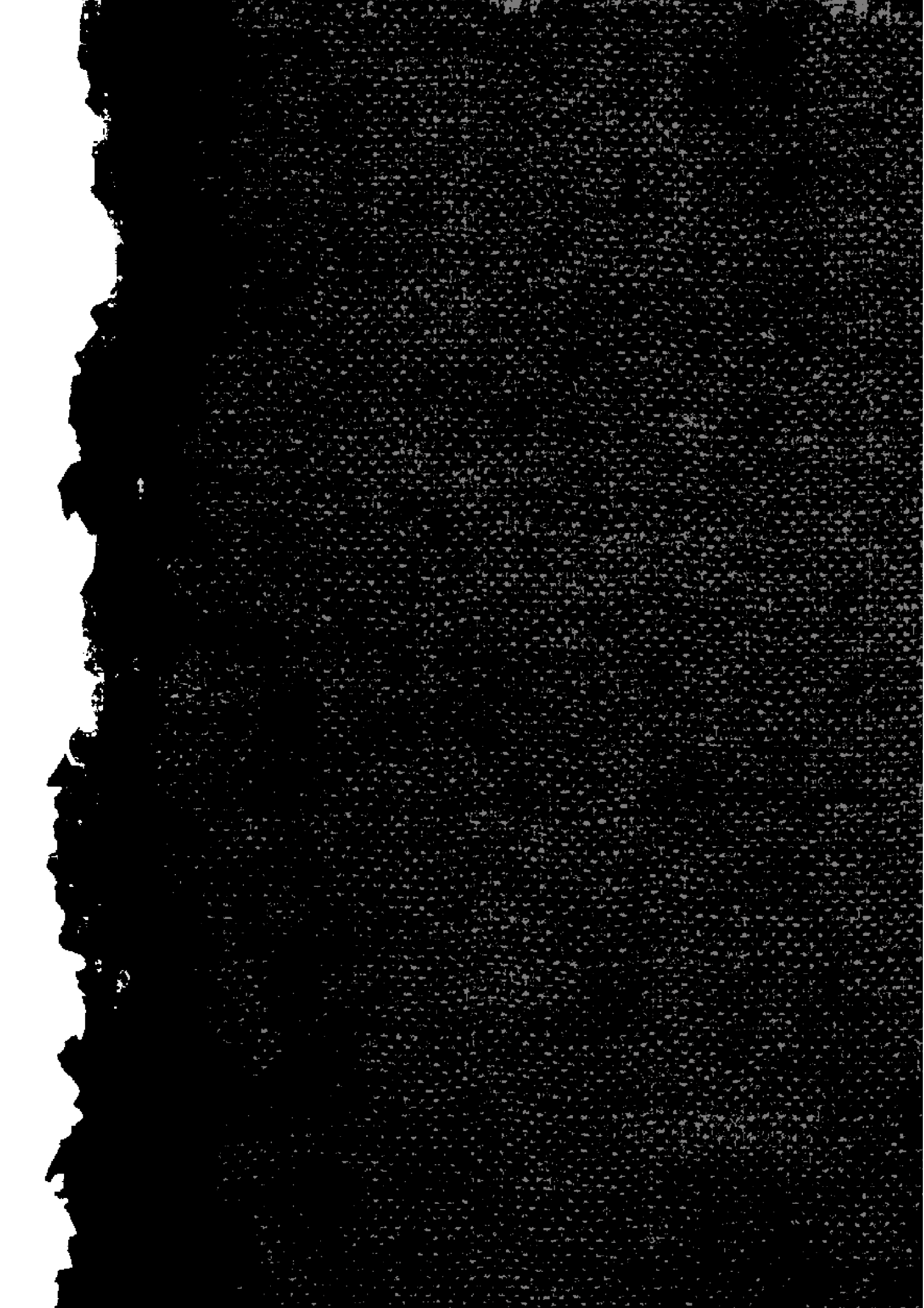
135 See G. Baars, "'It's not me, it's the corporation'": the value of corporate accountability in the global political economy', *London Review of International Law* 4:1 (2016), pp.127-163.

136 D. Whyte, 'The Autonomous Corporation: The Acceptable Mask of Capitalism', *Kings Law Journal* 29:1 (2018), p. 101.

137 See the website of the Oil Justice project: <http://oil-justice.org>

138 Audiencia Pública Popular and Sinaltrainal, 'Reparación integral de las víctimas' (proposal for full reparation on the part of the Colombian State and Coca-Cola) 5 December 2002. The list of demands included public apologies to the union by both the President of Colombia and the President of Coca-Cola, the appearance of photos and biographies of murdered trade unionists on all Coca-Cola bottles and funding for a visual and written documentation of the repression of the union in order to retain historical memory of what had happened.

139 The PPT is an international alternative justice mechanism that applies international law to crimes that remain in systematic impunity. For discussion, see L. M. Coleman, 'Struggles, over Rights: Humanism, Ethical Dispossession and Resistance', in *Third World Quarterly* 36:6, 2015, pp. 1070-1072; G. Rojas-Páez, 'Understanding Environmental Harm and Justice Claims in the Global South', in D. Rodríguez Goyes, H. Mol, A. Brisman and N. South (eds), *Environmental Crime in Latin America: The Theft of Nature and the Poisoning of the Land*. London: Palgrave MacMillan, 2017, pp. 77-80.



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