

Article

Counter Corporate Litigation: Remedy, Regulation, and Repression in the Struggle for a Just Transition

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Abstract: Hundreds of human rights and environmental cases against corporations have been launched in countries around the world in the past two decades. This body of counter corporate litigation—legal actions that involve attempts to enforce legal or normative standards against business entities—forms a significant part of the legal struggles shaping the transition to a sustainable economy. However, the question remains—how does litigation against companies fit with the larger patterns of reform? In this paper, I draw on a taxonomy of sustainability litigation to describe three functions of counter corporate litigation: remedy, the search for justice through legal action; regulation, the enforcement of legal standards through the courts; and repression, the proscription of predatory business models. I argue that research into counter corporate litigation helps to illuminate the priorities for legal reform, including the integration of human rights and the environment into legal instruments governing corporate activities, transnational approaches to corporate accountability, and a willingness to challenge unsustainable business models.



Citation: Taylor, M.B. Counter Corporate Litigation: Remedy, Regulation, and Repression in the Struggle for a Just Transition.

Sustainability **2021**, *13*, 10742. <https://doi.org/10.3390/su131910742>

Academic Editors:

Olga Martin-Ortega, Valerie Nelson,
Renginee G. Pillay,
Fatimazahra Dehbi and
Marc A. Rosen

Received: 15 June 2021

Accepted: 7 September 2021

Published: 27 September 2021

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Keywords: strategic litigation; climate justice; corporate accountability; business and human rights; just transition; predation; regulation; remedies; planetary boundaries; CSR; ESG

1. Introduction

Is there a legal defence against corporate *un*-sustainability? Compared to the rapid and economically drastic regulatory action taken by governments in response to the COVID-19 pandemic, the responses to widespread and disastrous harms from climate change or the depletion of biodiversity have been timid half-measures. Urgency has been lacking. Rather than rapid regulatory intervention to stop the interconnected impacts on society and our biosphere by our systems of production and consumption, sustainability regulation has instead aimed at encouraging business innovation to shift to more sustainable modes of production and consumption. Even where legislators have chosen to act, questions of justice and regulatory effectiveness remain.

Those questions are increasingly being asked in court. Legal scholars have identified a “new wave” [1–3] of well over a thousand climate litigation cases, of which cases against multinational corporations are a part. Much of this litigation has occurred since the 2015 Paris Agreement on Climate Change. At the same time, in the field of business and human rights, researchers have documented a longer-term trend of an “expanding web of liability” for corporations with respect to human rights [4–7]. Together, these two bodies of litigation now constitute hundreds of individual climate and human rights cases involving corporations, over two decades; enough that dedicated case law databases have been established to track them [8,9].

The existence of both climate and human rights litigation against corporations is hardly surprising. Depending on legal culture—as well as the extent to which government regulation is weak or captured by corporate interests—the courts may be one avenue open to victims who seek justice and remedy for adverse impacts of corporate activities. In addition, criminal, civil or administrative litigation is a common form of enforcement in regulatory systems protecting workers, consumers and the environment. Finally, a

just transition to sustainable systems of production and consumption requires significant structural changes to large and powerful sectors of national economies. A massive and necessarily rapid transition, such as the one that presently grips policy debates, is bound to generate conflicts, not least over responsibility for the harms generated by the existing systems. Litigation has rapidly become an important site where these conflicts are being played out.

In what follows I examine counter corporate litigation—legal actions in court that involve attempts to enforce legal or normative standards against business entities—as part of the wider reforms that are shaping the transition to a sustainable economy. My objective in doing so is to try to understand the role of legal action in a just transition. In the process, I hope to contribute to developing a language that enables the study of litigation against corporate defendants in the present context or, to put it simply, to understand the role of corporate accountability in a just transition.

In Section 2 I describe the way litigation is reflecting contemporary empirical-normative definitions of sustainability. The latter are increasingly based on the latest scientific research into the environmental and social impacts of our systems of production and consumption. Reflecting this body of research, I draw on a taxonomy of sustainability litigation [10] to argue it is possible to categorize contemporary cases as litigating four types of harms: bio-sphere violations, eco-human toxicity, predation, and corporate lawfare. In the subsequent sections of the paper, I briefly describe three functions of these bodies of counter corporate litigation, all of which are important for a just transition. Section 3 describes the search for justice through legal action drawing on examples of counter corporate litigation. Section 4 locates counter corporate litigation within the broader move to regulate business activity for sustainability, with a particular focus on the role of the courts in the enforcement of regulatory standards. Section 5 describes how certain court cases have sought to challenge business models that are predatory, defined as value creation based on extraction or exploitation or that harms people or the planet. Counter corporate litigation has confronted the legitimacy and lawfulness of certain extractive and exploitative business models, while corporate lawfare has sought to defend these business models. I argue that these three functions of counter corporate litigation—remedy, regulation, and repression—are increasingly reflective of minimum standards of acceptable business conduct in a just transition. Beyond the function of particular cases as a defence of rights or interests, or as form of the enforcement of standards in law, counter corporate cases, taken as a whole, describe the contours of acceptable business conduct in a just transition. In this sense, they are a particular category of strategic litigation, the study of which may help us better understand the influence of regulation in the present transition and on our systems of production and consumption more generally.

2. Litigating Sustainability

The politics of sustainability are constantly being reinvented, such is the nature of a transition that has tentatively taken hold. The policies and practices of corporate sustainability are responding. For example, traditional forms of business self-regulation, such as corporate social responsibility (CSR), or its finance sector variant Environmental, Social and Governance (ESG) standards, have been reshaped to reflect the Sustainable Development Goals (SDGs). In turn, these changes have been integrated to the wide range of CSR and ESG standards applicable across industries or economic sectors. These standards are evolving in interaction with the evolution of global norms for business, such as the UN Guiding Principles on Business and Human Rights (UNGPs). These standards and norms are increasingly reflected in legal regulations; for example, through the legislation of human rights and environmental due diligence standards for business.

Standards, norms and regulations are also under constant revision in response to the changing expectations imposed by the latest scientific findings concerning the health of our biosphere or the most recent investigations in human rights in global value chains. The most comprehensive attempt to translate the science of global impacts from our systems of production and consumption into a framework of use to sustainability policy is the planetary boundaries framework [11,12]. The framework places human production and consumption within a defined set of natural or planetary “boundaries” of sustainable human activity on planet Earth. Combined with a set of “social foundations” of human welfare [13]—economic, social and other activities that secure human welfare and realize human rights—the framework defines a “safe and just space for humanity” delineated by these boundaries and foundations [13,14]. Sustainable activities are those which take place within that safe and just space.

Identifying a safe and just space for humanity is simultaneously an empirical and normative exercise. It identifies physical or material limits which must be respected by our systems of production and consumption in order to maintain a habitable biosphere, while at the same time framing those limits in normative terms of society’s survival, human security and social justice. It assumes that as scientific knowledge and social norms evolve, this will be reflected in market dynamics, such as demand for sustainable products and investment vehicles, as well as in our policies and laws.

Debates over legally enforceable rules that will shape the transition to sustainability presently occupy legislators and jurists in all the major economies. Those debates have prompted jurists to seek to identify a clear and verifiable standard of sustainable behaviour to which corporate actors can be held legally accountable. Researchers have deployed the empirical-normative approach of the planetary boundaries to the regulation of global value chains, including with respect to systems of production [15] and procurement [16,17] corporate purpose [18] and corporate governance more broadly [19].

The planetary boundaries definition of sustainability has also proven useful in developing a taxonomy of cases in order to identify the larger patterns which constitute “litigating for sustainability” [19]. The objective of this latter effort is in part to develop a language which enables the study of litigation against corporate defendants as manifestations of legal action for a just transition or, to put it simply, to understand the role of corporate accountability to a just transition.

One immediate conclusion is that it is both possible to chart litigation across the full spectrum of sustainability policy. Such a perspective need not be as unwieldy as one might expect. It is inevitable that the categories presented here are broad, given both the macrolevel approach of the planetary boundaries and social foundations framework and the pervasive impacts of business activity on human life and our biosphere. Adopting sustainability as a lens for research into litigation is bound to result in a vast array of case law, across a range of discreet fields of legal practice. However, it is possible to frame litigation against business entities in relation to the larger challenge of sustainability and sustainability policy.

Using planetary boundaries and social foundations as the frame, four main categories of counter corporate litigation against companies, each with its own dimensions, appear relevant [10]:

- Biosphere violations—litigation addressing breaches of scientifically established planetary boundaries, including climate action cases drawing on causes of action such as human rights violations, investor fraud, consumer protection, and torts of public nuisance;
- Eco-human toxicity—litigation addressing harms to people or the planet arising from the use of hazardous chemicals, including cases arising from workplace health and safety violations, environmental pollution, and incidents of widespread exposure to toxic chemicals;

- Predation—litigation addressing unlawful exploitation of labour or appropriation of property, including the commodification of human data through technology, as well as the use of coercion and violence in the extraction of commercial value;
- Corporate lawfare—litigation in defence of corporate interests, including strategic litigation against public participation (SLAPPs) intended to shift public debates into private conflicts or criminalize criticism of corporate behaviour.

The cases in these categories arose in criminal, civil (tort) and administrative fora in every region of the world. They included both domestic cases about production of greenhouse gas emissions (GHGs) which have global impacts, as well as transnational cases involving claims of foreign direct liability [20] against domiciled companies for human rights abuses occurring abroad. Not all cases reached the stage of judicial decision—some were dismissed and some settled out of court—and many were ongoing at the time of writing.

If it is possible to organise an analysis that helps to organize this complexity, then it might also be possible to think strategically about the impacts of such litigation on the shape of the transition in which we now find ourselves. The overall impression left by the taxonomy of counter corporate litigation is that regulation is struggling to cope with the demands posed by corporate un-sustainability. It is tempting to view this a response to failing systems of governance. The fact that climate justice cases against corporations have emerged at the same time as climate justice cases against governments reinforces this impression, raising questions about a political role for the courts [21]. Sustainability regulation is far too underdeveloped at present to be able to declare it a failure, with industrial policies and various ‘Green New Deals’ only now being debated and introduced. These hold real promise, not least in shaping compliance for business entities with sustainable standards of production and consumption. If litigation is now highlighting any regulatory failures, those lie with the regulations which make possible the existing systems of un-sustainable production and consumption.

Looking more closely at the categories of the taxonomy, a convergence appears in the substance displayed by a number of cases, despite often different causes of action, and in the transnational dimensions of these cases. For example, climate litigation may be based on human rights claims, and human rights litigation often arises from environmental impacts. In *Milieudefensie*, a Dutch court applied standards of international human rights law to find that Royal Dutch Shell had an obligation to change its business model in order to reduce its GHG emissions [22–24]. In *Okpabi* in 2021 and *Vedanta* in 2019, the UK Supreme Court concluded that cases could proceed in the UK involving claims that people’s health and livelihoods had suffered from the environmental impacts of mining and oil operations [25,26]. In all of three cases, as described below, human rights and environmental law standards create obligations or duties of care via private or tort law provisions in domestic jurisdictions. In addition, in all three cases, those obligations extended beyond the jurisdiction of the home domicile of the corporation.

As I will describe below, this pattern of converging substance and extra-territorial jurisdiction across a variety of causes of actions appears repeatedly across the four categories of counter corporate litigation identified here. At a minimum this suggests we need to stop thinking about the laws governing social and environmental impacts of business as entirely separate fields of legal practice and continue to develop approaches to studying economic regulation in terms that encompass the overall project of regulating for sustainability.

To that end, this paper asks in what ways litigation addresses the regulatory disjunctures that promote un-sustainability [16]. In attempting to provide an answer, I have drawn on a taxonomy of counter corporate litigation [10] to suggest three functions of litigation that may be significant: remedy, the search for justice and accountability through legal action; regulation, the enforcement of legal standards through the courts; and repression, the proscription of business models that are harmful to people or the planet. In what follows, I explain each by drawing on examples from the body of counter corporate litigation available in case law databases.

3. Remedies for Harms to People and the Planet

Seeking justice or the defence of rights through the courts is the function we most often think of when considering counter corporate litigation. This is because litigation between business entities has always been a fact of life in commercial relations. In the twentieth century, litigation seeking to hold accountable those responsible for corporate harms, and defend people and the environment, became increasingly frequent. This long-term trend in attempts to end impunity for human rights and environmental violations has also been characterised by corporate lawfare, the practice by business entities of attempting to silence or disarm their critics through litigation in the courts.

As noted above, the nexus between human rights and climate, and the potential for these to give rise to civil liabilities for companies has been at the core of several counter corporate cases. In April 2019 a suit was launched in the Netherlands by six Dutch civil society organisations. Plaintiffs included Milieudefensie, ActionAid NL, Both ENDS, Fossilvrij NL, Greenpeace NL, Young Friends of the Earth NL, and Waddenvereniging against Royal Dutch Shell plc, a UK registered company with its headquarters in The Hague. In *Milieudefensie et al.*, the plaintiffs, alleged unlawful endangerment under the Dutch Civil Code (article 6:162) The elements of unlawful endangerment include: (i) the nature and the scope of the damage caused by climate change; (ii) the knowledge and foreseeability of this damage; (iii) the likelihood that dangerous climate change will manifest itself; (iv) the nature of the behaviour (or the omissions) of the state; and (v) the inconvenience of the precautionary measures to be taken. These criteria should be applied with a view to the state of knowledge, the available (technical) possibilities to take safety measures and the benefit–cost ratio of the safety measures to be taken, according to the court arising from Shell’s contribution to GHG emissions contributing to climate change. The case relied in part on the finding of a Dutch court in *Urgenda*, [27] confirmed by Appeals Court in The Hague in 2018, that the Dutch state was unlawfully endangering its citizens by not reducing GHGs in the Netherlands at a faster pace (at a minimum twenty-five percent of 1990 levels by 2020) [24]. Based on *Urgenda*, the plaintiffs argued that a duty of care had been established that also applied to companies and that encompasses certain human rights, such as the right to life or the right to undisturbed family life [24] (para 514–515). In May 2021, the court of first instance found in favour of the plaintiffs, arguing that climate change constituted a threat to human rights and, citing the UN Guiding Principles on Business and Human Rights (UNGPs), that businesses have a responsibility to respect human rights. The court issued the injunction requested by the plaintiffs that required Shell to reduce the emissions of its entire corporate groups 45 per cent by 2030, to bring its emissions in line with the state obligations based on the reports of the IPCC [22].

The *Milieudefensie* case is not an isolated example of rights-based claims seeking remedy for biosphere violations. In 2015 a claim was filed by a coalition of civil society groups and individuals in the Philippines. The plaintiffs petitioned the Commission on Human Rights of the Philippines to conduct “a comprehensive investigation into the responsibility of the Carbon Majors for violations or threats of violations of human rights resulting from the impacts of climate change” [28]. The petitioners cited threats to the right to life and livelihoods of the people in the Philippines arising from ocean acidification, rising sea levels and weather events, such as typhoon Haiyan/Yolanda in 2013, which resulted in the deaths of over six thousand people. The petition named fifty publicly traded corporations and asked the commission to investigate “whether the investor-owned Carbon Majors have breached their responsibilities to respect the rights of the Filipino people” [28] (p. 31).

The *NICC* petition invoked the constitutionally mandated power of the Commission on Human Rights of the Philippines to investigate “all sorts of human rights violations and abuses” [28] (p. 6). The petitioners demanded that the government of the Philippines engage with the home states of carbon major companies to take steps to “prevent, remedy or eliminate human rights violations resulting from the impacts of climate change” [28] (p. 31). In addition, the petition drew on the UN Guiding Principles on Business and

Human Rights (UNGPs) to explain the nature of corporate responsibility for the negative impacts on human rights arising from climate change, including contributions to such impacts and a failure to prevent them [28] (pp. 19–22). By way of relief, the petitioners sought an investigation by the Commission, improved monitoring of human rights issues arising from climate change impacts, and the creation by legislators of accountability mechanisms for use by victims of climate change. At the end of 2019, the Commission found that the companies had clear moral responsibility. In addition, the Commission found that where the companies had wilfully obfuscated the potential impacts of their activities and climate change impacts, they could be subject to potential civil and criminal liabilities in various jurisdictions [29].

In 2015, Saul Lliuya, from the mountain community of Huaraz in Peru, filed suit in Germany against RWE, the country's largest energy company [30]. The claim alleged that by contributing to climate change, which gives rise to the risk of flooding from an alpine lake above the town of Huaraz, RWE interfered in the property of Mr. Lliuya. In *Saul Luciano Lliuya vs. RWE*, Mr. Lliuya claimed the amount of USD 1,000 for flood early warning systems and new or improved dams to mitigate the risk of flooding in the area. The amount was calculated based on the proportion of RWE's 0.47 per cent contribution of total GHG emissions [30], relying in part on the 'carbon majors' research [31] to attribute a proportion of global and historical carbon emissions to RWE. On appeal, the Regional Court at Hamm deemed the complaint admissible, expressly rejecting the defendant's argument that the matter was governed solely by the German regulation, such as the Emissions Control Act. Of wider significance was the acceptance by the court of a "chain of causation" that could link GHG emissions from coal fired electricity plants owned by RWE to the flood risk experienced by Huazara and Mr. Lliuya in particular [30] (para 3).

In effect, the Regional Court recognized the validity of a civil claim based on a causal relationship between putting GHGs into the atmosphere and harms being suffered by people resulting from changes to the climate caused by GHGs emissions. In addition, the court accepted to hear a claim for harms that occurred outside German jurisdiction based on acts—emissions—that occurred within Germany. As such, the court in *Lliuya v RWE* had accepted to hear evidence pertaining to a climate-based form of foreign direct liability, based on claims of "people- and planet-related norm violations" [20] that occur abroad but to which German companies might contribute.

Similar patterns of rights-based claims with transnational dimensions relating to environmental impacts have been at the heart of cases pushing the boundaries of foreign direct liability. This has been particular true of the many cases arising from toxic impacts on people and the environment arising from industrial activity, or so-called 'toxic tort' litigation [32]. These can be grouped into three basic categories of transnational cases litigating eco-human toxicity impacts: workplace health and safety, long term pollution of the environment, toxic incidents.

The emblematic case of litigation arising from a toxic incident is the *Bhopal* case. A gas leak from the Union Carbide pesticide plant at Bhopal, India in December 1984 killed thousands of people within hours and days and affected hundreds of thousands more. Civil actions were launched in both India and the U.S. in the immediate aftermath of the disaster, but by 1987 U.S. federal court refused to hear the case on grounds of forum non conveniens (that India was the more appropriate forum). This decision was based, in part, on a finding that Union Carbide's Indian subsidiary constituted a separate legal entity, despite Union Carbide's majority stake in the subsidiary. The U.S. Court of Appeals upheld this ruling but required Union Carbide to participate once the case was transferred to India and to submit to the decisions of the Indian courts.

An out of court settlement was reached amounting to over USD 400 million, in which the company did not accept culpability. The Indian government rejected the settlement, only to have it upheld in 1991 by the Indian Supreme Court. Litigation surrounding the disbursement of the settlement proceeded in both U.S. and Indian courts. Litigation in the U.S. under the Alien Tort Statute was filed in 1999 seeking damages and a clean-up, but it was dismissed in 2012. Criminal charges for manslaughter were filed by authorities in India in 1991 against the CEO of Union Carbide, a U.S. citizen. A number of Indian managers of the Indian subsidiary were convicted in 2010. Meanwhile, Union Carbide sold its Indian operations and was later bought by Dow Chemical (now DowDuPont) in 2001. Dow took the position that responsibility lay with the owner of Union Carbide's Indian subsidiary, a separate legal entity, which itself asserted that responsibility with the new owners of Union Carbide [33].

Workplace exposure to hazardous substances was also the harm that provided important precedent concerning responsibility on the part of corporations for their governance of global value chains. In *Lubbe v. Cape Plc* workers in South African asbestos mines sued the UK-based Cape plc in a UK court seeking compensation for asbestos related diseases. The suit, launched in 1997, was eventually joined later by several thousand workers and residents near the mine. The court of first instance accepted Cape's application to have the case dismissed on grounds of forum non conveniens, but this decision was overturned on appeal. Ultimately, the case was decided by the Law Lords, who ruled in 2000 that the lack of legal aid for personal injury cases in South Africa meant that they country could not serve as an alternative forum and that the case could proceed in the UK High Court. The case was resolved through out of court settlements in 2001 and 2003 [34]. In 2011, the UK High Court ruling in *Chandler v. Cape Plc* established that a parent could be held responsible for unsafe working conditions at a subsidiary, based on facts involving worker exposure to asbestos at a Cape subsidiary plant in the UK. The ruling established that under UK law the duties of a subsidiary do not necessarily exclude duties on the part of a parent for harms suffered by workers, and that nature of the duty of care of the parent should be established based on factual nature of involvement of the parent in the operations of the subsidiary [35].

Similar logic has been applied by the UK courts to assume jurisdiction in cases involving long-term pollution of the environment that impacts communities. In 2019, the UK Supreme Court confirmed UK jurisdiction in *Vedanta v. Lungowe*. The case involved allegations by a group of Zambian villagers that water pollution from the Nchanga Copper Mine, operated by Vedanta's Zambian subsidiary, damaged their lands and livelihoods. In *Vedanta*, as in *Lubbe v. Cape Plc*, the High Court found that the jurisdiction of UK courts would be open to the case on the grounds of evidence that a lack of access to legal aid, which made it likely that justice could not be obtained in the jurisdiction where the harm occurred [36].

This pattern of civil actions, judgments across several jurisdictions, and the complicating factor of separate legal entities in the parent–subsidiary relationship, was evident in the case of attempts by people of the Amazonian rain forest to seek compensation and the clean-up of pollution in their water and near environment allegedly left behind by oil extraction. In 1993, Peruvian (*Jota v. Texaco*) and Ecuadoran (*Aguinda v. Texaco*) plaintiffs filed suits in the U.S. alleging that Texaco's oil operations between 1964 and 1992 resulted in contamination of the forests and water courses, resulting in damage to the health of the environment and people living in the area. The cases were dismissed by U.S. federal courts in 2002 on grounds of forum non conveniens (e.g., that Ecuador was the more appropriate forum).

In 2003, a class action was launched in Ecuador against Texaco alleging similar harms. Texaco had been acquired by Chevron in 2001. Chevron contested the allegations in Ecuador but in 2011, a ruling was issued by a court in Ecuador finding in favour of the plaintiffs and ordering Chevron to pay between USD 8.6 and USD 18 billion in damages, the latter amount in the event that Chevron did not apologize [37]. By that point, Chevron

had filed separate complaints in the U.S. and Ecuador alleging fraud on the part of the plaintiffs. Chevron pursued litigation in Ecuador seeking to overturn the court's decision, international arbitration under the terms of Ecuador's bilateral investment agreement with the U.S. and litigation in the U.S. against the plaintiffs lawyers [38]. In the cluster of litigation concerning *Chevron v. Ecuador*, the company succeeded in its racketeering and related claims in an almost unprecedented private prosecution against a public interest lawyer in a New York court, resulting in financial penalties and house arrest [39,40]. In 2018, after several rounds of hearings at various levels in Ecuador, Ecuador's constitutional court upheld a USD 9.5 billion judgment against Chevron, but Chevron successfully litigated the case through international arbitration.

The corporate liabilities which arise from rights-based tort or administrative complaints have their analogs in criminal law. For example, cases have been filed alleging companies or businesspeople have acted as accomplices to international crimes. In 2002, prosecutors launched an investigation into the role of former executives of Ford Motor Company's subsidiary in Argentina in antiunion activities at the company during the military dictatorship (1976–1983). They were eventually charged in connection with the kidnapping and torture of twenty-four workers employed by their factory near Buenos Aires. The prosecutors alleged the executive provided photographs, home addresses and other information in support of the kidnappings and allowed a detention centre to be set up on factory premises. In 2018, two former executives were found guilty and sentenced to 10–12 years in prison [41].

In Sweden, prosecutors investigated allegations that the Swedish oil company *Lundin* provided logistical support for aircraft and the construction of infrastructure that enabled war crimes by Sudanese armed forces and allied armed groups in south Sudan during 1997–2003. The facilities were allegedly used in the government's counterinsurgency campaign and supported air attacks by government forces against villages in the south of the country, which resulted in thousands of deaths and an estimated 200,000 people being displaced, as well as rape, child abduction, and torture. The case is likely to go to trial in 2021 [42]. Similar allegations of corporate complicity have arisen in relation to other companies and other conflicts, such as the *Anvil Mining* case in DRC [43], or the complaint filed (and later dropped by the prosecutor) in Germany against the Danzer timber company [44]. In 2016, a criminal complaint was filed in France against Lafarge, alleging the company had made payments to the Islamic State (IS) in Syria in order to ensure freedom of movement in the areas around its Jalabiya plant near Raqqa, Syria. The complaint also alleged that the company had purchased raw materials used in the operation of the plant from an IS controlled source. The complaint was filed by lawyers representing former employees of the Syrian subsidiary of Lafarge. It alleged complicity in war crimes and crimes against humanity, as well as financing of terrorism (a parallel claim was filed by French authorities alleging financing of terrorism). In 2019, the prosecuting authorities excluded from the case the charges alleging complicity in crimes against humanity, but maintained the charges relating to financing of terrorism [45].

Complicity may also arise from supply chain relationships. In 2005, a Dutch businessman was prosecuted in a court in the Netherlands for providing material support to international crimes committed by the regime of Saddam Hussein. Frans van Anraat was convicted of aiding and abetting war crimes committed by the Iraqi regime and sentenced to 17 years in prison for having sold chemical components to Iraq that were then used in the production of chemical weapons deployed against Iran and against Iraq's own Kurdish population. The case in effect criminalized transactions involving ostensibly dual use products as material support for a war crime [46]. Similarly, in early 2019, the Penal Court of Antwerp in Belgium convicted three businesses and their owners for shipping 168 tons of isopropanol to buyers in Syria between 2014–2016. Isopropanol may be used in the making of chemical weapons. The shipments were made in violation of EU export licensing requirements. The companies were fined between EUR 75,000 and EUR 500,000 and two company managers received between four and twelve month prison sentences [47]. Similar

patterns of facts were at issue in a 2011 criminal complaint filed in France against *Amesys*, a French company, alleging it provided communication and Internet surveillance equipment to the Gaddafi government in Libya. The complaint alleged that, with the help of the company, the Libyan authorities used the equipment to identify opponents of Gaddafi, who were then detained and tortured [48]. A similar case involving surveillance technology provision to the regime in Syria by *Qosmos*, also a French company, was filed in 2012. In both cases, the online surveillance systems were allegedly used to target activists and other opposition elements for arrest and ultimately torture in 2011 and 2012, as those two countries descended rapidly into civil war in the wake of the Arab revolutions [49].

In these supply chain cases, business entities acted as suppliers to the perpetrators of international crimes, in part by providing key elements of the means of perpetration. In most of these cases, complicity arises from a relationship that was, for the most part, commercial. However, there are also cases in which the lines blur between commercial and political role of business accomplices. For example, in 2004, the International Criminal Tribunal for Rwanda (ICTR) indicted Felicien Kabuga. An influential Rwandan businessman, Kabuga was indicted for conspiracy to commit genocide and extermination (a crime against humanity). The indictment alleges that Kabuga used his company to purchase large stocks of machetes, weapons and uniforms, as well as provide transportation, for the Interahamwe militia that carried out the Rwandan genocide in 1994. Kabuga is also alleged to have helped create the National Defence Fund in order to buy weapons, vehicles and uniforms for the Interahamwe. In early 2020, Kabuga was detained by police in France [50]. In 2017 a Dutchman, Gus van Kouwenhoven, was convicted by a Dutch court as an accomplice to war crimes committed by Liberian ex president and convicted war criminal Charles Taylor. Kouwenhoven was the Dutch head of two companies, the Oriental Timber Company and Royal Timber Company, both of Liberia, which were accused of providing weapons and ammunition to Taylor's fighters. The prosecution alleged that Kouwenhoven's companies provided weapons, ammunition, meeting places and other support to Taylor's armed forces, who committed atrocities. That support included the importation of weapons in violation of a UN arms embargo and financial contributions [51].

The *Lluyya* case also suggests the emergence of the principle that transboundary impacts of greenhouse gas emissions are a legitimate basis for regulatory action by governments with jurisdiction at the source of production. RWE is Germany's largest producer of energy from coal burning power plants, which burn lignite produced from German coal fields. To the extent that RWE's emissions were from coal produced in Germany, a positive decision in *Lluyya* would lend weight to the idea that companies and countries that bring carbon to the market have a responsibility for doing so.

The litigation undertaken in these cases suggest courts have little problem understanding the harms at issue, which have to do with rights as well as issues of environmental protection and the nexus of rights and protection of the environment. In addition, it would appear that the difficulty in establishing responsibility arising from global value chains is slowly being overcome. In the Bhopal-related litigation in the U.S., the courts were quick to dismiss it on the basis of the common law doctrine of *forum non conveniens*, based on the separate legal entity of the foreign subsidiary and on the foreign location of the harm and victims. In the UK, the rulings in *Cape Plc* and *Vedanta* have mitigated this tendency on the part of common law jurisdictions, and *forum non conveniens* has been rejected by the European Court of Justice for EU member states [52,53]. However, the departure of the UK from the EU is likely to put *forum non conveniens* back on the judicial agenda in cases involving corporate control over global value chains. In the US, the tendency to restrict jurisdiction was reinforced in 2013 by the U.S. Supreme Court in *Kiobel*, when it ruled that suits involving torts arising from violations of international law and filed under the extra-territorial jurisdiction of the Alien Tort Statute (ATS) must "touch and concern" U.S. jurisdiction in order to displace a presumption against extraterritorial application of the ATS.

4. Regulating Duties of Care

Counter corporate litigation is an accepted part of well-established regulatory tools at the national level. Some countries are more litigious than others. However, litigation as part of regulatory regimes is widespread, often constituting a statutory measure in the enforcement of corporate duties of care in environmental law, labour market regulation, antitrust law, anticorruption law, consumer protection and other regulatory regimes in many different countries [54]. While jurisdiction in these regimes is usually presumed to be domestic, certain regimes—such as antibribery laws, anti-money-laundering laws, and international criminal law—often also include extra-territorial jurisdiction for violations which occur abroad.

This regulatory role assigned to litigation is also used to constrain corporate activities where existing regulation is failing or non-existent. This may occur when new and unregulated business models arise from new commercial opportunities or new technologies. For example, there are an increasing number of cases in Europe and the U.S. focusing on the challenges posed to labour relations arising from the digital economy. New forms of employment, such as platform work, have transformed the labour contract through digital platforms, but have been challenged in the courts of a number of jurisdictions [55,56]. Regulation has also sought to grapple with risks to rights posed by business models of digital platforms that commodify and appropriate personal and other kinds of data produced by users and consumers [57]. These technologies are transforming the labour contract as well as offering new business models for the extracting of value from the labour of consumers. Google and Facebook have faced litigation launched by regulators in the U.S. challenging their handling of consumer data. In Europe, legislators have extended the reach of regulation to protect citizen data across the internal market and beyond the borders of the EU under the General Data Protection Regulation (GDPR).

Litigation also arises where regulation appears to be failing or ineffective. The failure of states to regulate is not an exception, but is in fact a common facet of contemporary capitalism. The regulatory effectiveness of regulation is undermined by the fragmentation of governance, itself a result of the rise of transnational value chains and global production networks. In addition, less regulation, not more, has been the default ideological assumption of neoliberal law-making for half a century. The result is a regulatory system that in many respects enables corporate avoidance or evasion [17].

In the context of a just transition, counter corporate litigation may be one way for plaintiffs to try to confront evasion and avoidance, either directly or by mobilizing regulators to act. In a number of countries, citizens and social movements have launched cases against their governments seeking to prevent activities contributing to GHGs or to force governments to do more to reduce such emissions. Although not imposing direct duties on companies, such cases have the potential indirect impact on corporate activities, since it is those activities which generate the bulk of emissions. For example, as noted above, in *Urgenda* a civil society group sued the state and won, resulting in an injunction from the Supreme Court of The Netherlands requiring the state to do more to constrain GHG emissions. Similarly, litigation launched by civil society organisations in Norway in 2019 sought to prevent the government from issuing licenses for new oil and gas exploration, arguing that doing so would violate Norway's constitutional provision (Section 112 of the Norwegian Constitution) guaranteeing citizens a sustainable and healthy environment. The Supreme Court ruled against the plaintiffs [58]. In the UK, the Court of Appeals ruled that plans for an additional runway at Heathrow airport were unlawful because the government had not adequately taken the UK's climate action commitments into account in their plans. That ruling was overturned on appeal to the UK Supreme Court, but policy changes in the meantime mean significant regulatory challenges remain to address the climate impacts of a new runway at Heathrow.

In 2019, the Land and Environment Court of New South Wales, Australia, upheld the government's denial of the application for the Rocky Hill Coal Project. The ruling involved the application of administrative law consideration of environmental impact assessments. The court cited state and local environment and land planning rules, as well as "the principles of ecologically sustainable development" under Section 4.15 (1) of the Environmental Planning and Assessment Act (the EPA). The project was designed to produce 21 million tonnes of coal over a period of sixteen years. The court found the project was "contrary to the principles of ecologically sustainable development because the direct and indirect greenhouse gas emissions of the mine will contribute to climate change" [59].

In this, *Gloucester Resources* is similar to the *NICC* case in the Philippines discussed above in that they both rely on specific regulatory mechanisms, albeit environmental regulation in one case and human rights protections in the other. They both use these regulatory mechanisms to engage direct corporate responsibilities for greenhouse gas emissions. In this they are similar to the German and Dutch cases discussed above, which all seek to hold companies directly liable for their activity in producing such emissions. While different in their causes of action, taken together these cases suggest a principle that transboundary impacts of greenhouse gas emissions are a legitimate basis for regulatory action by governments, or adjudication by courts, in jurisdictions at the source of GHG production.

In the U.S., governments used litigation based on commercial statutes as the basis for holding corporations responsible for climate impacts. Investor civil actions in the U.S. include cases filed by the states of New York and Massachusetts against Exxon Mobil Corporation (Exxon) alleging fraud in the form of the misrepresentation of risks material to the company arising from climate change. This category also includes cases filed in federal courts in Texas by shareholders and pension beneficiaries against managers of Exxon's pension fund alleging failures to manage the funds with a view to mitigating the effects of climate change on Exxon's share price.

The state attorneys general of New York and Massachusetts filed claims in the state courts of New York and Massachusetts, respectively, alleging that Exxon misled its shareholders through the company's communications to investors on the risk of climate change to the company. Both complaints drew on the Paris Agreement target of two degrees of global warming as the standard likely to be implemented by government regulation and therefore likely to affect company activities. Both complaints alleged the company misled investors about the material significance of those targets for the company. Exxon denied the allegations, calling them "baseless" and the result of "lobbying" and "political opportunism" [60].

The suit launched by the state New York case was based on the tort of fraud with respect to information provided by companies to shareholders. This is a not uncommon form of litigation used in the U.S., including by law enforcement, in order to protect the interests of investors, and more generally to regulate the proper functioning of markets. The New York case was also based on the 1921 Martin Act which has been used repeatedly by the state's Attorneys General over the years to investigate companies doing business in New York and who are alleged to have lied to their customers or shareholders about their activities. The statute provides the basis for both civil or criminal procedures. Under the civil procedures, prosecutors are not required to prove a company intended to defraud investors, only that it misrepresented or withheld information through their reporting or marketing materials. Before the case went to trial, the fraud charges were dropped but the case proceeded on the Martin Act as a civil claim.

The New York complaint went to trial in late 2019 alleging that Exxon had "falsely assured investors that it has taken active and consistent steps to protect the company's value from the risk that climate change regulation poses to its business" [61] (para 76). At issue was whether Exxon's practice in recent years of informing investors about future "proxy costs", while simultaneously maintaining a lower "GHG cost" for internal purposes, constituted misleading investors. At the heart of the cause of action is the allegation that

the proxy costs were fraudulently calculated in order to obscure the potential costs of climate change related regulation and, in particular, that none of its assets—both existing exploitation and investments in new reserves—were at risk of becoming “stranded” [61] (para 286, 287). In short, the plaintiffs alleged that while the proxy costs were meant to be the basis for internalizing to the company the cost of climate change, they were instead used to signal business as usual. In a December 2018 ruling, a judge found in Exxon’s favour, accepting Exxon testimony that the two costs had separate and legitimate purposes and ruling that the Attorney General’s office had failed to show that any investors had been misled by the company practice [61].

The Massachusetts Attorney General filed a suit in October 2019 alleging that Exxon provided misleading information in violation of the state’s consumer and investor protection laws [61]. Superficially, the Massachusetts’ suit included similar allegations to New York’s allegations of misleading investors: the Massachusetts’ complaint does make allegations based on evidence of different proxy costs used by the company [62] (para 114–142). However, the complaint is in fact much wider in substance. The Massachusetts’ complaint was based on provisions of the state’s consumer protection laws as well as investor protection laws. It built on evidence of Exxon’s advanced knowledge about the systemic risks from climate change dating back to the 1970s to allege the company’s external communications were at odds with this knowledge and to allege those communications were misleading about the material nature of systemic risks from climate change to the interests of both investors and consumers.

Litigation concerned with the ecological and human impacts of toxic chemicals has also taken place in the context of a variety of other regulatory actions by authorities. For example, in *Trafigura*, the Dutch–UK–Swiss oil trading company by the same name was sued in the UK by thirty thousand residents of the Ivory Coast who alleged “damages in respect of the discharge of chemical waste from a tanker, the ‘Probo Koala’” in August 2006 [63]. The plaintiffs alleged that in August 2006, Trafigura shipped chemical waste to Côte d’Ivoire, and arranged for it to be off-loaded by a local company, knowing that there was no local capacity to treat the waste and that this resulted in widespread impacts on the health of people. The waste was disposed of in open sites around the city of Abidjan. For its part, Trafigura asserted the waste was not toxic, that it was the responsibility of the local company to dispose of the waste properly, and that the number of those harmed was far smaller than the suit claimed. The approach was similar to that of Dow in response to the 1984 disaster at Bhopal [33].

In the immediate aftermath of the incident, Trafigura executives were detained in Abidjan and held until February 2007, when the company reached a settlement with the government of Cote d’Ivoire for a reported USD 198 million for a compensation fund, the construction of a waste treatment plant and to assist in recovery operation. By that point, the UK High Court of Justice had accepted jurisdiction to hear the civil action. In 2009, the parties in that case reached a settlement of approximately USD 30 million, which was approved by the UK court. A conflict arose over disbursement of the funds and more litigation resulted in both Cote d’Ivoire and the UK [63].

Meanwhile, criminal proceedings were launched in the Netherlands alleging Trafigura had illegally exported hazardous waste. The charges arose from the fact that the Probo Koala, prior to landing in Cote d’Ivoire, had stopped in Amsterdam and attempted to off load its waste, but when facing extra fees for handling the waste, had departed. In 2010, Trafigura was found by a Dutch court to have concealed the dangerous nature of the waste. The court fined the company EUR 1 million, and convicted both a Trafigura employee and the captain of the Probo Koala. In 2008, Greenpeace launched a successful legal process in the courts to pressure prosecutors to pursue Trafigura’s director. In 2012, the prosecutor’s office and Trafigura reached a settlement, including EUR 300,000 in compensation and a EUR 67,000 fine [64].

Labour laws, which often include specialized courts or tribunals, generate countless cases of enforcement each year in all major economies, including the U.S., EU and China. Most regulatory regimes concerned with labour seek to address different facets of the predatory taking of labour-generated value. Predatory labour exploitation is based upon an imbalance of economic power between business owners and their workers, and exacerbates the vulnerability of workers. For example, when labour markets are loose due to an abundance of workers, often living in poverty and with little in the way of social protection, the leverage of workers to seek improved rights or protection through, for example, various forms of collective action directed at employers or at governments, is significantly reduced. Labour vulnerability or marginalisation can take many forms, but is usually referred to as precarious work, or work that maintains people's vulnerability through poverty or economic inequality, forms of non-standard employment relationships, or repression of their rights to collective action [65].

In many jurisdictions, labour regulation includes options for litigation by or on behalf of workers, often before specialized courts or tribunals. As with the set of cases addressing eco-human toxicity, there are thousands of cases that occur each year in a variety of domestic jurisdictions. There are tens of thousands of cases each year in the labour courts of China, many of which seek to hold employers accountable for such violations as wage theft, in addition to harms to workers arising from workplace health and safety. Such specialized courts are usually intended to speedily resolve conflicts and deter breaches of established protections; in some jurisdictions they act alongside social dialogue and collective bargaining, while in others they are a clear attempt to contradict attempts by workers to organize themselves [65–67].

The rise of toxic torts in the U.S. courts in the 1970s and 1980s has been replicated in more recent years by thousands of workplace health and safety cases in China's specialised labour courts [68]. This has also occurred elsewhere in Asia. One example is in Korea, where a settlement was reached in November 2018 after a decade-long struggle between Samsung and Korean workers and their families for compensation for health injuries and deaths resulting from exposure to toxic substances in Samsung factories. The cases had lasted over a decade, involving both Samsung and the government of South Korea in claims for compensation, and also resulted in a Korean Supreme Court ruling on a causal link between conditions in Samsung factories and workers' health [69].

Finally, the interaction of litigation and regulation is also a site for corporate lawfare. For example, in 2013 a large Canadian forestry company sued Greenpeace in the U.S. over the latter's campaign accusing the company of "destructive logging practices" [70]. The company's complaint alleged, in part, that the campaign involved the dissemination of "intentionally and materially false, misleading, and defamatory" statements, including about the company's compliance with the relevant regulations [71].

In 2013, an activist report by Finnwatch (Finland) alleged that a large agricultural company in the Philippines was failing to respect the rights of its workers, including by paying less than minimum wage. The company responded by filing civil and criminal defamation complaints in the Philippines against the local campaigners who contributed to the report. In both cases, the courts ultimately disagreed with the company, but not before lengthy processes had effectively transformed a public debate over company compliance with public law rules, into a conflict between private parties to be adjudicated before a court [72].

These cases are examples of so-called SLAPP lawsuits—or strategic litigation against public participation. Research into SLAPP case identified the strategic element of SLAPPs as "the transformation of a debate over public policy into a private dispute" [73,74]. One of the effects of SLAPP lawsuits is to divert controversy about corporate practices from the domain of public concerns about regulation and corporate accountability into the domain of private adjudication. By launching litigation, the corporation diverts the dispute from the public political sphere and a debate about regulation, into a courtroom concerned with adjudicating private conflicts through civil litigation. Often this attempt at transforming

the debate occurs by using allegations of defamation in reaction to claims about company failures to comply with normative or regulatory standards: “One moment a citizen is testifying against a city zoning permit for a proposed housing subdivision; suddenly, “city hall” becomes “courthouse,” and “zoning” becomes “slander.” One set of interests has successfully transformed a public, political-arena debate into a private, judicial-arena adjudication. Not only are parties’ resources diverted from the original issue, the new forum typically will not be able to resolve the problem (zoning), limited as it is to adjudicating the camouflage (slander)” [73].

Part of shifting a political dispute over negative corporate impacts into a courtroom involves turning the tables on those seeking to constrain negative corporate behavior. It forces workers, journalists, affected communities or activists to defend their actions in profiling harmful corporate impacts. This can backfire on corporate plaintiffs, as well shall see, but the time and costs involved in defending against corporate lawfare divert defendants from their concern with corporate activities to a focus on the various activities—fundraising, etc.—to enable a legal defense. The process is not designed to be quick. Lengthy court proceedings can take years and impose crippling costs on those least able to pay. This penalizes those who oppose corporate interests and undermines their practical ability to perform their original social function, that is to act as a check on negative corporate impacts. It also stigmatizes critics of corporate behavior: by putting corporate critics on trial, corporate lawfare undermines the legitimacy of their claims in the minds of the public, media and political decision-makers [73–75].

Facing subpoenas for discovery as part of investigations into investor fraud concerning climate risk calculations by the Attorneys-General of the states of New York, Massachusetts, and the Virgin Islands, Exxon filed suit in Texas federal court. The Exxon complaint alleged abuse of process citing evidence of a coordinated effort from several states to pursue the company in state courts. The argument was, in part, that the investigations compromised the company’s ability to participate in public debate. The complaint against the Virgin Islands stated that the subpoena is “a pretextual (sic) use of law enforcement power to deter Exxon from participating in ongoing public deliberations about climate change . . . ” and that “[t]he chilling effect of this inquiry . . . target[s] one side of an ongoing policy debate, [and] strikes at protected speech at the core of the First Amendment” [76]. In other words, in this case Exxon deployed a core element of the argument against SLAPPs—that they interfere with public participation—only this time that argument was deployed against public law enforcement.

A more direct route, at least for some companies investing abroad, has been to contest the application of host state regulation or adjudication by suing host governments under applicable trade and investment agreements that allow for international arbitration. This is increasingly common: the UN has reported that a rise in so-called Investor–State Dispute Settlement (ISDS) in relation to climate regulations is threatening efforts to regulate the transition to sustainability [77,78]. Prominent examples of ISDS litigation included a 2014 a suit launched by a Canadian company, which sued the government of Peru under the Canada–Peru free trade agreement. The suit alleged that by cancelling the mining concession, even at an early phase of the project, the government had in effect expropriated the company’s investment. The case was heard by an international arbitration tribunal, which agreed with the company and ordered the government of Peru to pay a total of over USD 30 million in costs and damages [79]. Similarly, in its long litigation battle concerning pollution related to oil production in Ecuador. Chevron succeeded in contesting through international arbitration a massive award to plaintiffs by an Ecuadorian court, confirmed by the country’s supreme court. In August 2018, the Permanent Court of Arbitration in the Hague found Ecuador liable for “denying justice” to Chevron by allowing its courts to issue allegedly fraudulent judgement against the company [80,81].

Private remedies have also been deployed against self-regulatory forms of corporate social responsibility. In 2018, garment factory owners in Bangladesh obtained a court order against the Bangladesh Accord on Fire and Building Safety from the High Court, effectively threatening to bring the Accord's negotiated, multistakeholder mandate to an abrupt end. Litigation ensued alongside negotiations (between global brands, Bangladeshi producers, global and national trade unions and civil society, and the government) and in 2019 the Supreme Court of Bangladesh approved a deal that endorsed a handover of the work of the Bangladesh Accord to a new multistakeholder entity by 2020. The Accord was originally formulated precisely because regulatory enforcement had been inadequate to protect against a fire and collapse of factories in 2013 that resulted in the deaths of 1133 workers. Monitoring by the Accord had indicated that more work was needed to improve domestic regulatory capacity and a transitional agreement had been reached taking the work forward into 2021. However, employers, with government backing, used the courts to force an early end to a private scheme which was designed to compensate for failures of public law enforcement [82].

5. Repression of Predatory Business Models

In addition to its functions as a source of remedy and as an enforcement measure in regulatory regimes, counter corporate litigation has also challenged the legitimacy of certain business models. The causes of action in such cases are often the same as those involved in cases which defend human rights and the environment, or seek to enforce regulatory standards; but the core of the cases are built around a judgment that a particular business model is predatory, in that it involves value creation based on harms to people or the planet, and as such should be repressed.

In the field of climate action, the *Milieudefensie et al.* claim in The Netherlands is perhaps typical. The plaintiffs did not seek damages or compensation but injunctive relief. The case relied on human rights claims under private law to argue that Shell's duty of care to people and the planet could not be fulfilled while the company continued GHG emissions at a rate beyond that deemed sustainable by the Paris accords. In this sense, the case is remedial in substance—it was a rights-based claim that sought to remedy an ongoing harm. However, the case also sought to repress a business model in which profitability was based on excessive GHG emissions: by seeking an injunction, the plaintiffs demanded that Shell change its business model with a view to ensuring it contribute to keeping anticipated global warming below the Paris Agreement targets. The court agreed and issued the injunction (see above Section 2).

As described in Section 2 above, the details of a company's business model, in particular its pricing of the risk of regulation, were also a key element in the investor fraud cases launched in the U.S. In other climate action cases in the US, plaintiffs argued that the business model of oil and gas corporations constituted a public nuisance, defined in U.S. law as an "unreasonable interference of a right common to the general public." In the second half of 2017, eight California municipalities (both cities and counties), along with New York City and municipalities in Washington and Colorado, all filed separate public nuisance lawsuits against oil and gas companies. The defendants in these cases varied between the top five companies (e.g., San Francisco and New York brought suit against BP, Chevron, ConocoPhillips, Exxon and Royal Dutch Shell) or as many as thirty-seven companies [83]. Several cases were brought in federal courts, while others were brought in state courts.

The suits alleged that the oil, gas and coal companies created a public nuisance in the form of climate change impacts and that this amounted to an interference in the property of the plaintiffs, as well as the torts of negligence (failure to warn of the effects of climate change) and trespass (causing rising sea levels that resulted in water invading the property of the plaintiffs). In addition, the cases alleged a "design defect", a product liability tort used in a number of historic tobacco industry cases. The design defect allegation involves

showing that a product was not as safe “as an ordinary consumer would expect” and that the risks of the products outweigh the benefits [83].

The plaintiffs alleged that the defendant companies are “vertically integrated extractors, producers, refiners, manufacturers, distributors, promoters, marketers, and sellers of fossil fuel products” and as such their business models involve activities directed to emitting GHGs.

The defendants, through their extraction, promotion, marketing, and sale of their fossil fuel products, caused approximately 20% of global fossil fuel product-related CO₂ between 1965 and 2015, with contributions currently continuing unabated. This constitutes a substantial portion of all such emissions in history, and the attendant historical, projected, and committed sea level rise associated therewith [83].

The cities demanded that companies “bear the costs of [sea level rise], rather than Plaintiffs, local taxpayers or residents” by paying into a fund that would finance the adjustments of coastal infrastructure to mitigate sea level rise. In *Boulder County Colorado v. Suncor et al.*, [84] the plaintiffs alleged impacts such as “larger and more frequent wildfires, increased concentrations of ground-level ozone, higher transmission of viruses and disease from insects, altered stream-flows, bark beetle outbreaks, ecosystem damage, forest die-off, reduced snowpack, and drought”, as well as threats to agriculture and the ski industry through warmer temperatures and shorter summers (para 110).

The alleged corporate responsibility in all of these cases arises from the combination of the core business activities of these companies as being directed towards bringing carbon to the market and specific knowledge with respect to the impact of those emissions. The wrongful acts alleged lie in the “vertically integrated” nature of the oil company business model, namely extracting fossil fuels, processing these into fossil fuel products and marketing those products, where marketing includes both making them available and encouraging consumers to buy them. Such complaints typically allege that knowledge of the climate change impacts of greenhouse gas emissions can be traced back to the 1950s “through immense internal investment in research, infrastructure improvements, and plans to exploit new opportunities in a warming world” [84] (para 5), while at the same time “Defendants concealed the dangers, sought to undermine public support for greenhouse gas regulation, and engaged in massive campaigns to promote the ever-increasing use of their products at ever greater volumes” [84].

In the New York, San Mateo and Oakland suits, the cases were dismissed in 2018 on the grounds that climate change impacts were too big an issue to be dealt with under a claim of public nuisance, that the problems were more suited to resort to the legislative branch of government and that the matters were better dealt with under federal administrative law, such as the Clean Air Act [85]. The plaintiffs appealed with the expectation by the end of 2019 that these cases were ultimately headed for the U.S. Supreme Court. Meanwhile, a number of cases, including by the city of Baltimore and Honolulu, were filed at the state level [3].

Beyond the climate action cases, the courts in a number of countries have been the site of challenges to predatory business models involving corporations in labour exploitation, either through foreign direct investment or via supply chain relationships. For example, in 2005, Cargill and Nestlé and other U.S. chocolate producers were sued by six former child labourers from West Africa under the Alien Tort Statute (ATS) in U.S. Federal Courts over the use of child labour in cocoa production, which occurred in countries in West Africa, such as Cote d’Ivoire and Ghana. In a pattern typical of modern slavery in supply chains, many children who work on cocoa farms migrate or are trafficked from neighbouring countries. Despite industry commitments to eliminate child labour from the production of cocoa, studies have found widespread use of children on farms throughout those regions, including in the performance of hazardous work (e.g., use of agricultural chemicals). By December 2020, the case had made its way to the U.S. Supreme Court [86].

In November 2014, Nevsun Resources in Vancouver, British Columbia, Canada was served with a lawsuit by three Eritreans alleging the company was an accomplice to the use of forced labour by Nevsun's local subcontractor, Segen Construction. Segen was owned by Eritrea's ruling party and ran the Bisha mine in Eritrea. The plaintiffs alleged that they were forced to work at the Bisha mine against their will and that while working there they suffered cruel, inhuman and degrading treatment, were forced to work long hours, and lived in constant fear of threats of torture and intimidation. Nevsun rejected the allegations as "unfounded" and declared that "the Bisha Mine has adhered at all times to international standards of governance, workplace conditions, and health and safety" [87]. The *Nevsun* case marked the first time a Canadian court had allowed a tort action of slavery. Nevsun appealed the decision of the British Columbia courts to the Supreme Court of Canada, which ruled in early 2020 that international law norms, such as those prohibiting forced labour and slavery, may be tried in Canadian courts. The case was settled out of court in October 2020.

The *Nevsun* case bore some similarities to earlier cases concerning slavery and forced labour. In 1996, forced labour was the basis of one of the early Alien Tort Statute (ATS) cases, in this case against the Unocal Corporation. In *Doe v. Unocal* A group of Burmese workers alleged they were forced to work on the Yadana Gas Pipeline Project, which was a joint venture between Unocal and the military government of then Burma, now Myanmar. The allegations described how government forces that had been engaged to provide security for the pipeline project forced people to work on the pipeline and instituted a system of repression and intimidation as part of doing so. Village populations were forced to work as porters or perform various menial tasks. Those who were unwilling were allegedly subject to arrest, beatings or executions by security force personnel. In addition to force labour, the suit alleged the company was complicit in the crimes against humanity of killing, rape, and torture. Although initially dismissed in 2000, the U.S. Court of Appeals (ninth circuit) reversed that decision in 2002 and sent it back for trial. The appeals court found that plaintiffs had provided enough evidence of harm by security forces, as well as knowing financial and other support by the company, that it warranted a trial. The parties reached an out of court settlement in 2004 [88].

Both *Nevsun* and *Unocal* are echoes of the earlier examples of litigation against business entities for participation in slavery and forced labour, namely criminal prosecutions in the wake of the Second World War. Subsequent to the International Military Tribunal (IMT), which prosecuted members of the Nazi regime in Germany, including those responsible for the German slave labour programme, the U.S. tribunal prosecuted officers of three companies—Krupp AG, IG Farben and the Flick holding company—for their active participation in that programme. In each case, the prosecution outlined how the German authorities exercised control over the flow of labour, including prisoners of war, civilians in concentration camps, and other work camps. At trial, the courts focused on drawing a line between mere business compliance with aspects of a state-regulated system of slave labour and active business participation and benefiting from slave labour. The tribunal tended to convict business people for the crime of slavery when it found active participation in the slave labour system. Active participation included, for example, involvement in the state's system designed to control of workers (e.g., building or maintaining camps). The tribunal considered the extent to which the business people were active participants in the system, for example as members of government bodies or as officials in government office, as well as the extent to which they were coerced to use forced labour by the authorities or had actively sought to have such labour deployed to their operations by the state (e.g., by requesting new deployments of forced labourers) [89].

The post-Second World War trials also dealt with predatory appropriation by corporate actors. In *U.S. v. Alfred Krupp* as well as *U.S. v. Krauch, et al., (The I.G. Farben Case)*, managers were convicted not only for participation in the Nazi slave labour programme but also for their involvement in pillage, a war crime. In *U.S. v. Friedrich Flick*, a number of company managers were convicted of pillage for their appropriation of Jewish min-

ing and industrial properties. Flick himself was convicted as an accessory to a criminal organization—the SS—by virtue of financial contributions made as part of his participation in the “Friends of Himmler” group. These convictions made clear that pillage in essence involved coerced, or non-consensual, transfer of title in property during time of war, and can span a continuum from irregular looting by soldiers, or the extortion of money at check points, to the systemic coerced transfer of property from one businesses to another or between businesses and the state. Most of these varieties of pillage were also dealt with by later tribunals, often in contexts of conflicts not of an international character, and often in close proximity to situations of forced labour. For example, the Special Court for Sierra Leone (SCSL) found that “forced mining” of diamonds was a source of revenue for armed groups, that those same armed groups were guilty of pillaging diamonds [90], and that those who aided and abetted pillage could be held liable as accomplices [91].

The coexistence of forced labour and pillage in the crime base of these cases is important in that it highlights the unlawfulness of predatory value creation, in particular where coercion is necessary for the creation of value, such as in labour exploitation or the unlawful appropriation of property. Coercion is also at issue in cases concerning the private military and security industry. For example, in October 2014, four Blackwater private security contractors were convicted of murder, manslaughter and weapons charges in connection with the killing of seventeen Iraqis in Nasour Square Baghdad in 2007. The four were prosecuted on the basis of domestic U.S. criminal law, which was given jurisdiction over the acts of military contractors by the Military Extraterritorial Jurisdiction Act (MEJA). In 2018, three of the four defendants were convicted and sentenced to time served. A fourth defendant was convicted of murder in 2018 and sentenced to life in prison [92].

In Al Shimari v. CACI, four Iraqis who were detained in Abu Ghraib prison in Iraq in 2003–2004 sued the U.S.-based security contractors CACI International Inc. and CACI Premier Technology, Inc. Launched in 2008, the lawsuit alleged that CACI tortured the plaintiffs at the Abu Ghraib prison in Iraq while contracted by the U.S. government to provide interrogation services. The causes of action under the ATS include allegations of violations of a mix of U.S. and international laws, including torture, cruel, inhuman, or degrading treatment, war crimes, assault and battery, sexual assault and battery, intentional infliction of emotional distress, negligent hiring and supervision, and negligent infliction of emotional distress. The plaintiffs were Iraqis civilians who were released without being charged with a crime and all claim to continue to experience physical and mental suffering caused by the torture and other abuse they experienced [93].

Security provision, essential for companies operating in civil wars or situations dominated by insurgency, can pose a particular liability risk. For example, in 2007, Chiquita Brands International agreed to a plea-bargain arrangement with U.S. prosecutors on charges of financing a listed terrorist organization. As part of the agreement, Chiquita admitted publicly to making payments to paramilitaries between 1997 and 2004. Chiquita claimed that it had been forced to pay to both the FARC guerrilla, when they had control of the territory, and to paramilitaries after the latter displaced the FARC. The president of Chiquita justified the payments to the paramilitaries on the grounds that not paying for protection meant running the risk of attacks on their employees [94].

Similarly, the *LafargeHolcim* and *Lundin* cases (see above Section 3) also involved companies in payments and other support to armed groups that arise from activities along what might be described as an extortion–protection–complicity spectrum. The nexus of activities giving rise to potential liability in these cases are essentially transactional, an outcome of a negotiation of mutual interests, at least one of which his commercial. In certain cases, such as in *CACI*, *Kouwenhoven* or *Kabouga*, businesses play an integral role in the organisation or networks of which perpetrators are a part. In the other cases, such as *van Anraat*, *Amesys/Qosmos*, or *LafargeHolcim*, commercial relationships with the perpetrators of international crimes—such as selling chemical precursors, providing financial support, buying or supplying weapons—may be enough to give rise to liability based on the criminalization of material support to the commission of international crimes. In all

cases the criminal act (actus reus) of the alleged crime occurred within the scope of the business activities of the defendant, not merely as political–military activities conducted on the margins of business activity. The potential liabilities arose from a variety of statutory sources, including international humanitarian or criminal law incorporated at the national level, as well as domestic criminal laws governing violent crime, sanctions and counterterrorism.

Predatory business models such as these have also been defended by the deployment of corporate lawfare. As indicated above (see Section 4), lawfare has been used to privatize counter corporate litigation in the public interest. In addition, lawfare litigation leverages the coercion inherent in law as an instrument of power [95] to stigmatise opponents. The principal form of stigmatization through corporate lawfare is that of criminalization, the use of criminal statutes—or their equivalent in tort—against those challenging corporate activities. In SLAPP lawsuits, typical allegations include defamation or racketeering. Defamation laws are a fundamental aspect of protecting the quality of public debate and free speech. At the same time, they can be used to in effect stifle critical voices, not least by corporations sensitive to reputation and branding. Racketeering is a category of criminal activity that involves earning money through illegal means, usually various forms of fraud or extortion, or combinations of these and other violations. The Racketeer Influenced and Corrupt Organizations Act (RICO) is a criminal statute in the U.S. originally aimed at organized crime. It has a provision for civil lawsuits that has been used repeatedly by corporations as part of SLAPP actions, often in combination with defamation claims. They may also include allegations that efforts by campaigners to raise money for their activities, such as campaigning for remedies for corporate misbehaviour, constitute a racket. For example, in the cluster of litigation concerning *Chevron v. Ecuador*, the company succeed in its racketeering and related claims against a public interest lawyer in a New York court, resulting in financial penalties and a regime of house arrest unprecedented in its duration [39,40].

A defamation claim reduces a matter of public policy concern to a private conflict in civil court. Such claims force corporate critics to defend the veracity of claims about corporate impacts in a court, while their primary purpose in making certain claims may have been to raise public awareness about a problem and thereby prompt remedial action by relevant authorities or by the companies themselves. For companies or industries that commonly resort to defamation and racketeering suits, normal public criticism may simply become too risky or burdensome. This has a chilling effect on free speech with respect to particular companies or industries.

Where SLAPPs are common, there is a growing movement towards legislative remedies that regulate or ban them. In some cases, so-called ‘anti-SLAPP’ laws [96] have helped defend a space for public debate about corporate impacts. For example, in California a court used anti-SLAPP legislation to issue an order for substantial costs to be paid by a company that had filed SLAPP suits against Greenpeace [70].

6. Conclusions—Litigating a Just Transition?

Ours is a moment in which structural conflicts abound over the nature and limits of our systems of production and consumption. The emergence of counter corporate litigation in recent decades suggests that the negative impacts generated by those systems, long sources of biosphere degradation and human rights risks, can no longer be externalized and forgotten.

The rise of counter corporate litigation suggests that the courts may have a role to play in contributing to a just transition, by providing remedy and justice to victims, enforcement of regulatory action by state authorities, and by the repression of predatory business models. Counter corporate litigation also suggests that a form of legal transnationalism may enable forms of solidarity across global value chains: there is a slow—painfully slow—willingness emerging on the part of the courts in major economies to hear cases involving harms committed abroad in value chains governed by corporations domiciled at home. This is

mirrored in the transnational effects anticipated by regulatory approaches to human rights and environmental due diligence.

Part of this arises from a healthy willingness on the part of social movements and state authorities to challenge predatory or otherwise unsustainable business models. In addition to litigating violations of rights that can be remedied or compensated, or litigating to enforce duties of care in particular regulatory regimes, we are increasingly using litigation to confront the business models which present structural threats to our biosphere as well as to our survival, rights and freedoms. However, a range of obstacles continue to foster corporate impunity. Given the scope of the damage being caused by our systems of production and consumption, the immunity that presently exists for the entities that run those systems is deranged. Counter corporate litigation is at least evidence of sanity.

Is there a legal defence against the threat of un-sustainability? The body of counter corporate litigation suggests there might be. Counter corporate litigation holds the promise of accountability for corporations but at the same time the existence of such litigation illuminates the utter inadequacy of the law in responding to demands for structural change. It is almost as though we think it useful and effective to save globalisation, one case at a time, rather than bringing to bear the full range of legal and regulatory tools to restructure the modes of production at work in contemporary capitalism.

The lessons arising from the body of counter corporate litigation should inform our understanding of the ways in which the default neoliberal regulatory approach is insufficient. The rise of counter corporate litigation is evidence—if more was needed—that using law to create enabling environments for corporate value creation will further biosphere degradation, human and ecological toxicity, and crises of labour and inequality driven by predatory capitalism.

The implication is clear: for law to contribute to a just transition it must demote market efficiency as a prime concern of economic regulation and focus rather on how to remedy, regulate and repress adverse market impacts on people and on the planet. This suggests that law must render redundant—and in certain cases outlaw—production and consumption activities that threaten the systems that sustain our biosphere and enable human well-being. In doing so, regulation will have to tackle business models that generate biosphere or human rights risks as well as tackle head-on the tactics of corporate resistance to the necessary structural change. Indeed, corporate lawfare of the sort described here should be seen for what it is—a manifestation of vested interests in our systems of production and consumption doubling down on unsustainable business models which have caused the problems in the first place.

Legal reforms for a just transition should be guided by the principled objective of eliminating the harms that can be done to people and the planet and enabling value creation that puts people and the planet first. As part of doing so, the existing legal rules undermining corporate accountability in the courts must be reformed and transformed into an effective deterrent to unsustainable value creation.

Funding: This research was funded by Horizon 2020 research programme, grant No 693642.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Acknowledgments: This paper is based on research conducted written while the author was a Postdoctoral Fellow, Faculty of Law, University of Oslo (2018–2020) as part of the project Sustainable Market Actors and Responsible Trade (SMART, Horizon 2020 research programme, grant No 693642). The author wishes to thank Professor Beate Sjøfjell and colleagues at the Department of Private Law, University of Oslo for their insights and support during the research. The author declares no conflicts of interest.

Conflicts of Interest: The authors declare no conflict of interest.

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