15. Oil, law, temporality and indigenous rights

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INTRODUCTION

In May 2021, a criminal contempt trial unfolded in the United States (US) District Court against Steven Donziger, the US advisory lawyer for the Ecuador legal team that won a $9.5 billion ruling against Chevron Corporation in 2011. While seemingly straightforward—Donziger defied the order of Judge Lewis A. Kaplan—upon closer inspection the case's complexity triggers vertigo. On the one hand, stark irregularities in the criminal procedure challenge assumptions about how the US judicial system should work. On the other, a Kafkaesque labyrinth of legal proceedings reaching across decades, continents, and legal systems confound the legal truths upon which Judge Kaplan's court order rests. Most relevant here, however, is Chevron's US countersuit, which ultimately convinced Kaplan to delegitimize the 2011 Ecuador judgment and determine a new legal truth: that the corporation's Ecuador $9.5 billion liability was procured through fraud.

Engaging three intersecting registers, this chapter explores petroleum capital, legal process, and lived sites of extraction. How did a US court's decision to nullify Chevron's foreign legal obligation to clean up the contamination that its oil extraction wrought proclaim the second-largest US oil conglomerate a victim of racketeering, incriminate those seeking restitution for environmental racism, and forsake Amazonian peoples living and dying amongst extensive contamination? In the first register, our analysis situates a highly irregular US trial against Donziger within its deeper 20-year context of legal efforts to seek accountability for the long-term environmental effects of oil operations, and Chevron's legal strategy to delegitimize those efforts. We describe the lawsuit against Chevron in Ecuador, fundamentally challenge Judge Kaplan's finding that Chevron's Ecuador liability was obtained through fraud, and trace the corporation's pursuit of further legal action. In a second register, we consider how specific legal processes constitute distinct temporalities, and toward what consequential effect. We argue that, in these proceedings, US law congealed a temporality of legal time that we call the "recurrent past." Those in the US trying to demand corporate responsibility were unable to escape this vortex, foreclosing any possibility to interrupt Kaplan's fraud ruling. Equally disquieting, the purported truth of this recurrent past released a vastly endowed corporation from assuming an ethical role of reckoning its prior extractive wrongs. In a third register, our analysis touches on how Chevron's fierce deployment of legal technique over the past decade has incessantly sought to disavow and obscure the conditions of living in the ruins of petrocapital.

An emerging literature on law and temporality guides our analysis. This scholarship takes as its point of departure an understanding that time is not merely a pre-given natural background against which events occur. Rather, it understands time as actively produced (Greenhouse 1989) and fundamentally constituted by (and constitutive of) particular relations and things (Grabham 2016; Grabham et al. 2018; Mawani 2015; M'charek 2014). The question asked is: what work does a particular temporality do (M'charek 2014, 2013) and how is that achieved? Annalise Riles (2011, 2005) points to the "formidable power of legal form" in private law to

Source: Photograph by Mitch Anderson, AmazonFrontlines/Alianza Ceibo. Used with kind permission.

Figure 15.1 *Indigenous leaders Emergildo Criollo (A'i Kofan), Flor Tangoy (Siona), and Nemonte Nenquimo (Waorani) and her daughter observe a waste pit near Lago Agrio, Sucumbios, Ecuador*

engage "legal technique" so as to "reverse, redirect, and reorder the temporality of politics" (Knop and Riles 2016, p. 886), by which is meant the temporality through which asymmetric, relational entanglements are given meaning and force.

With respect to the legal complex we examine here, specific legal forms and techniques took part in constituting time, with distinct political effects. Our argument is twofold. First, Chevron and its army of lawyers brilliantly deployed its claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) as the legal form to reverse and redirect the temporality through which the Ecuador court had given meaning and effect to the contamination wrought by oil extraction: a $9.5 billion liability dedicated toward remediation. Using technicalities within the RICO form—conspiracy, bribery, manipulation—Chevron amassed a plurifaceted fraud narrative whose entangled density simultaneously curbed avenues for legal appeal. That is, Chevron's mastery of legal technique created a world of conspiracy recited in Kaplan's 485-page ruling so ensnared as to virtually foreclose appealing the labyrinth of constructed facts. With the appeal on legal grounds having failed, Kaplan's "findings of fact" and the "truth of fraud" came to entrench an inescapable and irredeemable past. Here, legal form and technique did not simply contain Chevron's opponents in an inexorable vortex. Doing so promised to secure Chevron's management of the future.

Second, the temporal trajectory that these legal technologies spurred in the US obscure a different temporality of reckoning presently unfolding in Ecuador. There, local collectives do not seek a once and for all closure. Rather, they are imbricated in an "expansive present" conditioned through "sequencing"; an attempt to address multidimensional harm through

something other than solely the zero-sum game of normative law (Knop and Riles 2016). While continuing to pursue enforcement of the Ecuador judgment in other jurisdictions, they are creatively and pragmatically spearheading a multifaceted program for healing on the ground, which "expresses both the seriousness of their situation and their realistic hope for surviving it" (Cepek 2012, p. 410).

What follows is an account of how Kaplan's 2014 ruling and a series of derivative legal actions have codified Chevron's fraud narrative and released the corporation from addressing extractive-related harms. With the temporal framework of the recurrent past packaging legal truths into a singular history resistant to revision, corporate impunity reigns. Understanding that process, and the response brewing in Ecuador, allows for a re-orientation toward the future and a reconceptualization of the work of decolonization.

As anthropologists who collectively have conducted over 20 years of research on the effects of oil operations in this rainforest region, our analysis emerges from in-depth research.[1] Donziger's 2021 criminal indictment rests on a cascade of prior legal proceedings. Even a partial list is long: the 2003–11 contamination lawsuit against Chevron for Texaco's oil operations in the Ecuadorian Amazon; a 2011–14 Chevron countersuit in the US seeking to delegitimize the Amazonian judgment against it; and the 2018–20 New York legal procedures over Donziger's bar license. These legal proceedings, and the immense energy and expense they demand (in excess of an estimated $1 billion on Chevron's part) detract from the ethical investment needed to remediate contaminated rainforest lands. Within the law, there appears little space to interrogate the irregularities of Donziger's criminal charges, and virtually no space to challenge the legal truths forming the basis of Kaplan's order. Law obscures the obligation to heal and mend that which extraction harmed, and signals deep contradictions in our system of justice.

DONZIGER'S CONTEMPT TRIAL

If weather could externalize a mood, the overcast skies outside the US District Court, Southern District of New York (USDC SDNY) on the morning of May 9, 2021 captured the cold tenor of a highly anomalous trial inside.[2] Judge Kaplan—having presided over Chevron's countersuit, in which Steven Donziger figured prominently—spurred a criminal contempt trial against Donziger. Assuming the role reserved for the Department of Justice (not a District Court judge), Kaplan appointed the like-minded Judge Preska to oversee the case. And, for the first time in the 232-year history of the USDC SDNY, he appointed a private law firm (Seward and Kissel LLP) to serve as prosecutors; a firm, it was later disclosed, that Chevron had retained as counsel.

The charges against Donziger stem from Kaplan's 2014 ruling delegitimizing Chevron's Ecuador liability. In his ruling, Kaplan declared that Donziger—the purported mastermind of a conspiracy to defraud Chevron—"never benefit in any material way from the [Ecuador] Judgment."[3] In 2018, Chevron alleged that this was not the case and that Donziger was benefiting as the legal team pursued legal proceedings in Canada, seeking enforcement of the 2011 Ecuador judgment. Kaplan ordered Donziger to comply with various conditions and ordered him to "turn over all Devices in his possession, custody, or control to the Neutral Forensic Expert."[4] When Donziger did not comply, Kaplan transformed civil contempt of court charges into a criminal contempt indictment.

Source: Photo by Ryland West/ALM.

Figure 15.2 Steven Donziger, with supporters, outside the courthouse during the criminal contempt trial, New York, USA

Thus, Chevron was invested in the criminal contempt of court proceedings against Donziger.[5] The proceedings are valuable to the corporation: obtaining Donziger's electronic devices could provide information that would undermine future enforcement efforts. And it may deter entities interested in investing in such efforts.[6] As disclosed during the trial, Chevron lawyers met on multiple occasions with the private attorneys serving as Department of Justice (DOJ) prosecutors, as well as with Judge Preska.[7] The coincidence of the criminal trial, the excessive punitive measures Preska imposed before trial, and the enforcement proceedings in Ontario did not seem accidental. In August 2019, declaring Donziger a flight risk, Preska sentenced him to home confinement (bearing an electronic ankle monitor) approximately 650 days prior to his court trial, even though he was only charged with a misdemeanor carrying a maximum sentence of 180 days.[8] On July 26, 2021, Judge Preska issued her verdict, which declared Donziger guilty of criminal contempt.

ECUADOR'S LEGAL RECKONING OF OIL CONTAMINATION'S TEMPORALITY

Ecuadorian Litigation against Chevron, 2003–11

Donziger's misdemeanor indictment directly issued from the 2014 ruling of District Court Judge Kaplan, which in turn issued from the 2011 Ecuador ruling. In May 2003, 48 *indígenas* (indigenous peoples) and *campesinos* (small land holders) filed a lawsuit against Chevron in

the Sucumbíos Provincial Court of Justice on behalf of 30 000 inhabitants of the Ecuadorian Amazon.[9] The lawsuit alleged that between 1964 and 1992 Texaco (which merged with Chevron in 2001) used substandard technology in its Ecuador oil operations. Plaintiffs claimed that these obsolete technologies systematically discharged oil-extraction wastes into Amazonian waters and lands. Over the course of Texaco's operations and beyond into the future, these industrial wastes were devastating the local ecology and endangering the well-being of local peoples with death, disease, deprivation, and dislocation.

According to plaintiffs, cost-cutting and ecologically disruptive practices pervaded all aspects of Texaco's operations. But most worrisome were the waste pits that Texaco excavated alongside each oil well. Open and unlined, these pits numbered two to five beside each drilled well, and pocked an inhabited landscape with festering chemicals. Vast pools brimming with crude oil, formation waters, and drilling refuse, these pits were holding receptacles for toxic seepage and overflow. A goose-necked overflow pipe engineered into each pit decanted its contents down embankments into adjacent gullies and local streams. Plaintiffs claimed this emulsion of hydrocarbons and subterranean fluids, spiked with influxes of chemical drilling muds and solvents, contaminated the surface waters, soils, and groundwaters on which all local life depended.

Even during the early years of Texaco's Ecuador operations, it was standard practice in the United States not to store hydrocarbon-laced drilling brine in open waste pits. Indeed, these pits were illegal in Texas from 1939.[10] Increasingly, the norm was to re-inject emulsions of crude oil, formation waters, and sands back into the subterranean strata from which they emerged. In Ecuador, Texaco chose not to—despite doing so in the US, despite retaining a patent for re-injection technology, and despite publishing on the dangers that formation waters posed.[11] The decision not to re-inject drilling wastes allegedly reduced the company's per-barrel production costs by approximately $3 and saved the parent corporation roughly $5 billion over the course of its operations in Ecuador (Sawyer 2001, 2022).

At a minimum, Texaco drilled 325 oil wells and excavated over 900 oil-waste pits in its Ecuador concession. Those pits were the centerpiece of the Ecuador litigation against Chevron and the sites at which 54 ground-proofing Judicial Inspections took place over the course of five years. The Judicial Inspections produced reams of scientific analysis of contamination, roughly 100 testimonials by local people of the contamination's effect on their health, and the experience garnered by the participating judge, legal teams, and international observers. This evidence, in conjunction with Ecuador statutory law and internal Texaco documents, led the Provincial Court of Justice to rule against Chevron. In February 2011, following over seven years of litigation, presiding Judge Nicolas Zambrano found Chevron liable for $9.5 billion, the monies to be used to remediate the region and monitor the poor health of local people.

US LEGAL FORM'S SPECIOUS ENTRENCHMENT OF A RECURRENT PAST

Kaplan's Ruling on Chevon's RICO Countersuit, 2011–14

Two weeks before Judge Zambrano rendered his judgment, Chevron filed a counterclaim in the USDC SDNY.[12] Having landed in Judge Lewis Kaplan's courtroom, the lawsuit (with his help) soon transformed into a RICO claim, a type of litigation enabled by the 1970 US RICO

Act. The RICO statute was enacted to facilitate the prosecution of organized crime. Rather than pursue isolated criminal acts, a RICO claim seeks to go after and intercept a criminal enterprise engaged in a pattern of racketeering activity. Deployed to litigate an array of prohibited conduct, this action can also take the form of a civil RICO claim. Such was Chevron's 2011 lawsuit against Steven Donziger, the Ecuador legal team, their scientific experts, and the rainforest plaintiffs.

Following a seven-week bench trial, Kaplan determined in 2014 that the 2011 Ecuador ruling had been procured through fraud. Kaplan's decision rendered Chevron's $9.5 billion Ecuador liability void and unenforceable in the United States. In 2016, the US Court of Appeals, 2nd Circuit, upheld Kaplan's ruling, despite three higher courts in Ecuador having upheld the 2011 ruling and dismissed Chevron's allegations of fraud.[13] The US Supreme Court declined to review the case upon appeal.

Following the doctrine of *res judicata*, once appeals have been exhausted, a fundamental ruling, if upheld, is taken as the legal truth. No future judicial proceeding involving the same subject matter and persons can relitigate the case or challenge its findings. As such, the seeming incontrovertible truth of Kaplan's "corruption" and "conspiracy" narrative entrenched a particular temporality: one of a ceaselessly recurring past of no escape. Any derivative legal action and procedure in the US would inevitably become sucked into the vortex of Kaplan's prior findings. This temporality had significant effects. Knowing that all ensuing legal action would be framed by fraud—endlessly caught in Dante's Eighth Circle of Hell—Chevron was empowered to further pursue its critics and to disavow all responsibility.[14] And it has distended an already bloated righteous exceptionalism within the US oil industry.

Kaplan's 2014 ruling, however, is deeply problematic. Here we focus on the circumstances surrounding two characters—Alberto Guerra Bastidas and Richard Cabrera Vega—upon whom Kaplan hung his findings of fraud.

Alberto Guerra—the first judge to preside over the Chevron case, subsequently dismissed from the bench for corruption—was Chevron's key RICO witness. Indeed, the corporation's entire bribery and ghostwriting allegations pivoted on his testimony. An abridged version of his tale goes as follows. In summer 2009, Zambrano instructed Guerra to approach the plaintiffs' legal team. In exchange for a price ($500 000), Zambrano would let the plaintiffs' attorneys ghostwrite the 2011 judicial decision in their favor. Since the plaintiffs hardly retained such monies, the parties cut a deal. Zambrano would be paid upon the one-day enforcement of his would-be judgment. For his go-between labors, Guerra would receive 20 percent of the promised bribe. Furthermore, Guerra "fine-tuned and polished" (and thus was in possession of) the final ruling so as to make it read "like a judgment issued by the President of the Court of Sucumbíos."[15]

In April 2012—a year after Chevron filed its RICO case—Guerra, apparently wracked with guilt, approached a Chevron lawyer to disclose the "truth" of how Zambrano's ruling came to pass.[16] Over the subsequent months, Chevron representatives paid Guerra for pieces of information; a practice that seemingly emboldened him to remember more details. Between summer and fall 2012, Chevron compensated Guerra $48 000 for various devices on which purported evidence of conspiracy resided: personal computer, flash drives, access to email accounts, cellphones, and so on.

Guerra's bribery tale was problematic on multiple fronts. To begin, the now repentant bribe-taking ex-judge was the recipient of what even Kaplan called Chevron's "private witness protection program."[17] In January 2013, Guerra and Chevron signed a contract that offered

him future security in exchange for undermining one of the more momentous foreign judicial rulings against a US corporation.[18] Along with his wife, son, and son's family, Guerra was whisked to the US and maintained by Chevron. Chevron hired an immigration attorney to arrange legal residency for him and his extended family (including offspring residing illegally in the US), leased a car for Guerra, paid his health insurance and his car insurance, hired a tax expert and paid his federal and state taxes, hired one lawyer to accompany him to all RICO proceedings and another to resolve proceedings in Ecuador, and paid Guerra a $10 000 monthly stipend and a $2000 monthly housing allowance.[19] Guerra had leveraged testimony as collateral for procuring a lifetime annuity. Were Chevron's support to wane, Guerra could change his story yet again.

In addition to Guerra being dearly invested, his testimony was inconsistent and unsubstantiated. His claim of possessing evidence of conspiracy proved untrue. A copy of the ghostwritten ruling never materialized. The circumstantial evidence of a handful of freight records and bank receipts—alleged proof that he was paid by the Ecuador plaintiffs to draft court orders for Zambrano—was vague and inconclusive. And inconsistencies riddled Guerra's testimony during the RICO trial, despite being coached by Chevron lawyers for three months. Within a few years of testifying before Kaplan, Guerra admitted before a tribunal of the Permanent Court of Arbitration to having embellished the bribery scheme in the hopes of garnering better returns from Chevron, and to having lied in Kaplan's court.[20] Clearly, Guerra proved himself an untrustworthy witness.

But that is not how Kaplan received him in 2014: Guerra plays a leading role in the intricate 485-page judgment. Years later, however, Kaplan would note: "The judgment of this Court is final and enforceable. It stands, regardless of … comment on [the] testimony of Guerra" because "Guerra was far from indispensable" to the 2014 RICO opinion.[21] Rather, the scandal around the Cabrera Report was much more central.

Thus, enter Richard Cabrera, the engineer appointed by the Provincial Court of Justice to conduct a Global Expert Assessment known as the "Cabrera Report." Cabrera's charge was to synthesize all the data garnered during the 54 Judicial Inspections (and additional inspections his team conducted) and provide a breakdown of damages and their remediation costs, were damages to have occurred. As was their right under Ecuadorian law, the plaintiffs requested the Global Expert Assessment. And as was the norm in this litigation, the party that requested an expert assessment was the party that paid, had some say over who would take on that job, and could meet, direct, and contribute to the assessment. After a year of investigation, Cabrera presented his extensive report—over 800 pages with multiple appendices—in spring 2008.

Nearly a year later, Chevron cried foul. The corporation claimed that the Ecuador legal team had collaborated and colluded with the Cabrera team. Deploying a little-used US federal statute (28 USC §1782), Chevron subpoenaed documents from Colorado-based Stratus Consulting, an environmental firm which the Ecuador plaintiffs had hired to conduct scientific analyses.[22] Chevron obtained discovery documents and depositions detailing that scientists working with Stratus largely completed the analysis and drafted the report appearing under Cabrera's name. The festering scandal that emerged demonstrated seemingly improper cooperation between the Ecuador lawyers and the Provincial Court's Global Expert.

Chevron, of course, presented its §1782 evidence of collusion to the Ecuador Provincial Court. Not wanting controversies to muddy his ruling, Judge Zambrano declared he would not engage the Cabrera Report.[23] Indeed, the Cabrera Report was not needed to establish a judicial

decision; incriminating evidence from over seven years of litigation was more than enough to substantiate the 2011 decision.

Chevron, however, had invested heavily in its §1782 proceedings and, in the corporation's eyes, what they discovered clearly implicated Steven Donziger. Discovery documents indicated that Donziger solicited the report, helped to determine its parameters, and coordinated its presentation to the court as the work of an independent neutral party. The irony here, of course, was that Stratus Consulting's scientific integrity was impeccable, and far from biased. As the plaintiff's legal team noted, the Cabrera Report was largely "a compilation of the vast record of scientific evidence in this case—a tool … to effectively cull relevant data from the record."[24] For a case as "massive and highly complex" as this, "party involvement in the preparation of a report [would be] especially necessary and appropriate."[25] There was nothing nefarious here; everyone knew that the plaintiffs had asked for this assessment, and how it would be produced. But Kaplan saw Donziger's involvement in orchestrating the Cabrera Report to be replete with misdeeds.

The key for Chevron was to solidify a link between Donziger's meddling and the 2011 Ecuador ruling. And it needed a way to dismiss Zambrano's insistence that the Cabrera Report did not figure in his judgment. Chevron achieved both goals by arguing that the Cabrera Report was crucially instrumental in determining the largest portion—$5.8 billion—of the $9.5 billion liability. The allegation hinged on a pit count; that is, a specific number of how many contaminated waste pits existed in Texaco's former concession. In Zambrano's ruling, that number was 880. According to Chevron, Zambrano obtained this number from, and only from, the Cabrera Report.

The logic here stretches to the seemingly shameless; but here it is in brief. The Cabrera Report calculates a pit count of 917. The problem was how to equate that with Zambrano's 880. Two Chevron experts bridged the gap. Having been given solely these two documents (the Cabrera Report and Zambrano's ruling) to examine, they reasoned that by engaging a precise calculation (simple subtraction) one could reach 880. But what pits could justifiably be subtracted? The answer: specific pits designated as "unaffected" by contamination by a mid-1990s remediation contract between Texaco and the Ministry of Energy and Mines. Subtracting these 37 purportedly unaffected pits from 917 leaves you with the magic number, 880.

For anyone familiar with the Ecuador litigation, this logic was specious.[26] To begin with, years of Judicial Inspections made clear that Texaco's mid-1990 remediation was genuinely suspect; repeatedly levels of hydrocarbon contamination in so-called remediated pits were staggeringly high. Why would Zambrano appeal to the parameters established by a compromised and highly questionable remediation agreement in his ruling? But even if one were to buy Chevron's logic, however, it was faulty. Unbeknownst to Chevron's experts—but common knowledge for anyone associated with the Ecuador litigation—the mid-1990s remediation agreement only addressed roughly 100 oil wells. Consequently, the pits deemed not affected by oil extraction only applied to one-third of all wells that Texaco drilled. Consequently, were the conclusions of the mid-1990s remediation contract to be applied to the entire concession (Zambrano's focus of the lawsuit against Chevron), then the number of purportedly unaffected pits would triple. Multiplied by three (for 300, not 100, wells) the number of pits to be subtracted from a well total would result in a pit-count significantly lower than 880.

Furthermore, Chevron's experts neglected to realize that the $5.8 billion clean-up cost was not based on a pit-count pure and simple. Rather, it was based on a metric volume. And the

way that Zambrano calculated metric volume was substantially different from how the Cabrera Report did. Meaning that not only did the two documents not have the same pit-count, but also each had a different way of calculating what a "pit" actually referred to. The 2011 judgment determined that a total volume of 7 392 000 cubic meters of soil needed clean-up; the Cabrera Report calculated 3 788 000 cubic meters needed remediation. If, as Kaplan claimed in his 2014 judgment, "the Cabrera Report in fact was relied upon by the author or authors of the Judgment and that it played an important role in holding Chevron liable to the extent of more than $8 billion"—with the "count of 880 pits" being the "essential predicate to more than $5 billion of the damage award"—then one would think that Zambrano and Cabrera were talking about the same thing.[27] They were not.

Contrary to Kaplan's findings of fact, there is no credible evidence that the Ecuador legal team "ghost-wrote former Judge Zambrano's purported decision."[28] And Kaplan's finding that Zambrano "demonstrably relied on the fraudulent Cabrera report" is simply incorrect.[29] Missteps by both parties marked the Ecuador litigation, but that does not mean those missteps affected the 2011 ruling. Chevron never, not once, produced substantive evidence of fraud, despite having obtained through subpoena the entire "universe" of their adversary's internal strategizing and communications documents. There was much, however, in the Ecuador litigation to find Chevron responsible for Texaco's contamination.

As for Donziger, he never played the outsized role that Kaplan claims he did. Without doubt, he was key in securing monies to fund the lawsuit in Ecuador and to fight Chevron's RICO countersuit. Equally, Donziger was and is a dynamic spokesperson, passionate in his advocacy to better the plight of the Amazonian peoples and ecologies harmed by decades of oil contamination. But Donziger was not core to the litigation process, regardless of how many times Chevron beknights him as the legal mastermind. He is the US face of a lawsuit that successfully sued the second-largest US oil corporation. Neither Chevron nor the oil industry are willing to tolerate this precedent. The RICO fraud temporality ensured that corporate rule would prevail.

THE INESCAPABLE VORTEX OF PRIOR FACTS FOUND

Bar Hearing of Steven Donziger: 2018–20

In September 2019, one month after Judge Preska placed Donziger in home confinement, a legal proceeding took place that in part challenged the reduplicating RICO fraud narrative of his misdeeds. The Supreme Court of the State of New York Appellate Division, First Department, held a hearing on the matter of Donziger's bar license after the Bar Grievance Committee (the body that assures compliance to professional rules of conduct) raised concerns about his continuing to practice law. One year earlier, the Department had suspended Donziger after concluding that "Judge Kaplan's findings constitute uncontroverted evidence of serious professional misconduct which immediately threaten the public interest."[30] Months prior to the hearing, in November 2018, John Horan, the appointed Referee, questioned whether Donziger had received "a full and fair hearing before Judge Kaplan" and determined that he be granted the right to dispute Kaplan's findings of fact.[31] The Appellate Division, however, quickly issued an order that expressly prohibited Horan from re-examining Kaplan's court determi-

nation and invoked the doctrine of "collateral estoppel," a legal doctrine which forecloses the relitigation of an issue.[32]

During the 2019 hearing, Horan allowed Donziger "to continue a denial also asserted before the District Court to maintain his innocence in the face of what are tantamount to criminal charges":[33] that he neither bribed any judges in Ecuador nor ghostwrote the Ecuador judgment. The Bar Grievance Committee argued, however, that collateral estoppel prevented Donziger from contesting Kaplan's findings of fact in the RICO case. It argued that Donziger's appeal before the US Court of Appeals, 2nd Circuit, "only proposed a standard of review of de novo appropriate for legal questions," rather than having sought to "reverse factual findings under the clearly erroneous test."[34] And as such, Donziger had waived his chance to rebut Kaplan's facts.

What emerged from the bar hearing was a display of how layers of legal technique can frame and foreclose avenues of appeal. The plurifaceted fraud narrative that Chevron had amassed in its RICO counterclaim was so intricate that it deterred Donziger's appellate counsel from appealing on "clearly erroneous" legal grounds. Such an appeal would demand that Donziger's legal team contest each infringement in all its dimensions of the elaborate conspiracy recited in Judge Kaplan's 485-page ruling. Here, Chevron's legal virtuosity exploited the RICO form to produce a web of conspiracy, bribery, and manipulation too densely enmeshed to disentangle.

In the bar hearing, Deepak Gupta, the lawyer heading Donziger's RICO appeal, disputed the Grievance Committee's depiction. The Committee was conflating the question of whether Donziger had contested the allegations against him with "the narrower question" of whether reversal was sought specifically on "clearly erroneous grounds."[35] "Any appellate lawyer knows," Gupta argued, that it is "a suicide mission" to appeal "500 pages of factual findings under the clearly erroneous standard of review," especially when they could build their case on "extremely strong legal arguments."[36] Indeed, few appeals cases are filed on "clearly erroneous" grounds given the financial costs, time strains, and additional challenges at play in trying to overturn the decision of a trial court. In Gupta's words, a "massive fortress" of findings (not simply a few facts) would have needed to be dismantled.[37] The financial and human resources needed for such an endeavor would have been overwhelming.

As Horan underscored in his "Recommendation" to the Appellate Division, the case before him was "decidedly unusual."[38] On the one hand, its subject matter was "unprecedented (findings criminal in nature in a civil RICO case)."[39] On the other, it bore "none of the characteristics of a typical attorney grievance matter," which tend to involve allegations of substance abuse or stealing client funds.[40] Given these singular circumstances, Horan was hesitant to apply Kaplan's findings of fact to the bar hearing on the grounds that they were established without the constitutional safeguards required for criminal convictions. In US criminal procedure, explanations to validate a decision must adhere to the strict "beyond a reasonable doubt" standard, whereas in civil disputes claims need only to pass as being "more probable than not."

With his hands tied by the collateral estoppel of Kaplan's ruling, Horan's Report and Recommendation issued on February 24, 2020 weaves documentary evidence to make a piercing commentary on how the codification of legal facts has denied Donziger the very "ability to dispute" Kaplan's findings.[41] Horan himself saw Donziger to be "essentially working for the public interest and not against it."[42] And his Recommendation leaves a record acknowledging how asymmetric power relations were influencing the direction of legal process, with perhaps the hope that one day the evidence could be reviewed from a new perspective.

In addition to Gupta, Horan cites character witness testimonies from 14 people—from other lawyers involved in Donziger's RICO defense; to environmental non-governmental organization directors; to the famous musician, and friend of Donziger's, Roger Waters of Pink Floyd—who all bestowed praise on Donziger and shunned the oil corporation's vilification of those waging the case for environmental accountability. Noting Kaplan's "regard for Chevron," the "disinclination of the United States Attorney's Office" to charge Donziger, and Donziger's contestation of Kaplan's facts upon appeal, "however unsuccessfully," Horan recommended that the "interim suspension" of Donziger's law license "should be ended" and that he be "allowed to resume the practice of law."[43]

Donziger's victory was short-lived. On August 13, 2020, the Appellate Division, First Department reversed Horan's recommendation with the argument that Horan had "exceeded his authority in permitting Respondent to continually offer protestations of innocence notwithstanding this Court's prior orders."[44] Once again, Donziger's "not guilty" plea was considered irrelevant, given that Kaplan's RICO opinion had already declared him culpable. Despite Horan having extended a generous latitude to Donziger and his legal team, the soon to be disbarred lawyer was unable to escape the temporal vortex of the RICO fraud's recurrent past.

The situation in Judge Preska's courtroom was perhaps even more stark as, in essence, Donziger was barred from pleading "not guilty." Early on Preska determined it to be outside her jurisdiction to review Kaplan's findings of fact in the RICO case, which Donziger's criminal contempt defense rested upon. Preska made clear that Donziger was entitled only to elaborating on his "state of mind" in his disobedience to Kaplan's orders. She did not find relevant the assertions by him, or others who testified, that Kaplan's RICO judgment and subsequent orders were biased and flawed, and that an adversary with extraordinary resources was corrupting the legal process. Instead, the "truth" of the RICO recurrent past congealed all the more as the outcome of future legal action was essentially a foregone conclusion and Donziger's inevitable culpability was already sealed.

Chevron's success arguably speaks to an imperial hubris through which US courts understand themselves as most fit to rule. Here a US federal judge believed himself more clairvoyant and capable than three higher courts in Ecuador to render the truth of fraud. This conceit—that the US judiciary reigns over truth—yields the possibility for a legal vortex's unquestioned and unquestionable sanctity under the law. Given the truncated time of the recurrent past, there is no room to explore historical patterns, to consider the *longue durée* of imperialist policies and practices of oil exploitation, and take seriously the efforts of collectives pursuing equitable recompense.

PRACTICES OUTSIDE THE VORTEX

In Ecuador, there is little interest in debating whether Donziger is a hero or a villain. In the eyes of the affected communities, their story of living amidst contamination has very little to do with him. Thus, while most journalists and legal scholars have focused on Chevron's legal and public relations (PR) campaign to "demonize Donziger," we focus below on the affected communities who have largely remained invisible throughout this legal saga. A good place to start is with Pablo Fajardo, the globally recognized face of the lawsuit that successfully sued Chevron. Fajardo is the lead lawyer of the Ecuador legal team that brought the

Ecuadorian plaintiffs to victory in 2011 with the court ruling that found the corporation liable for $9.5 billion.

Note: Banner reads: "End to the Gas Flares of Death."
Source: Photo by UDAPT, as shared on the organization's website.

Figure 15.3 UDAPT protest against gas flares, Sucumbíos, Ecuador

Today, Fajardo continues to direct the Union of People Affected by Chevron-Texaco (UDAPT), an Amazonian non-profit organization co-founded by six indigenous nationalities and 80 rural settler communities to coordinate grassroots objectives with the battle in the courts. UDAPT does not fit the image of a "corrupt enterprise," nor does Fajardo resemble a "co-conspirator" or "pawn" in Donziger's so-called master-scheme, as Chevron wishes to have it. In its legal work, UDAPT is pursuing the possible enforcement of the 2011 Ecuador judgment (which, despite Chevron's opposition, still stands) in a new jurisdiction. Similarly, the organization is making legal demands on the Ecuadorian state to curtail ongoing extractive activities, especially the use of gas flares, which emit large quantities of carbon dioxide into the atmosphere. In its community work, UDAPT extends far beyond the court to quotidian practices of healing. Here, sequenced collective practice seeks to redress multidimensional harm by creatively and pragmatically engaging "different points of openness and closure" (Knop and Riles 2016, p. 927) in order to reckon the past with an eye toward the future. Although Kaplan's RICO decision has foreclosed certain possibilities for remedy, the story does not end there.

UDAPT's main objective is to ensure the execution of "integral reparations"; that is, a holistic response to damages wrought by extractive industry. Towards that end, UDAPT has formed reparation committees to restore soil health, purify contaminated water, revitalize cultural livelihood, rebuild the local economy, and care for a growing population of cancer patients. Along with an environmental health clinic in the region, the Clínica Ambiental, the committees are addressing exposure to heavy metals and hydrocarbons by taking biopsies,

diagnosing illnesses, and facilitating access to traditional medicine and hospital treatments. A collaborative study by the two organizations and the Geneva-based Centrale Sanitaire Suisse Romande found that one out of every four families living near oil installations have experienced at least one incidence of cancer.[45] Without legal recompense, creativity is a necessity for building future possibilities. Joining forces with Amisacho, another community organization focused on healing, UDAPT is also involved in innovative experiments that explore how fungi and plants may be used to inexpensively break down hydrocarbons in soil and water.

The efforts just mentioned take inspiration from a plan for healing that the Clínica Ambiental drew up during its formation in 2008. The plan envisions distributed responsibility for the Amazon's well-being by acknowledging the importance of the individual, the family, and the collective in that endeavor. Against Chevron's concocted image of the affected communities as involved in a "get-rich-quick ploy,"[46] the plan obligates action by all. The reparation committees make it their mission to: visit patients at their homes on a bi-weekly basis; transport medical files between cities to allow patients to rest; promote organic farming and a vegetarian diet to limit toxic exposure; petition the Ecuadorian government to improve social security and health benefits; and organize free programs on meditation, psychotherapy, and herbal and other home treatment, among a plethora of other activities for improving access to clean water, air, and food.

One of the main consequences of Chevron's retaliation for the affected communities in Ecuador is that action must take a particular direction. And yet, never fully determined by the lawsuit, that action emerges from a distinct temporality: the "expansive present." Traversing all tenses, the expansive present concerns the history of oil exploitation in the Amazonian frontier, the ethics of caring in the face of potentially permanent damages, and the pragmatics of orienting toward a hopeful future. It is a type of present that, to borrow from Silvia Rivera Cusicanqui, "contains within it the seeds of the future that emerge from the depths of the past"; with "the repetition or overcoming of the past" being "at play in each conjuncture," it invites historical analysis of colonization and inspires experiments for carving a new path forward (Cusicanqui 2020, p. 48). In other words, by staging their fight on multiple fronts through a pluralistic theory of time, the affected communities are continually reconceptualizing the very meaning of justice and the work of decolonization. Overall, they demand that we think outside the legal vortex.

CONCLUSION

Focusing on a subset of court proceedings involving Chevron, this chapter demonstrates how legal technique can foster a legal temporality that both exacerbates inequities pervading oil extraction, and relinquishes the corporation from addressing the harms integral to it. In 2014, a US District Court determined that a precedent-setting 2011 Ecuador judgment—hailed by environmental and indigenous rights advocates around the globe—was null and void in the US. Chevron's US countersuit against the $9.5 billion Ecuador ruling was arguably brilliant, as its lawyers mastered the RICO legal form so as to "reverse, redirect, and reorder the temporality of politics" (Knop and Riles 2016, p. 886). The labyrinth of intrigue, corruption, bribery, and manipulation that Chevron's army of lawyers wove virtually ensured (having persuaded the District Court) the irreversibility of fraud. In delegitimizing the corporation's massive Ecuador liability, Kaplan's decision instantiated a RICO fraud temporality—the recurrent

Source: Photo by Amisacho, http://amisacho.com/.

Figure 15.4 *An image from Amisacho's website that reads: "Social Fabric: Creating spaces to strengthen and exchange seeds, knowledge and the arts," Sucumbíos, Ecuador*

past—that inverted, and thus gave new meaning and force to, the asymmetric relations that have largely configured oil operations in the Global South. Chevron thus became the victim of a racketeering scheme seeking to extract resources from it illegitimately.

The ensuing legal vortex that the recurrent past created was damningly consequential. Admissible legal arguments in all court proceedings issuing from Chevron's RICO case were constrained within the recurrent past of Kaplan's fraud findings. That is, the "truth" of fraud both served as the underlying predicate act generating a panoply of legal proceedings, and it constricted those proceedings within its grip. As we detail above, Kaplan's ruling is not truth. It is the convincing effect of a crafted conspiracy: an entire realm of machinations, of Chevron's fraud-worlding that has scant grounding in processes and practices in Ecuador. Within the confines of law, however, Kaplan's fraud findings are virtually impossible to interrupt. Maligned within the legal vortex are Steven Donziger, local Amazonian residents seeking reparation, and the Ecuadorian judiciary adjudicating contamination's wrongs.

Although Chevron's legal strategy is singular, what the technique of law allows is certainly not unique to this case. As research in critical legal studies demonstrates, the embrace of a narrow, as opposed to a broad, time frame in Western judicial practice tends to enable the reproduction of social inequality and its obfuscation (Chowdhury 2017; Kelman 1981; Nousiainen 1994). In a poignant analysis by Tanzil Chowdhury on the "relationship between time, factual construction and responsibility," the influence of Kantian temporality on legal practice in the United States has been a force for "normalizing oppressive conditions" (Chowdhury 2017, pp. 188, 204). By conceptualizing time as "divisible into uniform and separate units," it becomes possible to remove a "unit" of time from a larger context and imbue it with the value of ultimate truth in "adjudication's factual construction" of " 'what happened' " (Chowdhury 2017, pp. 188, 190, 194). Legal narratives of "what happened," depend not on the "finding" of truth, but rather on the making of truth; a process that is significantly shaped by its temporal framing. Extending this analysis, we argue that in the RICO case Chevron first contrived specific events (that is, wrongly determined that the 2011 Ecuador ruling relied on the Cabrera Report) that then were removed from their spatial/temporal context and solidified

as the "ultimate truth" by Kaplan. Decontextualized as a suspended event-unit from the forces and processes of which it is constituted and constitutive—and played on repeat—the recurrent past creates a singular history that hacks into the present in order to manage the future. This is to say that the incessant reiteration of the RICO fraud narrative constrains action in the present tense such as to limit the very potentialities latent within it.

Instantiating the recurrent past—the truth of fraud—necessarily involves the production of selective past events; a production, as we demonstrate in the case of Chevron's fraud-worlding, that is replete with interests. The broader context, however, is also ripe with prejudice. That the counsel for Chevron has argued that "transnational tort litigation" is not the appropriate venue for debating "the U.S. government's historical treatment of indigenous peoples" or the effects of "American-style capitalism" (Boutrous 2013, p. 236), points to legal technique at work. By Chevron having made its countersuit specifically about the alleged corruption of its adversaries, Judge Kaplan was arguably restricted under the RICO form to not allow for evidence of the substance of the Ecuador liability to be admissible; thus, an unlikely story of victim and perpetrator was born. It has been near impossible to challenge the RICO decision in derivative proceedings, as the temporality of law has allowed only certain "*types of facts*" and "*types of pasts*" to emerge (Chowdhury 2017, p. 188). The case at hand is an egregious example of how law "expands and compresses time by emphasizing, erasing, and recasting historical events" (Mawani 2015, p. 261). Still, it is by no means extraordinary: marginalized communities around the world experience violent pushback when they demand accountability and challenge the dominant distribution of power, both in the streets and in the courts. The legal vortex of crafted conspiracy serves to conceal base injuries and undermine efforts to effect change. The Ecuadorian communities who are dealing with Chevron's extractive harms warrant significantly more.

NOTES

1. See Suzana Sawyer's (2022) book, *The Small Matter of Suing Chevron*, and Lindsay Ofrias' forthcoming PhD dissertation "Healing Justice: Environmental Defenders and a Thriving Amazonia." See also: Sawyer (2015, 2009, 2007, 2006, 2002, 2001); Ofrias (2017); and Ofrias and Roecker (2019).
2. *USA v. Donziger*, 1:19-cr-00561-LAP, DI 328, June 9, 2021, p. 4.
3. *Chevron Corporation v Steven Donziger, et al.* 11 Civ. 00691 [LAK-JCF] (hereafter: *Chevron v Donziger*, 1:11-cv-00691-LAK), DI 1874, March 4, 2014, p. 478.
4. Ibid., DI 2276, July 31, 2019, pp. 1–2.
5. Ibid., DI 2108, October 18, 2018, pp. 2–3.
6. See Donziger's "Opposition to Contempt Motion," which describes how Chevron has a history of "inflicting brutally costly and time-consuming discovery demands" on supporters, funders, and financial managers involved in the enforcement effort. Ibid., DI 2090, November 2, 2018, p. 3.
7. *USA v. Donziger*, 1:19-cr-00561-LAP, DI 328, June, 9, 2021, pp. 8–13.
8. Ibid., p. 3.
9. *Aguinda v. ChevronTexaco Corp.*, Superior Court of Justice of Nueva Loja (Lago Agrio) (subsequently renamed the Sucumbíos Provincial Court of Justice), No. 002-2003-P-CSJNL, May 7, 2003.
10. Railroad Commission of Texas, "Open Pit Storage Prohibited," Texas Statewide Order No. 20-804, July 31, 1939. On the US Gulf Coast, states prohibited the release of formation waters and industrial wastes into water systems by the early 1930s and mandated that it be re-injected at least 1 mile below the surface of the Earth. Louisiana Department of Natural Resources (DNR),

SONRIS/2000. "SRCN4282K Injection Wells by Parish." http://reports.dnr.state.la.us/reports/rwservlet?SRCN4282K_p.

11. Texaco's re-injection technology patents were as follows: United States Patent 3,680,389. Frederick H. Binkely, Jr, et al., assignor to Texaco Inc. August 1, 1972. United States Patent 3,817,859. Jack F. Tate, assignor to Texaco Inc. June 18, 1975. In 1962, Texaco's director of Health and Safety published an article in an American Petroleum Institute (API) publication, *The Primer of Oil and Gas Production*, which among other things voiced its concern about the dangers of formation waters.
12. *Chevron v. Donziger,* 1:11-cv-00691-LAK.
13. The three higher Ecuador courts are: the Sucumbíos Provincial Court of Justice, Appellate Division, January 6, 2012; the National Court of Justice, November 12, 2013; and the Constitutional Court, July 11, 2018.
14. The fraud narrative also played an important role in the corporation's 2018 win against the Republic of Ecuador in the Permanent Court of Arbitration in The Hague.
15. *Chevron v. Donziger*, 1:11-cv-00691-LAK. Witness Statement of Alberto Guerra Bastida, Plaintiff's Exhibit 4800, DI 1596, pp. 19–20. Court Transcript of Guerra's testimony, DI 1802, October 25, 2013, pp. 1103–1109.
16. Ibid., Court Transcript of Guerra's testimony, DI 1800, October 24, 2013, p. 1069. 'Agreement', Guerra-Chevron, Plaintiff's Exhibit 1671, January 27, 2013, p. 1.
17. Ibid.*,* Ruling, March 4, 2014, p. 222.
18. The initial contract was to last 24 months. Its terms have been reinstated at 12-month increments since. PCA Case No.: 2009-23. Track 2 Procedural Meeting, April 24, 2015, pp. 855–858.
19. *Chevron v. Donziger*, 1:11-cv-00691-LAK. Court Transcript of Guerra's testimony, DI 1800, October 24, 2013, pp. 1053–1064. "Agreement," Plaintiff's Exhibit 1671, January 27, 2013, pp. 3–4.
20. Permanent Court of Arbitration (PCA) Case No.: 2009-23. Track 2 Hearing, Guerra Transcript, Tuesday, April 21, 2015, pp. 730–731, 840–845.
21. *Chevron v. Donziger*, 1:11-cv-00691-LAK. Judge Kaplan, Memorandum Opinion, DI 1963, March 1, 2018, p. 12.
22. 28 USC §1782 allows a litigant in a legal proceedings outside the United States to apply to a US court to obtain evidence for use in the foreign proceedings. The scale of the §1782 discovery proceedings campaign became breathtaking. Between 2009 and 2010, what had become Chevron's army of lawyers submitted over 25 requests to obtain discovery from 30 different parties in 15 federal courts and jurisdictions across the country. By September 2010—when Judge Zambrano assumed the case—Chevron had already filed 20 disarming and threatening §1782 proceedings, and had won 12.
23. In rendering his ruling, Zambrano (2011, p. 51) wrote: "the Court accepts [Chevron's] petition that said report not be taken into account to issue this verdict." In his clarification order of March 4, 2011, Zambrano stated: "The Court decided to refrain entirely from relying on Expert Cabrera's report when rendering judgment … [Chevron's] motion was granted, and … the report had NO bearing on the decision" (ibid., p. 8).
24. *Chevron v. Donziger*, 1:11-cv-00691-LAK, Declaration of Juan Pablo Sáenz M., DI 145, February 27, 2011, p. 38.
25. Ibid., p. 37.
26. For a more extensive analysis of Chevron's legal logic during its RICO countersuit, see Sawyer (2022).
27. *Chevron v. Donziger*, Case 1:11-cv-00691-LAK-JCF, DI 1874, March 4, 2014, p. 325.
28. Judge Lewis Kaplan, Memorandum Opinion, DI 1963, March 1, 2018, p. 12.
29. Ibid.
30. Supreme Court, Appellate Division, First Department, 2018 NY Slip Op 05128, "Matter of Donziger," July 10, 2018. (Herein "Matter of Donziger".)
31. Referee John Horan, Decision on Procedure for the Post-Suspension Hearing Under 22 NYCRR 1240.9(c) November 8, 2018, p. 3.
32. Matter of Donziger. County Clerk, Susanna Rojas, M-5782, January 17, 2019, pp. 1–2.
33. Matter of Donziger. Referee John Horan, Report and Recommendation. RP No. 2018.7009, February 24, 2020, p. 29.

34. Matter of Donziger. Gupta Cross-examination (by George Davidson), RP No. 2018.7008. Donziger Bar Hearing Transcript, September 17, 2019, p. 372.
35. Ibid., pp. 361–362.
36. Ibid., p. 360.
37. Ibid., p. 360.
38. Horan Report and Recommendation, RP No. 2018.7009, February 24, 2020, p. 5.
39. Ibid.
40. Ibid.
41. Ibid., p. 10.
42. Ibid., p. 35.
43. Ibid., pp. 9, 10, 29, 33.
44. Matter of Donziger, NY Slip Op 04523, August 13, 2020.
45. UDAPT (2017), Clínica Ambiental and the Centrale Sanitaire Suisse Romande, "¿Sabías Qué?: Informe de Salud," accessed July 11, 2021, http://www.clinicambiental.org/wp-content/uploads/docs/publicaciones/informe_salud_tex.pdf.
46. *Amazon Post*, "Yet Another Get-Rich-Quick Ploy in Ecuador," August 6, 2015, accessed July 15, 2021 at https://theamazonpost.com/yet-another-get-rich-quick-ploy-in-ecuador/.

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APPENDIX: SEQUENCE OF LEGAL CASES

November 1993	Ecuador plaintiffs file contamination lawsuit against Texaco in US District Court, Southern District of New York.
May 2001	US District Court directs contamination suit to be heard in Ecuador. Texaco and Chevron merge.
May 2003	Ecuador plaintiffs file contamination claim in the Sucumbíos Provincial Court of Justice.
September 2009	Chevron files Bilateral Investment Treaty (BIT) claim in the Permanent Court of Arbitration in The Hague.
February 2011	Chevron files RICO countersuit in the US District Court, Southern District of New York, seeking to delegitimize the Ecuador judgment.
February 2011	Sucumbíos Provincial Court Judge Zambrano finds Chevron liable for contamination clean-up costs amounting to $9.5 billion.
October 2013	Chevron's RICO trial commences in US District Court, Southern District of New York with Judge Kaplan presiding.
March 2014	US District Court Judge Kaplan issues a RICO ruling declaring the 2011 Ecuador judgment was procured through fraud.
September 2015	The Supreme Court of Canada rules Ecuadorians can seek enforcement in Ontario of the 2011 judgment against Chevron.
August 2016	US Court of Appeals, 2nd Circuit upholds Judge Kaplan's 2014 RICO ruling.
January 2017	The Court of Appeal for Ontario rules Chevron Canada was a separate entity from Chevron Corp., thus barring the Ecuadorians from seizing its shares and assets.
August 2018	The Tribunal of the Permanent Court of Arbitration in The Hague rules in favor of Chevron's BIT claim.
April 2019	The Supreme Court of Canada dismisses claims brought against Chevron's wholly owned subsidiary Chevron Canada.
May–June 2019	US District Court Judge Kaplan finds Donziger in civil contempt of court.
July 2019	US District Court Judge Kaplan drafts criminal contempt charges against Donziger and appoints Judge Preska to preside over the case.
August 2019	US District Court Judge Preska assigns Donziger to pre-trial home confinement.
September–October 2019	The US Supreme Court of the State of New York Appellate Division, First Department holds hearings over Donziger's bar license.
May 2021	US District Court Judge Preska presides over Donziger's contempt trial.