

Book review: White Collar-Crime (or the remaining blind spot in Criminology and Transitional Justice)

Valeria Vegh Weis, Alexander von Humboldt Postdoctoral Fellow at Freie Universität Berlin - Adjunct Professor at Buenos Aires University Law School and National Quilmes University

Diego Zysman-Quirós, Professor at Buenos Aires University Law School and Palermo University Law School and Adjunct Professor at Queensland University of Technology (Australia).

Transitional Justice and Corporate Accountability from Below. Deploying Archimedes' Lever. By Leigh A. Payne, Gabriel Pereira and Laura Bernal-Bermúdez, Cambridge, Cambridge University Press, 2020.

Fuga de capitales en la Argentina (1976-1983). Corrupción y delitos de cuello blanco. By Andrés Gabriel Gómez, Bernal, Universidad Nacional de Quilmes, 2018.

Transitional Justice and Criminology have been largely working as separate fields of study, despite their shared concerns and shortcomings. This short essay deals with one of those shortcomings. i.e., the disregard for economic or white-collar crimes in both areas of research. Within Criminology and despite the almost hundred years passed since the work of Sutherland¹, the study of economic crimes is still marginal while ordinary offences remain as the focus of mainstream research. In the Transitional Justice field, the bloody crimes of murder, torture or disappearance are generally in the spotlight, hiding the economic and financial ventures that happen behind-the-scenes. The result is that economic actors with the power to foster dictatorships or a country's bankruptcy, remain immune not only to the criminal justice system but also to scholarly research.

Here, we offer two good exceptions of this trend. These are two books that shed light on the role of economic crimes in the contexts of massive human rights violations, opening the path for more research in this field. *Transitional Justice and Corporate Accountability from Below* was released in 2020 and it is very thought-provoking not only in terms of the topic but also because it was collectively written by scholars from the Global North and the Global South, who have also worked as experts bringing corporations to court. For example, Andhes – an Argentinean human rights organization in which one of the authors, Gabriel Pereira, takes action - joined the prosecutor's case by representing Fidel Jacobo Ortiz, who had been allegedly held and tortured in the detention center of the corporation Fronterita.

In terms of content, the book looks into four different data sets to explore grassroots efforts towards corporate accountability. Notably, according to the authors, the struggle for accountability is not limited to criminal trials, as it also involves truth commissions and civil procedures. The cases under study include the Holocaust trials, World War II crimes in Japan, the Rwandan genocide and processes under the Alien Tort Statute in US courts. Because not even the conceptual category of corporate crime within massive human rights violations has been agreed upon, the book first defines it as inclusive of direct complicity, forced or slave labor, financing of repression and indirect complicity with violence via bank loans and others (p. 13).

On the basis of these data sets, the study develops the notion of “corporate accountability from below” understood as “the efforts by domestic institutions in the Global South to hold economic actors accountable for complicity in human rights violations during dictatorships and armed conflict” (p. 17) or

¹ Sutherland, Edwin H., White-Collar Criminality, American Sociological Review, Vol. 5, No. 1 (Feb., 1940), pp. 1-12

as “the role of national courts in responding to victims’ demands for corporate accountability” (p. 214). In these regards, the authors seem to use the notion of “below” to refer to domestic courts – as hierarchically “below” international law – and to the Global South – as geographically and socio-economically “below” the Global North –. In a similar vein, the book also refers to “bottom-up lawmaking” efforts to describe how ordinary domestic legislation incorporates international human rights standards (p. 40).

Under this logic, the book highlights that efforts by domestic courts in the Global South have been somehow more successful than the Global North and the international ones, but that this fact has not been yet fully acknowledged. In their own words: “the most successful outcomes for victims emerge from trials in domestic courts in the Global South, and not in international courts or foreign courts in the Global North” (p. 215). Moreover, the book shows that the southern efforts to achieve corporate accountability have taken place both locally and at the international level. To exemplify, they recall that an “international legally binding instrument on transnational corporations and other business enterprises with respect to human rights” (p. 107) was sponsored by Ecuador and South Africa, and co-sponsored by Bolivia, Cuba, and Venezuela, and subsequently by Algeria, El Salvador, Nicaragua, and Senegal before the Human Rights Council. In contrast, the countries from the Global North voted against the proposal. Notably, this overall statement of the Global South as a large accountability pioneer is later relativized in the text when the authors acknowledge that, indeed, most of the actions against corporations took place in three specific countries (Argentina, Colombia and Chile) and not in the overall South.

Following with the analysis, the book identifies four necessary pillars that make accountability possible: strong civil society demand, strong domestic judicial leadership, strong international pressure, and weak veto power players. For example, in the study of the Holocaust and Japan, the authors state that there were very low levels of corporate accountability and highlight the absent of international pressure as the main explanation behind this: “Global human rights agents, although they existed, could not apply sufficient pressure to outweigh the powerful veto from opposing global agents when the context shifted away from corporate accountability” (p. 75). Indeed, the authors understand that international pressure is somehow the most relevant pillar and that, without it, the other efforts might be insufficient. In their words: “Unless international pressure is exerted, civil society groups, even with powerful tools in the hands of institutional innovators, may be hard-pressed to advance corporate accountability” (p. 223).

Overall, the book exposes interesting findings. For example, almost 60% of the thirty-nine truth commissions with final reports, “not only mention corporate complicity in human rights violations during past authoritarian regimes or armed conflict, [but also] name names of economic actors allegedly involved in those abuses” (p. 167). In contrast, the outcomes are not so cheerful in terms of judicial accountability as “only two courts since the World War II cases have rendered guilty verdicts against multinational companies for corporate complicity in human rights abuses during dictatorships and armed conflict (Chevron-Ecuador and Ford-Argentina)” (p. 159). The work could benefit from a clearer definition of “corporate accountability from below” and a justification of the data sets chosen to conduct the analysis, but these shortcomings do not shadow the notable contribution that the book makes in order to foster the study of economic crimes within transitional justice research.

The other book that represents an outlier in the extended dismissed of corporate accountability within criminological and transitional justice studies is *Fuga de capitales en la Argentina (1976-1983)*.

Corrupción y delitos de cuello blanco [Flight of capitals in Argentina (1976-1983). Corruption and white-collar crimes]. The author, Andrés Gabriel Gómez, identifies and defines the concept of “flight of capital”, its mechanisms, and economic outcomes. Even when there are not fixed definitions, he defines the concept as money flows that are extracted from the economy of a country to a foreign destiny. These capital outflows can be legal or illegal. The author is interested in both, although he specifically focuses on the violation of tax and customs regulations, the falsification of balance sheets, and other facts that are carried out for or as a consequence of this flight of capital by corporations and powerholders. Notably, when the behavior is described as a crime, it seems to respond to the original theoretical framework of white-collar crime by Sutherland. In its both modalities, the flight of capital is an ever-present topic of discussion in Argentina and the rest of Latin America as it is a source of “decapitalization of the local economies and of the subsequent deficit in productive investment, employment and tax collection” (p. 21). Despite these damaging outcomes, the flight of capital is not always considered from a criminal perspective but as an economic venture. This might be related to the link between the flight of capital and the so-called tax havens which are not subjected to control or public scrutiny.

The uniqueness of Gómez’s work is that it provides an analysis of Argentine economic history, mainly of the last and most brutal civic-military dictatorship that took place between 1976 and 1983. The author states that, during the dictatorship, a criminal plan was conceived and executed by high-ranking officials, businesspeople, actors working on the financial market, agro-exporters, arms dealers, and the military, all of them belonging to the upper social circles. Gómez suggests that, following this plan, the mentioned actors obtained an extraordinary income based on the looting of the state resources.

Based on documentation and economic data, Gómez explains that, along with the repressive political agenda, the military government also carried out an economic program aimed at replacing productive activities with a “new paradigm” centered on financial investments (p. 55). This plan required the support of international lenders, multilateral credit organizations and foreign banks, which benefited from the collection of commissions by placing surplus dollar flows in Argentina and other Latin American countries. This plan included a massive external debt contracted by the de facto government and Argentine corporations. The private external debt reached 21,278 million dollars at the end of 1983 while the public one was multiplied by seven. Overall, “more than 37 billion dollars were drained from Argentina during the dictatorship and went mostly to tax havens” (p. 120)

The attempts to investigate these maneuvers encountered great obstacles and they gradually lost strength and political support. Today, the statutes of limitation seem to have already expired for this type of crimes. However, the author of the book understands that, although more than four decades have passed since the end of the dictatorship and the crimes have indeed prescribed if we consider them from an ordinary criminal law perspective, there is still the possibility of achieving accountability. Gómez states that those lenders who granted the “loans allowed the dictatorial regime to carry out its repressive plan and therefore, could be prosecuted within the framework of crimes against humanity, which do not abide by statutes of limitation” (p. 115).

In this regard, it is relevant to mention that the crimes of the dictatorship began to be prosecuted by the first democratic government with the so-called Junta Trials of 1985 and that these accountability efforts were later interrupted by the impunity laws at the end of the 1980s and by the executive branch pardons in the 1990s. However, a new opportunity arose after the ruling of the Federal Supreme Court

that, in 2005, established that the crimes committed during the dictatorship encompassed crimes against humanity and, therefore, must be regarded as imprescriptible. This ruling was accompanied by a declaration of invalidity of the impunity laws by the Parliament. It was then that, after a paralysis of thirty years due to amnesty laws, more and broader trials started to be carried out. The new wave of trials conceives crimes against humanity as imprescriptible, according to the international law of human rights, and could be a suitable arena to prosecute those involved in the flight of capital, regardless statutes of limitation.

Unfortunately, a shortcoming of the book is that it is restricted to Sutherland's initial formulation of white-collar crime, which prevents the author from establishing interesting and necessary theoretical dialogues with most recent contributions, including the categories of social harm, governmental crime, state-corporate crime, crimes of globalization and financial crimes². The work could have also benefit from an analysis of the legal dimensions of the phenomenon of flight of capital and the differentiation between behaviors that constitute crimes under the law and those which have not been legally identified as crimes but that nevertheless produce social harm. However, these limitations are also understandable, since the author wants to narrow down his analysis to a proposal that can foster criminal prosecution of these crimes in Argentina today. Therefore, according to his understanding, the notion of white-collar crime in dialogue with the concept of crimes against humanity are sufficient to judge members of the economic cabinet of the dictatorship and members of private corporations who participated in the credit procedures.

In sum, these two books are inspiring inputs to the still very narrow field of corporate accountability within transitional processes. Probably because of the political relevance of the topic, both books offer not only scholarly analyses but also programmatic visions. After all, we do not only want to better understand white-collar and corporate crimes; we also want to stop them and bring perpetrators to justice.

² See e.g., Friedrichs, D.O. (2002). State-corporate crime in a globalized world: myth or major challenge? In: *Controversies in White - Collar Crime* (ed. G.W. Potter), 53–72. Cincinnati, OH: Anderson; Friedrichs, D.O. (2010). *Trusted Criminals: White Collar Crime in Contemporary Society*, 4e. Belmont, CA: Wadsworth; Friedrichs, D.O. and Rothe, D.L. (2014). State-corporate crime and major financial institutions. *State Crime* 3 (2): 146–162) or Bernat, I. and Whyte, D., State-Corporate Crime, in Rorie, M., *The Handbook of White-Collar Crime*, Wiley Blackwell, 2020, 127-138; among others).