Transnational Human Rights Litigation
A Means of Obtaining Effective Remedy Abroad?

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Abstract: In recent years, various transnational corporations (TNCs) have faced legal proceedings in their home states for human rights violations and environmental damage committed abroad. These transnational lawsuits are an attempt to overcome corporate impunity and establish transnational chains of responsibility. At the same time, the individual legal cases are marked by procedural and legal hurdles and may entail the risk of social costs for claimants. In this article, I explore what such transnational lawsuits can contribute from the perspective of social movements in the Global South. Taking the Monterrico case from Peru as an example, I discuss the expectations of human rights lawyers in such cases and the relevant legal mechanisms. By focusing on out-of-court settlements, I argue that, from the perspective of the Global South actors involved in the case study, adjudication and the related judicial practices are fundamental to making the law effective.

Keywords: adjudication, human rights lawyers, legal expectations, out-of-court settlements, Peru, transnational corporate responsibility

Corporate impunity for human rights violations is increasingly questioned, contested, and opposed. Transnational corporations (TNCs) can no longer be sure that crimes they commit will remain unobserved, even when they occur in connection with the activities of their subsidiaries in the Global South. In recent years, non-governmental organizations (NGOs) and other civil society organizations have reported many such instances of wrongdoing and brought legal actions against parent companies. Leading TNCs such as Royal Dutch Shell, Chevron, Xstrata, BHP Billiton, Newmont Mining, Vedanta Resources, Unilever, Nestlé, and Chiquita have all had to confront legal proceedings in their home states for crimes committed by subsidiaries abroad (Blackburn 2017; Skinner et al. 2013). In Anglo-Saxon countries, in particular, NGOs and private law firms have filed 'foreign direct liability cases' against TNCs

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(Enneking 2014; Zerk 2006: 198). Such claims have raised considerable expectations, although the legal proceedings have advanced slowly and the majority of cases have been dismissed or settled out of court (Aristova 2018: 20).

In this article, I examine what such transnational claims can achieve in practice. I analyse how human rights lawyers from the Global South perceive the approach of suing TNCs at home and study the legal expectations they have in such cases. By observing their expectations towards the law and towards specific legal mechanisms, my aim is to contribute to the debate on the functioning of law as a social practice. Legal disputes take place in specific social contexts and are shaped by power relations, conflicts of interest, and political struggles. They expose individuals and lead to the individualization of political conflicts. The article sheds light on the functioning of law beyond its merely judicial mechanisms. I ask what is gained and what is lost in such transnational proceedings and argue that if we take a closer look at what actually happens in these lawsuits, we can observe how law becomes effective in claims against TNCs.

This article is the result of a research project on the human rights movement and the judicialization of mining conflicts in Peru. In undertaking this research, I analyse how Peruvian social movements and NGOs mobilize law to bring about social change through legal activism.[1] Peru's human rights movement is part of a transnational network that is challenging the impunity of TNCs. Although most Peruvian human rights lawyers focus their struggles on the domestic justice system, there have been attempts to bring claims abroad and to sue TNCs in their home states. In this article, I trace one of the most emblematic cases in this regard: the Monterrico case.

The Monterrico case is a lawsuit that emerged from human rights abuses committed in the context of an industrial mining project in Peru. The lawsuit was brought before a court in London and eventually led to an out-of-court settlement. The parent company paid financial compensation to the claimants but did not admit any liability. Settlements of this kind are a common outcome of transnational human rights litigation—at least in cases that are not dismissed, something that is still more frequent. Settling a case means securing financial compensation for the claimants and avoiding the risk of going to trial. Out-of-court settlements are thus a form of alternative dispute resolution (ADR) (Nader 1999). They make adjudication unnecessary or impossible, supposedly functioning according to a 'harmony law model' (Nader 1999). This article takes a closer look at the outcomes of this type of settlement

and asks how they differ from other legal mechanisms, such as trials and adjudication. In particular, it examines the extent the settlement in the Monterrico case served as an 'effective remedy' in the perception of Peruvian human rights lawyers.

The term 'effective remedy' has its origin in international law. The right to obtain 'effective remedy' is enshrined in the International Covenant on Civil and Political Rights,[2] which ensures access to the judicial system and to due process. In recent years, the term has been used extensively in debates on business and human rights, where it has been deployed to underline efforts to overcome corporate impunity. Despite the widespread use of the term, however, it often remains unclear what it actually means for the actors involved in a legal dispute. What do lawsuits have to contribute in order to be 'effective'? In this article, I use 'effective remedy' as an analytic term to help understand which mechanisms of law are considered effective by the Peruvian human rights lawyers. On the one hand, the focus on the remedy asks what law can and should contribute to in order to indemnify suffered harm. On the other hand, the term asks for the effectiveness of law and examines whether legal mechanisms can become 'emancipatory' (Santos 2002) for the struggles of human rights movements.

Challenging corporate impunity

To illustrate how the term *effective remedy* is used, I would like to refer to an observation I made during the United Nations' 6th Forum on Business and Human Rights in 2017. In his opening remarks to the forum, Surya Deva, the then chairperson of the working group that organized the event, underlined the importance of access to effective remedy: 'The sad reality is that access to effective remedy for the victims . . . remains an exception, rather than the rule.' The event Deva was opening aimed to improve this situation. Its motto was 'Realizing Access to Effective Remedy'. Thereby the organizers were seeking to address a core component of the United Nations' Guiding Principles on Business and Human Rights (UNGPs). The UNGPs' third pillar requires states to guarantee access to remedy 'through judicial, administrative, legislative or other appropriate means' (UNHRC 2011: 22).

During the forum, however, I could observe how different groups of participants were talking at cross purposes. Representatives of business stressed their engagement for human rights, which in practice means involvement in corporate social responsibility (CSR) programmes and

non-judicial grievance mechanisms. State actors stressed the National Action Plans (NAPs) their countries had elaborated to implement the UNGPs nationally. Representatives of international NGOs, meanwhile, insisted that access to remedy means access to the systems of justice in the TNCs' home states.

Hardly anyone talked about bringing human rights violations to courts in the host states, that is, in the countries where TNCs operate. There seemed to be a consensus that access to remedy in the countries of the Global South was 'unrealistic' anyway and that the search for the means to compensate for harm therefore had to be centred on the Global North. This reflects a global tendency, as a great deal of hope is currently being invested in the attribution of corporate responsibility in home states. This is because it is considered more feasible to bring lawsuits in companies' home states—or at least less unrealistic than bringing claims in the host states. Furthermore, the strategy implies that doing business globally should result in the attribution of responsibility globally. Not only profits should flow northwards, there should also exist chains of responsibility linking sites of operation in the Global South to the TNCs' headquarters (see Eckert and Knöpfel this issue). The law is a forum for the pursuit of claims in these transnational disputes that seek to address the discrepancy between TNCs' profits and corporate impunity.

This legal activism directed at TNCs is to be understood in the context of a growing 'juridification' of social conflicts, a phenomenon that has been observed worldwide (see, for example, Eckert et al. 2012; Sieder 2010). Claims filed under the Alien Tort Claims Act (ATCA)[3] in the United States pioneered this form of legal activism (Deva 2012: 66–74; Enneking 2014: 44–49). The ATCA experience exemplified how NGOs and human rights lawyers were strategically searching for legal routes to hold TNCs liable at home. In various countries, the law provides access points for such claims. Lawyers attempt to track down these points and to make strategic use of them. At the same time, the ATCA experience demonstrated the obstacles that still stand in the way of access to justice systems in the Global North, despite these legal possibilities, and revealed corporate opposition to legal investigations. TNCs prefer non-judicial grievance mechanisms to solve conflicts, and, whenever possible, internal corporate mechanisms. They mobilize all the legal, jurisdictional, and procedural means available to have lawsuits dismissed.

The legal principles they invoke include, first, the *forum non conveniens* doctrine, which states that courts can dismiss claims if there is

another more suitable jurisdiction available to hear them. In the European Union, a landmark decision by the European Court of Justice overcame this doctrine,[4] but in many non-EU Anglo-Saxon countries it remains a hurdle when it comes to suing parent companies (Blackburn 2017: 38–39). A second legal obstacle is what is known as the 'corporate veil' principle, which comes into play because of the structure of TNCs. This principle stipulates that parent companies and subsidiaries are separate entities and that the former cannot be held liable for the misconduct of the latter, thereby hindering the creation of global responsibility chains (Skinner et al. 2013: 69; Skinner 2014: 214–215). This obstacle has been challenged by suing parent companies for a breach of 'duty of care' or 'due diligence', rather than for a direct involvement in abuses. Hence, the strategy is not to 'pierce', but to circumvent the 'corporate veil' (Zerk 2014: 46).

Experience with transnational lawsuits has revealed, however, that a progressive legal basis is not sufficient, as procedural hurdles may exist that can still make court proceedings impossible. This includes, for example, a high burden of proof and the fact that evidence is in the possession of corporate defendants (Blackburn 2017: 54). Further problems derive from strict statute of limitation rules, given that it often takes many years to bring transnational cases to court (Skinner et al. 2013: 7, 39, 40). Moreover, most people who have suffered corporate abuses and become claimants in transnational lawsuits are what Marc Galanter calls 'one-shotters' (1974: 97). They often belong to marginalized groups, live in remote areas and have no litigation experience, which means that they lack knowledge about legal proceedings (Kirsch 2014: 85). Following Galanter's terminology, TNCs, in turn, are 'repeat players' (1974: 97). They have extensive financial resources and long-term experience in law and are therefore more likely to 'come out ahead' (1974: 97) in court. Claimants rely on lawyers who are experienced enough to confront the proverbial 'army of corporate lawyers' and are willing to be involved in risky litigation for years without knowing if they will ever recover their own expenses. The fact that transnational human rights litigation is extremely expensive can make claims unfeasible. Lawyers who take such cases are rare; they often work for human rights NGOs or pro bono law firms (Enneking 2014: 48). Thus, transnational human rights litigation is risky, costly, and marked by various obstacles, many of which also shaped the Monterrico case.

The Río Blanco mining conflict

The Monterrico case has its origin in the conflict over the Río Blanco mining project in Piura, in Peru's northern highlands. For more than fifteen years now, a TNC has planned to build a copper and molybdenum mine in this region (Velazco Rondón and Quedena Zambrano 2015). The project was led by a Peruvian subsidiary, which was initially known by the name of Majaz but later changed its name to Río Blanco. Río Blanco was wholly owned by the British corporation Monterrico Metals (Bebbington et al. 2007: 14). In 2003, the Peruvian government granted the concession to operate, and the corporation built a mining camp (Skinner et al. 2013: 93). Due to local resistance, however, construction of the mine was suspended. The company has remained active in the region and attempted to obtain the 'social license to operate' through CSR projects. In 2007, Monterrico Metals' assets were taken over by the Chinese company Zijin Mining (Kamphuis 2011: 74). In recent years, the project has been promoted again by the Peruvian government as part of its attempts to deepen economic cooperation with China (Amancio 2016).

The planned mine is geographically located in an area with a vulnerable ecosystem (Bebbington et al. 2007: 15). It is situated on land belonging to the *comunidades campesinas* of Yanta and Segunda y Cajas, two peasant communities which hold official land titles. Members of these *comunidades* fear the mine's negative impacts on the water supply and on local agriculture. They have also reported irregularities in the company's land purchase. Members of the local communities have opposed the mine by organizing protest marches. In 2007, a *consulta vecinal*, a local referendum, was held. This was not legally binding, but revealed the extent of local opposition to the project (Hoetmer 2010: 185).

One event in the conflict over the Río Blanco project has been particularly deeply etched in the collective memory. In 2005, the opposition movement marched to the mine camp in protest, where they were attacked by police forces. One *comunero* was killed and several people were injured (Bebbington et al. 2007: 17–18; Skinner et al. 2013: 94). Twenty-eight people were detained by the Peruvian National Police and held within the camp for three days (Kamphuis 2011: 75). Inside the camp, the detainees allegedly suffered physical and psychological violence, as well as acts of torture. They were beaten, subjected to tear gas, and threatened with violence and death. Among the detainees were two women and one minor. The two women suffered sexual abuse. For several hours, the detainees received neither food nor water; plastic

bags containing an irritating powder were placed over their heads; they had to sit for a long time with their hands tied (Kamphuis 2012: 544). Members of the National Police as well as employees of a private security company and the mining company were present during the events (Kamphuis 2011: 77). Moreover, a local prosecutor visited the site, but did not intervene, although he was able to observe the mistreatment (Velazco Rondón and Quedena Zambrano 2015: 51).

On the third day, the detainees were released. A few days later, they were charged by the local authorities for participating in the protest march. The judicial authorities thus initiated criminal proceedings against the protesters while simultaneously ignoring the abuses they had suffered. The detainees themselves filed a criminal complaint in June 2008 with the support of the NGO Fundación Ecuménica para el Desarrollo y La Paz (Fedepaz).[5] Fedepaz is a national human rights organization based in Lima and had provided legal assistance to the affected *comunidades* for many years. Founded in the early 1990s, the NGO has extensive experience in litigating human rights violations committed by state actors in the context of the extractive industries.

Shortly after the complaint was filed, the national newspaper *La República* published photographs showing the violence against the demonstrators. Despite the publication of these pictures, however, the criminal proceedings have faced considerable difficulties over the years. The complaint demanded that the responsibility of both the police and the mining company be clarified. The public prosecutor, in turn, limited investigations to the involved police officers and their superiors. Over the years, the judicial authorities have repeatedly closed the case. Although Fedepaz successfully appealed these decisions, the case proceeded very slowly and has to this day still not reached the procedural stage of the trial.

Proceedings in London

In view of the judicial difficulties in Peru, Fedepaz, in collaboration with the Coordinadora Nacional de Derechos Humanos, the national umbrella organization of Peru's human rights NGOs, searched for legal options abroad. They consulted various international allies, including the Environmental Defender Law Center (EDLC) in the United States, which then established contact with Leigh Day, a British law firm. In 2009, Leigh Day filed a civil claim at the High Court in London against Monterrico Metals and its Peruvian subsidiary.[6] Fedepaz and the

Coordinadora were involved in bringing the claim. They established contact with the claimants in Piura and provided Leigh Day with information on the Peruvian criminal case. Leigh Day's lawyers travelled to Peru several times and hired an assistant to maintain contact with the claimants and to conduct on-site research.

Leigh Day is a private law firm that has been involved in various lawsuits against UK-based corporations for human rights abuses committed abroad (Leigh Day 2020: 2). Working on a pro bono basis, it has attempted to push the boundaries of English tort law in order to establish the principle that parent companies owe a 'duty of care' for their subsidiaries' wrongdoings (Brett 2018: 55–56; Leigh Day 2020: 7). Leigh Day is one of those few law firms mentioned above that have the experience and are willing to bring claims against TNCs in the Global North. Over the years, the firm has led various cases to an out-of-court settlement. This means that claimants were paid financial compensation, and Leigh Day was able to cover its litigation costs. On the other hand, this practice of settlements meant that the UK courts have to date not decided whether parent companies actually owe a duty of care (Aristova 2018: 20). None of Leigh Day's cases has so far set this precedent.[7]

The claim against Monterrico Metals initially looked promising and proceeded relatively rapidly. Leigh Day argued that the parent company had 'exercised effective control' over the Peruvian subsidiary's management and that 'officers of Rio [sic] Blanco or of Monterrico ought to have intervened so as to have prevented the abuses of the Claimants' human rights'.[8] The claim was made on behalf of thirty-two claimants, including the twenty-eight detained persons and the relatives of the *comunero* who was killed when the police forces intervened against the protesters. The claim described the group's detention as a 'joint operation' involving members of the Peruvian National Police and employees of both the security company and the mining company.[9] Corporate defendants, in turn, asked the court to dismiss the claim, arguing that 'there was no evidence that Rio [sic] Blanco or Monterrico were in any way responsible for the violence' that occurred.[10] In addition, they argued that the case was time barred and that 'there was no good reason why the Claimants were unable to secure legal redress in Peru'.[11]

The allegation of torture was, via its translation into English tort law, transformed into a case of 'negligence'. According to a British lawyer familiar with the lawsuit, this made it possible to bring the claim in the United Kingdom, but was, at the same time, 'not ideal'.[12] She told me that 'to characterize . . . torture as negligence, breach of a duty of care, that seems to be minimizing the significance of what happened'.

It was, however, the only access point of English law, since to allege that the parent company had been directly involved in the acts of torture was unviable. In this lawyer's view, 'the alternative is to make allegations which will just get kicked out of court straight away and that doesn't really help anybody'.

Shortly after the beginning of the proceedings, the High Court ordered a worldwide freezing of Monterrico Metals' assets.[13] In its judgement, the court argued that the claimants had demonstrated 'a good arguable case'.[14] A ten-week trial was scheduled for October 2011, in which more than eighty witnesses, including corporate employees, were to be summoned (Leigh Day & Co. 2011). However, the trial ultimately did not take place, as an out-of-court settlement was reached shortly beforehand in July 2011 (Skinner et al. 2013: 96). Monterrico Metals agreed to pay individual compensation to the claimants, the amount of which remained confidential. As part of the agreement, the company did not admit any legal responsibility, and the claimants had to waive the need for a judgement (Kamphuis 2012: 548). The settlement was in line with Leigh Day's earlier cases; in terms of corporate liability, however, it avoided adjudication, which led to disagreements between London and Lima.

Out-of-court settlements: A manifestation of justice?

More than thirty years ago, Marc Galanter (1985) described the phenomenon of 'litigotiation', which was based on his observation that a large proportion of lawsuits in the United States ended in a settlement and not in a trial. Galanter wrote: 'Lawyers find trials distasteful: they may bring little financial gain, they disrupt one's practice, they require extensive preparation, and they expose one to risks of losing or revealing lack of expertise. If trial offers parties hope of complete victory or vindication, it also involves additional cost, protracted delay and a risk of losing all' (Galanter 1985: 13). I argue that we can observe this same phenomenon with regard to human rights litigation in TNCs' home states today. As mentioned above, transnational lawsuits against TNCs have, up to the present day, either been dismissed or settled—but not dealt with in trial. There are systemic reasons that favour the settlement of such lawsuits, for example the fact that litigation would take years or even decades. A London-based NGO employee told me that when she started her job she thought these claims should end with a judgement, 'but over time I have come to understand that the way the system here

works is all geared towards settlements'. In Galanter's words, there is too much uncertainty and too much to lose for the involved parties to risk going to trial. The few lawyers taking such cases often work for pro bono law firms. For them, settlements offer 'the best business option' (Kamphuis 2012: 561)—a safe means of recovering their own costs. Additionally, settling a case means faster and more secure redress for claimants (Kamphuis 2011: 562; Taylor et al. 2010: 17). Katharina Pistor has written that '[out-of-court] dispute settlement has private and social costs as well as benefits' and warned that '[w]hen entire areas of the law are carved out from the public space that courts provide, the private benefits of out-of-court dispute settlement may well exceed the social benefits. In fact, the main beneficiaries of private settlements may not even be the parties in the dispute, but their attorneys' (Pistor 2019: 181; see also Shavell 1997).

Furthermore, research on specific lawsuits against TNCs has revealed that out-of-court settlements may impair a legal action's chances of success and may even result in adverse effects. Kim Fortun (2001), Veena Das (1995), and Jamie Cassels (1991) analysed the settlement reached in the aftermath of the industrial disaster in Bhopal, India.[15] They described the public outcry that followed the settlement, stating that the affected people were deprived of their 'right to be heard' (Das 1995: 146), as they did not have 'their day in court'. For others, the settlement exemplified how 'third world life is cheap' (Cassels 1991: 38; see also Fortun 2001: xviii) measured against corporate profits. In the Bhopal case, the settlement was said to be an *ineffective* remedy (Skinner 2014: 206).

Further research on out-of-court settlements has questioned the long-term benefits of such agreements. In his research on the Ok Tedi mine in Papua New Guinea, Stuart Kirsch (2006: 21–22, 2007: 308) traced the challenges in enforcing concessions made by TNCs under such settlements, which may go beyond financial compensation. Furthermore, various authors have raised issues of representation that have emerged in such settlements. This aspect became evident, for example, in a claim against Newmont Mining in the United States for a mercury spill in Choropampa, Peru. The involved lawyers were alleged to be pursuing the representation of claimants as a business model (Kamphuis 2012: 561–562; Li 2017: 185–187). Out-of-court settlements in the context of transnational legal activism have thus been criticized for various reasons.

Social tensions and allegations of 'being bought'

The Monterrico claim revealed further difficulties. In the local protest movement in Piura, the settlement raised major issues as it led to disputes and social tensions in the affected communities. Since the agreement was confidential, the claimants were not allowed to speak about its content. At the same time, however, Leigh Day and Fedepaz made details of the settlement public. The British law firm saw it as a successful result of its efforts and obviously wanted to report on this (Leigh Day & Co. 2011). Fedepaz attempted to interpret the settlement as an admission of guilt, even though the company rejected any liability. David Velazco, one of Fedepaz' lawyers, told me that 'beyond the fact that in the out-of-court settlement it is said that the company does not recognize responsibility, if it does not recognize responsibility, why does it pay?' Fedepaz published a press release taking up this argumentation (Fedepaz 2011).

Consequently, it became public knowledge that the company paid individual compensation to the claimants, but the people who received money were not allowed to explain themselves and clarify matters. Rumours circulated within the *comunidades*, resulting in allegations against the claimants of 'having collaborated' with the corporation. Mar Pérez, a lawyer working with the Coordinadora, recounted that some claimants had held positions as local leaders. They were discredited as a result of the settlement, because 'it appeared as if they had been bought, that the company had covered their mouths, and that they were delegitimized before the community'. Thus, the financial compensation was beneficial to the individual claimants, but in the broader context it had adverse impacts in and on the affected communities and on the protest movement. From the point of view of the Peruvian human rights movement, the settlement's 'private benefits' for the individual claimants exceeded the 'social benefits' for the communities, in Pistor's (2019: 181) terms.

Court cases expose individual claimants and can lead to the individualization of broader conflicts, regardless of whether they result in a judgement or a settlement. This tendency towards individualization is a major challenge that arises from the juridification of social struggles. For the Peruvian lawyers, it was uncontested that the claimants in the Monterrico case had a right to individual financial compensation because they saw this as an opportunity that could 'change the affected people's lives'. To avoid friction in the communities, however, the Peruvian lawyers attempted to bring the issue of the *comunidad*

into the claim in London as well. For them, the case had a 'community dimension' (*dimensión comunitaria*) since the abuses occurred in the context of a broader mining conflict. One lawyer from Lima told me how they explained to their British counterpart that a *comunidad campesina* possesses legal personality in Peruvian law. Thus, in their opinion, Peruvian law would have allowed the attempt to go beyond individual compensation payments and to include the *comunidad* as an injured party in order to avoid social tension on the ground.[16] However, this aspect was not included in the claim in London.

As specialists in transnational claims against TNCs, Leigh Day's lawyers 'represent people all over the world fighting for justice and challenging powerful corporate and government interests' (Leigh Day 2020: 2). They '[push] the boundaries of the law to hold the powerful to account' (Leigh Day 2020: 2), and they 'are not afraid to take on daunting challenges' since they 'believe passionately that every individual and community, no matter who they are or where they live, is entitled to defend their human rights, including their right to justice' (Leigh Day 2020: 4). Working on a pro bono basis, the firm has been involved in litigation against various UK-based corporations. In most of these cases, Leigh Day has represented large groups of claimants, such as communities affected by environmental pollution. Compared to the Monterrico claim, the risk of the claimants being accused within their own community of having been bought off by means of compensation payments was much lower in these cases. As various authors have discussed, however, the law firm experienced problems in other cases it took on, for example in the process of distributing compensation payments among large groups of claimants in the Ivory Coast and in Nigeria (Blackburn 2017: 26; Brett 2018: 56–58; MacManus 2018: 122, 137–138).

With regard to its practice of representing foreign claimants before courts in the United Kingdom, Leigh Day wrote: 'Understanding clients' needs is our first priority. We act on our clients' instructions and in their best interests' (Leigh Day 2020: 5). To secure financial compensation is at the centre of the firm's efforts. I argue, however, that the Monterrico case raises questions about legal representation and about power relations in this transnational collaboration between clients and lawyers. The lawyers from London were the legal experts in the case, but how much did they know about the local circumstances in Peru? How did they know what would be an effective remedy for the affected people? And would the claimants have been able to assert themselves against the recommendations of the British lawyers? I argue that this kind of

client-lawyer collaboration presupposes a balance of power in relations between the involved parties. As in other transnational lawsuits, claimants in the Monterrico case were from a marginalized area and had no litigation experience. They were 'one-shotters' (Galanter 1974: 97) who depended entirely on their lawyers' knowledge and recommendations.

By contrast, the lawyers working with Fedepaz attempted to take into account not only the instructions of the individual 'clients', but perceived the lawsuit in a wider context, in which the communities played an important role, too. They have worked with these communities in Piura for years and saw the claim as part of a broader strategy to support them in their struggle against the mining project. To the Peruvian human rights lawyers, a claim does not have to be financially viable, but rather politically decisive. While financial compensation for the claimants was one of their hopes of the proceedings in London, which was therefore fulfilled with the settlement, thus obtaining remedy for the claimants, in a sense, this financial compensation caused social tensions. The Peruvian lawyers had feared this, but could not control it, because they were not a party to the proceedings in London. I argue that this called into question the effectiveness of the remedy.

Settled in London, contested in Lima

Beyond the discussion of financial compensation, the Monterrico case revealed further discrepancies between London and Lima, which derived from the settlement itself and its legal function. One of Leigh Day's lawyers wrote in an article that 'academics and campaigners have expressed concern that the settlement of litigation enables deep-pocketed [T]NCs to avoid being held to account at trial and deprives the system of binding legal precedents' (Meeran 2011: 24). In his view, however, 'negotiation and settlement are . . . integral to civil compensation claims', and 'the substantial expense and reputational risks arising from litigation provide a potentially powerful deterrent against [T]NC wrongdoing' (Meeran 2011: 24). In his opinion, therefore, even a settled case can constitute what others have called a 'litigation threat' (see, for example, Schrempf-Stirling and Wettstein 2017: 556).

The Peruvian lawyers, in turn, considered the Monterrico case's 'deterrent effect' to be much more modest, in particular because the mining company Río Blanco remained active in Piura after the settlement. They regretted that no judgement had been reached on the company's responsibility. David, one of Fedepaz' lawyers, told me: 'We

are not very much convinced of the extrajudicial agreement because, as human rights defenders, what we want is that the truth is publicly known and that justice is established by official acts'. The Peruvian lawyers described the British lawyers' work as 'super-efficient' and their legal strategy as 'brilliant'. At the same time, their legal expectations remained unfulfilled due to the settlement and the missed adjudication.

These differences between London and Lima may stem from different legal cultures. Most of Peru's human rights lawyers specialize in either criminal law or constitutional law. Civil cases are seen as a less feasible option, because the burden of proof is high, litigation is even more lengthy than in criminal cases, and, most importantly, the role of the state is less prominent. In constitutional claims, the state is directly addressed and its duty to protect the population's rights is raised (Affolter, this issue). Criminal law deals with violations of a society's legal norms, which the state prosecutes and sanctions, mostly *ex officio*. Civil suits, in turn, are disputes between private parties. The state acts in these cases only as a kind of mediator who hears cases and determines whether the claimants' compensation demands are justified. Consequently, civil law is less suitable for making political demands on the state. The Peruvian human rights movement therefore mainly utilizes criminal and constitutional complaints to persuade the state to take responsibility and to respond through institutional mechanisms to human rights abuses, thereby bringing about social change through legal mobilization.

This experience has shaped the Peruvian lawyers' expectations of the Monterrico case—a lawsuit dealt with under civil law in a common law country. In contrast to Galanter's statement that 'lawyers find trials distasteful' (1985: 13), David underlined the importance of a trial and of a judgement. 'Justice is to know the truth.', he told me. To him, this includes, on the one hand, that the injured parties learn who is responsible for the abuses committed. It implies an official review of the events, since a lawsuit is a form of public acknowledgment of a crime. For Fedepaz, pursuit of civil cases abroad is only a 'subsidiary option', since the NGO's primary purpose is to bring cases of human rights violations to the domestic justice system and to demand an official response by the Peruvian authorities. To them, adjudication is a crucial part of obtaining an effective remedy; it is what makes law effective for them. Since legal proceedings in Peru had made no progress, Fedepaz had hoped that the lawsuit in London would contribute to the official acknowledgment and give an answer as to whether the corporation holds responsibility for the abuses. Yet, in the pre-trial phase, which the Monterrico case went

through, only procedural issues were discussed. Since no trial was held, the issue of corporate responsibility remained untouched.

Expectations of law

Sally Merry has written that law works not only by rule enforcement and punishment 'but also by its capacity to construct authoritative images of social relationships and actions' (1990: 9). In this regard, the Peruvian lawyers attempted to construct the company's responsibility as an 'authoritative image' by filing a lawsuit abroad. The Monterrico case has revealed, however, how out-of-court settlements circumvent mechanisms laid down in law, namely the discussion of chains of responsibility and the attribution of liability. Adjudication is key in constructing 'authoritative images'. As a legal mechanism, it leads to the public recognition and acknowledgment that abuses were committed. The chains of responsibility that transnational lawsuits seek to establish are only addressed in a trial. Settlements avoid the risk of losing in a trial, but, at the same time, they make adjudication and the attribution of responsibility impossible (Eckert 2016; Taylor et al. 2010: 17). Furthermore, settlements prevent precedents from being established. They hinder the emergence of a body of law with regard to corporate liability (Oxford Pro Bono Publico 2008: iv). In the Monterrico case, as in other settled cases, the court did not deal with the question of whether the parent company actually owes a 'duty of care' for subsidiaries' activities, and the underlying attempt to establish a chain of responsibility between the company's headquarters and the mine site in Peru therefore remained unaddressed.

This case confirmed earlier experiences with settlements, which have demonstrated that this practice allows TNCs to claim 'that they have done "nothing wrong"' (Blackburn 2017: 36), despite facing legal proceedings lasting years. Out-of-court settlements are a form of 'corporate antipolitics' (Sawyer 2004: 118), since the political and moral claims underlying the lawsuits against TNCs remain undiscussed (Kamphuis 2012: 562). I argue that the parent companies would not have been able to avoid these political issues in a trial, because the attribution of responsibility would have been at the centre of any trial.

Adjudication includes the attribution of responsibility, and it is precisely this aspect that makes the law effective. Out-of-court settlements, by contrast, are 'harmony law models' in Laura Nader's sense (1999: 305, 308). Like other types of alternative dispute resolution (ADR), they are

aimed at avoiding trial and adjudication, and, instead, to reach a consensus between the parties to the conflict. Following Nader's approach, 'harmony law models' aim ostensibly at balance and reconciliation rather than punishment. In fact, however, they lead to the silencing of people and are part of a 'hegemonic control system' (Nader 1999: 308). We can observe precisely these characteristics when lawsuits against TNCs are settled out of court.

Settlements are often negotiated in the private area, rather than publicly before court. As Pistor noted, '[s]omething is lost . . . when cases are resolved not in a courtroom where they can be seen, dissected, and critiqued by others, but in its shadows' (2019: 180). Settlements do not take place on a level playing field, but allow powerful actors such as TNCs to utilize their power (Kirsch 2018: 38; Taylor et al. 2010: 17, 27). This is not to say, of course, that cases dealt with in court always take place on a level playing field and that the legal system is equally accessible to everyone. Different obstacles may lead the 'haves [to] come out ahead' in courtrooms, to come back to Galanter's (1974) terminology. Research has revealed, however, that there is hope for marginalized people involved in litigation if they succeed in altering the 'legal opportunity structures' (Gloppen 2018; Wilson and Rodríguez Cordero 2006). In this way, law may become 'emancipatory' (Santos 2002) for social movements. The Peruvian lawyers derived their expectations of the claim in London from this hope. Their aim was to provoke an official answer that would determine who bears responsibility for the abuses. This is what law as a social practice can, in their opinion, contribute to. With the removal of the case from the public sphere of the court, however, and its transformation into a settlement, the law did not become effective in this sense and their legal expectations were not fulfilled.

Conclusion

The Monterrico case exemplifies what can be gained and what is lost on the transnational judicial journey from the *comunidades* in Piura to the courtrooms of London, particularly with regard to the challenges that arise from the practice of out-of-court settlements. The fact that settlements are reached out of court does not mean that they necessarily take place outside the sphere of law. They do, however, testify to a different understanding of law, one that focuses on negotiation rather than on adjudication and aims toward compromise rather than sanction. For the involved British lawyers, settlements are an inherent part of legal

culture, but for their Peruvian counterparts, the settlement impeded the search for justice and determination of the truth. The Peruvian human rights lawyers understand obtaining effective remedy to entail a determination of who is responsible for the offenses and not just the payment of individual financial compensation. In their view, in order to be 'effective', a remedy should take a broader approach and include consideration about the community as a whole, not just the individuals. For them, the power of law lies in its ability to grant official recognition of suffering. This is what law can achieve as a social practice, but only if law's mechanisms are enforced through adjudication.

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Notes

1. Additional information had been gathered in an interview with a British lawyer involved in the transnational lawsuit that I discuss in this article. Unfortunately, he later withdrew all his statements.
2. International Covenant on Civil and Political Rights, article 2(3)(a).
3. 28 U.S. Code § 1350. Alien's action for tort.
4. *Owusu v. Jackson* ([2005] ECR 1383) (see also Blackburn 2017: 38–39).
5. Ecumenical Foundation for Development and Peace.

6. *Guerrero v. Monterrico*, [2009] EWHC 2475 (QB).

7. An exception to this was *Chandler v. Cape Plc*, a case concluded in 2012 with the judgement that a UK parent company could owe a duty of care to employees of subsidiaries abroad (*Chandler v. Cape Plc* [2012] EWCA Civ 525).

8. *Guerrero v. Monterrico*, [2009] EWHC 2475 (QB), para. 8 (see also Zerk 2014: 23).

9. Cited in: *Guerrero v. Monterrico*, [2009] EWHC 2475 (QB), para. 10.

10. *Guerrero v. Monterrico*, [2009] EWHC 2475 (QB), para. 20.i (see also Skinner et al. 2013: 95).

11. *Guerrero v. Monterrico*, [2009] EWHC 2475 (QB), para. 20.iv.

12. Various authors have written from a legal perspective about the translation 'from torture to tort' in transnational lawsuits (see, for example, Scott 2001; Augenstein 2018).

13. *Guerrero v. Monterrico*, [2009] EWHC 2475 (QB), para. 41 (see also Kamphuis 2012: 547).

14. *Guerrero v. Monterrico*, [2009] EWHC 2475 (QB), para. 26 (see also Kamphuis 2011: 77; Leigh Day & Co. 2011).

15. This settlement was reached in the TNC's host state and thus took place under different circumstances than the others cases discussed in this article. Nevertheless, the Bhopal example revealed general difficulties with settlements.

16. The claim was filed under Peruvian and English law. The High Court would have had to decide which law was applicable.

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