

Human Rights *in* Minefields

Extractive Economies,
Environmental Conflicts,
and Social Justice in the
Global South



César Rodríguez-Garavito
(Director)


Human Rights Action Research
from the Global South (Volume I)

Dejusticia
Series

HUMAN RIGHTS IN MINEFIELDS

EXTRACTIVE ECONOMIES, ENVIRONMENTAL CONFLICTS, AND SOCIAL
JUSTICE IN THE GLOBAL SOUTH

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Rodríguez-Garavito, César (dir.), Carlos Andrés Baquero Díaz, Asanda Benya, Michael Burawoy, Omaira Cárdenas Mendoza, Mariana González Armijo, Karl von Holdt, Arpitha Kodiveri, Maximiliano Mendieta Miranda, Meghan L. Morris, Ida Nakiganda, Cristián Sanhueza Cubillos, Marisa Viegas e Silva, Nandini Sundar, María José Veramendi Villa, Wilmien Wicomb.

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Introduction: A New Generation of Writing on Human Rights

César Rodríguez-Garavito

Point of Departure: The Current State of Human Rights¹

These days, uncertainty seems to be the prevailing mood in human rights circles (Gearty and Douzinas 2012). A new wave of academic works is debating fundamental tenets of the human rights movement and asking whether we are now facing “the endtimes” (Hopgood 2013). Activists and nongovernmental organizations (NGOs) can feel the foundations trembling beneath their feet.

This despair stems from the convergence of four structural transformations pushing the human rights field in different directions. First, the rise of new global powers (such as the BRICS countries: Brazil, Russia, India, China, and South Africa) and the relative decline of Europe and the United States points to a multipolar global order. Together with the proliferation of “hard” and “soft” law in international governance, this tendency has yielded a wider and more fragmented legal and political space. In this new context, states and NGOs from the global North are no longer the only ones controlling the production of human rights standards, as new actors (such as transnational social movements, transnational companies, and states and NGOs from the global South) emerge as influential voices.

Second, the repertoire of actors and strategies, both legal and political, has expanded considerably. Traditional strategies, such as “naming and shaming” recalcitrant states, are complemented by new strategies of transnational activism that involve a large number of actors (both promoters and targets of activism), including social movements, online media networks, transnational

1 This section is taken in part from Rodríguez-Garavito (2014).

companies, intergovernmental organizations, universities, and online activist groups.

Third, information and communication technologies simultaneously present new challenges and opportunities for human rights. As demonstrated by the worldwide mobilizations linked to the Occupy movement, tools like social networks, documentaries, digital reports, and online and distance learning have the potential to accelerate political change, reduce informational disadvantages suffered by marginalized groups, and bring together national, regional, and global groups to directly influence human rights protection.

Fourth, extreme environmental degradation—climate change, water scarcity, the rapid extinction of species and forests, unchecked pollution—has become one of the most dangerous threats to human rights. After all, human rights are essentially meaningless if what is truly at stake is the life of this planet. Ecological problems are thus fundamental for global discussions on human rights, whether those discussions adopt a traditional conception of economic development, link environmental justice with social justice, or search for new conceptions of human rights that are compatible with the rights of nature.

The resulting uncertainty puts the human rights community—a community that, for decades, has courageously confronted dictatorships, corporate abuses, socioeconomic injustice, ethnocide, and environmental degradation—in an uncomfortable spot. Having more questions than answers is disconcerting for human rights organizations, who today are expected to offer well-defined legal solutions to complex moral and political dilemmas.

Nevertheless, I believe that we should celebrate this discomfort, as the transitions—between strategic models, between intellectual paradigms, between governance structures, between technologies—represent moments of creativity and innovation in social fields. In human rights circles, where we have erected organizational and intellectual barriers so tall that it is hard for us to be reflective and self-critical, this situation offers an unprecedented opportunity to reevaluate some of our core premises: who may consider themselves members of the movement, what types of knowledge and disciplines should be taken into account, and what strategies are most effective in a multipolar world that is

also characterized by a multiplicity of modes of communication. For the first time, important tensions and asymmetries—North vis-à-vis South, elite versus the masses, national against global—are being openly discussed with the aim of overcoming them and strengthening the movement’s collective capacity.

A New Generation of Writing and Reflection

This book, and the Dejusticia initiative that inspired it, seeks to feed such discussions. To that end, it proposes a new type of writing on human rights, one with three specific characteristics. First, the writing is *reflective*: its authors, who are the very people working in organizations on the ground, stop to think about the potential, achievements, and limits of their knowledge and their practice. In this sense, both this book and Dejusticia’s larger project, described below, seek to amplify the voices of human rights defenders in academic and practical discussions about the future of the field, which, to date, have tended to be dominated by academic studies. In the spirit of the type of action research that I describe in detail in chapter one, this type of writing combines the methodological and analytical strengths of academic research with the practical experience of the authors and the organizations and communities with whom they work. The result is a writing that is as robust as it is relevant, and which contributes to broadening the window of reflection within the human rights field that has been opened with the recent debates mentioned above.

Second, the genre of writing proposed in this book is *narrative*. Partly because of the human rights community’s excessive mastery of legal language and knowledge, its preferred mode of writing is that of technical reports and legal briefs. While this genre has enjoyed notable achievements for decades, it has hindered organizations and activists from effectively sharing and communicating the stories that they live and learn about firsthand: those of the victims, of campaigns, of moral dilemmas, of injustices, of victories. Opening the human rights field to other types of actors, knowledge, and audiences means telling these stories—and telling them well. To that end, the contributors in this volume—with the help of techniques borrowed from fields such as narrative journalism (see chapter one)—tell and are part of these stories.

Third, this new type of writing *comes from the global South*, from the countries and regions that have tended to be objects rather than subjects of the knowledge and decisions within the human rights field. In this sense, it attempts to respond to the challenges of an increasingly multipolar world and to counteract the organizational, economic, and epistemological asymmetries between the South and North that have impeded the effectiveness and legitimacy of the global human rights movement. The authors of this genre of writing are activist-researchers from Africa, Latin America, the Middle East, and South and Southeast Asia who belong to human rights organizations and write from this geographic and professional angle to enrich global dialogue on the future of the field.

The Origin and Structure of the Book

This text forms part of a long-term project undertaken by Dejusticia, which revolves around the Global Action-Research Workshop for Young Human Rights Advocates. The workshop, organized annually, seeks to foster connections among and train a new generation of action researchers.

As explained in chapter one, the workshop helps participants develop action-research tools, understood as the combination of rigorous research and practical experience in social justice causes. For ten days, Dejusticia brings approximately fifteen participants and ten expert instructors to Colombia for a series of practical and interactive sessions on research, narrative writing, multimedia, and strategic reflection on the future of human rights. The aim is to strengthen participants' capacity to produce hybrid-style texts that are at once rigorous and appealing to wide audiences. Participants are selected on the basis of a text proposal, which is then discussed during the workshop and subsequently developed with the help of a mentor (one of the instructors) until a publishable version is achieved, such as the chapters that make up this volume.

The workshop also offers participants the opportunity to take advantage of new technologies and translate the results of their research and activism into diverse formats—from blogs, videos, and multimedia to social network communications and academic

articles. Therefore, in addition to the annual volume comprising participants' texts and instructors' reflections, the workshop produces a blog in Spanish and English that features weekly entries by workshop alumni, written in the style described above. As explained in chapter one, the title of the blog—*Amphibious Accounts: Human Rights Stories from the Global South*²—owes itself to the fact that action research is “amphibious” in that its practitioners move seamlessly between different environments and worlds, from academic circles to local communities to state entities. For those who are dedicated to the promotion of human rights, this often implies navigating these worlds in the global North and South alike.

Each year, the workshop is centered on a particular current issue. In 2013, the topic was the impact of the “boom” of extractive economies that have proliferated around the world in light of the increasing demand for and price of minerals (gold, coltan, platinum, copper, etc.) and fossil fuels. In addition to providing coherence to the book and the group of participants, the selected topic determines the workshop site—for the sessions are held not in a classroom or convention center but in the middle of the field, in the very communities and places that are witnessing the issue firsthand. For example, the 2013 workshop traveled to northern Colombia, where the eruption of extractive economies (centered on coal and other minerals) has profoundly affected the rights and lives of indigenous and rural communities.³

The structure of this volume reflects that of the workshop. Following the opening chapter, which defines action research and its practice in the “minefields” of extractive economies, the core section of the book features studies on the consequences of these economies on human rights around the globe—from the rights of rural communities in countries like Brazil, India, Mexico, Peru, South Africa, and Uganda to the rights of indigenous peoples in places like Chile, Colombia, and Paraguay. Finally, the last part of the book gathers the reflections of several of the instructors who

2 See www.amphibiousaccounts.org.

3 To learn more about the workshop's journey and hear participants' testimonies, see the brief video at <http://www.amphibiousaccounts.org/#!/conoce>.

led sessions during the workshop and acted as mentors during the writing process.

Acknowledgments

A new and long-term initiative such as this one is more than a collective effort—it requires the support of an entire organization. This text and the ongoing commitment that it represents is an institutional effort of Dejusticia that involves, in one way or another, all of the organization’s members. For the unconditional support that Dejusticia’s staff have dedicated to this project, and for embodying the hybrid of research and action in their daily work, I extend enormous thanks to all of them.

I am particularly indebted to the colleagues and friends who were co-architects of the 2013 workshop and subsequent publication process. First of all, I would like to thank Meghan Morris, senior researcher at Dejusticia, for having believed in the idea of the workshop from the beginning, when it was a mere dream, and for having dedicated her unparalleled talent, generosity, and commitment to the immense task of ensuring that the workshop, this volume, and the blog became a reality. If we are able to sustain our efforts moving forward, it will be in large measure thanks to Meghan. And when we still were fortunate to have Eliana Kaimowitz here at Dejusticia, she was the ideal and indefatigable workshop co-organizer and facilitator. Her energy, intelligence, and efficiency were essential for laying the foundations of the project, to which we are sure she will continue contributing as it moves forward. Finally, any initiative of this nature requires considerable logistical support, which William Morales assumed with an admirable mixture of efficiency, solidarity, and optimism. Without his daily support and his ability to anticipate problems, put out fires, and ensure that everything functioned better than planned, this project would have surely outstripped us. Thanks to him for everything.

At the workshop, significant contributions were made by the instructors, many of whom also served as mentors to participants during the subsequent writing process. I therefore extend my deepest thanks to Michael Burawoy, Gavin Capps, Elvia Cuadro, Karl von Holdt, Adele Kirsten, Chris Michael, Diana Rodríguez

Franco, Laura Salas, Debbie Stothard, Nandini Sundar, and Rodrigo Uprimny. In his hybrid role as organizer and participant, Carlos Andrés Baquero was, as always, simply essential.

During the editing and production process, three individuals were fundamental. Morgan Stoffregen went above and beyond her duties as a professional translator and editor, becoming an unwavering ally who made continual improvements, proposed alternatives and ideas, and ensured that a polyphonic manuscript was converted into a coherent and legible whole. Elvia Sáenz, in coordinating Dejusticia's publication process, never ceased to demonstrate precision and creativity. Marta Rojas was, once again, our ideal graphic designer.

The convening of our workshop and the publication of this book—in addition to the ongoing operation of Dejusticia's international program—were made possible thanks to the generous and enduring support of the Ford Foundation. Louis Bickford and Martín Abregú were and continue to be fundamental counterparts in our efforts: beyond coordinating the foundation's financial support, they have served as partners who are at once sympathetic to and independent from our ideas and initiatives, for which we are enormously grateful.

I would like to conclude by recognizing perhaps the most essential players of all: the activist-researchers who authored the chapters in this volume. Both during and after the workshop, they enthusiastically supported Dejusticia's commitment to action research and took time from their busy lives to reflect, write, revise, and write again. If the space that we created for them is helpful in their work to contribute to a more effective, horizontal, and creative human rights movement, this effort will have been worth it.

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CHAPTER 1
Amphibious Research:
Human Rights and Action
Research in a Multimedia World

César Rodríguez-Garavito

To do action research on human rights is to lead a double life. It is to experience, in a matter of hours, the transition from the introverted world of the classroom to the extroverted world of the media and meetings with activists and public officials. The contrast can be felt on the skin: the humidity and heat of fieldwork is a far cry from the climate-controlled air of university offices, courthouses, and philanthropic foundations.

The contrast is even more marked when practicing action research in highly dangerous and unequal contexts, such as those visited by the contributors to this volume in the course of their advocacy and research on socioenvironmental conflicts. Such conflicts have exploded throughout the globe over the last fifteen years, as one country after another has turned toward natural resource exploitation to satisfy a growing global demand for minerals, oil, and energy.

Elsewhere, I have used the term “minefields” to refer to these sites and the spheres of social interaction produced within them (Rodríguez-Garavito 2011). They are minefields in both a sociological sense and an economic sense. In sociological terms, they are true social *fields* (Bourdieu 1977), characteristic of enclave economies in the extractive sector, and therefore typified by profoundly unequal power relations between mining companies and local communities, as well as a scarce state presence. They are *minefields* in that they are highly dangerous: any misstep within these fields, which are characterized by violent and distrustful social interactions, can be fatal. They are also minefields in an economic sense. On many occasions, they revolve around the exploitation of gold, silver, coltan, or other valuable minerals.

In other cases, as in several natural resource exploitation projects in Colombia that I have studied, they are minefields in a more

literal sense as well: the territories in conflict are littered with anti-personnel mines, sown by leftist guerrillas and right-wing paramilitaries as a strategy of war and territorial control.

In this chapter, I reflect on the nature of and challenges inherent to the type of action research embodied in this volume, which we at Dejusticia are nurturing through an annual workshop for young human rights activists from the global South. In line with its reflexive logic, the chapter draws explicitly on an earlier work of mine (Rodríguez-Garavito 2011), which is based on my experience of practicing action research in social minefields, particularly three socioenvironmental conflicts in indigenous territories that have received national and international attention: the dispute over the construction of the Belo Monte dam in the Brazilian Amazon, the conflict over oil drilling in the territory of the Sarayaku indigenous community in the Ecuadorian Amazon, and the struggle surrounding the construction of the Urrá dam in northern Colombia.

The chapter is divided into three sections. In the first, I characterize the practice of action research within these contexts, highlighting what I consider to be its four main scientific and political strengths. In the second, I explore the dilemmas facing action research, outlining the four challenges that represent the flip sides of the strengths mentioned in the first part. I close the chapter with a proposal to solve some of these dilemmas, through strategies that form an approach that I refer to as “amphibious research” — research that allows the action researcher to breathe simultaneously in the two very different worlds of academia and the public sphere, and to synthesize her two lives into one without drowning in the process. In making the case for amphibious research, I highlight the need to widen the types of writing and forms of diffusion of human rights work in order to take advantage of a world that is increasingly multimedia.

The Action-Research Windmill

One of the best characterizations of the practice of action research is the beautiful article by Michael Burawoy (2010) about Edward Webster, the renowned South African labor sociologist who founded the Society, Work and Development Institute (SWOP) of

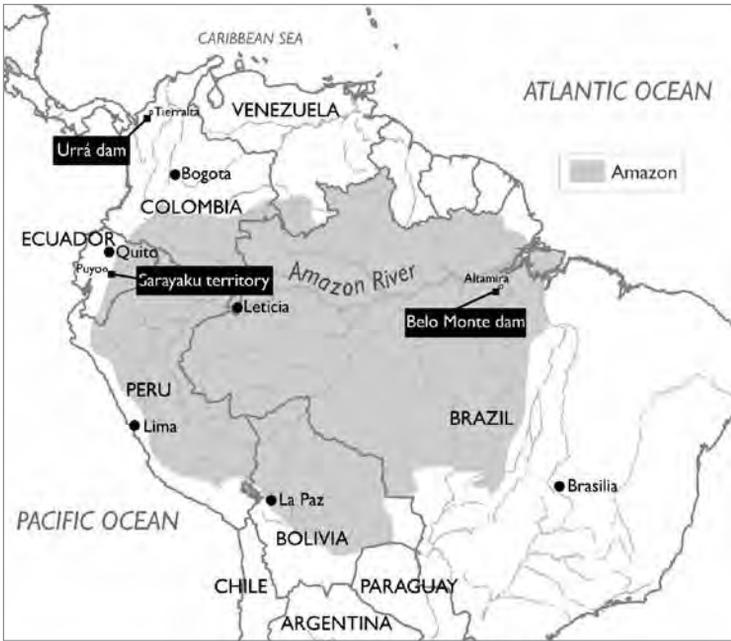
the University of the Witwatersrand. Burawoy uses the metaphor of a windmill to describe a typical day in the life of Webster. Like a windmill, Webster, a public sociologist and action researcher, is in constant movement, propelled by the many blades that constitute his professional activity: research and teaching, participation in the public sphere (the media, social movements, and so on), public policy advocacy, and the construction of institutions that embody and promote action research, such as think tanks and nongovernmental organizations (NGOs). The rotation and interconnectedness of these four blades causes the sociological imagination to transform into political imagination, in the same way that the relentless turning of a windmill converts air into energy.

This South African windmill resonated thousands of miles away, in the heart of the Amazon, during my empirical work on minefields. I had been propelled there by the forces of various blades that led me from academic research and public debate on indigenous rights in Colombia to human rights advocacy in Washington and, from there, to new rounds of research and activism in Brazil and Ecuador. All of these activities formed part of the consolidation process for two institutions I helped found: the Center for the Study of Law, Justice and Society (Dejusticia, a research center and NGO) and the Global Justice and Human Rights Program at the University of Los Andes (a university-based legal clinic), both in Bogotá, Colombia.

I started the project with a study on the Urrá dam, located in northern Colombia, the birthplace of the country's blood-soaked paramilitary movement and the site of violent disputes over territorial control and drug trafficking between the paramilitaries—working in shady alliances with Colombia's armed forces and political elite—and the equally violent leftist guerrillas, particularly the Revolutionary Armed Forces of Colombia (FARC) (see figure 1). Caught in the crossfire are the indigenous Embera-Katio people, who have lost at least twenty-one leaders through assassinations by one side or another. And today—after twenty-five years of forced displacement and human and environmental loss caused by the construction of the Urrá dam—the Embera-Katio people face the very real threat of cultural and physical extinction (Rodríguez-Garavito and Orduz 2012).

FIGURE 1.1

**Indigenous peoples and socioenvironmental conflicts:
Mapping amphibious research**



SOURCE: Dejusticia

Even though I arrived in Urrá with the intention of documenting what had happened over those two decades—and in that sense, donning my professional sociologist hat—from the very beginning, the research project had a component of action. In fact, I had learned about the Urrá case during a collaborative effort with the National Indigenous Organization of Colombia, when I had been donning my other professional hat (as a lawyer) to advise the organization on legal strategies for defending indigenous territories and livelihoods. Thus, on my first trip to Urrá, I was accompanied by students from the Program on Global Justice and Human Rights at the University of Los Andes with the goal of helping the Embera-Katío community explore the legal options available to defend their rights.

I still remember vividly my arrival to Urrá. Before the unusual sight of a group of professors and students in one of the most violent regions in one of the world’s most violent countries, the military personnel who jealously guarded the entrance greeted us

with distrustful questions—“Who are you?” “What are you doing here?” Once we passed the checkpoint, the reasons for the distrust became clear. As we traveled down the river that fed into the reservoir, we saw navy speedboats playing cat and mouse with the illegal boats transporting cocaine produced on the slopes of the river.

Allowing myself to go with the unpredictable flow of action research, I arrived at the second stop in the project: the Belo Monte dam in the Brazilian Amazon. The action-research project on the Urrá dam had led to my involvement in the legal defense of other indigenous communities who, like the Embera-Katío, had not been consulted prior to the construction of development projects in their territories, despite the fact that practically every Latin American country has ratified Convention 169 of the International Labour Organization, which establishes the obligation to conduct prior consultations. While at a public hearing on this topic before the Inter-American Commission on Human Rights in 2010, I learned that the commission had just received a complaint regarding a case similar to Urrá. This complaint, submitted by indigenous communities and environmental organizations, accused the Brazilian government of having failed to consult Amazonian indigenous communities before authorizing the construction of Belo Monte, slated to be the third largest dam in the world. The case immediately attracted international attention given that, on the one hand, the Brazilian government had declared the dam to be of national interest as part of the country’s plans to become an economic superpower and, on the other, international celebrities (such as Sting and James Cameron) had traveled to the region to express their solidarity with the indigenous peoples. When the Brazilian government refused to obey the Inter-American Commission’s order to suspend the dam’s construction while the commission reviewed the complaint, various human rights organizations and scholars—myself among them—traveled to the region to document the situation and express our condemnation of the government’s decision.

Having been involved in the Urrá case as an academic researcher and in Belo Monte as a lawyer, my comparative-sociologist intuition led me to look for a third case of legal and political mobilization that, unlike the previous two, had ended with a

favorable judicial decision for the indigenous communities. The opportunity to complete the study sample arose in mid-2012, when the Inter-American Court of Human Rights held a hearing in the territory of the Sarayaku people in the Ecuadorian Amazon, which foretold a decision in favor of the indigenous community. When I traveled to the Sarayaku territory for fieldwork, the community and their lawyers were eagerly awaiting the court's decision, which was published a day after my visit ended. In a historic decision, the Inter-American Court ordered Ecuador to provide compensation to the indigenous community for having authorized oil exploration without first consulting them, and to conduct such a consultation should Ecuador consider oil exploration within Sarayaku territory in the future.

With this case study, my journey had reflected a complete rotation of the windmill: from the research of a professional social scientist to intervention in the courts and media as a human rights lawyer, including participation in debates on indigenous rights in each of the three countries, and ending again with the professional social scientist. As tends to happen, today, several years into the project, I am certain of neither my identity nor my precise role in the story. I have been all roles at once and none in particular. Nor do I know when my involvement will end; unlike professional academics, I cannot choose to leave the project once I publish a book on it. Since my commitment is to the underlying human rights cause as well as to the people and communities who have placed their trust in my work, I cannot simply "move on" to the next book project.

Elsewhere, I offer a detailed account of the theoretical and legal framework of the study (Rodríguez-Garavito 2011). For the purposes of this chapter, I will limit myself to outlining the four strengths of action research that I believe are illustrated by the type of process I have described, which can also be seen at play in the other chapters in this book. First, the rapid changing of the action researcher's roles and identities allows one to see the same social reality from distinct angles (that of the scientist, the activist, the judge, and the public official). The result, I believe, is a greater *empirical richness and precision* than is possible in other types of research. For instance, over the course of the project's several years, I have had the opportunity to interact with a broad range

of actors who hold widely different views about economic development, indigenous peoples' rights, and the environment. In dozens of meetings, public debates, and field visits, the views of indigenous leaders, human rights defenders, high-ranking public officials and judges, journalists, business representatives, officials of the United Nations and inter-American human rights system, and academics have helped me understand both the complexity and the clear patterns that characterize the messy daily realities of socioenvironmental conflicts in Latin America and elsewhere.

Second, the design, questions, and results of the action-research project are directly informed by interactions with actors on the ground and are planned with diverse audiences in mind. As shown by the contributors to this book, the result is a greater *relevance* of the research for multiple audiences, which can translate into influence in the fate of the issues under study. I have had the opportunity to appreciate this advantage firsthand. By following the thread of events in the three cases and remaining committed to the underlying cause and to the communities and organizations involved, I and my colleagues at Dejusticia have been able to provide useful information and expertise at key junctures. In Ecuador—after the government cracked down on indigenous and environmental organizations by revoking their registration and suing their leaders for “terrorism” for having organized marches and protests—we used the information we had gathered and our previous work on authoritarian governments to produce a report documenting widespread violations of the rights to protest and freedom of expression in Ecuador (Pásara 2014). The fact that the report was widely discussed in Ecuador—including by President Rafael Correa, who lashed out against it repeatedly on television and social media—attests to the relevance that this type of work can have. Similarly, in Brazil and Colombia, our action-research team has become a go-to resource in policy and media debates on indigenous peoples' rights, as well as a frequent collaborator in training workshops for grassroots communities, judges, human rights officials, and other influential audiences.

Third, by letting the rhythm of events lead the way, the action researcher achieves *immediate and continued access* to the places and people of her studies, who see her as just another participant instead of an intruder seeking to extract information. Interventions

delivered in multiple formats (such as opinion pieces and media appearances) also lend an immediacy to research products that is absent from traditional academic production, which can take years before coming to fruition. Unlike conventional researchers—for whom social practice is a laboratory where one wears rubber gloves and dissects events with the cold analytic scalpel of the professional scientist and from which one leaves untouched, never to return—action researchers tend to keep the conversation going with the people and communities for whom these events are not a laboratory but their lives. This creates the essential interpersonal glue—trust—that not only allows the action researcher to have continuous access but, more importantly, leads social actors to actively seek her involvement, as has been the case with the social leaders and progressive judges and public officials with whom we have worked.

Fourth, action research has an emotional strength that has been largely overlooked by the growing literature devoted to it. Because it involves direct contact with events and a multitude of people (protagonists in the cases, colleagues, diverse audiences, and so on)—and because it is explicitly inspired by moral convictions (such as the defense of a social justice cause or the construction of an institution that represents these convictions)—action research is a constant source of *motivation*. The adrenaline that runs through one's veins while standing between the blades of the windmill is a powerful incentive to continue working, and is one that tends to be lacking in the solitary work of professional scholars, who are expected to check their moral commitments at the door. As Burawoy writes in connection with the sociological windmill, "When the winds are gale force it is impossible to get close [to it] without being drawn into its vortex" (2010, 5).

It is an exhilarating experience indeed—one made even more stimulating by the fact that it is always a *collaborative* enterprise, for only through the collective work of highly motivated individuals can the many commitments and activities of action research be achieved. For instance, the project on environmental conflicts and indigenous rights that I have been using as an illustration in this chapter involved no fewer than twenty people throughout the years, including outstanding young researchers, human rights advocates, filmmakers, designers, and webmasters.

Appropriately, several of the publications resulting from the project have been co-authored with young scholar-activists trained in action research (Rodríguez-Garavito and Baquero forthcoming; Rodríguez-Garavito and Orduz 2012). In the various instances when exhaustion or failures of our efforts have caused me doubt or disillusionment, these individuals' deep commitment, talent, and enthusiasm have been more than enough to move forward.

To my mind, these are the strengths of the practice of action research and the results that it generates. But each strength has its dark side, which gives rise to profound dilemmas. To them I now turn.

Don Quixote versus the Windmill: The Dilemmas of Action Research

In a famous passage of *Don Quixote*, the novel's protagonist, accompanied by his faithful squire, Sancho Panza, spars with windmills that he mistakes for dangerous giants. As in Miguel de Cervantes's story of the celebrated knight, there is much that is quixotic in action research. It is a very ambitious undertaking, and can even be dangerous in contexts such as minefields. As in the novel, there is a high risk that something will go wrong in the story of the sociological windmill.

The main risks can be viewed as the flip sides of the four aforementioned strengths. First, the shifting of roles and activities that allows for a richer and more complete version of the facts inevitably leads to *dispersion*. The action researcher leaps from task to task, from one meeting to the next, from one place to another. For example, I remember writing my opinion pieces for a Colombian newspaper as I was in the midst of conducting fieldwork in the Brazilian and Ecuadorian jungles, only to then search anxiously for an internet cafe in a small town on my way back in order to submit it before the deadline. This risk of dispersion becomes permanent, which means that the concentration needed to convert empirical richness into quality academic products becomes impossible to achieve. In other words, the speed and immediacy of public interventions wind up replacing the slower and more patient work of the social scientist. The result can be academic dilettantism.

Second, with relevance and influence comes the risk of a *loss of independence*. By interacting with multiple audiences, action

researchers can be captured by one of them—for example, a state agency or company that hires them as a consultant, or a social movement that demands unconditional loyalty. I have personally lived this dilemma: a state agency that asked me to write a concept paper about a draft bill on prior consultation in Colombia was so uncomfortable with my position of guaranteeing indigenous rights that it decided to shelve the report; I have rejected several offers from mining companies to work as an “indigenous community relations consultant”; and several times I have had to explain to the indigenous movement why I would not sign their communiqués, even though I agreed with them. The reason was the same in all of these cases: I needed to maintain my professional role as an action researcher. Or, to paraphrase Boaventura de Sousa Santos (2014), I had to remain objective despite not being neutral. But this was not always well received by the above audiences.

In violent places and countries, relevance has an additional high cost: action researchers risk not only their independence but also their physical safety and lives. Precisely because action researchers are relevant, they are a problem for powerful, violent actors—from the state’s armed forces to leftist guerrillas, right-wing paramilitary squads, local mafias, or private armies serving companies. Ever since the publication of our book on Urrá, I have been advised by trustworthy local leaders not to go back to the region for safety reasons. And after the publication of our report on the Ecuadorian government’s persecution of social movement and political opposition leaders, it has become clear to me and to the heads of other organizations sponsoring the report that traveling to Ecuador may put us at risk of arrest.

In fact, the connection between relevance and personal danger is so close that I believe it is characteristic of action research in countries with a legacy of recent political violence (such as Colombia, South Africa, and many other countries of the global South represented in this volume) or volatile contexts such as minefields. Put more clearly: those who practice action research in these contexts can do so only because other action researchers who came before us sacrificed their lives, tranquility, or personal safety for the cause.

This was the moving revelation of a conversation that I had in Johannesburg with the new generation of researchers from SWOP,

the center founded by Eddie Webster, our “sociological windmill,” who was also present. The youngest members were the ones who remembered that several of Webster’s colleagues had been murdered by state forces for their anti-apartheid academic and political work. Without such extreme commitment and persistence on the part of Webster and his surviving colleagues, SWOP might have disappeared at the hands of the apartheid regime.

The same can be said of action research—and, in fact, of social science and legal research in general—in Latin America. Indeed, some of the pioneering centers of Latin American social science (such as the Brazilian Center for Analysis and Planning, co-founded by Fernando Henrique Cardoso) served as refuges for academics being persecuted for their studies and their militant critiques of the dictatorships of the 1960s and 1970s. Therefore, from the beginning, the human rights movement and action research were intimately tied, and some philanthropic organizations (such as the Ford Foundation) that had previously tended to support only academic programs in the region inaugurated programs to finance the then-emerging human rights NGOs when it came to light that the academics who supported these NGOs were being killed, threatened, and exiled (Keck and Sikkink 1998).

In the most violent countries, such as Colombia, many action researchers have paid with their lives or with exile for having raised their voices against the various armed groups. In fact, the founder of one of the most influential strands of action research—sociologist Orlando Fals Borda, the creator of participatory action research—was arbitrarily detained in 1979 by the government of Julio César Turbay on unfounded charges of belonging to the guerrilla group M-19. Furthermore, in the 1990s, the most influential academic center for the study of violence at the time (the Institute of Political Studies and International Relations of the National University of Colombia) was persecuted so harshly and systematically that a good number of its researchers ended up in exile. Some (such as Eduardo Pizarro) were targets of the FARC, while others (such as Álvaro Camacho and Iván Orozco) were targets of paramilitary groups; many of these individuals received research grants from the University of Notre Dame and elsewhere in order to escape the violence for a few years. With the caustic humor that Colombians have developed to endure this savagery, some called

these sponsorships “Carlos Castaño Fellowships,” a reference to the name of the commander of the powerful paramilitary armies that forced many public intellectuals into exile at the end of the 1990s. Others did not manage to flee in time: in 2004, Alfredo Correa de Andreis, a well-known sociologist from the Caribbean coast, was assassinated in a plot involving paramilitaries and the intelligence agency of the Colombian state. Although those of us who practice action research in Colombia today face personal risks that we must anticipate and manage with extreme prudence—for example, by carefully coordinating fieldwork with local NGOs and communities—fortunately, we do not face the prohibitive level of risk experienced by our predecessors. To them we owe the spaces we now have in universities, civil society, the state, and the media.

Third, the drawback to immediate access to actors and events is *difficulty in achieving the analytic distance* so essential for academic work. Precisely because they are not intruders in a social “laboratory” from which they want to extract information, action researchers wind up entangled in events, unable to leave in order to think and write. The problem with the windmill is that it never stops turning. And the vertigo of this perpetual movement can inhibit the tranquility and distance necessary to theorize and unravel the patterns that connect the facts. I was acutely aware of this dilemma on an almost daily basis, as the never-ending demands and unpredictable twists and turns of public engagement kept crowding out my plans to sit down and write the book I had intended to write, which explains why it took me three extra years to complete it.

Finally, the flipside of emotional adrenaline is *burn-out*. Motivated by their moral and personal commitments to their audiences and institutions, action researchers can end up in the vortex about which Burawoy writes. Before reading his account of the sociological windmill, I had used the same word—vortex—to describe the sensation I felt when practicing action research, interacting with so many different people in so many diverse places at such a dizzying speed. The experience is as exultant as it is exhausting. Going from minefields to classrooms and then to hearings before national and international human rights agencies and courts is fascinating. But it requires a work pace that can be inadvisable and even unsustainable.

Amphibious Research: Action Research in a Multimedia World

How can such difficulties be negotiated? There are no simple solutions. In the end, they are existential dilemmas, the kind that go hand in hand with the job itself. Those who enjoy the benefits of action research also accept its costs.

In this chapter, in framing this book and *Dejusticia*'s action-research project underlying it, I have sought to be reflective about the difficulties of this endeavor. However, I do not want to end this chapter with this pessimistic tone, in part because a characteristic feature of action research is optimism. Or, to paraphrase Antonio Gramsci (1971), its combination of scientific and moral commitments means that the pessimism of the intellect is mixed with the optimism of the will. Thus, an appropriate way to conclude is to mention, at least briefly, professional strategies that could mitigate the dilemmas and take advantage of the strengths of action research, as illustrated by chapters in this volume and the training program that led to it.

My argument is the following: to navigate the winds of the windmill, it is necessary to become amphibious. In the same way that amphibious animals or vehicles move from land to water, the action researcher should be able to move seamlessly through various media. In violent contexts, in addition to navigating water and earth, the action researcher must be able to face the fire.

This type of practice is what I refer to as amphibious research. Etymologically, "amphibian" means "one that lives a double life." And, as we have seen, this is the defining characteristic of the action researcher.

Two strategies seem especially promising to advance amphibious research: one related to the texts that it produces and the other to additional forms of diffusion. I believe that one of the main reasons that action researchers suffer from dispersion and burnout is that the valid formats for the academic world (articles in indexed journals and books published by university presses) use a language and codes of communication that differ markedly from those expected by their other audiences (such as newspaper readers, social movement leaders, marginalized communities, television viewers, and the anonymous public of social media).

The distance between these formats is so great that to be relevant in different worlds, one must live two (or more) parallel lives.

In the face of this dilemma, one solution is to cultivate intermediate genres of writing and diversify the formats in which the results of action research are disseminated. The first implies producing texts that are legible for a wider audience, without losing academic rigor. The second means that action research must be *multimedia*. As an amphibious animal moves from one natural medium to another, so the amphibious researcher translates his or her work products into different formats, from books and articles to videos, podcasts, blogs, and online classes. In both cases, the goal is to create products that can be circulated among academic audiences and the public sphere.

Precisely to foster this new genre of writing in the human rights field, in 2013 I founded, along with a team of outstanding researcher-advocates at Dejusticia, the Global Action-Research Workshop for Young Human Rights Advocates. The annual workshop brings together around twenty action researchers from Latin America, Africa, the Middle East, South Asia, and Southeast Asia for an intensive training in creative writing, social science research, and communications. Over ten days, expert journalists, researchers, and advocates from around the world lead hands-on, interactive sessions designed to guide participants in the use of these tools so that they can improve the quality and impact of their research and activism. We encourage them to be reflective about their own practice and to incorporate narratives—including personal stories—into their writing. The goal is to have them tell stories of the struggles they wage in collaboration with victims of human rights violations in different parts of the world, with the aim of fostering creativity and reflexivity in human rights circles. Instead of, or in addition to, having professional researchers (usually from the global North) document and publish these stories, the workshop aims to give a voice to those working on the ground.

To that end, we spend ten intense days together doing fieldwork, visiting grassroots communities, and holding workshop sessions in a region of Colombia that is illustrative of the human rights issue selected for that year's workshop. For several months after the workshop, instructors work closely with participants to

help them develop the paper outlines they submitted with their applications. After going through several rounds of revisions, participants' papers, along with instructors' comments, are then compiled into an edited volume like this one. The goal is that as the number of alumni and edited volumes grows, a community of action researchers will emerge that will be able to better communicate with a larger audience and have a more effective impact. We also hope that they will support one another and forge durable ties of solidarity and collaboration across different regions of the global South, as well as with like-minded researcher-activists from the global North.

Workshop participants and other practitioners of action research who wish to experiment with these strategies have a spectrum of fascinating opportunities available to them. For example, if they want to attempt a hybrid writing style combining academia and journalism, they can find support in the growing literature of journalists and nonfiction authors who write with the fluidity of their trades while incorporating theories and empirical findings from the social sciences. Such writers have addressed topics as diverse as African dictatorships (Kapuściński 2001), political violence in Colombia (García Márquez 1993), urban life in contemporary India (Mehta 2005), drug trafficking and slum culture in Latin America (Alarcón 2012), job insecurity in the United States (Ehrenreich 2008), and the future of online social movements (Gladwell 2010).

Also aiming for this middle point are academics who borrow narrative tools from journalism and literature. The results are ethnographies, chronicles, and essays written for broad audiences on topics such as the politics of clientelism in Argentina (Auyero 2001) and forced displacement in Colombia (Molano 2005). Nonetheless, hybrid literature produced from the sidelines of academia continues to be relatively scarce and timid in comparison with that produced outside universities. In this sense, the invitation of Fals Borda (1995) remains open: "Do not impose your own ponderous scientific style for communicating results, but diffuse and share what you have learned together with the people, in a manner that is wholly understandable and even literary and pleasant, for science should not be necessarily a mystery nor a monopoly of experts and intellectuals."

I believe that this encounter is fundamental for action research, not only because it can mitigate the action researcher's dispersion and burnout but also because there is a profound elective affinity between the action researcher and the investigative journalist who produces in-depth social analysis. Both use a combination of deep empirical work, creative reflection, and empathy and solidarity with their subjects. This is evident, for instance, in the description of "immersion journalism" offered by the legendary chronicler Ryszard Kapuściński in a book whose title—*A Cynic Wouldn't Suit This Profession*—already reveals an affinity with action research. Kapuściński describes his chronicles on Africa as an effort to portray and think about society "from within and below" (2002, 31), based on a lifetime of dialoguing and living with the subjects of his writings. With regard to the relationship between theory and experience in intellectual work, the Polish journalist maintains that "in the community of writers, a very simple distinction can be drawn between those who find inspiration in themselves and those who must be inspired by external forces. There are reflexive personalities and those that reflect the world" (ibid., 120). Speaking of his own work, he says something that could describe many action researchers: "In my case . . . I reflect the world: I have to visit the place of events to be able to write. Staying in just one place, I die" (ibid., 120). Like amphibians, I would add.

I have tried to move my own work on minefields in this direction. After publishing an academic article that outlines the project's theoretical framework and illustrates it with the case study of the Urrá dam in Colombia (Rodríguez-Garavito 2011), I realized that the empirical richness of this story could not be told within the trappings of conventional academic writing. Indeed, the twenty years of the case tell more than a story about a dam. They tell a story of the core processes underlying the civil war and the dispute over land and natural resources in contemporary Colombia: the rise of right-wing paramilitary squads and their penetration into politics; the involvement of the FARC in drug trafficking and the struggle to control areas of cultivation and transport; forced displacement and land encroachment; the complicity of wide sectors of rural business in displacement and violence; the race for natural resources in a country turning toward a mining- and oil-based economy; and the tragic impact of

all of this on indigenous peoples, whose lands, cultures, and lives are endangered for no other reason than their being caught in the crossfire. This is why I decided to co-author a book that weaves together the threads of this story, which had not been told in a systematic form (Rodríguez-Garavito and Orduz 2012). Although we performed the research with sociological tools, we wrote the book in the language of literary journalism with the hope of reaching a wider public, including indigenous peoples who today suffer similar cases in Colombia and elsewhere. The experience was as challenging as it was gratifying, and it led me to write journalistic chronicles for the Colombian press regarding the other two cases of the study, before co-authoring with an action researcher—who was trained as such through this project—a more academic book that compares and theorizes the three cases (Rodríguez-Garavito and Baquero forthcoming).

But all of this refers to the written format, which is but one of the possible channels of expression for the amphibious researcher. An equally useful strategy for addressing some of the dilemmas of action research is to take advantage of its strengths in order to generate products in diverse formats. The dominance of texts in academic life means that action researchers exclude a large part of their work from their publications. Left out are many of the most interesting experiences and information resulting from their participation in meetings, events, fieldwork, and court proceedings. Further, confining one's work to academic books and newspaper articles means denying access to many potential audiences—from grassroots organizations and social movements to university professors and students in marginalized areas.

The opportunities to fill this gap are multiple. For example, the fact that internet users spend more than 80% of their time online watching videos creates a valuable opportunity for amphibious research. Given that action researchers have access to people and situations that are interesting for broad audiences, all they need to do is incorporate a video camera into their toolbox, alongside their tape recorder and notebook. In this way, they can generate valuable images that can be used in classes, in training courses for marginalized communities, as evidence in legal proceedings, or as accompaniments to texts that result from the research. The same can be done with pictures, podcasts, and documents that they

collect during their work and which can be easily disseminated through blogs, websites, and social media. This is why Dejusticia's Global Action-Research Workshop also trains participants to write blogs and shoot short videos. It is also the reason why we created a website, *Amphibious Accounts*,¹ whose title reflects the idea of amphibious research explained in this chapter and that features blogs, videos, and multimedia materials produced by alumni and instructors.

I have experimented with these formats in the project on minefields, with the help of other researchers and a professional film crew that accompanied us on our fieldwork. The interviews and shots have been made into documentaries that we disseminate for free over the internet, together with academic and journalistic texts on the project.² We have also written policy papers and educational booklets regarding the right to prior consultation. In this way, we hope to reach diverse audiences. While indigenous peoples' organizations tend to use the videos and booklets in the training courses that they run, university students prefer videos, public officials opt for policy papers, academics prefer analytic texts, and the wider public reads newspaper chronicles.

Of course, all this sounds easier than it is in reality. There is a long way to go before hybrid genres of writing and multimedia formats are formally recognized as a valid form of knowledge within academic communities. And moving from one medium to another creates new risks of dispersion, burnout, dependency, and diletantism. In my case, I am still in the midst of experimenting with multimedia and have reached only incomplete and temporary solutions. But that is exactly the challenge of amphibious research.

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1 See amphibiousaccounts.org

2 See, for instance, the documentary video we produced on the Sarayaku case at www.canaljusticia.org.

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PART ONE: STUDIES

CHAPTER 2
The Limits of the Law:
The Struggles of the Traditional
Fishers of Hobeni Village

Wilmien Wicomb
(South Africa)

Introduction

On May 22, 2012, three fishermen from Hobeni, a community located next to the Dwesa-Cwebe Nature Reserve in the Eastern Cape, South Africa, were found guilty of attempting to fish in a marine protected area (MPA).¹ Despite the verdict, the crowd of community members from Hobeni and neighboring villages who had come to support the accused were dancing, singing, and waving homemade cardboard signs triumphantly on the courthouse lawn. These community members, residents of the poorest municipal district of South Africa, had grown tired of being invisible. They were triumphant because, for once, the magistrate and the state prosecutor, along with the rangers, park managers, and scientists with whom they had attempted to engage for more than a decade, had been forced to hear them out.

The sentences were to be handed down later that day in the second courtroom of the Elliotdale courthouse. Since the room could hold no more than ten people, the community supporters had to wait outside. As David Gongqose, Siphumile Windase, and Nkosiphendule Juza stood shoulder to shoulder waiting to hear their sentences, I hid behind my advocate to send text messages providing blow-by-blow commentary to my colleagues outside. I could hardly contain myself as the magistrate read:

1 Under the Marine Living Resources Act 18 of 1998, the responsible minister may declare an area a “marine protected area” for the protection of fauna and flora or the protection of fish stocks. The minister may then prohibit any activities inside the MPA. There are various MPAs in South Africa, but only two are “no take,” where no fishing is allowed at all. Dwesa-Cwebe is one of the no-take MPAs. It incorporates approximately nineteen kilometers of mainly rocky shore coastline and extends six nautical miles (10.8 km) out to sea.

The State correctly argues that you were acting in defiance of a law you know exists, however it cannot be denied that laws can be changed through defiance. And I shudder to think where we would be today if the laws that existed prior to our Constitutional democracy had not been defied. Please do not misunderstand me to be encouraging defiance of the laws or condoning it. However, this Court through the days of evidence is fully apprised of the particular hardships that you are suffering.²

One of my text messages to the outside said, “He is comparing us to Mandela!!”³

The magistrate gave effect to his own outrage at the injustice by doing the only thing that the law allowed him to do in a lower court: by suspending the sentences of the three fishers.⁴ They may have been found guilty, but they were free to walk.

For a young human rights lawyer like myself, that day was by far the most affirming experience I had had in my first few years of practice. Watching the community members outside the courtroom remind one another animatedly about what they had seen and heard—their story told, recorded, and taken seriously—convinced me of the unquestionable value of the work we do.

But as I arrived back at my office in Cape Town and set about giving legal effect to the emotions of the day by ensuring actual access for the local fishing communities, I was forced to reflect on the meaning of the day’s events—and, indeed, on the meaning of law and litigation in changing the lives of the voiceless. As a human rights lawyer, I am often faced with criticism from activists and academics in the field who argue that law is not a valid tool for social change. Even as a lawyer, I would be hard-pressed to defend the law in that debate: it *is* elitist, it *does* take time, and it *is* difficult to implement judgments on the ground.

2 Record submitted to the High Court of South Africa (Eastern Cape Division) under Case No. E382/2010, vol. 5 of 8, at 471. In this chapter, all excerpts from the court proceedings are taken from this transcript.

3 I had long become accustomed to the lawyerly (and probably indefensible) habit of identifying with my clients to the extent of thinking of myself as one of them.

4 Despite the magistrate’s statements that the law prohibiting these fishers from practicing their customs was probably unconstitutional, a magistrate’s court cannot decide on the validity of any law in South Africa and must “apply the law as it finds it.”

Nonetheless, I cannot deny that I experienced a shift in the world of the Hobeni and surrounding communities that day in Elliotdale. What was it? And what did law have to do with it?

These are the questions that I explore in this chapter. My exploration is from a very personal point of view, not only because such a perspective reflects my level of engagement with these events but also because this exploration is in pursuit of a very personal question: should we continue to use the law as a tool for social change?

A Community in Turmoil

I first heard about the hardships of the communities around the Dwesa-Cwebe Nature Reserve in July 2011 at a meeting of non-governmental organizations (NGOs) working in the Eastern Cape Province of South Africa. I was working as an attorney for the Legal Resources Centre (LRC), the oldest and largest public interest law firm in South Africa. Those attending the meeting were shocked by reports that local communities were being harassed by park rangers in Dwesa-Cwebe and that recent shootings had resulted in the death of at least one local fisher in the park (another would be killed only months later). Fieldworkers from the Transkei Land Service Organisation recounted these and other stories, including ones of the alleged rape of local women by enforcers of the environmental regime in the area.

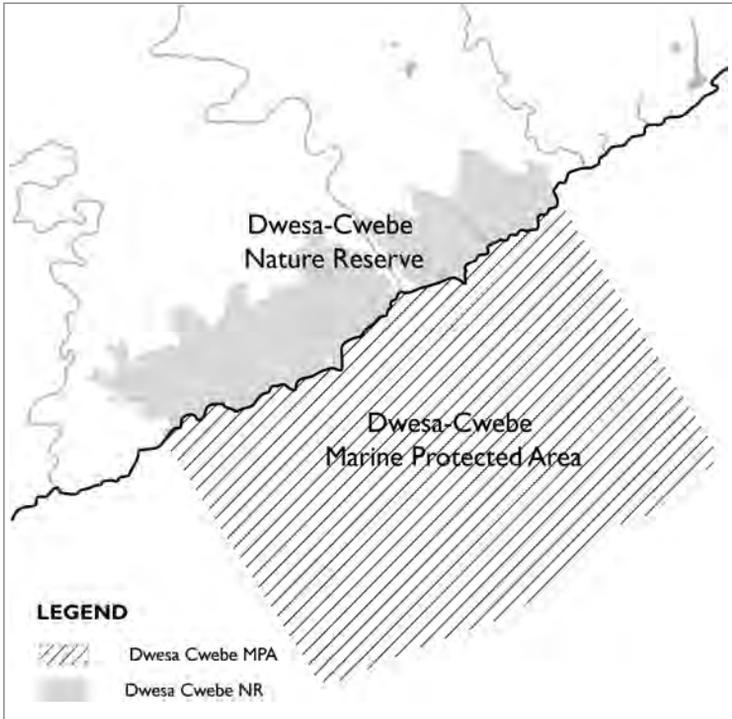
Sadly, horrific as these stories were, it was not immediately apparent that the LRC had the capacity to become involved. Litigating with limited resources and capacity in the most unequal society in the world meant that we had to pick our cases carefully, based on particular criteria—such as whether the case is likely to have a broader impact.

My ears pricked up immediately, however, because of the apparent denial of a local community's customary rights to the marine resource. I have been privileged to have had the opportunity to work under the expert mentorship of Henk Smith, who was responsible for litigating the first case in the African continent to recognize a local community's customary rights to land and minerals.⁵ We had started to envision a new legal route for changing

5 Constitutional Court, *Alexkor Ltd v. The Richtersveld Community*

MAP 2.1

The Dwesa-Cwebe Nature Reserve and Marine Protected Area



SOURCE: Eastern Cape Parks and Tourism Agency

the continued inequality in resource-ownership patterns in South Africa. This vision was not merely about taking property away from white owners and handing it to “previously disadvantaged individuals,” as the caricature of redistribution would have it. It was about changing the way property rights were understood—changing the power dynamics between the “haves” and the “have nots,” in the familiar terms of absolute ownership regimes. This project included using litigation and the South African Constitution to reinterpret and recognize previously marginalized forms of law, rights, and governance.

2004 (5) SA 460 (CC). The subsequent settlement agreed to by the parties included the transfer of the land and 49% shareholding in the state mining company to the community.

Our strategy was made possible by the exciting gains in customary law jurisprudence in South Africa.⁶ The South African Constitution of 1996 recognizes customary law and the rights conferred under it (secs. 39[3], 211).⁷ In order for a community to assert its rights arising from customary law, it must prove that it has a customary system (e.g., one that includes rules relating to the governance of resources) and that the system recognizes rights (e.g., rights to access and use natural resources). South African jurisprudence has also been infused by the common law doctrine of aboriginal title and rights, which recognizes ownership and “less-er” rights over land. The doctrine requires customary rights to be explicitly extinguished in order for aboriginal title and rights to cease to exist.⁸ The significance of this aboriginal title jurisprudence is that it is based on the right to equality, including the equality of legal systems. Read with South Africa’s constitutional commitment to substantive equality, the assertion of customary law has become an ever-stronger option for changing the status quo.

A community that had accessed and governed a marine resource for generations under a customary governance system but whose right to do so had unceremoniously—and at the time, violently—been curbed by the authorities seemed a promising client. And the fact that local fishers were so determined to continue the practice despite the difficult circumstances made the case all the more attractive.

At the time of our meeting, the criminal case of the three fishers from Hobeni village charged with attempting to fish in the Dwe-sa-Cwebe MPA was pending. David, Nkosiphendule, and Siphumile had been spotted on the beach inside the reserve carrying

6 I use the term “customary law” to refer to the local and indigenous laws of communities in (South) Africa. Customary law has also been described as the law of small-scale communities. It generally refers to the system of rules and principles that communities use to govern themselves and their access to shared resources.

7 The Constitutional Court has found that customary law is protected under the Constitution as an independent source of law (*Bhe and Others v. Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC), para. 41). Moreover, the validity of customary law is determined by reference to the Constitution, not to common law (*ibid.*, para. 42).

8 Extinguishment can happen, for example, through legislation that explicitly abolishes the rights or through the property right being transferred to private ownership.

fishing rods on the night of September 22, 2010. The three had indeed planned to fish but were still waiting for the tide to come in and were busy making a small fire when they were surrounded by four rangers pointing rifles at them. They were handcuffed, loaded onto the back of an open *bakkie* (pick-up truck), and driven to the nearest police station, in Elliotdale—more than an hour away given the state of the dirt roads in this poor district.

The policeman on duty first castigated the rangers for arresting the three men without finding any fish on them—and therefore evidence—and threatened to release them. After phone calls to superiors of both the station and the reserve, the fishermen were charged with trespassing. They were held in the police station for four days. On the fifth day, their statements were taken and the men were brought to court for their bail hearing. Despite learning that the fishermen were unemployed, the magistrate set their bail at R500 (about US\$48) each—two-thirds of the mean monthly expenditure of households in the Elliotdale district.⁹

By the time we learned of the case, it had been postponed eight times for “further investigation” by the state. The trio’s expenditure on public transport to attend the various hearings had already exceeded the bail amounts they had paid.

The irony of the trespassing charge against the three fishers began to unfold as I learned bits and pieces of the history of the larger Dwesa-Cwebe community. Seven communities, descended from the royal lineage of the Xhosa, had lived in the area today demarcated as the reserve “since recorded time and at least for the last three hundred years,” according to the South African Land Claims Commission (2001). The area—located on the banks of the Mbashe River, close to where Nelson Mandela was born and raised—was formally annexed by the British in 1885 following the brutal frontier wars of the preceding years. Soon after, the Mfengu people also came to settle in the Dwesa side of the Mbashe River. The exquisite beauty of the virgin forests surrounding the river’s mouth quickly caught the attention of colonial masters, who,

9 A 2000 survey found that the mean monthly expenditure among households in Elliotdale was R746 (approximately US\$72) per month. Further, a 2001 report classified 93% of households in rural Elliotdale as living below the poverty line and between 70% and 77% as “ultra-poor” (Shackleton et al. 2007).

starting in 1893, began to demarcate the Dwesa and Cwebe Forest Reserves along the banks of the river (Vermaak and Peckham 1996).

While the local communities were free to continue harvesting the resources, including for timber, fishing, grazing, and thatching purposes, their villages were forcibly relocated between 1898 and 1931. These removals took five decades to be finalized because of the resistance of the local communities: people kept returning and reestablishing themselves after being removed. The Dwesa community was placed on the land adjacent to the reserve. The few white families living inside the reserve remained untouched (Fay 2003).

In the late 1970s, the fencing of the reserve began, curbing local communities' access to their resources, particularly building materials (Fay, Timmermans, and Palmer 2002). Community elders recounted to my colleague Jackie Sunde, during her PhD research in the area in 2012, that at first they believed that the fence was being erected to keep wild pigs away from their crops. But it soon became apparent that the fence was there to keep the communities out of their own territory.

The communities were relocated again in the early 1980s as a result of the apartheid government's "betterment" schemes to forcefully encourage "villagization." This is where most villages are still located today (Fay 2003).

The area formed part of the Bantustan called Transkei. Bantustans were one of the legal fictions created by the apartheid government to facilitate the separate development of the country's black and "European" populations. The Transkei government turned violent on these communities in the late 1980s as it was forced to repress inhabitants' increasing frustration with extreme poverty and neglect in the area. Its repression efforts were supported by South African security forces.

In 1991, the Dwesa-Cwebe Nature Reserve was established. The Transkei legislation regulating the reserve exempted local fishers from the prohibition on fishing in the reserve, acknowledging their right to do so and the central role of fishing in their livelihoods.¹⁰ While this is significant because the same recognition is

10 A 2008 study conducted in a village along the Wild Coast found

not extended to these communities under post-apartheid legislation, the exemptions were a far cry from the proper realization of the rights of the communities.

The exemptions did not extend to local women who harvested mussels and collected other marine organisms; however, the prohibition was poorly enforced and the women continued to practice this custom (Lasiak 1998).

Nelson Mandela had recently been freed, and these communities, who suffered some of the worst impacts of the colonial and apartheid projects, had caught on to the promise of a free and equal society. In 1993, 2,500 local community members attended a crisis meeting and demanded access to grazing in the reserve (Terblanche and Kraai 1997). It was rejected. A year later, in the wake of South Africa's first democratic election and the adoption of an interim constitution and bill of rights, the communities took their protest one step further and entered the reserve *en masse*, where they symbolically harvested marine and other resources in defiance of the regulations that prohibited them from doing so. The protest made the national television news, and authorities finally took note.

Over the following few years, the newly elected democratic government vigorously engaged the seven villages around Dwesa and Cwebe, assisting them in creating representative structures and conceptualizing and negotiating a flagship settlement under the 1994 Restitution of Land Rights Act that would see stewardship over the Dwesa-Cwebe Reserve returned to the communities.¹¹ Integral to these negotiations were various proposals presented by the local communities regarding the sustainable utilization of resources within the reserve.

For the government, this ambitious settlement proposal—which carried with it the promise of a “quick win” to mark the

that the quality of children's diets was on average 60% lower than the Food and Agriculture Organization's food security guidelines; that 62% of children supplemented their diets with wild foods; and that 30% of children supplemented over half of their diet with wild foods (McGarry 2008).

11 Under the Restitution of Land Rights Act 22 of 1994, individuals or communities dispossessed of land after 1913 on the basis of racially discriminatory laws and policies could lodge a claim for restitution; the claim had to be filed by December 31, 1998.

beginning of a new democratic era—would not be slowed down by unnecessary complexity. Thus, the Eastern Cape Regional Land Claims Commission decided to combine all seven villages that had been removed from the reserve’s territory and create a new community called the “Dwesa-Cwebe community.” This new community was given legal personality and was represented by a land trust that spoke for the seven villages, each of which had a separate communal property association.

Creating the legal fiction of the “Dwesa-Cwebe community” glossed over the fact that the only commonality among these seven villages was a history of dispossession. The villages are spread out over a large zone, made all the more vast by the inaccessibility of various parts of the “community” by road. The villages have different histories of lineage, settlement, and dispossession. They also have markedly different histories of reaction to and interaction with the authorities—some exceedingly vigilant and others passive.

Every community, no matter how small, carries with it the tensions of heterogeneity, asymmetry, and diverse interests. These divisive factors, countered by the pull of commonality and cohesion based on history, dynamic interaction, and familiarity, can provide creative tension and richness that strengthens the community. But within the constructed realm of a community created on paper, such differences merely serve to undermine the whole—something that I would discover firsthand.

The signing of the 2001 settlement agreement that transferred ownership of the reserve to the Dwesa-Cwebe community should have marked a new beginning. Instead, in the words of the Elliotdale magistrate, it marked the point at which “the goodwill toward [this community] appears to terminate.”¹² The title deed was never transferred, none of the co-management promises were realized, and the community’s rights to its resources—instead of being fulfilled—were foreclosed entirely.

Warning bells should have tolled when only months prior to the signing of the agreement, on December 29, 2000, the then minister of environmental affairs declared the Dwesa-Cwebe MPA

12 Elliotdale Magistrate’s Court, *State v. David Gongqoze and Two Others*, Case No. E382/10, May 22, 2012.

a “no-take zone,” finally outlawing all forms of fishing and harvesting, in direct conflict with negotiations with the surrounding communities at the time. No one heeded the warning, however, because no one was consulted or even informed about the minister’s decision.

Nine years later, two members of the “Dwesa-Cwebe community,” “owners” of the reserve, were shot and killed by rangers after attempting to access the marine resources that they understood as belonging to them, while at least three others were charged with trespassing on their own land.

The abuse of a people had come full circle.

Lawyers to the Rescue?

I am based in Cape Town. From there, it is more than 1,200 kilometers—or two hours by plane and a further five to seven hours by road (depending on the state of the road)—to reach Dwesa-Cwebe. As it happened, at the time, Jackie Sunde, a longtime colleague, friend, and tireless advocate for the rights of rural communities, was pursuing a doctoral degree at the Environmental Evaluation Unit at the University of Cape Town. After nearly ten years of working in the small-scale fishing sector, she had decided to focus her research on customary fishing systems and small-scale fisheries governance in South Africa. One of her research sites was Hobeni village, the home of the three accused. Jackie’s research, focus-group reports, and in-depth interviews provided me with an invaluable entry point into the lives of my three new clients.

By the time I first set foot in Hobeni, I had gone on record for the three accused in the Elliotdale Magistrate’s Court. I had also already briefed another friend and colleague, Jason Brickhill, to argue the matter. Jason was a brilliant young advocate working as in-house counsel at the LRC. My briefing to him happened within the space of minutes in his Johannesburg office, as these things do. Much as I imagine budding script writers vying for the attention of producers with a two-minute pitch, I took my chance to interrupt a meeting between Jason and another new employee in which the latter had just asked how the LRC chooses new cases and what we meant by “making new law.” Within approximately ninety seconds—and with the starry-eyed enthusiasm of a new lawyer who thinks she is the first to find the elusive concept of

justice within the strict confines of the law—I set out the facts of the case and the idea of asserting constitutionally protected customary rights as a defense against the charge of unlawful fishing in the reserve. It worked. Jason turned to our colleague and said, “Now that is making new law.”

For this defense, we would need to show that the community had been fishing in the reserve “since time immemorial” and had been doing so in accordance with its own customary rules. As a result, we would argue, the community had aboriginal rights to resources within the reserve that had never been explicitly extinguished by any legislation. To further strengthen our case, we wanted to investigate the extent to which the practice of fishing and harvesting mussels and otherwise interacting with the ocean inside the reserve formed an integral part of the community’s culture.¹³ Before traveling to meet the community for the first time, I prepared a legal memorandum that outlined, step by step, what we would need to prove and what evidence we would need in order to do so.

This strategy meant that while the case was on behalf of three individuals, we had to understand the culture and customs of the community. In this case, the “community” was the fishers and mussel harvesters of Hobeni village, one of the seven villages that constitute Dwesa-Cwebe. The community that we were interested in was defined by the boundaries of the customary system that governed Hobeni’s access to the marine resource.

Armed with these legal principles neatly set out, we sat down with the fishermen of Hobeni for the first time in January 2012. The meeting took place at the house of Loli Majambe, chair of the fishing committee. In general, meetings always took place there, perhaps out of respect for his leadership or perhaps because his two-room house was more spacious than other houses. Whatever

13 Relevant principles had been established in other jurisdictions, such as Canada (Supreme Court, *Ronald Edward Sparrow v. Her Majesty The Queen*, [1990] 1 S.C.R. 1075); Australia (High Court of Australia, *Yanner v. Eaton* [1999] HCA 53); the United Nations Human Rights Committee (*Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993, October 27, 2000); and the African regional level (African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication No. 276/03, November 25, 2009).

the reason, the space was tiny. It was also without electricity, for none of the houses in Hobeni have electricity, despite power lines running through the village to service the one tourist hotel inside the reserve.

Mcebisi Kraai, a fieldworker from Masifundise, a national organization that works with small-scale fishing communities, acted as our interpreter. Mcebisi had been working in the area for more than a decade on behalf of different organizations, and had only recently joined the fishing sector. But his knowledge of the dynamics within the communities ran deep.

These dynamics, however, were of no concern to me at the time. I ran down my list of questions, starting with the history of the community, particularly its practice of fishing. Elders took turns recounting their childhood days when they learned not only to fish but to fish within the system of their community. Rocks had names and belonged to families. Fishing was performed by men and the harvesting of mussels by women. Access to the sea was regulated by knowledge of the resource and how to utilize it: you went to sea only if you understood the ocean. Above all, you never caught more than you could carry.

The sea was also about more than fish and mussels, they explained. It was an integral part of their culture and religion: their ancestors live in the sea within the reserve and must be honored there. Twins must perform specific rituals in the ocean.¹⁴ Traditional healers must go to the sea before they can qualify for the profession. Seawater is believed to make their women fertile.

I was excitedly typing away because I had found much of what I had come to look for. But I was getting greedy. I wanted the community members to articulate their rights in the words that I had used in my memorandum on the evidence needed. "So where did your rights to fish come from?" I asked. "Who gave them to you?" I wanted them to answer not that their rights were given to them by the government (in South Africa, fishing rights are allocated by the minister of agriculture, forestry and fisheries) but that their rights belonged to them because of their history and customary practice in the area. I kept pushing, asking the

14 The area is known for an unusually high rate of twin births. Locals believe it is because of the seawater that the women drink.

question in different ways. Finally, one of the older men looked at me and said (and this is how it was translated to me):

You are using the wrong words. We didn't have a right to fish. Fishing was simply life. What you call rights, for us was simply a part of life. It is you who use this language of rights. We don't know that. We want our life, but if we can't have that, then maybe at a minimum we can have these rights to fish that you are talking about.¹⁵

This would not be the last time that I fell into the trap of trying to reconcile the language of law with the vernacular of the community at all costs. At another meeting some months later, this time with Jason by my side, we pushed the fishers for an explanation of the community sanctions that are applied when community rules are broken. We wanted to demonstrate the existence of a governance system, and the logic of sanctions seemed integral to it. Every time Jason asked what would happen if someone broke a rule—by, for example, catching more than he could carry—the fishers responded by saying that such a breach would not happen. Jason would try again: “Okay, but let us pretend that someone had broken a rule. What would happen to that person?” Their response: “It would not happen.” It was not possible for them to even imagine.

As a lawyer working with customary law and historical claims, I have become used to coping with the tension between the language of law and the language of “facts.” This tension, of course, is not unique to customary law, but perhaps it is more evident in this area because of the close relationship to the social sciences. In fact, whereas other forms of law at least pretend to work with fixed legal notions and rules, customary law itself must always be found before it can be applied.

Anthropologists, historians, and sociologists also try to understand the history and customs of communities. But in these sciences, essentialism or reductionism spell academic suicide. Rather, it is the job of the social scientist to throw up contradiction, to problematize accepted concepts and notions and unveil the complexity of her subject. Lawyers may find such complexity

15 Statement by elder community member, community meeting, January 20, 2012, Hobeni.

useful, for it provides potential for molding different arguments by highlighting certain aspects of a complex reality and underplaying others. But working in the area of customary law—which is an unwritten form of law and, within the state law system, a new kid on the block—is a different story. The content of the law itself must be *found* before it can be applied. Fundamental principles remain undefined given that customary law cases have only recently started reaching the South African Constitutional Court. This means that these principles—and the content of the law itself—are largely up for grabs. My job as a lawyer representing communities, as I see it, is to make sure that these principles are infused with meaning that will benefit the poor and vulnerable instead of the rich and powerful. My job is to unashamedly *inject* meaning into these legal concepts before the more powerful forces do so, and to reappropriate those terms already conquered. That admittedly leaves little room for problematizing.

Such “strategic essentialism” does take its toll, however. Romantic notions of the materially poor but culturally rich Hobeni fishing community are juxtaposed, for example, with harsh gender imbalances. This could be seen during our meetings, when the men habitually filled the few chairs in the room while the women sat on the floor. While exceptions were made for Jackie and me—white female lawyers from Cape Town—I often had to bite my tongue at the effect of the culture of discrimination in my own presence. Whenever we were joined by a male colleague, our history of meetings with the community would come to naught as the room would focus its attention on the male presence.

I recall one day in particular. At a certain point about halfway through the meeting, a very elderly woman entered to join us. Jackie stood up from her chair to make room for the elderly woman. The chair of the fishing committee—who had, for some reason, lost access to his chair earlier—assumed that Jackie had relinquished the seat for him and took it. The elderly woman clearly was not expecting to be offered a seat and quietly went to sit on the floor. I was outraged, and for the rest of the meeting battled tears of anger, frustration, and perhaps confusion. I closed the meeting by encouraging community members to demand that their dignity be respected and that their rights be valued as much (if not more!) as the precious resources protected within the

reserve. By then, I had lost the battle against the tears, but the community experienced it as a sign of deep empathy with and understanding of their situation. I preferred the fiction to stand.

In the evenings, after long days of meetings, I would gather with my colleagues for a drink and to reflect on the day. I have come to know these moments as a *sine qua non* to the survival of the strategic essentialist. These are the moments in which we can laugh at our own crude projections onto the community and the painful contradictions that we have to pretend to ignore. But tomorrow, we go out and do it all over again.

The Trial

By March 2012, our preparation was done and we were ready to go to trial. David Gongqose, one of the accused, emerged as a natural leader and spokesperson not only for the three fishers but also for the Hobeni fishing community in general. He had been a member of the fishing committee and had been at the forefront of the fishers' recent attempts to engage with authorities to convince them to allow the fishers to use the marine resource. He would be called as a witness.

David was born in 1962 in Hobeni. While his family had been relocated there before his birth, he experienced a further removal during his lifetime. He grew up fishing with his father and grandfather. With money earned from fishing, David's father was able to send him to school; David completed grade seven before he had to drop out to help support his family, also by fishing. When he was twenty, he left the village to work in the mines. He did not last long, yearning for the ocean, and instead moved to Cape Town, where he worked on the boats and survived on odd jobs. But whenever possible, he would visit Hobeni to fish. In 2005, upon the death of his father, he moved back to Hobeni permanently, as is expected of a son. He fished to support his four children and his ailing mother. At the time, fishing in the reserve had already been made illegal, although the prohibition was not enforced. The only source of income in David's household was the R1,100 (about US\$105) pension received by his mother, along with whatever David could earn through fishing. The night that he was caught in the reserve, he had been fishing in order to pay the debts that the family had incurred on account of his father's funeral.

The community voice would be completed by Vuyelwa Siyaleko, a mussel harvester and a *sangoma* (traditional healer) in training who could testify to the cultural significance of the sea to the community.

Jackie would be called as an expert witness to testify about the customary governance system of the Hobeni fishing community. We were also very fortunate to have Derick Fay, an anthropologist from the University of California who had written his PhD dissertation on some of the Dwesa-Cwebe communities, to testify about their customary law and their utilization of natural resources. Derick learned to speak isiXhosa during his work in the area and knew the communities very well. We would never have been able to pay for Derick to make the trip but had the amazing good fortune that he was willing to come on his own steam.

The day before the trial was due to start, Jason, Jackie, Derick, and I were staying at the hotel in the reserve, conducting final preparations with the accused and with other community members. Toward the end of the day, I received a phone call from the local prosecutor. The trial could not go ahead, he said, because the magistrate did not have a copy of the Marine Living Resources Act. Under normal circumstances, this would be a remarkable “excuse” for postponing a trial. Whereas copies of legislation are indeed hard to find in some African countries, this is not the case in South Africa. Locating a piece of national legislation promulgated in 1998 could not possibly have been a problem—even in Elliotdale. But the excuse was far more remarkable given that the same magistrate had sent many fishermen to prison for breaking the very act that he now claimed to have never seen.

It would be fair to say that I panicked. I could not help but recall a conversation I had had months earlier with a senior attorney at the LRC, who discouraged me from pursuing the case because she could not imagine any rural magistrate’s court actually hearing a trial as complicated as this one. Was she right? The best play I had, I thought, was to tell the prosecutor that I had flown in an expert from the United States, an advocate from Johannesburg, and a team from Cape Town, and that postponement was simply not an option. How he would make it happen was his problem.

The prosecutor rose to the occasion. He realized that his local magistrate would not agree to hear a trial of this magnitude, and

he found a more senior magistrate from the closest town, Mthatha, to agree to come and hear us. We were on.

On the day of the trial, the numbers of community members attending to support the three accused expanded beyond the boundaries of Hobeni. The case had caught the attention of fishers from other Dwesa-Cwebe communities, many of whom, despite the extreme difficulty of finding transport in the area, had made the long trip to the courthouse.

However, the scene that greeted these buoyant community members inside the courtroom must have seemed eerily familiar: in the dock were three black men, and facing them were the magistrate and the advocates for the state¹⁶ and for the defense, all white men. While I brought at least gender diversity, I could do nothing to break the stronghold of white supremacy on formal proceedings. My counterpart on the state's side could, but, for some reason, he did not join his advocate at the front of the court. Add to it our two experts and the expert to be called by the state, Peter Fielding, and the racial division between those at the decision-making end and those at the receiving end was complete. Had anything changed in this country after nearly twenty years of democracy?

If I had been asked that question a day into proceedings, I would have answered a despondent no. At that point, there was no indication in the courtroom that the apartheid era and its discrimination and indignity had been dismantled.

After the accused admitted all material elements and the state closed its case, Jason called David and led him through his evidence. Our plan was to argue that the element of guilt related to unlawfulness had not been fulfilled because the fishers had intended to fish within the framework of their customary law. David began by reciting his entire family tree, to the delight of the community members watching. He went on to describe the countless efforts in which he had been involved as a member of the community and of the fishing committee, which had tried to engage authorities about reopening the reserve. As he explained, despite various promises made by authorities—many documented—nothing had

16 The advocate for the state was later replaced by his junior, who was not a white man.

come of a single one of them. In the meantime, the community had been starving and desperate.

He also explained to the court that the communities of Dwesa-Cwebe understood the settlement agreement promising the return of the reserve's land to include the sustainable utilization of resources by communities.

It was now the turn of the prosecution (in court, represented by a state advocate) to cross-examine the witness. Just as a number of narratives undoubtedly informed the version that we put forward to the court, there were clear narratives that the state wanted to project onto the matter. For one, the state was bent on depicting David as an angry man who had taken the law into his own hands by entering the reserve to fish. In fact, the prosecution seemed to suggest, it had not been about practicing his custom or even about providing for his family—it had been a purely rebellious act. The prosecuting advocate repeatedly asked David whether he was angry, which David repeatedly denied.

To support its narrative, the state tried to show that David had not acted out of ignorance but rather had known the law and defied it nonetheless. This made for some of the most interesting exchanges, as it not only exposed the clash between state law and customary law but also highlighted the question of just law. An extract from the transcripts reads as follows:

PROSECUTOR: Do you believe that you have to follow the rules of Government?

DAVID: Yes we follow Government rules, but ours the Government doesn't follow our rules.

PROSECUTOR: If there is a rule of Government . . . you will follow it?

DAVID: Yes we follow, but our rules Government must follow. . . .

PROSECUTOR: If the Government has a rule that says so and so, you are obliged to follow that, am I right?

DAVID: Yes, yes I will follow, I will follow that rule but not leaving us behind.

In his questioning, the prosecuting advocate vacillated between treating David with patronizing contempt and attempting to depict him as a calculated rabble-rouser.

But perhaps most offensive was the advocate's inability to comprehend or relate in any way to the circumstances of this local community. Examples abound: he rejected the community's

claim that fishing outside the boundaries of the reserve is not feasible because it is too far. For a person accustomed to driving in a car, the distance on the map looked insignificant. David assured him that it was a nine-hour walk.

At one point, the prosecutor clumsily tried to relate to David as one fisherman to another. He recalled how he used to sit around the fire with his father and his father's friends, listening to their stories about the fish they had caught. Did David remember the same thing? And did David also recall, as the prosecutor did, how the fish they caught were always very big? He did not really expect David to answer these questions before he would drive his point home: the fish were bigger in those days because the fishermen were fewer. I am unsure whether he reflected afterward that perhaps David, whose family was violently removed when he was a child and who was then forced to drop out of school to support his family, did not sit around the campfire with his father and his father's friends sipping whisky and swapping fishermen's tales. But I do hope so.

The prosecutor's final flourish at the end of the cross-examination aptly summed up both his indifference to the lifeworld of the community and the dignity with which David deflected it:

PROSECUTOR: Now I want to leave you with this little story sir, and maybe you will understand if I tell this to you. There is a man that came from England, you know where England is?

[Jason for the defense, exasperated by the sarcastic tone of the advocate throughout, objected without success.]

PROSECUTOR: It's not a sarcastic tone at all, Your Worship, it is indeed a question put to him, I know that he hasn't been schooled so I am asking him a question whether he knows where England is . . .

DAVID: I don't know England.

PROSECUTOR: It doesn't matter. But this man's custom, this man that comes from overseas, his custom was to drive on the right hand side of the road, that's his custom. But he comes to South Africa because remember in custom his grandfather told him, his father told him, we drive right. He comes to South Africa, the law says drive left. What does the man do?

DAVID: Get injured.

PROSECUTOR: Yes he will get injured, but what does the man do, what would you do, would you say yes I am driving left?

DAVID: Yes, the rules of the road, if it is permissible you must drive on the right side of the road, but what we are talking about is about our need in this case.

PROSECUTOR: Is that your answer? Because I see you do understand, you just don't want to answer.

DAVID: Yes it is my answer, because if you drive on the wrong side, you will get injured.

Vuyelwa, who followed David as a witness, was treated with confusion rather than contempt. The state, by its own admission, could not understand the relevance of her testimony about the cultural significance of the sea and fishing for this community. Neither, for that matter, could the magistrate—but aware of the likelihood of the case reaching higher courts, he decided to allow her. The prosecutor's cross-examination of Vuyelwa attempted to establish that while the community might find seawater important to drink and might think that the sea is a sacred place, these beliefs applied to the sea in general. The community could drink any seawater and thus did not need to enter the reserve to do so. To this line of questioning, Vuyelwa answered that she is "told" where specifically she must go to sea. Clearly not expecting the answer he was going to get, the prosecution inquired, "Who tells you where to go?" She answered, "The ancestors." The prosecuting advocate threw his hands in the air and exclaimed, "Are you telling me, ma'am, that your ancestors—" at which point he stopped abruptly. He was unable to engage with something that he simply did not understand.

By the time the prosecutor started his cross-examination of Jackie, a Freudian slip provided much-needed comic relief. Intending to ask her whether she was a social scientist, the question came out as, "You are a socialist?"

The ideological overtones of the prosecution were solidified in the testimony of its expert witness, Peter Fielding. Fielding, a marine scientist who had done a number of studies in Dwesa-Cwebe, was qualified to testify about the environmental impact of fishing on the Dwesa resource. However, the state allowed him to testify far beyond his expertise, permitting him to share his personal opinions about the history and current situation of the community, of which he had no expert knowledge. It provided a fascinating insight into his view of the community and their plight, however.

He first insisted that there is a taboo on eating fish

by coastal people along the coast here. Now I am distressed that this issue of this taboo has only surfaced now when I am sitting here in the stand I have spoken to Jim Feely, he says adult Nguni males do not eat fish.

The Nguni men in the audience—and Jackie in reexamination—did not agree.

He went on to compare the community's custom with the practice of having a Sunday roast—a custom that would have to be adapted if we start running out of cows, he explained. He continued:

Sixty years ago everybody in this room [by which he meant all the black people in the room] would have been wearing blankets but they are not wearing blankets now, why not? They have changed.

He agreed with the prosecution that a nine-hour walk to and from the nearest fishing spot outside the reserve boundaries should be quite doable for a healthy man, and argued that, in any event, these communities had “many lifestyle choices,” of which fishing was only one. He did not care to elaborate on the alternatives.

But the most remarkable story that emerged during the two days of testimony may have been that of the magistrate. He visibly moved from seeing the accused, as the state did, as common criminal poachers—an abhorred term in a country punch-drunk from rhino poaching—to men of principle and courage forced by their circumstances into confrontation with the law. One could hear the penny drop.

Where Was the Environment?

Every court case involves the telling of a story. We knew that the story the state was going to tell would be one based on scientific facts and “absolutes.” The state would paint a picture of nineteen kilometers of coastline considered “an important and sensitive bio-zone” containing a critical estuary. In addition, it would argue, South Africa was falling short of its target of 20% of its coastline as no-take zones, and opening up this no-take zone would be “a step backwards.”¹⁷ The area includes one of only two known

17 These descriptions were used in a report by Peter Fielding

spawning sites for white steenbras and is home to a threatened linefish, the dusky kob.

Most of these facts are, in themselves, indisputable. What is wrong with the story, however, is that it is not—as it pretends to be—a story of objective scientific facts operating without context. The story that the defense told was a first attempt at giving content to that context—but there was a lot more to be said.

The conservation narrative is a tainted one in South Africa. Historically, many apartheid atrocities happened in the name of conservation, with the forced removals that enabled the fencing of the Dwesa-Cwebe Reserve being just one example. But “conservation” was also inherently racist. It was a project to protect the environment for the benefit of future *white* generations. What is more, it expected poor local black communities to bear the brunt of the sacrifices that conservation entailed.

Historian Lance van Sittert has written about this phenomenon in the context of net fisheries in the Western Cape:

Net fisheries (both seine and gill) were preserved by these reserves into the final quarter of the twentieth century when (white) urban middle class recreational users and marine scientists made them the convenient scapegoats for widespread marine fish species declines driven by industrial fishing, urbanisation and pollution and lobbied and legislated for the severe curtailment of their activities on “conservation” grounds.¹⁸

In acknowledgement of this history, the Policy for the Small Scale Fisheries Sector in South Africa, adopted by the Department of Agriculture, Forestry and Fisheries in 2012, opens with the following text:

This policy aims to provide redress and recognition to the rights of Small Scale fisher communities in South Africa previously marginalised and discriminated against in terms of racially exclusionary laws and policies, individualised permit-based systems of resource allocation and *insensitive impositions of conservation-driven regulation*. In line with the broader agenda of the transformation of the fishing sector, this policy provides the framework for the promotion of the rights of

(2010, 5–6), the state’s expert, submitted as an exhibit during the trial.

18 Affidavit filed with the Equality Court in the matter of *Kenneth George and Others v. The Minister of Environment and Tourism and Others* 2009, April 30, 2010, at 297–312 of the court record.

these fishers in order to fulfil the constitutional promise of substantive equality of the rights of these fishers During colonial times and more recently during the Apartheid era, many traditional fishing communities were dispossessed of their lands adjacent to the coast. . . . Taking the relevance of this policy into consideration, it is clear that a new approach is needed to address the ecological sustainability of the resource and to provide for the progressive realisation of human rights within the affected communities. (secs. 1, 1.1, 2.2, emphasis added)

While the policy suggests that the conservation discourse has undergone a sea change in South Africa, this is probably a flawed assumption. Of all positions in government, those of the natural scientists working in the field of conservation seem to remain by far the most untransformed, at least in the eyes of the casual observer. I would be hard-pressed to recall more than a handful of government scientists with whom I have engaged along the coast who are not white men who started their careers under the previous regime.

The effect is that the status quo is kept intact with only the thinnest constitutional veneer. In Dwesa-Cwebe, for example, despite the absolute prohibition on fishing by the local communities since the mid-2000s, the hotel within the reserve was allowed to continue holding its annual “grunter hunt” competition until as late as 2010. It is also telling that Dwesa-Cwebe is one of only two absolute no-take marine areas in South Africa; the other one is similarly situated in a coastal zone where only local communities and the occasional recreational fisher would access resources on a regular basis. These two areas were not singled out for no-take status because their conservation imperative is higher than anywhere else along the country’s coastline. Rather, they are situated in areas difficult for commercial interests to exploit, which made them easy to exploit for conservation purposes.

In fact, by their own admission, government scientists knew very little about the status of the Dwesa-Cwebe area before deciding to prohibit its customary owners from using it. During the trial, the state prosecutor asked Fielding to confirm that the declaration of the Dwesa-Cwebe MPA was based on sound research. Once more, the prosecutor posed a question to which he clearly did not know the answer—this time of his own witness. Fielding responded:

Half and half. Many of the marine protected areas that exist in South Africa today were just implemented kind of on an ad hoc basis; you know they were just gazetted because people thought they were valuable areas to conserve for a number of reasons Currently there is a sort of a much more sophisticated conservation expansion, or protected areas expansion strategy that sort of a systematic conservation planning that determines where protected areas need to be and would look at sort of expanding protected areas if need be.

This is not to deny that conservation is extremely important and that the Dwesa-Cwebe MPA is worth protecting. Rather, I am arguing against the notion that science operates in a vacuum of objectivity and is untouched by ideology. This argument is of course one that is widely accepted by many international environmental scientists—but it has yet to reach the South African shores. After the trial, the relevant government departments met with some of the local communities to discuss a way forward. The government entities emphasized, however, that “scientific findings and recommendations are based on the state of the MPA environment, *thus these findings cannot be negotiated*” (Eastern Cape Parks and Tourism Agency 2013; emphasis added). This is deeply problematic.

Most offensive to the Hobeni and other local communities, however, is the disdain with which they are treated, particularly in comparison to other groups with lesser interests. These communities were never consulted about a single change to the status of what is supposed to be their reserve—and their only source of survival. In contrast, the interests of the local hotel and of visiting recreational fishers have consistently been considered.

History shows precisely how marginalized these communities have become. Archival records indicate that the Kei Mouth local government attempted in 1934 to have regulations issued that would prohibit the catching or collecting of shellfish, catfish, and re-bait in an area that includes Dwesa-Cwebe as it is known today. This followed “numerous complaints” received by the local magistrate that “natives [were] crossing over to our coast and carrying away sacks of every edible matter they can find on the rocks and low tide” (Native Affairs Department 1934). The magistrate’s concern was to ensure that the coast remained good for [recreational] fishing. He suggested that “even an unreasonable negrophilist would not advocate the killing off of the fish food at

the expense of the very numerous native fishermen.” JD de Villiers, the provincial secretary, responded that “it would appear that the protection of shell fish etc. may cause serious hardship to natives along the coast” (Native Affairs Department 1934). He thus sought the views of the secretary for native affairs in Pretoria on the matter. The latter sent letters to all magistrates in the region seeking their views. On January 29, 1935, the magistrate of Ngqeleni responded as follows:

Natives in this area have been gathering the above mentioned for generations, and I do not see that the restrictions proposed to be imposed will now make any difference to the fishing. From information gleaned from ordent fishermen and observers, the depradations [*sic*] of the natives is negligible compared to the quantities of shell fish etc., which are out of reach of the natives at lowest tides. People who fished the coast for years, state that the stripping of the rocks does not appreciably affect the fishing because most of the fish caught are seasonal The shellfish etc., gathered on this coast, greatly augment the natives’ food supplies in times of famine. (Native Affairs Department 1935)

Under South Africa’s constitutional dispensation, the courtesy of considering the socioeconomic impact of regulations on local communities’ livelihoods was not extended to the Dwesa-Cwebe fishing communities.

The Aftermath

The case garnered remarkable attention for one set in a rural magistrate’s court. It was covered in national newspapers, I was interviewed on the radio, and the case was even the subject of an editorial in *Business Day*, South Africa’s leading serious daily (“Hooray for the Courts” 2012). The editorial praised the victory of the poor over the interests of the rich. Academic curiosity was also triggered, with at least three articles being published since the ruling (Feris 2013; Sowman et al. 2013; Lehman forthcoming) and two universities inviting me to speak to post-graduate students about the case. News of the case spread across regional and international networks of NGOs, and it was even mentioned in a bulletin of the United Nations Office of the High Commissioner for Human Rights (2012, 6) and the *Samudra Report* of the International Collective in Support of Fishworkers (2012, 4–7).

Did life change for the Hobeni fishers? Given the limited mandate of the magistrate's court, one could never expect it to set aside the prohibition on the exercise of customary fishing rights. Such a change hopefully awaits us when the matter is appealed to the High Court and, eventually, the Constitutional Court.

In law, therefore, everything remains the same. In reality, everything has changed.

Within weeks of the judgment, government officials dotted down at Hobeni village in a helicopter to visit the community and hear its grievances. Since then, the government has set up an "implementation committee" to look at the resonation and opening of the MPA; but the committee remains heavily manned by conservative scientists and, perhaps as a result, has gotten nowhere. But the fact that the officials came at least signaled to the community something of a change in power dynamics. The government has put the community's plight on the map.

Far more radical have been the changes within the Hobeni and Dwesa-Cwebe communities. David Gongqose, first witness and accused, has grown markedly in stature. His name is known across the Mbashe River, and, these days, the government does not host meetings about the MPA without ensuring his attendance. At these meetings, he always insists on a turn to speak and then delivers moving but precise statements on behalf of his community. During the trial, the state pushed him to admit that he was a "leader" among the fishers (and thus responsible for organizing unlawful protests). David consistently denied that he was special, identifying himself a community member rather than a leader. He has not lost that sentiment, but his voice has grown to be the voice of his people. More recently, David has been brought into contact with the struggles of other fishers along the coast, who have heard his story and who dream of similar recognition. And while Majambe remains the official chair of the Hobeni fishing committee, David has assumed the role of the symbolic leader of the struggle.

One incident illustrates David's ascendance to me beyond doubt. I am unable to recall who reported it to me, but the story was that David had told the local environmental authority that if it did not move fast in reopening the MPA for local fishers, he would be unable to further "hold off" the LRC in pursuing further litigation. Of course, everything was wrong with that statement.

As lawyers at LRC, we act on a mandate rather than pursuing cases in our own name. We are also very careful not to impose our ideas on clients. We would never do what David threatened. But it did not matter. The point was that David had found himself in a position of leverage—whether real or fictional—and he used it to effect change. The agency was his, not the authority’s.

The events surrounding the trial did not go unnoticed in the larger Dwesa-Cwebe community. It was a deeply problematic community. The land trust formed in 2001 with the signing of the settlement agreement had been replaced under acrimonious circumstances with a second trust, which, in turn, was replaced with a third trust. Litigation abounds between the three trusts based largely on accusations of corruption and mismanagement of the little funds afforded to the community. Around the time of the trial, a fourth structure, an “umbrella communal property association,” was preparing to replace the third trust as the representative of the Dwesa-Cwebe community. Given the troubled history of these trusts, the chair of the new structure was insistent on keeping the entire Dwesa-Cwebe community on a tight leash. The growing persona of David Gongqose and the increasing support for the case from both sides of the Mbashe River apparently made the chair very uneasy.

When I visited the Hobeni fishers in early 2013 to discuss the legal way forward and how the reserve’s resources would be managed once access was granted, I set up our meeting through the local NGO and fishing committee, as was our normal course. What I did not expect was to be met with the wrath of the new leader. Around midnight the night before the meeting, the chair phoned me and instructed me in aggressive terms to postpone my arrangements on the grounds that I had not consulted him prior to my visit. I was completely taken aback and told him so. I had never before requested permission to speak to my clients. At the time, I had already made the arduous trip to Hobeni with a colleague, arranged for an interpreter to come from a nearby town, and organized transport for community members. So I decided to forge ahead with the meeting.

I remember that meeting as one of the most tense that I had ever experienced. Even though most of those in attendance were the familiar Hobeni faces, I decided to be forthright about the phone

call from the chair. I told the group that I was committed to honoring community structures but that I needed greater clarity on these structures, since the impact of the case spilled over into other constituencies. This unleashed tensions, frustrations, and conflict among those in attendance that had until then been hidden from me. I could not ignore these tensions. Keeping the successes within the confines of Hobeni and its fishing committee was clearly a dangerous option in light of the broader instability that now unfolded before me. I needed a large part of the greater Dwesa-Cwebe community to support our case—or, at the very least, to not oppose it.

My colleague Henk made the thoughtful suggestion that we keep a running record of the meeting and print copies of the record before people left so that complete transparency could be ensured. Together with those in attendance, we started drafting a community resolution that set out the community's demands. This document could be changed over time and people could sign up for it over time.

Although the meeting ended peacefully, it was just the start of what would become a year-long struggle to win the trust of the chair and the greater community, which caused considerable delays in the legal battle. This struggle meant having the chair hang up the phone on me on several occasions. It meant defending myself as the chair accused me, in correspondence to the organizers of an international conference, of attempting to undermine the community by supporting the first (and by then defunct) land trust, simply because some members were fishers. It meant getting a Xhosa-speaking facilitator to participate in my phone calls to him. Finally, it meant traveling all the way to Dwesa-Cwebe to sit through a day-long meeting of the umbrella community property association (conducted in isiXhosa) in order to be allowed five minutes to state my case.

On the one hand, the situation was exacerbated by the position of the official representing the local governmental environmental agency, who had decided to take sides with the chair against us. It was a good option for the official because we were supporting the community narrative that attributed the community's current situation to the government's failure and neglect. The chair and the environmental agency countered by blaming the failure of the Dwesa-Cwebe project on the community and its internal

tensions—and the NGOs that were now seen to be perpetuating such tensions. On the other hand, I quickly realized that we were carrying a lot of baggage created by other NGOs that had been working in the area for decades.

I am still unclear about what led to the chair's change of heart, but, by the end of 2013, he was ready to support the appeal and review process that would lead the way for the reopening of the reserve for local fishers. In the same week that saw the death of the Mbashe River's greatest son,¹⁹ a review of the decision to ban local customary fishing in the reserve was launched in the Mthatha High Court.

Conclusion

Writing this brief account of a long and difficult history of the Hobeni and Dwesa-Cwebe communities allowed me to reflect not only on the meaning of the legal route we chose but also, in more general terms, on the meaning of the law for these communities.

Law facilitated the repeated devastation of communities around the Dwesa-Cwebe area: proclamations provided for removals of villages in order to demarcate the reserve and, later, for additional removals to further the apartheid government's "betterment" schemes. But law also provided the singular opportunity for these communities to claim restitution for these atrocities, which should have culminated in the *implementation* of the 2001 settlement agreement and in the reserve being returned to its rightful owners. Instead, it ended in fanfare at the signing ceremony.

The reason for that, I would argue, is that the law was applied where it had no business: it was used to construct an artificial community in order to close the deal neatly. The Dwesa-Cwebe community could go back to the Land Claims Court and ask that the settlement agreement be made an order of court, which would help force implementation. Yet, for twelve years, the "community" has not done so because it is too divided to agree on a legal representative with a mandate to do the job.

19 Nelson Rolihlahla Mandela, South Africa's first democratic president, died in December 2013.

This is even more tragic given that the law failed this community in its core business: the multiple abuses, including two killings, committed by rangers on community members have never been prosecuted. As I was finalizing this chapter, news came of another scuffle between a ranger and a community member. This time, it ended with the death of a ranger and two community members behind bars.

Crucially, with regard to access to resources within the reserve, the law—and here I refer to state law—has played the role of an absent parent. The history of the regulation of resources on paper bears little resemblance to the actual use and governance that played out in the reserve. For decades, this was due to the inability of the colonial and apartheid governments to enforce regulations in far-flung places. This is part of the reason why robust *local customary law systems* were able to develop and be sustained throughout the era of the fiction of government regulation. Since 2000 and the declaration of Dwesa-Cwebe as a no-take MPA, the prohibition on community fishing in the reserve was not implemented because the local enforcement agency did not agree with a policy that further impoverished already desperate communities.

Thus, nothing changed *in the law* in 2005, when rangers abruptly and forcefully began implementing the prohibition on fishing in the reserve. It was simply a change in attitude.

There can be no denial that law is a concept as ambiguous, pliable, and subjective as those of “conservation” and “science.” While these concepts ostensibly draw their significance from their claims to objectivity, neutrality, and dissociation, they prove to be quite the opposite. The contents of law, as of science, are products of circumstance, manipulation, and even chance.

But that does not mean that law has no *meaning*.

What did the law mean for this community in the Elliotdale courtroom in March 2012? It did not mean the reopening of the reserve or the implementation of co-management of the community resources. It did not even mean that the three fishers were acquitted. What it may have meant was that an ever-so-small chink was made in the armor of the almighty state law—by the recognition of the presence and legitimacy of local customary law. This is significant, for state law continues to entrench the discourses of absolute private property rights and conservation models complicit in undermining vulnerable and poor communities such as this one.

But what I believe it definitely meant was a radical change in the internal dynamics of the Hobeni and larger Dwesa-Cwebe communities. The more difficult question is whether that change has been for the better. I would dare to believe so.

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CHAPTER 3

Notes for a Territory

Cristián Sanhueza Cubillos
(Chile)

Drinking the *Resistencia*

Those who have visited the Chilean Patagonia know that its landscapes offer one of the wonders of the world: the famous Torres del Paine National Park. One feels a bit strange when there, since it is one of the few places in the country where there are more tourists than Chilean citizens. It is not uncommon to hear commentaries exclaiming that it does not look like Chile. The question, then, is, “What does it look like?” considering that this is the territory traditionally navigated by the Kawésqar people.

Another well-known attraction in this area is the Balmaceda and Serrano Glaciers, located in Bernardo O’Higgins National Park. To get there, you must take a small boat from the port town of Puerto Natales and pass through the Última Esperanza Sound. After about three hours, you can see the Balmaceda glacier from the boat; shortly after, you arrive to the Serrano glacier, where you take a twenty-minute walk on land. Before exiting the boat, the crew kindly informs you that, upon your return from the walk, a reward will await you on deck: a whiskey with “millennial” ice—a picture-perfect moment that virtually no tourist forgets to capture on camera.

I recently traveled through this area in the company of a group of indigenous leaders. Truth be told, I enjoyed that reward. We were recently beginning the return trip when a piece of that sublime glacier lay in our cups—a glacier that is slowly disappearing. Indeed, the Balmaceda glacier is in the process of melting, and the “tongue” that used to reach the seawater today seems to be running from it. Without missing an opportunity for critical thought,

a friend from my group said to me, “We are drinking part of the *resistencia*.”¹

His comment did not come out of nowhere. A few days earlier, we had visited continental Chile’s southernmost territory, the community of Puerto Williams. This is another ancestral territory inhabited by several indigenous peoples, of which today only the Yagán people survive. Today, “grandmother Cristina” is the only person from the population’s estimated 1,235 individuals² who keeps this community’s ancestral language alive—a voice in the south of the world that resists attempts to silence.

The Yagán people, as well as other indigenous peoples in Chile and Latin America, have endured violent histories that have resulted in their repression. Whether through physical violence (such as the “Appeasement of Araucanía” suffered by the Mapuche) or silent violence (such as assimilation), indigenous communities have suffered violations of their fundamental human rights, including the right to life. For example, today, the Selk’man people exist only in memory. The annihilation of a people brings with it the extinction not only of a people but also of part of the world (see Arendt 2005, 175).

The resistance of indigenous peoples has always been present in their histories. Although cultures always find spaces to transmit their knowledge—allowing them to remain alive—colonization has exceeded many of these limits, thus diluting these cultural roots. Emanating from a variety of devices that collude in favor of ideologies, indigenous peoples resist the furthering of their deterioration. To paraphrase my friend, they are avoiding the melting of their existence.

According to Boaventura de Sousa Santos (2002), the struggle of indigenous peoples differs from other struggles because it involves more than the mere fight for land. Indigenous peoples are fighting to maintain the roots of their identity: territory. While for

1 By saying *resistencia* (resistance), he was referring to the part of the glacier that is still “alive” and struggling to not disappear.

2 The 2012 census was the subject of public questioning due to methodological errors that affected the measure’s validity. With regard to the percentage of the Yagán population, this number was determined in response to the question, “Do you consider yourself to belong to any indigenous population?” which is a question focused not on the condition of being indigenous but on self-identification.

some, territory is valid to the extent that it can be exploited, for the indigenous, land is valid in itself in that it provides them with their identity.

In Chile, one side of state policy on indigenous land reclamation—which is riddled with bureaucracy—is based on the assumption of indigenous peoples as poor and rural populations that seek land production. Meanwhile, another side of the state institutional structure allows private industries to endanger indigenous territories and, as a consequence, intensify the relationship between land reclamation and land protection.

Currently, the country is affected by many socioenvironmental conflicts. According to a study by the National Human Rights Institute, between January 2010 and June 2012 there were ninety-seven conflicts related to human rights (Instituto Nacional de Derechos Humanos 2012). Of these, thirty-three involved, if not transgressed, the rights to territory, natural resources, and indigenous participation and consultation, all of which are recognized in the International Labour Organization's (ILO) Convention 169 (1989).

Furthermore, between 2010 and 2013, 29% of the environmental impact studies admitted to Chile's Environmental Evaluation Service that had been approved through an "environmental qualification resolution" were facing legal proceedings (Pérez-Cueeto and Astudillo 2013). In addition, according to data from the Supreme Court, between January 2010 and July 2011, forty-five judgments of the court involved the violation of rights contained in Convention 169; and of these judgments, twenty-two related largely to the approval of environmental qualification resolutions for investment projects that violated articles 6 and 7 of ILO Convention 169, which protect indigenous peoples' rights to consultation and participation (Corte Suprema 2011).

Nonetheless, private investment continues, as does opposition from indigenous communities. Although there are many ways in which indigenous resistance manifests itself, the law continues to be a key field in which these oppositions are aired. Those who exalt the importance of such investment projects for the national interest argue that these communities are "opposed to progress"—in other words, opposed to the interests of the public at large. What these proponents fail to mention, however, is that the

communities are opposed to a particular kind of development: the kind that violates human rights. Whether because of the mining industry in the north of the country, the forestry industry in the central-south region, or the electricity and farming and livestock industries in the extreme south, many are the affected indigenous communities that seek the effective protection of their rights.

These events take place in distinct times and places, in communities whose inhabitants put a human face to a phenomenon that numbers and words fail to demonstrate. One such place is Curarrehue, a rural community located in the Andes mountain range. In this community, which is located in the region with the country's highest level of structural poverty (22.9% of the population), costly projects seek to take advantage of the area's geographic qualities. One such project is the proposed hydroelectric plant on the Añihuerraqui River, whose estimated cost of US\$22 million—about nine times the 2013 annual budget for the municipality of Curarrehue—will be used to construct a plant with a capacity of 9 megawatts and an annual generation of 50 gigawatt hours that would be transmitted through a 744-meter power line (Servicio de Evaluación Ambiental 2014). Both this plant and the proposed Panguí hydroelectric plant would be located in the ancestral territories of Mapuche communities that have inhabited the area since before the construction of a modern road.

Based on the experience of the aforementioned case and others in the region, this chapter provides a panorama of how the Chilean system fails to accommodate the expectations of indigenous peoples, even when national laws protect rights of this nature. The lack of concrete spaces for participation and decision making by indigenous peoples relegates indigenous knowledge under the assumptions of modernity, leaving few opportunities for these communities' voices to constitute a real vision. This chapter is not about the behavior of indigenous populations but rather about how state structures respond to this behavior.

In particular, this chapter explores the phenomenon that emerges between investment projects affecting indigenous peoples and how the defense of these projects, in certain cases, relies on legal tools. It analyzes the relationships around the right to free, prior, and informed consent (FPIC) with the aim of determining whether this right constitutes a guarantee of the interests

of these peoples in modern-day Chile. I argue that, regrettably, in this context the law has become a ritual whose presence legitimizes state decisions and whose absence constitutes a valuable ex-post argument. I dare to suggest that with regard to investment projects that utilize natural resources in indigenous territories, the business sector is still unprepared to acknowledge that indigenous communities should participate in these events. Nevertheless, I defend the idea that the law can be emancipatory, provided that its construction originates from within the communities.

Not Damage but “Impact”

During a 2013 workshop in Colombia organized by Dejusticia—which provided the motivation for the ideas in this chapter—workshop participants visited the Cerrejón mine, the largest open-pit carbon mine in the world. Cerrejón is located in indigenous territory in the Sierra Nevada, in the north of Colombia. Upon our arrival, a company executive welcomed us by giving a speech about how Cerrejón understands “responsible mining” and how the company maintains a healthy relationship with the indigenous communities who live nearby.

As the executive spoke about risk-control mechanisms, he cited the numbers of human deaths that had occurred in prior years due to accidents on the 150-kilometer railway, which is used to carry coal from the mine to the port, where the coal is then exported by ship. This railway certainly did not exist prior to the construction of this mega-business. What surprised me was the solution: the company had worked to reduce the frequency of railroad travel in order to reduce the number of accidents. Simple answer: fewer rail journeys, lower probability of accidents.

Upon first glance, it seemed sensible. Yet I could not help but think of a different explanation for the reduction in rail journeys: a reduction in transportation costs would, in essence, lead to an increase in earnings. At that moment, I began to question whether the company’s measure constituted a genuine form of helping the communities or whether it was simply an elegant way of disguising the damage.

The truth, though, is that there was nothing elegant about it. Even rhetorically, the company official preferred to speak of “impact” instead of “damage” whenever the discussion centered on

harmful effects to the environment or communities. For example, for Cerrejón, affecting the normal water level of a river is not damage—it is an impact that an indigenous community bears. It is thus not surprising that there exists iron-clad opposition to the mine among those who live in the territory where this business is “authorized.”

In this Colombian case, just as in other cases in Latin America, the resistance of indigenous communities has brought more than one disastrous consequence. In fact, as we were on our way to the mine, we passed a community leader’s home that had been attacked a few weeks earlier. As one of the people on the trip explained to me, a grenade had destroyed a large part of the house’s facade.

How is it possible that such diverse positions can exist with regard to a single fact? On what grounds did the company legitimize its actions, and on what grounds did the communities legitimize their opposition? How does the state create laws governing these dynamics, thus converting them into official voices and, in turn, an order?

A bit farther south, similar experiences are being lived. Because of the field in which these actors work—what César Rodríguez-Garavito (2010) calls “minefields”—and the systematic persecution of members of indigenous communities, Chile has utilized a range of mechanisms to address these communities’ historical demands. Although the country has ratified numerous international human rights treaties, including ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples (2007), the state still upholds practices that, according to Santos (2009, 70–71), represent an “internal legal pluralism”—in other words, the uncoordinated actions of state organs within one legal system, in their respective jurisdictions and *legality*. It is something like a schizophrenia of the state: the ability, whether voluntary or not, to grow increasingly incoherent without prior notice. An example of this is the state’s 2010 declaration of Curarrehue as a UNESCO Biosphere Reserve, followed four years later by the construction of two hydroelectric plants in indigenous territory in the same commune.³

3 In Chile, communes are the smallest administrative divisions.

The 2013 *Human Rights Report* of Diego Portales University documented how the discourse used by the Chilean government justified the application of the 1984 antiterrorism law (Ley 18314) for acts related to or occurring within indigenous territories, even though numerous international organisms have criticized the law's application in this context, particularly with regard to the Mapuche people (see Coddou and Godoy 2013). The questionable application of this law was perhaps the most discussed topic during Chile's latest Universal Periodic Review,⁴ held in January 2014.

What this kind of official discourse does is condone the application of a law or a practice that legitimizes the injury of human rights as a necessary cost. In practice, it foregoes a systematic and coherent reading of law and internalizes a contradictory conduct of that law, based on the excuse that it is trying to protect something in the nation's best interest. In other words, it argues that violence is sometimes necessary in a democracy, despite the fact that the texts enshrining people's human rights indicate precisely the opposite. But can there be something that is not regulated by law yet whose application is justified from a point external to the law? Is there something that escapes the law? Yes, all the time.

To the sorrow of many, this is not the only example of state incoherence regarding indigenous peoples' rights. Investment projects that generate "environmental impacts" also demonstrate such incoherence. For example, a team of academics and students, of which I was a part, performed research for over three years regarding the implementation of international human rights standards on indigenous peoples' rights. The research team confirmed that the Chilean state continues to violate the right to FPIC in cases of fish-farming projects in the Araucanía region. The result is a bit obvious: such practices do nothing but perpetuate mistrust and intensify the distances between the state and indigenous peoples (see Sanhueza et al. 2013). What other outcome can be expected from a vision that, instead of trying to reduce power imbalances, exacerbates social exclusion?

4 The Universal Periodic Review is a mechanism of the United Nations by which the human rights records of all 193 member states are reviewed on a regular basis.

Our interviewees in this project—public officials, representatives of private entities, members and leaders of indigenous communities, and academics—pointed us in varying directions with regard to how they experienced and witnessed situations involving the installation of fish farms in or near indigenous communities in the Araucanía region. The cases we documented revealed the existence of investment projects whose authorization was not consulted, as well as investment projects that, although having involved community participation, did not constitute consultation processes as such.

Prior to joining this research team, I had been involved in the fight for public interest causes as a student at my university's human rights clinic, where I took a course on strategic litigation as a tool for structural change. But this time, I realized that research and action could be joined together in a common practice. On the one hand, we developed a reasoned investigation into the right to FPIC. And on the other, we looked into legal and administrative proceedings on behalf of indigenous leaders.

While in the midst of research, I grasped what it means to act within the field of law in a critical and inductive manner—in other words, engaging in conduct that has a specific goal in mind. In truth, there is no neutral ground in the field of human rights; therefore, during the course of our research, we took sides with the communities defending their territories. One of these was the Mapuche community of Cónquil (in Villarrica), which was able to successfully halt the construction of a fish farm in its territory. In that case, human rights were indeed useful.

However, in this chapter, I will focus not on successful cases but on ones in which the system fails indigenous peoples and leads—directly or indirectly—to human rights violations. The situation of various communities in the Putúe territory, a few kilometers from the city of Villarrica, was the most problematic case that we discovered in our research. At least three of the Mapuche communities are affected by the presence of two public landfills, two fish farms, and one sewage water treatment plant, whose infrastructures are near important cultural sites. I lived near these communities for eight months in 2013, and the general feeling among community members was that their area is treated as the “neglected backyard of Villarrica.”

We visited Putúe about five times over two years. During this period, we spoke with community members on multiple occasions about the impacts of these projects. It thus took us by surprise when, during the last six months of our research, the community's stance against the construction of a fish farm began tilting toward approval, contingent on certain agreements. As the president of one of these communities told us with resignation, "We don't hope for anything from the government level."

What people expect from the government is that before dictating administrative measures authorizing an investment project (through an environmental qualification resolution, in the case of Chile), the government should consult with the indigenous communities that stand to be directly affected. In essence, they hope that the government will comply with its international obligations. In the cases we studied, however, what we saw time and again was that the responsible state entity simply held public meetings in which it provided company-furnished information about the project.

In Chile, this is known as "socialization"—the moment in which the project owner presents to the community the scope of its investment, but in which the community does not participate as is required by the right to FPIC. Many of these meetings were presented as constituting part of the participatory process according to the standards of FPIC—events that Chile's highest tribunal ended up discounting in numerous sentences, signaling that merely providing information does not constitute compliance with the right to FPIC.⁵

Our research revealed habitual practices between private companies and indigenous communities—or, to be exact, some members of these communities. These practices included bilateral conversations with particular individuals that ended up dividing the communities; private agreements with individuals that did

5 Corte Suprema, *Asociación Indígena Consejo de Pueblos Atacameños c/ Comisión Regional del Medio Ambiente Antofagasta*, Sentencia Rol 258-2011, July 13, 2011, considerando 8; *Comunidad Indígena Antu Lafquen de Huentetique c/ Comisión Regional del Medio Ambiente Región de los Lagos*, Sentencia Rol 10.090-2011, March 22, 2012, considerando 8; *Marcelo Condore Vilca Consejero Territorial Alto Tarapacá y otros c/ Directora Servicio de Evaluación Ambiental Primera Región de Tarapacá*, Sentencia Rol 11.040-2011, March 30, 2012, considerando 9–10.

not involve collective benefits; and compensation agreements between companies and communities that were a far cry from granting communities a fair share of the profits.

In fact, I am inclined to view them as tactical steps in a strategy that involves denying indigenous communities as equal players in what is an essentially economic relationship. This strategy is primarily economic insofar as the relationships that emerge from it fall outside the field of law and remain attached largely to the decisions of the market.

The above occurs within the framework of the state's absence—which is quite paradoxical if we consider that these same indigenous peoples, in another era, had to defend themselves against the state's invasive entrance. Throughout these rural territories, the basic services enjoyed in the city arrive too little and too late. This urban-rural inequity is evident when one visits rural sectors that lack access to safe drinking water, whose septic tanks are precarious, and whose public transportation is practically nonexistent—not to mention proportionally much more expensive than in the capital of Santiago.

This is, in part, what makes this kind of case so dramatic. We speak of contexts that severely lack resources, are isolated from the conveniences of the city, have diminished expectations in terms of development, and, in many cases, suffer systematic discrimination. These profound inequalities are stark in the meetings between indigenous communities and the companies that implement costly projects. In this regard, Juan Muñoz, regional councillor of Araucanía, who lives in the Toltén River basin in Curarrehue, believes that “civil society does not have sufficient expert elements or actors with knowledge and expertise to be able to deal with processes that are cumbersome, complex, and nonbinding in terms of social participation.” In other words, even these participatory spaces represent obstacles to any community that finds itself “up against” an investment project.

The construction of hydroelectric plants in Curarrehue are not exempt from this situation. The Añihuerraqui hydroelectric project was entered into the Environmental Impact Assessment System (SEIA, for its Spanish acronym) on November 29, 2012. Even though it still has not been approved by the SEIA, a series of observations have been made with the objective of helping the

project owner improve its proposal through an “addendum.” One of the areas of attention that the Environmental Evaluation Service has mentioned is to clarify the project’s expected impact in three nearby Mapuche communities: Camilo Coñoequir, Camilo Coñoequir Lloftonekul, and Juanita Curipichún. Indeed, the project’s proximity to these communities was reason for it to require an environmental impact study from the beginning, in light of the significant changes that were anticipated to take place to indigenous cultures and economies (Regulation of the Environmental Impact Assessment System [Reglamento del Sistema de Evaluación de Impacto Ambiental], art. 8[c], [e]).

In terms of impacts that should be mitigated by the project owner, the aspect most emphasized by the Environmental Evaluation Service is the hydroelectric plant’s proximity to an *eltún* (cemetery); a *nguillatuwe* (ceremonial site); two sites of cultural relevance, Penewue and Punuemanque; and several areas used for the gathering of medicinal herbs. These are, on the one hand, impacts that the company justifies and seeks to mitigate and, on the other, direct effects that the communities claim are violations of their rights.

One day, as we were interviewing Silverio Locopan, president of the Camilo Coñoequir Lloftonekul community, he explained that the company did not consider the richness of the environment when it was measuring the project’s impacts: “They say that nothing exists here, that there was nothing—no fish or anything, there was no life. And that is a lie; it’s not like that. Here there is everything, there is life. Our economy depends on the river.”

These distinct conceptions about what an investment project involves, besides manifesting themselves within individuals, have been externalized in an administrative case file that records all of the efforts of the process. According to the performance report, the Añihuerraqui hydroelectric project undertook a citizen’s participation process (PAC, for its Spanish acronym) as required under environmental legislation; nevertheless, some communities were opposed to this process insofar as it was not in line with an FPIC process. In effect, the PAC was designed by the project holder and established a number of information sessions, but none of which constituted a consultation process. Such is the difference between PAC and FPIC processes that, eight months after the end

of this “participation” process, the Environmental Evaluation Service issued a resolution (Resolución Exenta 262/2013) ordering the carrying out of a prior consultation process according to the provisions of ILO Convention 169.

What is interesting about this example is that it presents a new scenario, for the Añihuerraqui hydroelectric plant would be the first project consulted under the new SEIA regulations that took effect in December 2013 and that refer to the right to consultation, albeit with serious normative deficiencies. Above all, in this zone, there are diverse positions regarding the expectations offered by one legal position or another. The private sector seeks certainty in its investment, offering guarantees that legitimize the sector in the eyes of environmental institutions, while indigenous communities turn to human rights protections to defend their interests. Some attempt to justify the “why yes,” and others the “why no.”

Incomplete Law, Or about Half-Truths

In a statement about the implementation of Chile’s criminal procedural reform, former president Ricardo Lagos noted that nobody “is above the law” (Aránguiz 2005). It was not an insignificant comment: the former leader chose the context of a widely covered trial that resulted in the conviction of an impudent Chilean senator who had been charged with committing sexual abuses against minors. This was an opportune statement for publicly signaling the idea that justice is blind and that the rule of law is applied equally to all.

The idea that the courts ensure the implementation of the law has been losing ground in recent years. In fact, a survey on people’s trust in government institutions revealed that only 12.9% have respect for the courts; in any case, this is more than they have for political parties, at a mere 5.2%. Thus, for many indigenous communities, a court judgment may not necessarily be the best route for defending their interests, since they have lost a great deal in such scenarios, above all with the application of the anti-terrorist law.

The idea of law and the courts involves relationships that go beyond what is written on paper, at least in the case of countries that follow the continental European tradition. Beyond their

diverse functions, courts have come to legitimize certain actions of the state. In democracies such as Chile, the production of regulations is monopolized by the executive and legislative branches, with no institutional pathways for citizens to push for legislative measures. In this sense, the closest that people can get to participating in a “legislative agenda” (to put it one way) is to place their trust in the government or a specific public official. In other words, the law is a monopoly of the state and is far removed from civil society, which depoliticizes it in turn.

Keeping citizens outside the legislative agenda is a good strategy for ensuring that they do not influence laws, thus consolidating the legislative process as the reproduction of the interests of those who do control the agenda. This exclusion is suffered more harshly in disadvantaged sectors that, besides being largely excluded from the political system, are also abused through acts that the legal system does not view as harmful—situations in which “the law is either blind to these [marginalized] people’s deprivations, deaf to their main claims, or unwilling to remedy the humiliations that they suffer” (Gargarella 2005, 36).

In these situations of “legal alienation,” as Roberto Gargarella argues, these disadvantaged sectors see the law as a strange and hostile object. The law is strange to the extent that during its creation, these sectors of the population played no role. And the law is hostile because, in practice, it strangles the expectations of a better life to the extent that these communities’ interactions with the law normalize the state in which they find themselves. These marginalized sectors have been hampered in their attempt to construct alternative visions of the law, either because they do not share the jargon of the legal field or because their visions are contrary to those valued by the system as normal, formal, legal, and so on. In a literal sense, they are displaced people in the field of law.

The marginalization with which the legal system operates in situations of marginalization isolates people from access to justice. Since the language that we use to refer to the law excludes a large part of the population, very few are able to achieve awareness about the scope of this cultural artifact and, as a result, respond in an appropriate manner to the injuries that they unjustly bear. Ironically, the subject’s sociocultural conditions matter only in the moment at which he or she activates rights as a tool for

protecting his or her interests. In essence, the system silences what some of the oppressed try to “verbalize” for the law.

As Santos (2002, 86) argues, “Legal fields are constellations of rhetoric, bureaucracy, and violence.” Thus, in the same phenomenon emerge distinct visions about what rights should provide to each of the interested parties. For example, in the field of FPIC, state agencies lean toward the bureaucratic aspects of the field; indigenous peoples toward the rhetorical aspects; and companies, in many cases, toward the violence—not necessarily physical—that they impose on the oppressed.

The question, then, is what elements beyond the legal system are influencing Chilean legal culture? By legal culture, I refer to the set of values and practices connected to the Chilean state and indigenous peoples, today traversed by the private sector that exploits natural resources for productive purposes.

In the cases that I have investigated for the purposes of studying the effects of discussions around FPIC, I have discovered that, in practice, power asymmetries end up reproducing inequalities that promote the social exclusion of disadvantaged groups (in this case, indigenous peoples). Even though the right to FPIC represents an advancement in participatory mechanisms for indigenous peoples, the spaces and fields of the law have not allowed them to place their discourses—which, here, are counterhegemonic and fit within a logic of “subaltern cosmopolitan legality”—within the official construction (Santos 2002). Indigenous peoples’ judicialization of this kind of case (e.g., the fish farms in Araucanía and the hydroelectric plant in Curarrehue) in order to challenge measures adopted without proper consultation is seen as a method of paralyzing investment projects and, consequently, the “development” of the country.

Chilean jurisprudence has changed in its interpretation of investment projects and the duty to conduct prior consultations, slowly approaching an interpretation that is more in line with Convention 169. Initially, the country’s higher courts subjugated FPIC to the provisions on citizen participation established in national environmental legislation; then, for a time, they considered that since FPIC and PAC were distinct processes, compliance with the latter did not necessarily require compliance with the former; and, more recently, they have embraced a view that considers a

PAC to be valid where it is undertaken according to the standards of FPIC.

Nevertheless, the courts continue subordinating Convention 169 to Chile's environmental law, since when they have declared environmental qualification resolutions illegal for failing to comply with the duty to consult, they have done so on the grounds that the resolution failed to comply with the legal mandate of the environmental law, following indications that there was an impact that had not been considered at the moment of the SEIA procedure. In recent years, higher courts have ruled on so many environmental cases that there is now a general societal perception of a "green" tide within the courts. However, Luis Cordero (2012) sees these rulings as focusing strictly on technicalities and not on substantive environmental issues. Thus, while on the streets people celebrate environmental justice, in companies' offices, projects are adjusted so that they can once again enter the SEIA and thus obtain proper environmental qualification resolutions.⁶

Just as the Cerrejón mine reduced the number of rail trips in Colombia, companies in Chile offer a series of methods for mitigating the impacts that their presence generates in indigenous territories, thus complying with environmental legislation. But what about the rights of the indigenous populations? In this legal field where the phenomena that I have described unfold, numerous actors bid from different visions, sometimes contradictory, of the law and rights when it comes to justifying an investment or protecting a territory. The lack of clear regulations, socioeconomic asymmetries among actors, and limited knowledge of rights are elements that have inhibited litigation as a tool for change for indigenous populations.

6 This was the case with the El Morro mining project in the Atacama region. In April 2012, the Supreme Court confirmed a lower court ruling ordering a derogation from Exempt Resolution 49 (Resolución Exenta 49) of the Environmental Evaluation Commission of the Atacama Region, which had approved the El Morro project, on the grounds that the impacts to the Huascoaltinos indigenous community had not been taken into account and the community had not been consulted. Nevertheless, a year and a half later, after the company carried out a consultation process with the community, the Atacama commission approved the project through Exempt Resolution 221 (Resolución Exenta 221).

To put the situation in context, investment projects with environmental impacts create a threshold for the legal question set forth in the discussion. It is the project owner who presents the information that is evaluated by the Environmental Evaluation Service, which requires the presentation of an environmental impact study or an environmental impact declaration. In both cases, it is always the project holder who articulates the information to be evaluated; there is no independent counterpart who can object, comment, or present information different from that presented by the project owner. The issue that matters to me here is that indigenous populations—under their existing conditions—do not have the resources to draft alternative reports that prove, using current legal language, the type of impacts that they are suffering or have suffered.

The time that it takes to develop these reports allows the companies to make contact with the communities through consultants who specialize in the preparation of the information that the company provides to the Environmental Evaluation Service. The consultants, who introduce themselves to the communities as technical agents, officiate in such a way that permits the companies to avoid the obstacles required under the law, which are not many. It is this type of information that has permeated environmental legislation, filling it with technical jargon that, among other things, means that judges are unqualified to understand the meaning and validity of the data with regard to a case. If this happens to judges, what should we expect to happen to a regular citizen?

In this scenario, a series of relationships commences among public officials, private actors, and civil society, including indigenous communities, in which certain expressions are seen as valid while others are looked down on, largely for not being formal mediums recognized under the law. In many of the cases that I researched, it was during this phase of the relationship that the companies processed the information provided by consultants (some with degrees in socio-anthropological research) to design and plan the mitigation measures required by the SEIA. Some of these mitigation measures concern the design of structures—a matter of not affecting (or affecting as little as possible) the environment with the project's construction. But other measures concern environmental justice, which is seen largely as a

compensation mechanism involving the payment of reparations, the construction of community centers, and the promise of better job opportunities.

All of the above occurs within the framework of the Environmental Evaluation Service. Even with this service, there are situations that jeopardize the international responsibility of the state when it allows projects such as these, which are, at a minimum, problematic. The case of the hydroelectric plant on the Añihuerraqui River is an example of how certain details are hidden by the law and are relegated to the underground of normalcy, enclosed in what could have been but is not.

The Curarrehue community has publicly voiced its opposition to the installation of hydroelectric plants in the commune. It has organized marches against these plants, as well as demonstrations before regional government authorities charged with decision making in this area. Social protest, of course, is a popular tool used by civil society and community movements. Nevertheless, the administrative files of these projects do not gather the sentiments reflected in the streets. Studying administrative processes insofar as the law is concerned enables one to see that objectionable deficiencies exist within them. Upon reviewing the administrative file of the Añihuerraqui hydroelectric plant, which is publicly available online, one sees information that, at the very least, is bothersome from a human rights perspective, particularly regarding the rights to FPIC and to participation. As shown in the Añihuerraqui records, the company entered into economic commitments with some community members in exchange for their consent to the project; these were signed in a private document before a notary, using articles 6 and 7 of Convention 169 as a regulatory reference.

This type of information presented by project holders as a form of responding to environmental requirements is based on information from PAC processes or from other mechanisms formalized through legal procedures, even when the communities objected to the PAC and to the individual negotiations conducted with community members, demanding compliance with the right to FPIC (Comunidad Indígena Camilo Coñoquir Lloftonekul 2013). In fact, the compensation payment of thirteen million pesos (approximately US\$24,000) to twenty-six community members

was not seen positively by the rest of the community, as pointed out by the presidents of two communities. Such individual payments have the effect of creating internal divisions within communities—divisions that ultimately benefit private investment.

Just as Sebastián Donoso, the former special advisor to the presidency on indigenous affairs, moved from a public post to private practice, many former commune mayors and public officials now serve as functionaries of businesses, where they focus their efforts on winning communities' approval. During a protest in the Temuco commune that was taking place against the hydroelectric plant in Curarrehue, Ely López from the local environment council told me, "We aren't accustomed to living on the defensive, but today we have to because company pick-up trucks are driving the streets trying to convince community members, dividing the communities."

In the case of the hydroelectric plant in Curarrehue, it seems strange that the company publicly displayed the agreements that it reached with individual community members. These individuals signed a "receipt and acknowledgment" document stating that the "company has provided detailed information about the project's main characteristics" and that such information-sharing moments constitute a "consultation process [that] has been carried out in good faith, in compliance with current regulations, and with the fulfillment and spirit of Convention 169 in mind" (Gestión Ambiental Consultores 2012). As is known, the duty to carry out a FPIC process falls within the domain of the state, not of private entities (International Labour Organization 2009, 61; see also Inter-American Commission on Human Rights 2009, para. 291). With this action, the company not only demonstrated its ignorance but also for a moment forgot about the state and legitimized its own actions by using state tools.

Along the same lines, the company offered a "Communication Protocol" to the communities, with provisions for the channeling and management of conflicts that might arise during the company's presence in indigenous territory (Gestión Ambiental Consultores 2014). According to this document, the available forms of communication are limited to reference books and notes, e-mails and letters to the project owner, and meetings with company representatives. The document does not indicate that this mechanism

was the result of a joint effort with communities; rather, it was yet another form of demonstrating the project's compliance with the requirements of the Environmental Evaluation Service. What we do not know is whether the project also complies with the requirements of the communities.

These practices—which involve rights violations and a flagrant confusion of roles—are carried out with such normalcy that they are able to demonstrate before a blind, deaf, and mute state that the demands of populations opposed to investment projects have a solution. Put another way, the issue is about a cost that is considered by the company and by regulations but whose value is not being determined by communities on equal footing.

"Nobody is going to want to visit Curarrehue and see a ton of cables passing through the sky. This area is so marvelous, with so many native trees, with so much greenery, with so much clear water," said Marisol Coñequier to the international media. The installation of the Añihuerraqui hydroelectric plant jeopardizes local entrepreneurship, such as Marisol's bee-keeping and cosmetics business, that promotes good rural living. Like her, other community members see their expectations dashed in the face of projects that end up industrializing areas that have been protected in light of their ecological richness.

The vast differences that exist between the company's interests and those of indigenous communities find fertile ground in the field of law, which addresses these demands, digests them, and transforms them into systematic outlets that allow companies to continue with their investment activities. Even when citizen opposition breaks ties with companies and saturates communication spaces, what is at play is not only citizens' ability to decide how to self-govern their spaces—democratizing the space, so to speak—but the extent to which companies define the value of what is at stake.

No Spring Thaw

At the end of 2013, a nongovernmental organization from the global North published a study on fifty-two of the largest oil and mining companies from the United States (First Peoples Worldwide 2013). The study revealed that these companies operate in thirty-six countries and in over three hundred indigenous territories. In

Latin America, they operate in forty-one such areas, and in Chile in at least six. In a certain sense, these companies demonstrate the globalized impact on indigenous communities from the actions of just one country.

Let us say that the installation of a mega-company in indigenous territory in Chile is, at the very least, problematic. The objective of the Añihuerraqui plant is similar to that of other projects, whether forestry, mining, or power generation: to use local resources to generate wealth. In this scenario, important points of contact are created between the various interests—private entities, indigenous communities, and the state—which are subjected to a formal process that dictates the guidelines regarding timelines and forms of participation. This, however, does not prohibit informal relations between companies and communities. And it is this mixture of formal and informal relations that results in exclusion.

Projects in indigenous territories significantly alter the habitat of those who live there, whether through the construction process itself or through the permanence of structures that change the environment; this, in turn, has consequences for indigenous identity and culture. These projects also involve socioeconomic distances that inhibit equal treatment of the various stakeholders such that the shortcomings of some allow for others—namely, the companies—to take advantage of opportunities to offer mitigation for the damage caused, doing many times what the state does not do: improving roads, maintaining community health centers, constructing water supply networks and sewage systems, and so forth.

In this way, the justification of mitigation measures allows companies to present projects that are in line with environmental standards (to the extent that the companies compensate or mitigate the impacts) but that fall short with regard to the rights of indigenous peoples. Weak and sometimes nonexistent FPIC processes mean that the populations in question cannot effectively influence decisions regarding the projects or their benefits. Thus, benefit-sharing for projects that use natural resources in indigenous territories has been scarce in Chile, limiting itself to the requirements of environmental legislation, such as the monthly subsidy of 3,000 pesos in the electricity bill for communities in Añihuerraqui.

Today, the value assigned to land varies according to different categories—for example, land versus territory. Obviously, for

Chilean legislation, it is preferable to speak of land than to speak of territory, whose meaning is read on the basis of Convention 169 instead of domestic legislation. Therefore, the creation of private property is more effective in defending the interests of businesses than collective property is in protecting the rights of indigenous peoples. This is the case for projects related to mining, energy, aquaculture, and so on.

The above results in an exclusionary vision of life that condones the violation of human rights. It is true that it is not easy to implement in practice what is written on paper. However, the language of neoliberal economists tends to use stock phrases to demonstrate the necessity of such investments: that a free market improves society's well-being; that raising the minimum wage will lead to increased unemployment; that the global economy has grown more in times of regulated capitalism; and the list goes on (see Chang 2010). These opinions are generally hidden behind myths that impede an understanding of what is happening—ideological traps that maintain a development model that is currently in crisis.

Indeed, law has formed part of this hegemonic construction, accentuating certain channels of communication with the state entities it regulates. For example, legal systems have been established that ignore the growing knowledge of groups with different expectations for their future, not to mention that of generations to come. It is not strange, then, that “the law itself becomes . . . the instrument of the theft of the people's land” (Marx 1887, 506).

It is estimated that in Chile, during the first half of the last century, at least one-third of the territory traditionally inhabited by the Mapuche people was seized from their control, through various private property regimes (Bengoa 2008, 367). Today, some Mapuche communities must request permission from forestry companies to be able to pass through extensive pine plantations to arrive to their ceremonial sites—and to reach their native forests, forget about it.

So great is companies' “impact” on communities in general that we have begun to speak about how companies should also respect human rights in the execution of their objectives. Indeed, a 2000 report on the world's largest economies revealed that fifty-one of these economies were companies, not countries (Anderson

and Cavanagh 2000). Maybe that is the point that a Brazilian lawyer tried to summarize when I met him at a human rights seminar: “The problem with Coca-Cola is not Coca-Cola, but the fact that it is not the state.”

Companies become involved entirely in people’s daily lives, sometimes interrupting the development of behaviors that stand in the way of the planned investment at hand. In the case of indigenous communities in Chile and the investment projects that seek to use natural resources in their territories, the tension is even greater. For a Santiaguino like myself, the passing of thirty trucks each day in front of my house is not much of a problem; but the same situation is unbearable if these trucks pass near a ceremonial site, or if pine tree plantations dry up the spring water in indigenous territories. The colonizing powers in today’s world are not nation-states but companies (Žižek 1997). This is the context in which states, companies, and indigenous communities meet.

Toward the end of 2012 and the middle of 2013, a national-level consultation process was held in Chile with the aim of reaching an agreement with the government on a regulation that would regulate FPIC processes. In the dialogue sessions held in early 2013, one of the biggest concerns of indigenous leaders centered on investment projects that entered the SEIA but that did not involve proper consultations. Indigenous leaders argued that consultation processes should be subjected to the new FPIC regulation, but the government did not yield in its position of preferring to subject consultations to the process established by the Regulation of the Environmental Impact Assessment System (RSEIA, for its Spanish acronym), thus continuing to place environmental legislation above the rights of indigenous peoples. The disagreement was such that after the consultation process was over and the final draft of the new regulation on consultation—Supreme Decree 66 (Decreto Supremo 66)—was presented by the government, indigenous leaders presented a “representation” to the ILO on the grounds that Chile had not adopted the measures necessary for implementing Convention 169, since the articles on direct impact and investment projects do not provide guarantees for the due protection of indigenous populations’ rights.

In this sense, the Chilean institutional framework considers that in the case of investment projects affecting indigenous

communities, as well as in the case of projects requiring environmental impact studies, indigenous populations will be consulted according to the provisions of the law and environmental regulations. According to Supreme Decree 66, in the event that there are no objections from the Comptroller General of the Republic (the organ that oversees the legality of acts of the central government), the measures provided for in this regulation will be applied, provided that the environmental impact declaration is performed according to the RSEIA. In simple terms, Supreme Decree 66 signals that the only projects that will be consulted are the ones involving environmental impact declarations, while the RSEIA signals that there will be FPIC processes only to the extent that the projects involve environmental impact studies.

The above leaves us at a crossroads, since in practical terms the Chilean government has created guidelines that do not require FPIC in the terms requested by communities; in other words, these projects are subordinated to the regulation on consensus (Supreme Decree 66) and not the RSEIA. Nonetheless, just as the government created a regulation vacuum regarding consultation, it opened a space for dispute in which communities must be alert in order for their discourses to be heard and recognized, whether in political spaces or in legal fields.

And it certainly was a complex debate. At that time, I was participating as a legal advisor for various indigenous leaders who had set up a dialogue with the government on this issue. It became clear as I was defending the current environmental regulatory framework that the state was acting under pressure from companies to reduce bureaucratic barriers. During those dialogue sessions, many of the government's arguments seemed problematic to me and far from a vision of human rights. I recall one conversation that I had with a government lawyer who insisted on first complying with obligations under domestic law before worrying about international obligations. How does one explain international norms to these state officials when many of them do not take those rights seriously in the first place? This was one of the questions that most frustrated me during the process.

In effect, just as the interest of many indigenous communities is to recover lost territory, and to defend it in some cases, the challenge before us is to reclaim the law for advancing the interests of

disadvantaged groups, and to use this tool not so much as a defense but as a tool for change. We need to move from a vision that monopolizes the law to one that articulates a mixture of various forms of knowledge in the field, thus placing it closer to civil society, and in turn politicizing it. The idea is not to politicize something that is not political but to demonstrate that it always has been, and that the current hegemonic ideology has simply been hiding this fact.

The challenge is two-sided, given that it appeals to both policymaking and the practice of law. It is a question that requires a “high-energy democracy” (Unger 2005, 78)—in other words, a democracy that allows civil society to actively participate in the creation of its future, constructing the paths deemed necessary and valuable in political activities. In the case of indigenous peoples, FPIC constitutes a space in which the law can be used in an emancipatory manner that changes the current hegemonic vision focused on extractivism.

Although it still remains to be seen what solutions will be offered in terms of the consultation regime with which investment projects must comply—since the campaign platform offered by Michelle Bachelet touched on this issue—current conditions in Chile allow us to influence this discussion. Nevertheless, certain preconditions, such as coordinated action among communities, are needed to move in this direction. The cases that have involved harmonized positions regarding investment projects are due to coordinated actions among members of affected communities, whose unification decreases the possibilities that companies are able to break the will of certain members in the face of material needs.

A coordinated stance among the community that uses the law as just one of many tools can be successful if it adopts a global perspective of the issue at hand—that is, a vision that makes the link between the various levels at which the law functions (local, national, and global). An example of this is learning how to coordinate strategies that link the various rights at play when it comes to indigenous peoples’ rights.

Obviously, the mere use of a tool such as the law does not guarantee an emancipatory result in the counter-hegemonic sense. The larger question is about reducing power inequalities and social exclusion. And in the case of FPIC, it is about capturing

greater decision-making spaces for indigenous peoples regarding the measures that affect them—in this particular case, investment projects.

In the cases that I have studied, I have arrived to the conclusion that the companies generate a false respect for indigenous communities. The effect is nothing more than silencing these communities' potential to act in a similar medium. In other words, the companies prevent communities from becoming a co-participant in economic relations, or (in the worst-case scenario for companies, and perhaps a better scenario for communities) from becoming the companies' own competition in the industry at issue. Everything is supposedly being done in the name of the communities, but it is nothing in reality. Mitigation measures in the form of compensatory payments that represent a tiny fraction of the company's profits, in truth, are a far cry from the expectations concerning the use of natural resources in indigenous territories (Anaya 2013).

What is hoped for is that the communities themselves become the ones to shape priorities and strategies regarding development projects and the use of their territories, for control by indigenous peoples is more prone to adopt a human rights focus than is an extractivist approach. To do this, the construction of government institutions that support initiatives for indigenous-run companies is critical, leaving by the wayside the purely agricultural vision with which the Chilean state has understood the problem.

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CHAPTER 4
**Negotiating Forest Rights,
Duties, and Relocation
in the Sariska Tiger Reserve**

Arpitha Kodiveri
(India)

Introduction

Large mountains and thick shrubs greet the eye as one enters the Sariska Tiger Reserve. Sariska is a richly forested area in the Aravalli Range in Rajasthan, India. The reserve is also a popular religious site because it is home to a temple in honor of the renouncer-king Raja Bharthari. I became familiar with the reserve when I began working as an environmental lawyer at Natural Justice, an international nongovernmental organization based in South Africa. Natural Justice provides legal assistance to indigenous peoples and local communities seeking to assert their rights to resources. The organization is just beginning to establish its work in India and has received a grant from the Ford Foundation to provide legal support to rural communities in India, among them forest dwellers living in the Sariska Tiger Reserve. Natural Justice functions on the notion of biocultural rights, which stems from the concept of traditional resource rights, described by Darrell A. Posey as

a bundle of basic rights that include human and cultural rights, the right to self-determination, and land and territorial rights . . . [and that] recognize the right of Indigenous peoples and local communities to control the use of plant, animal and other resources, and associated traditional knowledge and technologies. (Natural Justice 2014)

In 2012, Krishi Avam Paristhitiki Vikas Sansthan (KRAPAVIS), a community-based organization, approached us for assistance in filing claims under the 2006 Forest Rights Act on behalf of the Gujjar community within the Sariska Tiger Reserve. KRAPAVIS has a history of working with the Gujjar community on the revitalization

of sacred groves, or *dev banis*,¹ and conducting training programs in ethno-veterinary medicine for local youth. Only recently has it begun to explore the Forest Rights Act as a potential tool for securing grazing rights for the Gujjar community. Apart from a few policy interventions regarding the institutionalization of sacred groves, KRPAVIS has not actively used law in its work. In many ways, the organization's legal efforts have developed through its collaboration with Natural Justice.

One balmy Monday afternoon, I found myself in Haripura, a tiny village nestled in Core Area 1 of the reserve, speaking with Nannakram, an elderly man from the local Gujjar community. Nannakram was describing the different families in his village that had decided to relocate from the reserve:

We need to stick together, but this family [he points to a large hut within the village] was so steeped in debt that the 10 lakh being offered by the Forest Department became their way out from this mess. I do not blame them, but if we do not stick together, the Forest Department will prey on this division and make sure that we all relocate. I do not wish to relocate. As a lawyer, what can you do for us?²

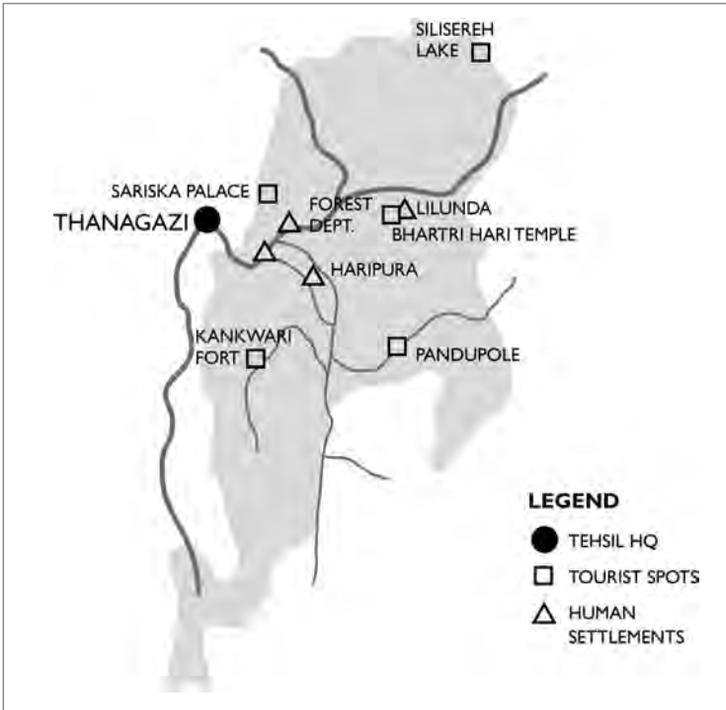
Nannakram's question came to define my engagement with this dynamic context.

This chapter reflects on my experience working with forest-dwelling communities in Sariska to implement the Forest Rights Act, as well as the practical challenges and personal transformations that I have experienced in light of the realities on the ground. In the first section of the chapter, I provide a brief overview of the Sariska Tiger Reserve. In the second section, I unpack the nature of forest rights in the reserve and the restrictions to which these rights have been subject. In the third section, I describe the 2006 Forest Rights Act and the challenges that I have experienced in its

1 Sacred groves can be viewed as a form of nature worship. According to the International Union for Conservation of Nature (2008, xi), they are a type of "sacred natural site," which is defined as an "[area] of land or water having special spiritual significance to peoples and communities." *Dev banis* in particular are sacred groves historically known to house a sage or traditional healer and to act as a repository of medicinal plants for the community. Through their revitalization process, which began in the early 1990s, *dev banis* are now also seen as an important source of livelihood for the community.

2 Interview with Nannakram Gujjar, July 2012, Haripura.

MAP 4.1
Sariska Tiger Reserve



SOURCE: Map prepared as part of the ROOTS project by designers at the Law+Environment+Design Lab (<http://srishti.ac.in/ledlab/folio/roots-project-sariska-tiger-reserve>)

implementation. In the fourth and fifth sections, I explore the issue of relocation and the limits of the law. I conclude the chapter with a proposed intervention on behalf of the forest dwellers of Sariska.

The Sariska Tiger Reserve

Sariska was originally created as a game reserve in 1900. Over subsequent decades, it was shielded by multiple layers of legal protection under a variety of laws aimed at preserving wildlife, particularly tigers, within the reserve. In 1955, Sariska was categorized as a reserve forest³ under the Indian Forest Act of 1927, and

3 Reserve forests were initially established with the intention of governing the use of natural resources, especially timber, by transferring control to the state from the communities that historically had their own systems of governing and managing these resources. Re-

in 1958 was deemed a wildlife sanctuary.⁴ Protection for the forested area increased as Sariska was categorized as a tiger reserve⁵ in 1979 (following the government's launch of Project Tiger, an initiative aimed at the exclusive protection of tigers) and then as a national park in 1982.⁶ However, the process of recognizing the forest rights of the communities that live within this area is yet to be completed. Parallel to these different legal categorizations of the land was a narrative of rights deprivation and relocation of the communities living within it. Eleven villages within Sariska's boundaries depend on the forest resources provided by the reserve. Yet these communities have been threatened with relocation since 1979.

The Sariska Tiger Reserve received widespread public attention in 2004, when its tigers went missing due to poaching. This put increased pressure on the Forest Department in Alwar District to quickly relocate local communities living within the reserve,

serve forests were established under a colonial law (the Indian Forest Act) that reflected the British colonial interest in exploiting resources by centralizing the management of India's forests.

4 Under section 26A of the Rajasthan Wild Animals and Birds Protection Act of 1951, a wildlife sanctuary is an area "considered by the State Government to be of adequate ecological, faunal, floral, geomorphological, natural or zoological significance for the purpose of protecting, propagating or developing wild life or its environment." The sanctuary restricts the rights of communities living within it by restricting their access to resources and grazing while sometimes also prohibiting entry into the area.

5 Tiger reserves, which are areas declared under Project Tiger and administered by the National Tiger Conservation Authority, are established to ensure the maintenance of a viable population of tigers in India. Each tiger reserve is divided into "core areas" and "buffer zones." The inviolate core area must be devoid of human interference, which often results in the relocation of communities that have traditionally resided within this area.

6 Under section 35 of the Wildlife Protection Act of 1972, a national park is an area that, "by reason of its ecological, faunal, floral, geomorphological or zoological association or importance, needed to be constituted as a National Park for the purpose of protecting, propagating or developing wild life therein or its environment." Before land can be set aside as a national park, the rights of the communities residing within the designated area must be settled by an administrative officer known as the "collector," who must carry out a consultative process with the communities. In the event that communities require relocating, the relocation process must take place in accordance with the 2007 National Rehabilitation and Resettlement Policy.

since these communities were being accused of participating in the poaching. However, the 2006 passage of the Forest Rights Act, a major piece of legislation that recognizes the rights of communities living within forest areas, has reconfigured the dynamics between the Forest Department and communities within Sariska, for it has provided these communities with a tool to assert their forest rights and thus seek protection against such relocation.

TABLE 4.1
Timeline of legal categorizations and relocation

19th century	Seven villages evicted during Maharaja Mangal Singh's reign
1900	Sariska declared a game reserve for the exclusive use of the British
1917–1918	Movement in Sariska restricted under Sariska Valley Toll Rules
1955	Sariska declared a reserve forest under the Indian Forest Act of 1927
1958	Sariska declared a wildlife sanctuary under the Rajasthan Wild Animals and Bird Protection Act of 1951
1979	Sariska declared a tiger reserve under Project Tiger; villages in the reserve threatened with relocation
1982	Sariska declared a national park under the Wildlife Protection Act of 1972; the rights that will be affected from this declaration have yet to be settled
2007	Sariska declared a critical tiger habitat
2008	Forest Rights Act (accompanied with its Rules) ready for implementation
2011–2012	Attempts to implement the Forest Rights Act begin; Natural Justice begins assisting KRAPAVIS in this area

The Sariska Tiger Reserve is home to many different communities that depend on the forest for their livelihood. The Gujjars and Meenas make up the majority of the population, while the Meos, Bawariyas, Ahirs, Gadia Lohars, and Jats constitute the rest. The Gujjars are a pastoralist community that occupies large parts of the reserve's "core areas" (land designated as the primary habitat of tigers). The majority of Gujjars' income comes from milk, *matwa*, and *ghee* sales (Shahbuddin, Shrivastava, and Kumar 2005). While the Gujjars are mainly pastoralists, the Meenas engage in agricultural activities within the reserve area.

The caste structure within the villages in the Sariska Tiger Reserve is fairly complex, with a hierarchical order of castes among the various communities. For example, the Bawariyas and Gadia

Lohars are considered lower castes than the Gujjars, while the Jats are considered higher in the hierarchy in comparison to the Gujjars. This hierarchy of the Jats vis-à-vis the Gujjars plays out strongly when Gujjar-dominated villages are relocated near Jat-dominated villages. Furthermore, the Gujjar community has its own internal hierarchy whereby members are demarcated on the basis of their *gothras*, or clans. For instance, the Gujjar community contains the Bainsale and Korri clans, which stand in a hierarchical relationship to each other.

In 2007, violent protests by the Gujjar community called for the community's recognition as a scheduled tribe,⁷ a classification that would allow it to benefit from "reservation" in government posts (a system akin to affirmative action); however, these protests ultimately proved unsuccessful. This issue continues to be a bone of contention in the community's engagement with legal processes and institutions, as well as in its relationship with the Meena community, which is recognized as a scheduled tribe.

Forest Rights in the Sariska Tiger Reserve

Historically, communities living within the reserve enjoyed forest rights, particularly the rights to graze cattle and collect fuel wood. However, the enjoyment of these rights was gradually circumscribed through a history of exclusion and relocation. In the late nineteenth century, seven villages were evicted from the area during Maharaja Mangal Singh's reign. Then, in 1900, access to resources was restricted when the area was declared a game reserve for the exclusive use of the British (Johari 2007).

The implementation of a toll tax in 1917–1918 led to further evictions and restricted movement within the area (Shahbuddin, Shrivastava, and Kumar 2005). And when Sariska was declared a reserve forest in 1955 under the Indian Forest Act, asserting forest rights became even more difficult, for communities within Sariska were not allowed to graze cattle, cultivate land, or collect forest

7 Scheduled castes and tribes are historically marginalized groups that are now protected by articles 341 and 342 of the Indian Constitution. Such constitutional recognition enables them to avail of the benefits of the reservation system in government posts and institutions, which helps ensure that their interests are protected and not further marginalized.

produce. The new legal framework transformed the exercise of forest rights into a crime and marked the beginning of continued hostility from the Forest Department, which had the authority to charge people with “forest offenses.” This criminalization of forest rights forced communities to deal with changes in the meaning of their daily activities—for example, cattle grazing, an activity that once supported their livelihoods, became impossible to undertake as the Forest Department began confiscating cattle under the Indian Forest Act.

In 1958, Sariska was declared a wildlife sanctuary under the Rajasthan Wild Animals and Birds Protection Act of 1951. While this did not further restrict the exercise of forest rights, it did create the possibility of relocating the communities. Settlement of rights⁸ is part of the legal process of declaring a sanctuary; it is necessary in order to understand the nature and extent of the community’s rights to land and other resources, which will be affected once the area is declared as a sanctuary. In the case of Sariska, however, this process was never conducted, and the nature and extent of the rights of communities living within the reserve were never identified. This allowed forest guards within Sariska to remain hostile toward local communities, including by evicting some of them from the sanctuary (Johari 2003).

In 1979, Sariska was declared a tiger reserve under Project Tiger, an effort initiated by Prime Minister Indira Gandhi to conserve the country’s depleting tiger population. Since the project’s inception, thirty-nine tiger reserves have been established (National Tiger Conservation Authority 2009). As Gandhi stated upon the initiation of Project Tiger, “[The tiger’s] habitat, threatened by human intrusion, commercial forestry and cattle grazing, must first be made inviolate” (ibid.). Her words capture the governing principle behind the Indian government’s management of tiger reserves.

8 Under section 19 of the 1972 Wildlife Protection Act, communities that will be affected by the declaration of a sanctuary must be duly acknowledged in the settlement of rights process. In this process, the collector places a notice of the boundaries of the sanctuary and then determines the nature and extent of the rights of any person who will be affected. A proclamation of such rights can also be sent to the collector to be considered. The collector will then undertake a process where restrictions of the rights that have been recognized will be put forth or such rights will be acquired with due compensation.

The organization of these reserves is based on a “core-buffer strategy” whereby the core area is to remain undisturbed, while the buffer zone can be subject to human intervention. These categories determine the type of activities allowed within the reserve.

As part of the government’s effort to make certain areas inviolate, many villages were relocated from the tiger reserve’s core areas. Sariska Tiger Reserve contains three core areas that constitute approximately 274 of the reserve’s 866 square kilometers. The remainder is a buffer zone. Core Area 1, assumed to be the main tiger habitat, was declared a national park in 1982 by the state government. All of Sariska’s eleven villages are located in Core Area 1. Once Sariska was declared a national park, grazing was prohibited within its boundaries. Because the settlement of rights of the communities has yet to be completed, the communities find themselves in limbo—the nature and extent of their rights within the reserve are not clear.

The experience of being in limbo was described to me by Dadkali Mai, a local leader from a village next to the Raja Bharthari temple in Core Area 1. Dadkali Mai moved to her village, Lilunda, after her marriage in 1950; since then, she has witnessed the shifting legal landscape and the ways in which it has translated into varying degrees of hostility by the Forest Department against villagers. As she stirred the milk in a large pot to make *mawa* cake (sold in the local markets and an important source of livelihood for the community), she told me about her experience:

I was all of fourteen when I came to Lilunda. It was a peaceful village and quite small compared to the village I grew up in. I was told soon after marriage that I would have to help in making milk cake, as I continue to do today, and sometimes graze the cattle. I grew up doing all these activities, so I was alright with that. We used to graze the cattle freely across the valley, though all that changed a few years after my marriage. My husband had gone to graze the cattle early one morning when he was stopped by a *junglaat wala* [forest guard] and was told that he could not take our cattle there to graze anymore. [The guard] took away four of our cows and then asked my husband to pay 100 rupees in *dhand* [fine]. I was very angry from this episode and went with him to take our cows back and to see what the reason behind taking them away was. To my surprise, they said that there was a new law which said that we were not allowed to graze anymore. The situation is much the same today except the *dhand* is more expensive. The most

troubling incident so far was in the early 1990s, when the *junglaatwale* came to our village to convince us to leave our homes so that the tiger may be safe. This is something I have not understood till today — why we need to leave to make the tigers feel safe.⁹

The relationship between tigers and communities living within the reserve has been shaped by the politics of conservation practices in the reserve, the recent disappearance of tigers, and incidents of man-animal conflict. Once Sariska was declared a tiger reserve, restrictions on the exercise of forest rights increased. There was a clear demarcation of the forest area between the core areas and buffer zone, which brought with it a focused call for the relocation of the eleven villages within Core Area 1.

Earlier communities are said to have worshipped the tiger; signs of that can still be seen in Haripura. However, such forms of cultural expressions seem to have decreased since the declaration of the tiger reserve (Johari 2003). For communities living in the reserve, the tiger has become a symbol of their marginalization caused by the government's exclusionary conservation practices. In addition, there are many reported incidents of tiger attacks within the reserve. Recently, a twelve-year-old boy was mauled by a tiger in Madogarh village. After this incident, community members staged a protest on the Alwar-Jaipur highway, which passes through the reserve, calling on the Forest Department to provide compensation to the boy ("Boy 'Mauled' by Tiger" 2013). Despite this protest, the department did not compensate the boy or his family. The Forest Department is also supposed to provide compensation for the loss of livestock caused by tigers, though there have been several cases in villages where such compensation has not been dispersed.¹⁰ This further deepens the distrust between the community and the Forest Department.

In December 2004, newspapers reported widely on the complete disappearance of tigers from Sariska. This disappearance was also covered in *The Report of the Tiger Task Force*, published by Project Tiger (Tiger Task Force 2005, 14–20). According to the report, "The prime minister asked the Central Bureau of Investigation

9 Interview with Dadkali Mai, July 2012, Lilunda.

10 Conversations with villagers and forest guards, November 2013, Haripura.

(CBI) to inquire into the disappearance: it reported that since July 2002, poachers had been killing tigers in the reserve and that the last six tigers were killed in the summer-monsoon of 2004. The CBI report pointed to the involvement of local villagers" (ibid., 14). This investigation process brought renewed fervor to the Forest Department, which increased its surveillance of local communities. There was now more impetus in the Forest Department to hasten the relocation of the eleven villages within Core Area 1 of the reserve. The local communities felt wrongfully accused—while some individuals might have been involved in poaching-related activities, the communities felt that they were being accused as a whole. They believed that the Forest Department should have taken clearer measures to monitor the tigers instead of reacting with violence and hostility to the entire community.

An evening meeting with Ghyasiram Gujjar, a local villager, revealed this violence and hostility. Ghyasiram told me that, one day, while he was on the way to graze his cattle, he saw the dead body of a tiger named Sultan. He proceeded to walk ahead until he encountered a forest guard, who asked Ghyasiram if he had seen the tiger. Ghyasiram's answer—yes, he had seen the dead tiger—led to his being placed in jail, where he was beaten ruthlessly. He was made to sign a piece of paper—which he did not understand, being illiterate—stating that he had killed the tiger. To this day, Ghyasiram continues to attend court hearings for a crime that he says he never committed.¹¹

The 2006 Forest Rights Act

In 2006, after a sustained struggle by *adivasi* (indigenous communities) and other forest dwellers for the recognition of their rights to forest land that they had been cultivating for generations, the Indian government passed the Forest Rights Act. This act seeks to correct the historical injustices committed against forest-dwelling communities by recognizing these communities' forest rights, including their rights to live on the forest land, to access resources from the forest land, and to exercise community control over the land and resources. However, no efforts were made to implement

11 Interview with Ghyasiram Gujjar, August 2013, Bhera.

this law within Sariska until 2011, when five legal claims were filed. All five claims were rejected by the subdivisional committee on the grounds that forest rights cannot be recognized within a tiger reserve. Thus, this progressive law was declared inapplicable to the Sariska case, and its potential to address the situation of communities living within the tiger reserve has yet to be realized.

As an environmental lawyer, I saw merit in the implementation of the Forest Rights Act—and it was in this regard that I began providing legal assistance to the Gujjar community. Yet as I spent more time in the villages in Core Area 1, I realized that implementing the Forest Rights Act would be more complicated than I had imagined and that my understanding of this grand narrative of marginalization was limited for two reasons. For one, I had been introduced to the context by KRAPAVIS, whose work is focused largely on the Gujjar community; and second, I had approached the situation with a predetermined legal strategy for implementing the Forest Rights Act. I discovered these limitations when I began interviewing members from other communities, particularly the Meenas and Bawariyas, during my visits to the reserve. It turned out that the dynamics within the communities and their interests are fairly complex.

Challenges in Implementation

One day, I found myself having a candid conversation with Nannakram about the Gujjar community's 2007 protests requesting recognition as a scheduled tribe. He explained that one of the reasons behind these protests was that the Meenas had been recognized as a scheduled tribe, and the Gujjars felt that they were being denied the benefits of having caste-based reservation despite being worse off than their counterparts. According to Nannakram, this was one of the main reasons for friction between the Meenas and the Gujjars: Meenas were now better represented within the government because of the reservation, and their interests were being better served.

The Gujjars, currently categorized as an "other backward class" (OBC),¹² are demanding that their status be changed a

12 OBC is a legal classification used to categorize people deemed socially and educationally "backward." The Ministry of Social Justice

scheduled tribe. In the OBC category, they must compete with the Jats, another dominant caste that is restricting them from gaining the full benefits of their OBC status. If they are recognized as a scheduled tribe, however, the Gujjars will be able to take advantage of this category's benefits because other communities within this category are lower in the pecking order. The Meenas do not welcome this demand for change to the Gujjars' status because it would lead to more competition for the administrative seats being reserved for these communities (Béteille 2008). The politics of legal classification is further complicated in Sariska by the implementation of the Forest Rights Act. Those categorized as a scheduled tribe can access the forest with a lesser degree of evidence, while those categorized as "other traditional forest dwellers," such as the Gujjars, must prove seventy-five years or three generations of existence within the forests. Proving this is sometimes a barrier in claiming forest rights.

Another challenge in the implementation of the Forest Rights Act is the complex caste structure within the villages of the reserve. The patterns of marginalization reflected in the caste structure are also reflected in the formation of institutional structures (such as the forest rights committees¹³) and in the process of identifying the nature and extent of rights under the act. My understanding of the complexity of this caste structure comes from my fieldwork in the villages of Haripura, Lilunda, and Kiraska in Core Area 1. I chose these villages because of the increasing pressure they were experiencing from the Forest Department to relocate. Further, KRAPAVIS had volunteers in these villages, which gave me a point of entry. My field observations revealed a distinct caste structure within the Gujjar community. While

and Empowerment maintains the list of OBCs. Like scheduled tribes, OBCs also benefit from reservation in public-sector posts and institutions.

13 Forest Rights Committees are village-level bodies charged with determining the nature and extent of rights being claimed under the Forest Rights Act. Their main responsibilities are to call for claims; to receive claims and related evidence; to prepare the record of claims and evidence, including maps; and to present findings on the nature and extent of these claim before the *gram sabha* or village assembly for its consideration.

originally considered a tribe, through Sanskritization,¹⁴ the Gujjars have gradually developed an internal hierarchical system of *gothras* (clans). There are norms governing marriage between the *gothras*, as well as levels of representation in the decision-making processes in the village and local institutions. In addition, as mentioned earlier, there is a caste hierarchy among other communities within these villages; for example, the Bawariyas and Gadia Lohars are lower in the hierarchy and thus discriminated against by the Gujjars. This form of discrimination is visible in the functioning of local bodies, such as the *gram sabha* (a type of public form), as well as in employment opportunities. The Gadia Lohars often make tools and work with metal, while the Bawariyas generally work as guards in the agricultural fields of other communities, particularly the Meenas.

The caste system also affects villagers' use of and access to resources. For example, norms regulating access to sacred groves are based on the caste system within these villages. I noticed this during one of my visits to a sacred grove, when the young boy accompanying me was not allowed to enter because he belonged to a lower caste from another community. This unequal access to resources, in turn, can influence how each group seeks to claim its forest rights.

In addition to the complex caste system, there is also the problematic issue of gender. Women in these three villages seldom participated in discussions during my visits because they were busy performing daily chores and because their participation was never encouraged. Also, women often cover their faces with veils, making it difficult to know what their position is during public forums like the *gram sabha*. This dynamic is another factor that must be considered in the implementation of the Forest Rights Act (though the law does specifically provide for women's representation within the forest rights committees), and encouraging women's active participation is an integral part of my legal strategy.

14 "Sanskritisation is a particular form of social change found in India. It denotes the process by which castes placed lower in the caste hierarchy seek upward mobility by emulating the rituals and practices of the upper or dominant castes" (Wikipedia 2014).

Another hurdle preventing the act's implementation is that the core areas of the reserve were declared a critical tiger habitat (see Ministry of Environment and Forests 2009)¹⁵ before the Forest Rights Act came into effect in 2008. Retroactive application of the act is not allowed. Yet the public consultation process—which was required prior to the creation of a tiger habitat—was never undertaken. The communities living within the reserve have become accustomed to having their forest rights arbitrarily curtailed and to being constantly threatened with relocation.

Relocation

As described earlier, since the nineteenth century, communities living in the reserve have been subject to threats of relocation in the name of conservation. The government's push to relocate these communities stems from three factors: the notion of inviolate spaces; the desire to "mainstream" communities by pushing them out of the forests; and the desire to open up forest land to facilitate industrialization (Xaxa 2012).

Since the area was declared a tiger reserve, this threat of relocation has intensified. All eleven villages in Core Area 1 have been notified for relocation, though only two—Umri and Deori—have been completely relocated. Some villages, such as Kiraska, have been partially relocated. The terms and conditions of relocation are based on guidelines issued by the National Tiger Conservation Authority (2008). Families are given two options for relocation: under the first option, the family receives 10 lakhs (about US\$16,400) in cash in exchange for foregoing assistance from the Forest Department in the rehabilitation and relocation process; and under the second option, the Forest Department provides the equivalent of 10 lakhs in rehabilitation and relocation assistance, including agricultural land and access to public facilities, such as schools. Most community members prefer option two.

15 As established by the 2006 amendment to the Wildlife Protection Act of 1972, critical tiger habitats are declared where it is "scientifically established on a case by case basis that continued human presence could lead to irreversible damage to tigers or their habitat"—and even then, such a declaration is subject to the consent of those who stand to be relocated, which is to be achieved through a consultative process (explanation [i] to section 38V[4]).

In Maujpur Roundh—an area located forty-five kilometers outside the Sariska Tiger Reserve, where residents of Umri and Deori have been relocated—I met with Kishan Singh, a local leader from the Gujjar community who moved from Umri two years ago. His account illustrated the hardships that the relocated population has suffered. Smoking his hookah, and with one hand raised against the harsh sun, he said:

In our village, we had decided against relocation on seeing this land, it is fairly barren. We thought we were better off grazing our cattle within the forest. The Forest Department, though, wanted us to move; since the tigers disappeared and new tigers were brought in, they wanted to make sure that they corrected the situation. They were very clever and created conflict within our villages by stating that one particular family would choose to relocate and that would create a divide in our communities.¹⁶

The Sariska Tiger Reserve management plan—a document that the Forest Department is required to produce and that will operationalize the guidelines for management and relocation as prescribed by the National Tiger Conservation Authority—identifies two approaches for relocation (Forest Department in Sariska and National Tiger Conservation Authority 2004). One is on an individual basis and the other is on a collective basis. Under the individual approach to relocation, each family can choose to relocate and pick between the two options. This allowed the Forest Department to create divisions within the communities. Relocation on a collective basis has not been carried out because not all members of a community have wanted to relocate. Thus, even though an entire village is slated for relocation, by giving individual families options, the Forest Department is able to create divisions in the community. Kishan Singh continued his story:

We were finally pushed to a corner where the Forest Department made it impossible for us to live within our villages by slapping us with wrongful accusations and cases. I remember when I used to enter the gates of the reserve after selling the milk from my buffaloes outside—they would catch us and tell us we don't belong here and it was time to leave. What were once empty threats became very real

16 Interview with Kishan Singh, August 2013, Maujpur Roundh. All quotations from Kishan in this chapter derive from this interview.

as families slowly began moving out of the village. So we decided to relocate, and it took them a year to give us this house. Our land, however, does not grow anything. I used to graze animals and now I am made to cultivate land.

When I interrupted him to ask how he had learned to farm, he answered with a half-smile, “The stomach is the greatest teacher of all, and we had to adapt. All our livestock, though, was lost in the process, as there was not enough water.” I then asked him what else, apart from the shift to agriculture, was an issue for his family. He puffed on his hookah and said:

You are the sixth or seventh organization that has come to inquire into our problems—but I am sure like the others you will also go. The biggest problem is we do not know who to go to with our problems. The Forest Department tells us to go to the Department of Revenue because the land is now being categorized as revenue land.

I later discovered that this administrative confusion was due to the fact that the forest land was being converted into revenue land in order to be able to declare Maujpur Roundh a revenue village.¹⁷ This is a long process, and until it is completed, none of the families that have been relocated will have any ownership rights over land. They have been given an *adhikaar patra*, a document outlining the ten rights that they can exercise in the relocated area, but they cannot obtain loans on the basis of this document. As a result, they are unable to obtain funds to buy tractors or other materials that would allow them to better cultivate their land.

As I walked with Kishan Singh down the dirt road in the unforgiving sun, I was curious to know why the roads had not yet been developed, as promised in the relocation package. Rubbing his shoes in the dirt, he said, “The Forest Department kept one lakh from our package to provide us with roads, electricity, and schools. Apart from electricity, nothing has been provided yet. Schools are something that really enticed us to move here. We send our children to the government school and it is quite far

17 Revenue land is land that falls within the administrative authority of the Department of Revenue. Revenue tax is leviable on such land. Property rights to revenue land are alienable and heritable. Development activities can take place on revenue land without the requirement of a forest clearance.

from here." The evening was growing late, and I could see lights shining beyond the limits of Maujpur Roundh. Watching me observe these lights, he said:

That is Gujjarwas, a neighboring village. We do get along, but they are not happy with us grazing our livestock in what they claim is their common land. There is not much we can do, as that is the only grazing pasture available. We are hoping that once we establish our own *panchayat* [local self-government], we will be able to resolve these matters.

The Forest Department, in identifying the relocation site, had not taken the time to anticipate the consequences of the relocation or to understand the local dynamics of surrounding villages. The department's identification of the land was not done through a process of consultation. Others in Maujpur Roundh recounted an episode where land had been identified and they had agreed to relocate there. But it was later discovered that the land belonged to a sanctuary and could not be used for relocation (Shahbuddin, Shrivastava, and Kumar 2005). Trust between the Forest Department and the local community was tenuous given the department's failure to fulfill its promises and the divisions that it had created within the villages with regard to relocation.

In the latter half of our conversation, I asked Kishan Singh hesitantly, "As lawyers, how do you think we can help you?" After a few thoughtful moments, he replied, "I want to go back to Umri, and I do not know if that is possible. If that is not possible, I want the conditions here to change to make the Forest Department more conscious of their responsibilities. They hardly even visit us to see how things are working." It was then that I first thought of filing a public interest litigation before the Supreme Court on the grounds of a violation of the right to life (protected in article 21 of the 1949 Constitution). Article 21 establishes that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law." I also considered filing a writ of mandamus before the High Court of Rajasthan requesting that the court order the Forest Department to fulfill the promises it made when relocating the communities. This could potentially help remedy the legal vacuum regarding the conditions of relocation from protected areas and open up a space for progressive jurisprudence to be discussed. When I discussed this with Kishan Singh, he said that it would be ideal if they could return to their

land. But with no quick legal solution in my bag, I walked away slightly disturbed but also motivated to find a solution.

The next day, I visited families from the Meena community that had relocated from Deori only a year prior. There was a stark difference in their relocation experience. They said that they had been extremely comfortable since relocating—their land was lush with the cultivation of mustard, in contrast to Kishan Singh's land that lay lifeless. The Meenas said that they had approached the Forest Department frequently with their concerns and that these concerns had been immediately resolved. I was unsure if the families were telling me this out of fear that I might be a journalist or someone who could create unwanted problems with the Forest Department. I had been warned that this might happen, since a series of articles in the local newspaper had previously disrupted their relationship with the Forest Department. When I asked the families if they wanted to return to Deori, they said that they were happier in their new land because they were able to cultivate and earn a better living. Our local driver, Hukkam Singh, provided a useful insight when I mentioned these contrasting experiences: "The Meenas have adequate representation even in the Forest Department. I think that is the reason for this contrast."¹⁸ The reservation system ensures that the interests of the community are well served; this further propels the Gujjars in their claim for scheduled tribe status, which may offer better benefits in the context of relocation.

The Divide

Within the three villages in Core Area 1, a clear divide exists between those wanting to relocate from the reserve and those wanting to stay within the reserve area. This divide became clear to me when I introduced the Forest Rights Act to the community. It brought up questions of land tenure rights, which then spurred a discussion of what would happen to the land if they chose to relocate. I had mistakenly presumed that the people would overwhelmingly oppose relocation. As lawyers, we often enter the field with a legal strategy in mind, and we begin to scout the field for legal facts that support our theories of legal violations. I

18 Interview with Hukkam Singh, August 2013, Alwar.

began to understand the community's division after conducting a survey of legal interests to understand what type of injustices had occurred within Sariska and whether the implementation of the Forest Rights Act would solve these problems. I became interested in understanding this divide beyond the legal frame and engaging with its multiple layers. This required delving into the community's perceptions about relocation, as well as the politics of identity and memory that governed their experiences. As lawyers, we are drawn by clarity in the articulation of desires, because we can then translate this into concrete legal solutions. The fact that clarity was missing in the communities' articulation forced me to leave the shelter of law and experiment with trying to understand their world through subtle observations, immersing myself in their problems, joys, and dreams. A divide that I initially thought of as one of divergent legal interests was actually a divide highlighting the communities' struggle to belong within the reserve; their notion of belonging to the reserve was being constantly challenged through relocation notifications that forced them to choose between fighting with the Forest Department to stay within the reserve or accepting relocation in order to avoid having to constantly justify their presence within the reserve. By asking questions that seemed to be of no legal use, I was able to break away from the law and arrive at a richer understanding of the communities, and to see why some members preferred relocation while others did not.

There were a number of reasons why people wished to relocate. For example, on my journey back to Haripura from Lilunda, I was accompanied by Charanram Gujjar, a young Gujjar from Nathusar. Tall and of a large build (he later told me that he was a famous local wrestler and had won many fights, even some against the forest guards), Charanram said that relocation would allow him to provide a house and a better education for his children. He felt that relocation would bring him closer to the city and that his family would be freed from the hostility of forest guards, which had increased in the wake of the tigers' disappearance.¹⁹ Charanram's ideas were emblematic of young people's percep-

19 Interview with Charanram Gujjar, July 2012, journey between Haripura and Lilunda.

tion of relocation in general, which was that relocation offered upward mobility and an opportunity to move from the village to the city. The youth had begun interacting with the market on different terms than the generation before them; some were taking exams to become police officers while others had moved to the city to become drivers or work in restaurants.

Another reason many wanted to relocate was to be able to have a say in matters that affected them. In the reserve, the local community was alienated from decision-making processes. For example, in Sariska, the Forest Department had the exclusive right to construct roads and other infrastructure, and in most cases the roads were built to suit the department's needs, not those of the community. Thus, many villagers felt that they would have a better chance working with the Department of Revenue because, unlike with the Forest Department, there was no prior history of conflict.

Most of the Meena community members I spoke with preferred to relocate because it would give them the chance to practice agriculture freely. Their small-scale farming activities within the reserve were often subject to restrictions and surveillance by the Forest Department. For them, relocation was a way to escape the department's constant monitoring of their agricultural activities. Many of the younger Meena community members also expressed a desire to expand their agricultural activities by mechanizing certain processes. The money that relocation promised might allow the mechanizations and expansion that they had in mind.

Others chose to relocate because of the access to cash (10 lakhs) offered by the first relocation option. In one case, a debt-ridden family in Haripura chose to relocate under the cash compensation option since it would provide them with quick money to pay off their debts. The irony, though, is that 10 lakhs is not enough to sustain an entire family for over a year, and many who elected the cash package have since moved back to their villages. This was the case in Kiraska, where it is estimated that five families who had been relocated returned.²⁰

I also discovered the reasons why others were against relocation. My conversations with the Gujjar elders of Haripura, for

20 Conversation with villagers, July 2012, Kiraska.

example, revealed a mosaic of reasons for wanting to stay in the reserve. They spoke of life within the forest as the ideal way of life and were concerned that relocation would break the cultural links between forest dwellers and their land. When I asked them what they meant by their cultural links to the land, they spoke of the sacred groves as an integral part of their identity and culture. Since the revitalization of sacred groves was a recent occurrence, this seemed to me to be a contemporary understanding of their culture. Also, they pointed to the Raja Bharthari temple as a symbol of their cultural links to the land: religion anchored their cultural expressions to the landscape. This cultural link was also of one of economic importance since being located close to the temple enabled them to sell their milk cake.

Some community members also voiced a strong distrust toward the Forest Department with respect to relocation. They spoke of promises that have not been fulfilled and of families that have returned from the relocation site and have recounted their dire experiences with relocation.

In addition, many community members viewed staying within the village view as a form of resistance to the power of the Forest Department. In 1987, the Forest Department issued a statement that all villages in Sariska were illegal (Shahbuddin, Shrivastava, and Kumar 2005). Choosing to stay within the village was seen as an act of resistance to this statement, and, today, many members choose to remain in the reserve for this reason.

Finally, some were opposed to relocation because the choice between two relocation options was no longer being offered. In 2003, the Forest Department announced that there was no more land available for relocation (*ibid.*).²¹ This meant that the second relocation option (assistance from the department in finding new land) was eliminated and that the only option was to cash compensation. This naturally resulted in many community members wanting to stay within the forest.

21 As mentioned earlier, the Forest Department had assured land upon relocation. The 2003 declaration is a violation of that initial assurance. The 2008 guidelines issued by the National Tiger Conservation Authority are at a national level and are not particular to Sariska. Land is available elsewhere for relocation and is needed as a legitimate option.

As I broke away from being a lawyer and became more of an observer, I began to view the role of law very differently, especially with regard to how it created and worsened the divide between those who chose to relocate and those who chose to stay. This division was deepened when the Forest Rights Act came into effect in 2008 and legally recognized the interests of those wanting to stay within the village. This recognition offered people the ability to gain ownership rights over land and access rights to resources in the form of community forest rights, thus leading some community members to change their preference and choose to stay within the reserve. I felt that implementation of the Forest Rights Act might help bridge this divide, since section 3(m) provides that *in situ* rehabilitation should take place for communities if there is no alternative land available to them or if they have been illegally evicted or displaced from their land.

The Difficulty of Being a Lawyer

In law school, I was taught that the practice of the law is anything but personal. The law must be viewed objectively, and our clients must be seen as mere carriers of a legal issue that needs solving. This view was constantly challenged as I began to work as an environmental lawyer and to use the law as a means of expressing my personal principles and values. Lawyers are not mere legal technicians but storytellers who appreciate the strangeness of truth in its multiple forms. It is this understanding of being a lawyer that I have come to adopt.

When I entered Sariska as an environmental lawyer, community members approached me both with caution and with the hope that I could resolve some of their legal issues. They expected that I would make my legal skills available to them and that I would provide assistance on all legal matters. These expectations initially made it difficult for me to establish a relationship with community members, since their understanding of my role as a lawyer did not appear to match my own understanding. For example, I was constantly approached with requests to help people with criminal cases, which I had no experience handling. Over the course of several conversations, however, they began to understand that although I had come there to provide legal assistance, my assistance had its limitations.

The biggest difficulty of being a lawyer is having to look at issues through the narrow lens of the law. As lawyers, we learn to tell stories of the law and, in the process, forget about the other narratives. The implementation of the 2006 Forest Rights Act became the story that I wanted to narrate, and I found it extremely difficult to allow other stories to enter this conversation. Leaving behind the law and learning to appreciate the richness of fieldwork was a tough process. I made this transition slowly, as my conversations with community members grew focused on understanding their lives rather than questioning them for legally relevant information. Going beyond the law and embracing nonlegal narratives enables a more holistic understanding of the practicality of legal strategies. This approach opens up the process of constructing a legal strategy with those who stand to be affected by a particular legal action. Crafting a legal strategy in isolation from the community is often an imposition of the law by the lawyer. But if the lawyer is immersed in the community's world, he or she is likely to be able to truly represent the community and to frame legal issues from the community's perspective.

As a traditional lawyer, one tries to understand injustice through the narrative provided by the client. But as a community-based lawyer, one must move from this traditional framework to one that is more willing to engage in questions of community dynamics. Representing a community with a specific legal strategy requires obtaining consent from different stakeholders, both within the community and without. As a lawyer, one should understand the power dynamics among the various stakeholders and learn how to use the law as a platform for these stakeholders to interact. Interacting with and understanding the various stakeholders is difficult because it can result in different interpretations and applications of a particular legal strategy. But it is also useful in helping human rights advocates understand the context and craft a legal strategy that can actually be implemented.

As a lawyer in Sariska, I found myself caught between competing legal interests and "project deliverables." The organization I worked for, Natural Justice, had received funding from the Ford Foundation to file at least four forest rights claims over the course of three years. I embarked on the Sariska project with the deliverables in mind but also trying to see beyond them. This was

not without its challenges since I had to explain myself to other lawyers at Natural Justice, to KRAPAVIS, and to the Ford Foundation. The initial proposal that had been drafted for the project had been done without an in-depth understanding of the realities on the ground. There was a stark difference in my approach toward Sariska and in my organization's mandate—and I felt trapped between them. I decided that a way to harmonize the two would be to explain my critique of the deliverables and the manner in which the proposal had been drafted. To my surprise, my colleagues agreed to review the deliverables that had been promised and to reexamine Natural Justice's role in this context based on my observations.

Through this experience, I learned that Natural Justice's work was based on the principle of deeply reflective intervention and of constantly critiquing its approach to the giant questions of law, culture, environment, and indigenous communities. This enabled me to reconfigure the Ford deliverables. The discussion with KRAPAVIS has been an ongoing one; Aman Singh was initially reluctant to take on such a broad approach to the deliverables, but through constant engagement, we have begun to find a way to work through these questions together. And the conversation with the Ford Foundation is one that is yet to happen, as we are presently redrafting aspects of the proposal, along with our reasoning for such a change. This experience has brought to light the restrictive nature of legal interventions funded by different target-driven agencies. In the flurry of trying to meet project deliverables, one can lose critical insight into the nature of the legal intervention.

Trying to measure the impact of legal interventions is also problematic, since many successes are intangible. The pressure to quantitatively explain how we are making a difference shifts the priorities of an intervention. Interventions that can be quantitatively justified are given higher priority than those that are more qualitative in nature. This problematic frame is something I experienced while in the field—I began to be bogged down in the search for measurement indicators at the expense of engaging with deeper questions. Though I am still finding my way through this maze of nongovernmental organizations, lawyers, and funders, being a part of an organization like Natural Justice—which is

driven by the ability to hold on to critical insight despite finding itself in these demanding funding realities—has helped me achieve a balance in my work between measurable deliverables and deeper questions.

Moving beyond the Law: Building Consensus

Moving beyond the law and observing community dynamics and politics allowed me to see the problems with the legal strategies that I had initially devised, and it exposed me to a different narrative of injustice.

One of these strategies was to file a public interest litigation before the Supreme Court of India to bring to light the relocation conditions experienced by the local community. Another was to file a writ of mandamus before the High Court of Rajasthan under article 32 of the Constitution, calling on the court to order the Forest Department to fulfill its public duty of meeting the appropriate conditions of relocation, as stipulated in the guidelines issued by the National Tiger Conservation Authority in 2008.

Reflecting on these legal strategies and the different forces at play on the ground, I decided instead to think of the law as a way to build consensus. I could use my position as a lawyer to mediate the different interests represented within the three villages of Core Area 1 of the reserve. Consensus building means looking beyond legal interests and understanding the underlying reasons behind people's positions and points of view (Menkel-Meadow 2002). It allows one to move away from an adversarial system of having to choose sides toward a system where arguments and positions are replaced with dialogue. Stuart Hampshire, a progressive socialist philosopher, has challenged the legal principle of *audi alteram partem* ("hear the other side"), arguing that one should instead "hear all sides" (ibid.). Rather than embracing adversarial systems that pit two notions of justice against each other, he maintains, we should promote dialogue between these multiple notions of justice, which can be achieved through institutional mechanisms that operate on the principle of consensus building.

I now view the process of implementing the Forest Rights Act as a method of consensus building. In order to claim forest rights, it is imperative that the forest rights committees be fully functional in every village and that they include different members

from the village, including women. I hope to experiment by using this authority (which is required to collect and determine the nature and extent of the claims) as a platform for dialogue between different communities. Since the struggle for community forest rights will require cooperation among the various communities, the forest rights committees can serve as a space where this cooperation is negotiated. To help the communities achieve such cooperation, I will need to shift my role from lawyer to mediator. Serving as a mediator will require that I begin to understand the different interests at play behind forest rights claims and work toward a common platform where the assertion of rights can take place in an equitable manner.

The Forest Rights Act was passed in 2006 with the intention of addressing the historical injustices faced by forest dwellers, and the forest rights committees offer the opportunity for different communities to come together to express this historical injustice and to share their views. The book *Practicing Therapeutic Jurisprudence* argues that the process of legal implementation should accompany a healing process that allows personal differences to also be addressed (Stolle, Wexler, and Winick 2000). With this in mind, my plan for implementing the Forest Rights Act within the three villages will attempt to bridge the divide between the different communities by focusing on their common legal interest of gaining forest rights and tying this interest to the institutional mechanisms for its realization. However, I will have to reflect more on what the mechanics of this process might be.

I have also decided to move away from the legal strategy of filing a public interest litigation or approaching the High Court. Instead, I am now negotiating with the Forest Department on a case-by-case basis regarding the lack of fulfillment of relocation conditions that were promised. In terms of my project deliverables, I continue to work toward them but with the knowledge that building consensus is the guiding principle in my effort to implement the Forest Rights Act. KRAPAVIS has seen the value in such an approach and will be working closely with us in operationalizing our attempt to innovatively implement the Forest Rights Act.

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CHAPTER 5
The Dispute over the “Heart
of the World”:
Indigenous Law Meets Western
Law in the Protection of Santa
Marta’s Sierra Nevada

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Four Indigenous Peoples, Two Laws, and One Territory

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The Dispute over the “Heart of the World”: Indigenous Law Meets Western Law in the Protection of Santa Marta’s Sierra

This chapter tells the story of four indigenous peoples that have used a combination of indigenous law and Western law to defend their territory. We explore how the Kogi, Arhuaco, Wiwa, and Kankuamo peoples of Santa Marta’s Sierra Nevada in northern Colombia have used these two legal systems to protect one of their sacred sites: Jukulwa.

Specifically, we explore what happens when two legal systems are combined in order to prevent the exploitation of a territory that has been the ancestral home of indigenous peoples. Drawing on two particular experiences—the struggle for land and a case demanding protection of the right to free, prior, and informed consent (FPIC)—we portray the various impacts that can result from the simultaneous use of two legal systems with different foundations, practices, concepts, timeframes, and institutions. These impacts are related to indigenous identity, the inclusion of women’s voices in indigenous political decisions, and the place that the right to FPIC occupies in indigenous mobilization.

The central theme of this chapter is also a reflection of ourselves, the authors. Together, we represent the two legal systems explored herein: Omaira was born in the Atánquez community, is an indigenous Kankuamo woman, studied law at the Popular University of Cesar, and is a coordinator at the Indigenous Legal Aid Clinic of the Kankuamo Indigenous Organization (OIK, for its Spanish acronym). Carlos Andrés was born in Bogotá, studied law, and is a researcher at Dejusticia. Our two distinct origins allow the text to emanate from two distinct spaces—indigenous law

and nonindigenous law—in order to depict the struggle of the indigenous peoples of Santa Marta’s Sierra Nevada.

This chapter is divided into five sections. The first provides an overview of the Sierra and its inhabitants. The second section presents the Sierra from the perspective of both indigenous law and Western law and shows how the use of these two legal systems served as a catalyst for reconstructing Kankuamo identity. The third section, through Omaira’s biographical account, focuses on the experience of the Kankuamo people and discusses how they were able to avoid physical and cultural extinction by utilizing these two laws. The fourth section explores how the Kankuamo people and three other peoples of the Sierra appropriated Western law through the creation of two institutions that facilitate the intersection between indigenous and Western law: the OIK and the Indigenous Legal Aid Clinic. In this section, we argue that the fusion of the two legal systems had an unexpected effect on the life of the indigenous peoples, whereby women’s participation in political decisions was strengthened. In the fifth section, we explore the Puerto Brisa project, which involves the creation of a port and a duty-free zone, and how the indigenous peoples have used the right to FPIC to protect their territory. We demonstrate that the mixture of indigenous and Western law has generated unexpected results for indigenous peoples: at the same time that it has allowed them to strengthen their cultural, political, and spiritual organization, it has also prevented them from protecting their territory. Finally, in the chapter’s conclusion, we discuss how the above panorama is still in the process of being created—in other words, it is an unfinished story that is still being told within the sacred territory of the Sierra.

The Sierra Is the Heart of the World

What is the meaning of the Sierra Nevada of Santa Marta? The indigenous Kogi, Arhuaco, Wiwa, and Kankuamo peoples, the region’s ancestral inhabitants, do not have a simple answer to this question. Some, like Jaime Luis Arias, technical secretary of the Cabildo Territorial Council,¹ believe that “the Sierra means a

1 Although *cabildo* used to refer only to a type of indigenous

sacred home, the heart of the world, represented in a territory, in a system.”² Others, like Crispín de Jesús, *cabildo menor* of the Atánquez community of the Kankuamo people, believe that “the Sierra is the strengthening element of the indigenous peoples. The Sierra Nevada is the heart of the world, where we were left from the beginning to guarantee the perpetuity of humankind.”³ Others, like Pedro Loperena, believe that “all of the Sierra is sacred: from the seashore to the mountain tops . . . so the Sierra Nevada is considered the heart of the world.”⁴ Despite their nuances, these ideas are essentially the same: the Sierra Nevada is the heart of the world.

Serankua, creator of the world, entrusted the indigenous peoples of the Sierra with caring for and protecting the heart of the world, on whose well-being all of humanity depends. To exemplify the teachings of Serankua, Juan Aurelio Arias, coordinator at the Environmental Commission of the Kankuamo People, explained to us that “if you analyze yourself as a body—woman, man—and detect where the heart is, then you care for your heart, you protect it.”⁵

To arrive to the heart of the world, one must travel to northern Colombia to the area where the departments of Magdalena, Cesar, and La Guajira meet. The tops of the Sierra are very high: just 42 kilometers from the Caribbean coast, the Sierra is 5,775 meters above sea level (Fundación Pro-Sierra Nevada de Santa Marta 2014b). As Jaime Luis Arias told us, in the Sierra’s upper region, in the snow-capped peaks of Cristóbal Colón and Simón Bolívar,

council, over time, this term has also come to refer to the individual representatives themselves. Some populations, such as the Kankuamo, have an internal political structure that differentiates between the *cabildo gobernador* (the council’s governor, also known as the *cabildo mayor*) and *cabildos menores* (representatives).

2 Interview with Jaime Luis Arias, technical secretary of the Consejo Territorial de Cabildos, March 17, 2013, Atánquez.

3 Interview with Crispín de Jesús, *cabildo menor* of the Kankuamo people, March 17, 2013, Atánquez.

4 Interview with Pedro Loperena, human rights coordinator of the Wiwa Yugumaiun Bunkuanarrua Tayrona Organization, March 12, 2013, Valledupar.

5 Interview with Juan Aurelio Arias, coordinator at the Environmental Commission of the Kankuamo People, March 17, 2013, Atánquez.

there exist “lakes, our spiritual mothers and fathers . . . which are sacred sites for the peoples of the Sierra.”⁶

Safeguarding the Heart of the World

Fulfilling Serankua’s instructions, the indigenous peoples of the Sierra have made great efforts to protect their territory. One of the tools that they have been using for five decades is Western law, the law created by the *hermanos menores*.⁷ Since the indigenous peoples, or *hermanos mayores*, and the *hermanos menores* organize the world in different forms, the Sierra can be seen as having two forms of organization—and indigenous peoples in the region have drawn on both forms in their struggle. For indigenous peoples, the Sierra is one land; for Western law, it is demarcated between indigenous *resguardos* (collectively owned indigenous territories) and national parks.⁸ The differing conceptions of territory have also generated distinct visions about the boundaries of the Sierra.

The indigenous populations are the owners of three *resguardos* in the Sierra. The first is the Indigenous Reserve of the Sierra Nevada, which was established by the Colombian Agrarian Reform Institute (INCORA, for its Spanish acronym) in 1974 with an initial area of 185,000 hectares. Under pressure from indigenous populations, in 1983 the government added 10,900 hectares to the territory, creating the Resguardo Arhuaco (Fundación Pro-Sierra Nevada de Santa Marta 2014a).

The second is the Kogi Malayo Arhuaco *resguardo*, created in 1980 by INCORA, which titled 363,849 hectares to indigenous populations. Since the title did not include an outlet to the sea,

6 Interview with Jaime Luis Arias, technical secretary of the Consejo Territorial de Cabildos, January 23, 2014, Valledupar. Unless otherwise noted, all quotations from Jaime Luis in this chapter derive from this interview.

7 *Hermanos menores* (younger brothers) is the name that the indigenous peoples of the Sierra Nevada of Santa Marta give to nonindigenous people. Other names include *hermanitos menores* (younger little brothers), *blancos* (whites), and *occidentales* (Westerners).

8 The Sierra Nevada has two national natural parks: Tayrona National Park, with a territory of 15,000 hectares, and the Sierra Nevada de Santa Marta National Natural Park, with a territory of 383,000 hectares (Fundación Pro-Sierra 2014a; Rodríguez 2010). The Sierra also has a forest reserve zone. This zone, together with the two natural parks, constitutes 90% of the Sierra’s territory (Rodríguez 2010).

MAP 5.1

The Sierra Nevada of Santa Marta



SOURCE: Dejusticia

indigenous peoples later pressured the government to give them such an outlet. Thus, in 1994, INCORA expanded the *resguardo* by 19,200 hectares (ibid.).

With this new title, the *hermanos mayores* gained access to the sea through the mouth of the Palomino River (Uribe 1998; Schlegelberger 1995). The sea is a critical resource for the indigenous peoples of the Sierra. On the beach, they select and gather shells, which they later place over fire and then crush and grind. The men then place these shells, together with coca leaves, inside a hollowed-out gourd to *mambear la palabra*.⁹

9 This involves placing the coca leaf together with the burned shell into one's mouth to inspire thinking and connect with Mother Earth.

The third collective territory is the Kankuamo Resguardo, located north of the city of Valledupar. With INCORA's creation of this *resguardo*—through Resolution 12 (Resolución 12) of April 10, 2003—one of the strongest historical claims of the Kankuamo people was fulfilled, guaranteeing them the right to their territory. Jaime Enrique Arias, *cabildo gobernador* of the Kankuamo people, described the process of creating the *resguardo*:

The process for the *resguardo* began in 1998 At the beginning, territorial difficulties were identified with the people and thus INCORA determined that in order to create the *resguardo*, it had to coordinate with other populations, and this process lasted some three years. Afterward came the process of internal organization with the Kankuamo so that the private Kankuamo owners would hand over their lands to the collective; this process was completed in 2002. But what happened was that from 2000 onward, the armed conflict intensified and prevented us from having meetings, and there were many difficulties. Even when we were going to delimit the lower part of the *resguardo*, the commission that was doing the delimiting was . . . harassed by an army helicopter. People had to hide in their houses because they had heard that this was a guerrilla group. From that moment on, the process could not be continued and the study was completed on the IGAC's [Geographic Institute Agustín Codazzi's] maps. That's how the mapping ended—on paper instead of on the territory, because of the war.¹⁰

Comparatively, the Kankuamo people were the last indigenous population in the Sierra to receive their collective title. This is due in part to the Colombian government's invisibilization of this population between the 1940s and the mid-1980s. According to the official story, the Kankuamo disappeared after assimilating with campesinos living within their ancestral territory, particularly the Atánquez community. In fact, Jasaima Talco (1994) has pointed out that Gerardo Reichel-Dolmatoff, an Austrian anthropologist who carried out substantial research in Colombia in the latter half of the 1900s, concluded that the Kankuamo people had disappeared.

Unlike what Reichel-Dolmatoff believed, “we Kankuamo were in the process of identifying ourselves, realizing that we were

10 Interview with Jaime Enrique Arias, *cabildo gobernador* of the Kankuamo people, January 22, 2014, Chemesquemena. All quotations from Jaime Enrique in this chapter derive from this interview.

indigenous,” said Yesica Pacheco of the Kankuamo Indigenous Organization one day as we entered the indigenous community of Guatapurí. During this *renacer kankuamo*—as the population’s process of political and identity resurgence is known—the participation of key Kankuamo leaders and the use of Western law was essential.¹¹

The struggle for land led this indigenous group to self-identify as Kankuamo. As Hermes Bacilio, one of the leaders of the Atánquez community, recalls, the indigenous Arhuaco wanted to appropriate the “La Finlandia” ranch located in the Atánquez jurisdiction.¹² Upon realizing that they stood to lose their land, the Kankuamo strengthened their indigenous identity, thus propelling the resurgence. *Cabildo gobernador* Arias explained to us that

we had a process in which people began to reflect on the need to call themselves indigenous: the issue of the struggle and the protection of territory because they were seeing us as settlers and wanted to kick us out of the land, and they were buying properties for other indigenous populations, which were being recognized under this banner.

The simultaneous use of indigenous law and the law of the *hermanos menores* led to two forms of demarcation in the Sierra: one based on the spiritual tradition of indigenous peoples and another based on Colombian domestic law. For the indigenous, the Sierra’s boundaries are defined by the spiritual border known as the Línea Negra. The Línea Negra, or black line, constitutes the border used by Mother Earth to separate the *hermanos mayores* from the *hermanos menores*, and was one of the central elements used by the indigenous populations of the Sierra to define their ancestral territories (Serje 2008; Tracy 1997). José Moscote, *mamo*¹³ of the Wiwa people, believes that “the Línea Negra marks the boundary of the territory given to us by our mother The

11 Hermes Arias, Jaime Enrique Arias, Numas Arias, Rocibeth García, Alfonso Gutiérrez, Armando Romero, and Adelaida Sarmiento participated in the process.

12 Interview with Hermes Bacilio, authority of the Atánquez community, January 23, 2014, Valledupar.

13 *Mamos* are the spiritual authorities of the indigenous populations of Santa Marta’s Sierra Nevada. Among their main responsibilities is interpreting the Law of Origin.

hermanos menores have not understood its meaning or the fact that it should not be interfered with.”¹⁴

Although the Colombian government has recognized the *Línea Negra* as the boundary of indigenous territory in the Sierra, its delimitation has sparked a debate between the state and indigenous communities. For the state, the line is a series of points that can be identified on a map. For the indigenous, the *Línea Negra* is a spiritual space that cannot be demarcated in such a black-and-white manner.

The combination of the two sets of laws led to the territory’s organization in two distinct forms: one according to the indigenous peoples’ spiritual vision and the other according to the state’s legal arrangements. Like the territory, the identity of the Kankuamo people was strengthened through this combination. Their identity was encouraged by spiritual and cultural claims at the same time that it was strengthened by the legal struggle to obtain collective title.

The Kankuamo People: Standing among Sacred Sites, Bullets, and the Law

The Kankuamo people live in the lower part of the Sierra. For this reason, the Kankuamo Resguardo has historically stood in the crossfire between various illegal armed actors fighting to appropriate the land for their own purposes. Scores of Kankuamo women and men have died at the hands of soldiers, guerrilla members, and paramilitaries who have punished them for their supposed collaboration with enemy forces. During the 1990s, more than 400 Kankuamo individuals were assassinated, and hundreds of families were displaced to Santa Marta, Valledupar, Riohacha, and Bogotá.

Just as its people, Mother Earth has also been a victim of the armed conflict. In fact, indigenous Colombian populations were the ones who invented the idea of “territory as a victim of conflict”—a concept that was included, for example, in the 2011 Victims’ Law for indigenous populations (Decreto Ley de

14 Interview with José Moscoto, *mamo* of the Wiwa people, October 16, 2012, sacred Wiwa site of Multego.

Víctimas No. 4633 de 2011).¹⁵ In the Sierra, some of the sites most afflicted by the armed conflict have been the sacred sites. For Enrique Vega, an indigenous Wiwa, "Wherever a *mamo* makes an offering to the spirits is a [sacred] site; the site is listening to you, it is your mother."¹⁶

In Atánquez, the community with the largest number of Kankuamo individuals, lives Saúl, a spiritual leader. The sacred site that he cares for is five minutes away from the main plaza, situated between a house and an evangelical church. To enter the site, one must request permission from the spiritual leader and Mother Earth. With Saúl, we crossed the invisible line separating the everyday world from the sacred, and we gathered around a fire, sitting on tree trunks, rocks, and an old jungle gym.

As Saúl picked apart a cotton boll, he explained how the intangible effects of megaprojects in the Sierra are invisible but are directly affecting Mother Earth and human beings. He handed small pieces of the cotton boll to those of us gathered around the fire. When everyone had a piece in their hands, Saúl asked us to place the thoughts that we had prior to entering the sacred site into the cotton. Cotton bolls are the offering given to Mother Earth so that she can store thoughts and balance the forces of the *hermanos mayores* and the *hermanos menores*.

The majesty of Saúl's sacred site is based on the fact that this is where Mother Earth communicates with the *hermanos mayores*. For the Sierra's indigenous populations, sacred sites unite the spiritual world with the material one and allow spiritual authorities to interpret the Law of Origin. Political authorities of the Sierra believe that

sacred sites are part of the body of Mother Earth. Each sacred site is a living being, a spiritual order, and they are interconnected like the nervous system of the human body. That is why, when a sacred site is damaged or affected, we say that . . . it is like cutting off a hand, or

15 Article 45 of the decree establishes that "territory, understood as the living integrity and sustenance of identity and harmony, in accordance with the cosmovision of the indigenous peoples and under the special and collective bond that they maintain with it, suffers damage when it is violated or desecrated by internal armed conflict and its associated and underlying factors."

16 Interview with Enrique Vega, Wiwa indigenous member, March 14, 2013, El Caney.

like damaging a woman's uterus, affecting the entire body. (Cabildo Territorial Council 2012)

There are thousands of sacred sites in the Sierra like the one cared for by Saúl. One of them is the sacred hill of Jukulwa, where leaders consult spiritual ancestors. Jukulwa is located in the northern slope of the Sierra, in the Caribbean sea, between the mouths of the Lagarto and Cañas Rivers, near a road that connects to the cities of Santa Marta and Riohacha. The hill is surrounded by coastal lagoons, former riverbeds, and swamps that make up one of Colombia's most important mangrove zones (Gonawindua Ette Ennaka 2009). Yet, as we will explore later in this chapter, these sacred sites have been damaged by *hermanos menores* seeking to appropriate, both legally and illegally, the territory and its natural resources.

From Sacred Sites to the Courts: The Law as a Tool of Survival

For over two decades, the state ignored the human rights abuses committed against the Kankuamo people and the threats to their sacred sites. Only in 2002 did the Ombudsman's Office of Colombia issue a resolution—Defense Resolution No. 24 (Resolución Defensorial No. 24)—acknowledging the humanitarian crisis of the Kankuamo and establishing that “the indigenous Kankuamo people of the Sierra Nevada are one of the most affected by the actions of armed groups, given that numerous crimes against the lives and integrity of a good number of indigenous have been committed.”

Because the Ombudsman's Office's actions were ineffective, allowing human rights violations to continue unabated, the Kankuamo decided to turn to international law to protect their lives and spread awareness of their situation. “We wanted a megaphone so the world would listen and learn about what was happening to us, that we were being annihilated,” Rosa Manuela Arias, Kankuamo leader, told us one day during a group discussion.¹⁷

17 Statement by Rosa Manuela Arias, Kankuamo leader, group discussion, June 22, 2013, Atánquez.

Thus, the Kankuamo turned to the inter-American human rights system. Together with the National Indigenous Organization of Colombia (ONIC, for its Spanish acronym) and the José Alvear Restrepo Lawyers’ Collective, the OIK requested precautionary measures from the Inter-American Commission on Human Rights to protect the lives of the Kankuamo people.

In September 2003, the commission granted these measures. Importantly, when it issued them, it recognized that “in the first half of 2003, 44 Kankuamo were assassinated. . . . In addition, there were displacements of the indigenous population, as a result of the constant acts of violence against the community” (Inter-American Commission on Human Rights 2003, para. 27). However, *cabildo gobernador* Jaime Enrique Arias believes that these measures’ effectiveness was limited because

the assassinations continued. After [the Inter-American Commission on Human Rights] issued the measures, the same day that cooperative process began, the army presented an alleged guerrilla killed in combat who was actually a member of the Kankuamo people. [He was Juan Enemias Daza], and up to now, it has been demonstrated that this was a “false positive” of the army and paramilitaries, and this case is currently before the commission. And in October [2003] there was a massacre in a community between Haticos and Murillo, known as Hoya, where five indigenous Kankuamo were assassinated.

In light of the ongoing violence, the commission referred the case to the Inter-American Court of Human Rights, which ordered provisional measures to protect the Kankuamo people the following year.

The court ordered the state to “adopt, forthwith, the measures necessary to protect the life and the integrity of the person of all members of the communities that comprise the Kankuamo indigenous people.”¹⁸ One of the main impacts of the provisional measures was that the armed actors changed their fighting tactics: they decreased the number of assassinations but increased mass detentions.¹⁹ In 2011, after seven years and five resolutions

18 Inter-American Court of Human Rights, *Provisional Measures regarding Colombia: Matter of Pueblo Indígena de Kankuamo*, July 5, 2004, at 7.

19 Interview with Jaime Luis Arias, technical secretary of the Consejo Territorial de Cabildos, January 23, 2014, Valledupar.

from the Inter-American Commission, the Inter-American Court removed the provisional measures (Medina 2011).

At the national level, the Colombian Constitutional Court also made pronouncements on the Kankuamo situation. In its Auto 004 of 2009, the court recognized that the Kankuamo people “have been perhaps the hardest hit of the four peoples of the Sierra by the armed conflict. . . . In 6 years, there have been 228 selective political assassinations of leaders, *mamos*, women, and others; creating 200 widows, 700 orphans, in complete impunity.”²⁰

These three judicial interventions acknowledging the Kankuamo people’s situation and ordering the state to protect their rights are a reflection of the Kankuamo people’s efforts to protect their lives. However, evaluating the effectiveness of the tribunals’ decisions is difficult, for at the same time they guaranteed the protection of human rights, they did nothing to halt the expansion of extractive projects in the region. Jaime Luis Arias of the Cabildo Territorial Council explained to us that the regional human rights system

was useful and important despite the fact that . . . all of the expectations have yet to be fulfilled. In that moment, it was a relief . . . [because it helped] stop things for a while, a bit less assassinations . . . “Don’t kill us, for we have [precautionary] measures!”

Although spiritually protected by their sacred sites, the indigenous people had to survive gunfire from the army, guerrillas, and paramilitaries, all of whom were eager to evict them from the heart of the world.

As we have seen, the indigenous peoples of the Sierra resorted both to spiritual authorities and to the courts in order to protect their right to life and their territory. The mixture of these two systems led to changes in the logic behind the conflict and at the same time pushed the Kankuamo political process forward. These unanticipated effects show the multiple facets of the indigenous peoples’ strategy of combining two systems.

20 Constitutional Court, Auto 004/09, January 26, 2009.

“We Are Fighting for Our Territory and Our Lives”: The Kankuamo Indigenous Organization and the Indigenous Legal Aid Clinic

While an account was being constructed at the national and regional levels to protect the Kankuamo people, at the local level, the Kankuamo sought refuge in the OIK. The OIK was founded during the First Kankuamo Indigenous Congress, which was held in Atánquez in 1993 with two objectives: to protect the territorial rights of the Kankuamo and to strengthen indigenous identity, which “did not appear in 1993 but rather has always been part of our fathers, grandfathers, great-grandfathers—all of us are indigenous Kankuamo.”²¹

The OIK seeks to teach the Kankuamo people, through three institutions, about the rights recognized by the Colombian state. The first of these institutions is the Kankuamo Human Rights Commission, created by Kankuamo leaders in 2005. Its central task is to identify and document human rights violations (for example, by sending reports to the Inter-American Commission on Human Rights) and to initiate legal proceedings to protect the Kankuamo.

The second institution is the Freddy Antonio Arias School, a school of “own-law” attended by indigenous leaders to learn about their own indigenous law and Western law. This school is a tribute to Freddy Arias, a Kankuamo leader who “confronted the armed conflict and took responsibility for the defense of our rights as indigenous people,” explained Shirley Arias, a lawyer at the Indigenous Legal Aid Clinic.²² As Freddy would always say, “Better that they kill us speaking than kill us quietly.” And thus it was: in August 2003 in Valledupar, a group of paramilitaries assassinated Freddy as he rode his bicycle, as he did each day, from the Indigenous House (a meeting place for indigenous communities) to his home.

The third institution is the Indigenous Legal Aid Clinic, established in 2010 by the OIK together with the Popular University of

21 Interview with Shirley Arias, legal advisor of the Kankuamo Indigenous Organization, January 22, 2014, Chemesquemena.

22 Ibid. All quotations from Shirley in this chapter derive from this interview.

Cesar in an effort to protect the territory and rights of the Kankuamo people. “We had to strengthen our defense of our rights. . . . In addition, there were a lot of Kankuamo law students who were providing their services in other institutions,”²³ Yanitza Carrillo, a Kankuamo lawyer who directed the clinic for three years, told us. Legal aid clinics were initiated by President Misael Pastrana through Decree 196 of 1971 (Decreto 196) so that law students could offer their expertise to individuals who could not afford professional lawyers.

The Indigenous Legal Aid Clinic not only serves as a training space for indigenous lawyers but also gives lawyers the opportunity to fight for the rights of indigenous peoples of the Sierra. For Shirley Arias, the clinic is “the main foundation for my training as an indigenous lawyer. . . . My life is there. . . . I wouldn’t be anything [otherwise]. It makes me who I am.” Since its founding, twelve indigenous lawyers have been part of the clinic.²⁴

The Indigenous Legal Aid Clinic: Legal Decisions, Women’s Voices, and Western Law

The legal aid clinic is located in Valledupar’s Indigenous House, which is the meeting place for the four indigenous peoples of the Sierra. Each day, the Indigenous House receives visits from indigenous individuals seeking legal advice, medical assistance, or a space to sell their artisan work.

Over time, the legal aid clinic has become a critical force in integrating Western law into the Kankuamo people’s legal and political claims. Yesica Pacheco described her work at the clinic:

At the beginning, I didn’t understand anything. . . . When they invited me to the organization, the *cabildo* told me, “Maybe you’ll like the process, you’ll stay, and you can be a lawyer in the future. Because in the future what we are going to need here are lawyers to defend our territory.”²⁵

23 Interview with Yanitza Carrillo, ex-coordinator at the Indigenous Legal Aid Clinic, March 2013, Atánquez.

24 These lawyers are José Abello, Shirley Arias, Luis Calderón, Omaira Cárdenas, Yanitza Carrillo, Kathy Dangón, Iván Lúquez, Orlando Maestre, Yesica Pacheco, Enrique Peñalosa, Charlie Rodríguez, and Ricardo Romero.

25 Interview with Yesica Pacheco, legal advisor of the Kankuamo

The Indigenous Legal Aid Clinic has also become a central space for dialogue among the four peoples of the Sierra, and has helped transform gender relations and the language used in the heart of the world. As Jaime Luis Arias explained:

The Kankuamo people have an influence on the Cabildo Territorial Council through the Indigenous Legal Aid Clinic. . . . Although we have our own laws, there are certain spaces that call for understanding and advice with regard to the external world, in Western law. . . . Thus, political and spiritual positions can be complemented with the legal side, and this side is what companies and the state latch on to. . . . The legal aspect creates a bridge between our part and the Western part . . . and the clinic created that assistance.

Before the creation of the clinic, decisions in the Sierra were made in two key spaces: the spiritual space and the political space. In the spiritual area, decisions are made by *mamos* and *mayores* (elders) through an interpretation of the Law of Origin. The Law of Origin is an immutable norm that defines indigenous peoples’ lives and their relation with Mother Earth.

The political space is the Cabildo Territorial Council (CTC), a territorial federation established by political authorities of the four indigenous peoples of the Sierra in 1999. The CTC is made up of four *cabildos gobernadores* (one for each of the populations) and their support teams.²⁶ Their central task is to engage in dialogue with the *hermanos menores*.

The Indigenous Legal Aid Clinic created a third space for decision making: one related to the use of Western law. With indigenous individuals trained in the law, the populations of the Sierra have been able to translate their ancestral claims into the legal language of the state.

The clinic has also modified gender conceptions as they exist in the Sierra. Traditionally, decision making and political representation has been the exclusive domain of men. For example, the Kankuamo people have had only male *cabildos gobernadores*. Nevertheless, the legal aid clinic has hired primarily female

Indigenous Organization, January 21, 2014, Valledupar.

26 As of January 2014, the *cabildos gobernadores* were Jaime Enrique Arias (Kankuamo), Víctor Loperena (Wiwa), Rogelio Mejía (Arhuaco), and José de los Santos Sauna (Kogi).

Kankuamo lawyers. For clinic lawyers Shirley, Omaira, and Yésica, gender relations began to change after the creation of the clinic. As Shirley noted, at the beginning, meetings with the CTC were “uncomfortable moments because our presence caused a lot of suspicion. People asked what good the women were doing here—they looked at us like we were strange insects.” With the work that female lawyers at the clinic have done on behalf of communities in the Sierra, the feminine identity of Mother Earth took root, which strengthened indigenous mobilization. Indeed, “the Sierra is experienced in the sense of being a woman, so if we say that women are Mother Earth, we should stop undervaluing women in political spaces.”²⁷

The Kankuamo women entered decision-making spaces by putting into practice the ancestral idea of “thinking the word” (*pensar la palabra*). According to indigenous tradition in the Sierra, women are responsible for weaving the woolen *mochilas* (sacks) that men use to store their gourds and coca leaves, and which all community members use to carry everyday items. Omaira’s mother used to explain to her that weaving means “intertwining one idea with another, it means weaving your thoughts because indigenous culture emphasizes the spoken word. . . . When you are weaving, you are creating that idea.”²⁸ After women began working at the legal aid clinic—and from there, the CTC—the sewing needle merged with the pencil and the sheep’s wool with paper, as women began to write legal documents about indigenous peoples struggling to defend their territory.

The life of Omaira Cárdenas is emblematic of Kankuamo women’s leadership. Omaira was born in Atánquez and is the daughter of a Kankuamo woman and an Ecuadorian immigrant. She studied law at the Popular University of Cesar, which provided her with the opportunity to strengthen her identity as an indigenous Kankuamo:

I always knew that I was a Kankuamo, but I didn’t understand it. . . . I mean, it’s an existential thing—you know that something exists but you don’t actually experience it because you don’t understand it. So I

27 Interview with Omaira Cárdenas, coordinator at the Indigenous Legal Aid Clinic, January 21, 2014, Valledupar.

28 Ibid.

went through this process during my time at the university. . . . I started working at the [OIK], and while I studied and worked, I started to form an answer to the big question in my life: why I was a Kankuamo, what was it that united me to that culture.²⁹

Since joining the clinic, Omaira has dedicated herself to translating the interests of the indigenous peoples of the Sierra into the language used by the state. Each day, she assists indigenous men and women who come to the clinic in search of protection. In her seven years at the clinic, she has worked on criminal cases, family cases, and above all, territorial claims based on the right to FPIC.

The Indigenous Legal Aid Clinic has also modified the language spoken in the heart of the world by integrating Western legal concepts into the Damana, Ikú, and Kakachuka languages.³⁰ For example, in March 2013, members of the Wiwa people met to discuss the effects of the Ranchería Dam. That night, as community members gathered around the campfire, the Wiwa language underwent some modifications. In the Wiwa language, there is no translation for words like “state,” “megaproject,” or “fundamental rights.” Thus, whenever a community member was speaking and had to refer to the law of the *hermanos menores*, the fluid Damana that they spoke was interrupted by Spanish terms.

As we have seen, the Kankuamo people have created several institutions to protect their rights: the Human Rights Commission, the school of “own law,” and the legal aid clinic. In the process, the combination of the two legal systems has had the unanticipated effect of strengthening women’s voices in the political arena. The cases of Omaira, Yanitza, and Shirley exemplify how training in the law of the *hermanos menores* has become an indispensable tool for working at the Indigenous Legal Aid Clinic and for defending indigenous territory.

The Right to Consultation and the Puerto Brisa Project

Of all the words introduced into indigenous language, the one most referred to was “prior consultation” (*consulta previa*). The

29 Ibid.

30 Languages of the Wiwa, Arhuaco, and Kankuamo peoples.

right to free, prior, and informed consent allows indigenous peoples' voices to be heard when these communities stand to be affected by government decisions. The main reason that the right to FPIC began to be discussed was because indigenous territories in the Sierra were being attacked by various companies seeking to appropriate the area's natural resources. Companies need permits from the state before they can exploit the land, and the state is obligated to first consult with indigenous populations before issuing these permits.

Parallel to the creation of the Indigenous Legal Aid Clinic, about 300 kilometers from Valledupar, Puerto Brisa was being constructed on one of the most important sacred sites in the heart of the world: Jukulwa. The threat posed to indigenous peoples by the port's construction led to the clinic becoming a critical player in defending indigenous territory via the right to FPIC.

Puerto Brisa is a private project that includes, among other things, the construction of a deepwater port, a duty-free zone, and a coal terminal (Zona Franca Brisa 2014). Despite several earlier attempts to build the port, the first successful effort occurred only in 2005. In December of that year, the Ministry of Environment, Housing, and Territorial Development granted the company the environmental license, which included a thirty-year concession and the permit to construct the port.

Unlike previous attempts, this one was successful because, in 2005, the Ethnic Groups Directorate at the Ministry of the Interior and Justice certified that there were no indigenous populations living in the port's construction zone and that a prior consultation was thus unnecessary. The ministry's granting of the license to the company sparked fear among indigenous communities because it "awoke" the sacred site, which began to demand increased spiritual offerings, and because it blocked indigenous authorities' access to the site. Among the effects most remembered by the indigenous was the death of a *mamo* named Valencia: "When construction on Jukulwa began, a *mamo* . . . said that he was going to die because they were damaging his father and mother. In other words, he was very affected, spiritually and physically. This *mamo*, as well as others, died because of this heavy impact."³¹

31 Interview with Jaime Luis Arias, technical secretary of the Consejo

In 2006, the ministry suspended the environmental license due to the impact of the port’s construction on an ecologically important wetland area. The ministry ordered the company to undertake two tasks before it could continue with the construction. First, the company had to reverse or mitigate the impacts caused to the wetlands. Second, it had to carry out a cooperative process with the indigenous peoples so that these communities and the company could agree on a mitigation mechanism regarding the project’s impacts on indigenous spiritual practices carried out in Jukulwa (Mora Rodríguez 2010).

As a result of the ministry’s order, a meeting was held in the village of Dumingueka, in the department of La Guajira. During the meeting, the company attempted to buy indigenous votes in favor of the port’s construction by handing out gifts, such as cattle.³²

According to Kankuamo *cabildo* Arias, the CTC had understood from the ministry that the purpose of this meeting would be “to discuss a methodology that was appropriate to our cultural principles”—in other words, to establish a framework, together with the company and the government, for how to move forward with the consultation process. However, he noted, “the surprise that we received was that the meeting was not to discuss methodology but rather to initiate the prior consultation process [right then and there].” The government’s change of plans upset indigenous leaders, who believed that the government was not acting in good faith and was violating the agreements that it had reached with the communities.

In that meeting, the company and the government promoted a vision that still persists regarding the indigenous peoples:

At that meeting was where I heard, for the first time, the idea that indigenous populations were opposed to the country’s development. The company didn’t understand that indigenous leaders were defending their spiritual territory that was being affected. . . . What were they going to understand if by that time they had already destroyed Jukulwa?³³

Territorial de Cabildos, January 23, 2014, Valledupar.

32 Ibid.

33 Interview with Shirley Arias, legal advisor of the Kankuamo In-

From the perspective of the *hermanos menores*, the indigenous peoples' claims went against economic progress and the region's development; this reading, however, hides the indigenous peoples' history in the region and their spiritual connection with the land.

After several meetings—which the indigenous communities did not attend because they considered this process of coordinating a mechanism for accessing the sacred site a violation of their right to FPIC—in 2008, the ministry lifted the precautionary measure that it had imposed on the company. With this decision, the ministry gave the company the green light to continue constructing the port (Rodríguez 2010, 244). For the indigenous, the lifting of the suspension marked the beginning of a long struggle to protect Jukulwa: “That day, we realized that we were up against a giant that was being driven by the most powerful forces on the [Colombian] coast and in the government.”³⁴

In 2008, the CTC, represented by the Latin American Institute for an Alternative Society and an Alternative Law, filed a *tutela* (protection writ) alleging the violation of its fundamental right to FPIC. The Colombian Constitutional Court ruled on the claim in 2010, ordering the Ministry of Environment, Housing, and Territorial Development to conduct “a consultation process with indigenous authorities from the Sierra Nevada, by means of an appropriate procedure, previously coordinated with said authorities, in order to establish the impact that Puerto Brisa would have on these communities' cultural, social, and economic integrity.”³⁵

Two Consultations, Two Meanings: Traditional Indigenous Consultation and the Right to Consultation

In light of the court's order for a consultation process, the task of the Indigenous Legal Aid Clinic was to spread awareness of the meaning of the right to FPIC throughout the Sierra. This task demonstrated that the indigenous peoples' “legal tools consisted

indigenous Organization, January 22, 2014, Chemesquemena.

34 Interview with Yanitza Carrillo, ex-coordinator at the Indigenous Legal Aid Clinic, March 2013, Atánquez.

35 Corte Constitucional, Sentencia T-547/10, July 1, 2010.

of . . . our way of thinking and speaking, and the understanding that we have of the law of the *hermanos menores*.”³⁶ Thus, at a spiritual level, indigenous thought was fused with the meaning of the right to FPIC, and the CTC showed the state that it had the ability to participate as a player in the field of the *hermanos menores*.

The court’s order, however, overlooked two important elements: one related to the company and the other to indigenous peoples. With regard to Puerto Brisa, the court failed to see that “there were two parallel scenarios because [the company] was moving forward with the construction on the one hand and on the other hand was saying that it was going to consult with the indigenous peoples in light of the court’s order.”³⁷

The court also failed to acknowledge that the indigenous peoples have a different understanding of consultation from that of the *hermanos menores*. This meant that “during [internal] political meetings, we had to emphasize which type of consultation [i.e., indigenous or Western] we were referring to and why the [Western] consultation was important.”³⁸ Thus, the expansion of Western law throughout the Sierra led to resistance among some indigenous leaders, who advocated that indigenous communities oppose both the decision and the consultation process, given that a significant part of the sacred site had already been destroyed.

When the judgment was handed down, there was a huge discussion because the *mamos* were saying that the consultation should not be done like that, that the project was already underway, that it was not a consultation, that we shouldn’t go through with it. But some advisors recommended that since it was a court decision, the best thing was to honor it.³⁹

For spiritual authorities, the concept of consultation has other meanings. For them, consultation is rooted in the cosmogony

36 Interview with Omaira Cárdenas, coordinator at the Indigenous Legal Aid Clinic, January 21, 2014, Valledupar.

37 Interview with Jaime Luis Arias, technical secretary of the Consejo Territorial de Cabildos, January 23, 2014, Valledupar.

38 Interview with Juan Aurelio Arias, coordinator at the Environmental Commission of the Kankuamo People, March 17, 2013, Atánquez.

39 Interview with Jaime Enrique Arias, *cabildo gobernador* of the Kankuamo people, January 22, 2014, Chemesquemena.

born in the *ezwamas*, sacred sites where the organization of the communities is studied. The *mamos* are responsible for consulting the Law of Origin in order to interpret the precepts dictated by the spiritual world. Through this traditional consultation, the consequences of cutting a tree or destroying a site are discovered, since it is through this mechanism that Mother Earth communicates with the *hermanos mayores*.

Western Consultation and the Puerto Brisa Project

The legal proceedings against Puerto Brisa did not end with the Constitutional Court's ruling. In fact, this was just the first step of indigenous resistance to the construction of a port on their sacred site. With increased awareness of the right to consultation that had been spread by the CTC and the Indigenous Legal Aid Clinic, the indigenous peoples met with government representatives to commence the prior consultation process ordered in the 2010 ruling. The opening session was held in 2011 in Dumingueka, an indigenous community located in the territory of the Kogi people.

To arrive to Dumingueka, or the "sacred site of good things," one must exit the paved road and begin heading up a dirt road. The session began in the middle of a huge downpour that made it even more difficult for people to get there. In the words of Omaira:

[On the day of the event] we asked ourselves, What is going to happen? Who are we going to be up against? . . . The day of the truth, the day that we traveled, we were listening to the *cabildo*, who told us that we were up against a company with lots of money that basically had already constructed the port. . . . They didn't know that it was the prior consultation process and that in the process we were going to find out, we were going to learn.⁴⁰

At the meeting, many differences emerged between the indigenous populations and representatives of the company and state. First, while the Ministry of the Interior considered this session to mark the beginning of the project's pre-consultation process, the indigenous communities argued that the meeting was simply the first rapprochement. For a long while, the discussion centered on

40 Interview with Omaira Cárdenas, coordinator at the Indigenous Legal Aid Clinic, January 21, 2014, Valledupar.

whether the company "was going to comply with the commitment to discuss a methodology for undertaking the process, because it was saying that this was already a consultation, an idea that was also supported by the government, which was also saying that this meeting was already the consultation."⁴¹

At midnight, company representatives ended the meeting, announcing that it would be impossible to suspend the port's construction because the economic losses would amount to millions. Meanwhile, the indigenous representatives insisted that "the destruction of Jukulwa should be halted to be able to establish how the consultation will be carried out and to comply with the judgment."⁴² At that moment, the various participants' epistemological differences became evident: while the company saw millions of pesos, the indigenous communities saw the destruction of their sacred site and the assassination of their Mother Earth. While the company argued that halting the project would imply economic losses and the company's eventual bankruptcy, the indigenous peoples argued that the continuation of the megaproject would lead to irrevocable traditional and spiritual losses.

Another cultural difference between the indigenous peoples and the company was the understanding of time. Since the consultation process was related to a spiritual concern, the indigenous peoples believed that its duration should conform to the spiritual cycles of consultation with Mother Earth. For this reason, it was difficult for the CTC to define an exact duration of the consultation process with the company.

Throughout the prior consultation process, the CTC and the Indigenous Legal Aid Clinic used two strategies for protecting indigenous interests: one related to memory and another related to mapping. With regard to the first, the team from the clinic became the institutional memory of the process, writing down everything that happened during the sessions. The written records maintained autonomously by indigenous peoples recorded the agreements and disagreements with the company. When it was

41 Interview with Jaime Luis Arias, technical secretary of the Consejo Territorial de Cabildos, January 23, 2014, Valledupar.

42 Interview with Shirley Arias, legal advisor of the Kankuamo Indigenous Organization, January 22, 2014, Chemesquemena.

time to read the final official act, members of the clinic contrasted their account with that produced by the Ministry of the Interior. As Jaime Luis Arias noted:

At first, we wrote down everything that was said . . . to show the stage of discussion. . . . But at that time, we didn't believe that the acts would be so important. . . . The tense moments should be reflected in the act. But from what occurred in the meeting, the ministry didn't want to show everything that had been said, and from there it became important for us to show that it was difficult to reach an agreement. . . . You had to be alert to everything being said in the meeting so that one thing wouldn't be said while another was reflected in the act.

Second, the indigenous peoples of the Sierra organized a tour throughout the territory to identify the cultural, social, and economic impacts generated by the port's construction. They identified twenty-four sacred sites, including Jukulwa, that had been affected by the construction of Puerto Brisa. Jaime Luis Arias explained that epistemological differences between the indigenous peoples and the company became evident during the tour as well:

In forming the methodology for the tour, there was a discussion with the company about the names that would be used. We wanted it to be called "Tour of the Sacred Area of Jukulwa," but the company wanted to call it "Tours of the Project Area" because they did not see Jukulwa as a sacred site.

The Deception of Western Law

The prior consultation process transformed the lives of the indigenous peoples in the Sierra, especially the Kankuamo. On the one hand, the focus on the right to consultation displaced discussions about the protection of other fundamental rights. It also paralyzed the functioning of the indigenous peoples' internal justice system: since indigenous authorities were busy with meetings about the project and the right to FPIC, many cases that were presented to them were put on the back burner. And in the case of the Kankuamo, the consultation process overlapped with the process of modifying the Maku Joguiki ethno-educational model,⁴³ meaning that

43 This was the Kankuamo people's educational model for children. The main objective of this model was to include indigenous knowledge

they were unable to implement the educational project and thus missed an opportunity to have a system of intercultural education that would promote both Western and indigenous forms of knowledge.

On the other hand, Puerto Brisa’s construction on ancestral indigenous territory modified perceptions of the forms of knowledge important for defending this territory. Defending the heart of the world requires both spiritual guidance from traditional authorities and legal assistance from indigenous individuals who have studied Western sciences. Thus, the legal vocabulary, which had previously been seen as secondary in the claims of the indigenous communities, gained importance.

The reason that leaders trained in Western law were needed was because the hegemonic language of the state is “the language that the company speaks as well, and which allows us to build a bridge between the indigenous and the state.”⁴⁴ Therefore, the partnership between the CTC and the legal aid clinic was important for allowing indigenous communities to communicate their opposition to Puerto Brisa to the state.

As seen above, the indigenous populations’ use of two forms of law had unexpected consequences in two areas: the indigenous political process and the inner workings of the prior consultation process. In the indigenous political process, the fusion of the two legal systems changed gender relations. In the consultation process, the fusion transformed the language being used and discussions that had been taking place in the Sierra prior to Puerto Brisa.

The Story without an End: Prior Consultation and the Puerto Brisa Project

Puerto Brisa represents a case in which the indigenous peoples of the Sierra have relied on both indigenous law and Western law to protect their ancestral territory. At the end of 2011, the last consultation session was held in Besotes, an indigenous community located in the ancestral territory of the Arhuaco people. By this

and the history of the Kankuamo people within the curriculum—two aspects that are excluded from Western educational models.

44 Interview with Yanitza Carrillo, ex-coordinator at the Indigenous Legal Aid Clinic, March 2013, Atánquez.

time, the CTC, spiritual authorities, and the Indigenous Legal Aid Clinic already had in their hands the result of the traditional consultation process with Mother Earth. According to the consultation that the spiritual authorities had performed, the construction of Puerto Brisa had to be suspended for nine years so that the indigenous communities could heal the spiritual damage already caused by the port.

When this request was relayed to company representatives during the consultation session, collective chaos ensued. For the company, the nine-year term requested by the CTC meant that the project would not be completed. The company was worried not about the death of the heart of the world but about the death of the project. As Jaime Enrique Arias, the Kankuamo *cabildo gobernador*, stated:

Our proposal was not accepted. We viewed the process of the technical study in a more holistic manner. We saw that the study should include the dimension of ancestral territory, the spiritual dimension, the government dimension, and so forth. And in the face of this, the management measures should have been different—and that led to the government not accepting it and not formalizing it.

For the indigenous, this session revealed the government's alliance with the company. "We could not certify the existence of the sacred sites" is what *cabildo gobernador* Arias described being said by Paola Bernal Valencia, the Ministry of the Interior's director of prior consultation, in the face of the CTC's request. The CTC and the Indigenous Legal Aid Clinic knew that the ministry had been the entity that had previously certified the absence of indigenous peoples in the territory of Jukulwa. Since, on that earlier occasion, the indigenous presence had been denied, this time the indigenous representatives asked the ministry to certify the presence of twenty-three sacred sites that would be directly affected by the project's construction.

The state's denial ignored everything that the four indigenous populations had gone through. The ministry's position prevented the possibility of the Western consultation process being multicultural and hindered the indigenous conception of consultation from having the same value as discussions that emanated from other sciences, such as the law.

Since the time limit established by the Constitutional Court for the development of the consultation process was coming to an end, the CTC, the Indigenous Legal Aid Clinic, and the four peoples of the Sierra decided to abandon their roundtable discussion with the company. If the protection of the sacred sites could not be guaranteed, then the indigenous peoples would not continue the process. As Wiwa community member Dora Loperena told us:

Nobody would be okay with having a conversation about how you want them to kill your mother—nobody would accept having to decide between hanging, drowning, or torture. The megaprojects . . . which put Mother Earth at risk, which are a slow death, should not be consulted. In other words, we do not want those consultations to be performed because in those cases, the authorities and the government should know that the indigenous peoples of the Sierra are opposed because that is not development, or at least not as we Indians understand it. It is not development because it is endangering Mother Earth, the Sierra, which is the heart of the world.⁴⁵

At 2:00 a.m. on December 5, 2011, under the moonlight and gathered around the campfire, the indigenous peoples drafted their own record regarding the consultation process. While in the distance they could hear the Ministry of the Interior read its “Act of No Agreement,” the CTC, with the help of the Indigenous Legal Aid Clinic, drafted a text that explained to the Constitutional Court what had happened after the ruling on Puerto Brisa. Part of the text read:

The negative intervention in a sacred site causes it to separate from the other sites; its spiritual connection with the others is broken, hindering the correct movement of its function. In this way, communication between the material world and the spiritual world is lost, then the site becomes sick, people become sick, and natural disasters (heavy rainfalls, droughts, mudslides, fires, deaths of animals, loss of crops, etc.) start occurring. The *mamos* should consult to determine the tributes and works necessary to repair, materially and spiritually, the damages to the site; these works can take years. (Cabildo Territorial Council 2012, 9)

After the record was presented to and approved by spiritual authorities, it was submitted to the Constitutional Court and the

45 Interview with Dora Loperena, member of the Wiwa people, October 19, 2012, Tayrona National Park.

Ministry of the Interior. With this document, the court would have a general panorama of what had happened and would be able to make a decision on whether to definitively suspend the port's construction.

Endless Silence: The Constitutional Court and the Puerto Brisa Project

After the last report was presented, the Constitutional Court entered into silence. This silence lasted until Supervisory Decision 033 of 2012 arrived to the CTC's offices, in which the court summoned the four indigenous peoples of the Sierra, the state, and the company to visit Jukulwa and present their positions regarding the port's construction.

On March 23, 2012, the *cabildos gobernadores* of the four indigenous peoples, state institutions, company representatives, local fishers, the mayor of the municipality of Dibulla, and three magistrates from the Constitutional Court arrived to Maziruma, a recreational center located at the mouth of the Jerez River, squarely within the zone where the port was being constructed.⁴⁶

When the court magistrates disembarked from the helicopter that had flown them to Maziruma, they greeted everyone. Unlike their predecessors, they did not give mirrors to the indigenous peoples;⁴⁷ this time, the *hermanos menores* gave them miniature replicas of the Colombian Constitution. As they had done more than five centuries ago, the *hermanos menores* took one of their main symbols of progress to the Sierra. And as before, the item that the *hermanos menores* brought to the indigenous peoples also served as a distraction. While the indigenous were busy analyzing the world through these gifts—first through the reflections generated in the mirror and then through the judicial actions allowed

46 The methodology for the hearing was determined in Auto 046/12 of the Constitutional Court, March 7, 2012.

47 Popular accounts of the Spanish Conquest of the Americas include a story about how the Spanish gave mirrors (brought from Europe) to the indigenous peoples in exchange for gold. Such a derisory and unfair exchange exemplifies how the "conquistadors" cheated and robbed indigenous peoples by giving them trinkets in exchange for precious metals. At the same time, it exemplifies the distraction created by the introduction of a strange and foreign object.

under Western law—the *hermanos menores* exploited the precious resources located in the heart of the world. Today, in the library of the Indigenous Legal Aid Clinic, one can find this replica received by the indigenous peoples on March 23, 2012, the day that the court asked them to confide in the protection provided by the Constitution.

What most bothered the indigenous peoples was that the port’s construction continued.⁴⁸ In the words of *cabildo gobernador* Jaime Enrique Arias, “The most worrying part is not that the court didn’t give an answer but that the company continued working on the project as if nothing had happened, and we have not been able to access the sacred site.”

In the meantime, the sacred site of Jukulwa has been completely destroyed. Shirley Arias summarized the words of the Kankuamo *cabildo gobernador*, who is the spokesperson of the four peoples:

[The *cabildo* explained that] we as indigenous peoples do not decide which sites are sacred—that comes from the Law of Origin. . . . We follow the Law of Origin, while [the *hermanos menores*] follow ordinary law. . . . There is a clash of perspectives, but the *cabildo* made clear that they were protecting an extremely important sacred site. . . . The *cabildo* gave an example: you have a house and they come to demolish it; what do you want? That they leave the house there so that you can be there with your children. That, for us, is a sacred site: a home that welcomes us and protects us, it provides a roof, it feeds us, it allows us to survive.

Two years after the special hearing, the Constitutional Court has yet to issue a pronouncement regarding the port’s definitive suspension. Although, legally, the court’s earlier suspension remains in effect, the entrance to Puerto Brisa shows another reality. At the end of 2012, during a tour of the sacred sites led by the Wiwa people, a company representative told us, “We are in the midst of construction, and today it is impossible to meet with you. We offer our sincere apologies, but we are unable to meet with you at the moment. . . . We are developing a port, a project for a

48 Interview with Yesica Pacheco, legal advisor of the Kankuamo Indigenous Organization, January 21, 2014, Valledupar.

port. . . . At this moment they're doing this work . . . construction work, civil engineering works."⁴⁹

The combination of the two types of law in the indigenous peoples' struggle generated contradictory effects in their spiritual and political dynamics. As Shirley explained, the fusion of the two systems

has kept us alert in protecting our territorial rights, through prior consultation and free, prior, and informed consent, which is enshrined in the norms of the *hermanos menores* . . . that they need to respect our space and our way of life. . . . It has allowed us to unite as indigenous peoples and to have legal tools. It has also been negative because all the companies have their eyes on the Sierra Nevada . . . [and] because prior consultation has led to divisions among the indigenous peoples due to money and tricks.

Sadly, in material terms, the right to FPIC has not meant the protection of Jukulwa, a fact for which the Constitutional Court is largely responsible. As Jaime Luis Arias of the CTC explained to us, this is because the indigenous

have faith in our *mamos*, our spiritual authorities; we thought that we would be dealing with the *mamos* of our *hermanos menores* as well and that we could confide in them. We placed our faith in them that they were going to make a good decision . . . but in the end, this expectation evaporated.

For Carlos Andrés, this is one of the main challenges regarding the rights of indigenous peoples. In this case, the court's silence has caused significant legal and political frustration. The court—despite being the authority capable of providing an answer that can protect the indigenous peoples—has allowed the violation of their rights and the construction of the port.

Conclusion

The story of Puerto Brisa is but one reflection of the contradictory effects that the fusion of the two legal systems can have on indigenous peoples and human rights organizations. On the one hand, this fusion had empowering effects on the peoples of the Sierra in

49 Statement by company representative, October 2012, Dibulla.

that it strengthened Kankuamo identity and gave women a voice in indigenous political processes.

On the other hand, the mixing of the two systems had harmful effects. Although the right to FPIC allowed the peoples of the Sierra to strengthen internally, the Constitutional Court's order has not been complied with and the territory has thus not been protected. In this way, the indigenous movement has become disillusioned by Western law because it has failed to keep its promise of protection.

At the same time, the case has generated disillusionment for the human rights movement regarding the limits of the law. The legal system of the *hermanos menores* has failed to provide the expected results, so much so that the company has not even abided by the court's decision. For human rights organizations, it appears that the indigenous peoples' territorial claims touch a glass ceiling when they are up against projects concerning the exploitation of natural resources.

The Puerto Brisa case has also taught us lessons about the forms of mobilization and of conducting consultation processes. On the one hand, the populations of the Sierra have taught other ethnic populations that the right to FPIC must be combined with other forms of resistance. That is to say, at the same time that legal proceedings are initiated, indigenous groups should continue strengthening their spiritual and cultural practices that are so fundamental to community cohesion. On the other hand, in order for consultation processes to meet their objectives, the actors involved must recognize the different forms of knowledge that are present within these processes, acknowledging that all arguments—whether based on biology, law, or spiritual knowledge—are valid. If this approach is not adopted by all parties involved, stories like Puerto Brisa will repeat themselves. In this case, the emphasis placed by certain actors on obtaining economic resources and imposing a particular definition of development has ended up invisibilizing the suffering that indigenous peoples have endured on their bodies and their territory.

This story is unfinished in two respects. First, in Dibulla, the construction of Puerto Brisa continues uninterrupted, as do the violations of indigenous peoples' rights. Second, there are many other indigenous populations in the global South who have tales

to tell about the consequences of combining their own law with Western law to protect their territory. It is time to tell those stories.

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CHAPTER 6

Why Not in Their Own Backyard? Development, Human Rights, and the Governance Framework

Mariana González Armijo
(Mexico)

*More than anything, I saw it as a lesson in defense. . . .
It wasn't a question of opposing development.
It was a question of human rights and of defending lives.*

—JOSÉ MANUEL BARRERA,

FORMER MUNICIPAL PRESIDENT OF TUXTEPEC¹

We were sitting on one side of the horseshoe-shaped table on a Wednesday afternoon in the municipality of Tuxtepec in the state of Oaxaca, Mexico. The air-conditioning cooled down the meeting room of the Hotel Gran Tuxtepec: not only was the climate hot, but so was the discussion. Seated at the table were representatives from the company that planned to undertake a hydroelectric project and representatives from the communities that stood to be affected by it. Dialogue and negotiation are not a common aspect of development processes in Mexico. Seated at the center of the horseshoe were Manuel, Agustín, Jorge, and Berta,² as well as other *ejido*³ leaders representing the *mestizo* and indigenous

1 Interview with José Manuel Barrera Mojica, former municipal president of Tuxtepec, September 23, 2013, Tuxtepec. All quotations from José Manuel in this chapter derive from this interview.

2 To protect their identities, I have changed the leaders' names and have omitted their specific titles.

3 The concept of *ejido* refers to an area of communal land managed by rural indigenous or *mestizo* communities. The *ejidos* function according to their internal regulations. The structure consists of the General Assembly, which is made up of all the *ejidatarios* (individual members of the *ejido*); the Ejido Commissariat, composed of the commissary, secretary, and treasurer; and the Supervisory Board, made up of three individuals with the aim of monitoring the performance of the Ejido Commissariat and the execution of agreements reached in the General Assembly (see Mexico's 1992 Agrarian Law [Ley Agraria]).

Chinantec people of Santa Úrsula, Los Reyes, Paso Canoa, and Cerro de Oro. Seated at one end of the table were representatives from the US company Conduit Capital and the Mexican companies Comexhidro and Electricidad de Oriente. At the other end were government representatives. Also present were representatives from the financial institution Overseas Private Investment Corporation (OPIC); an engineer with expertise in dams; a mediator; and representatives from several civil society organizations: a lawyer from the Accountability Counsel, an anthropologist from the Center for Research and Higher Studies in Social Anthropology (CIESAS, for its Spanish acronym), and a colleague and myself from Fundar.

It was July 20, 2011, and we were in the middle of the fourth session of roundtable discussions and conflict resolution regarding the plan to add hydroelectric capacity to the Cerro de Oro dam. The proposed project would affect local communities and the local environment, especially La Sal Creek, which is indispensable for supplying the area with water. During this session, the company presented, among other things, an alternative hydroelectric project that, according to company representatives, would not damage La Sal Creek. While the representatives maintained that the creek was actually runoff from the dam, the communities argued that it was spring water in existence since time immemorial.

The communities had set two key conditions before agreeing to have talks with the companies and the financing institution about the project: (i) the project's construction—which had begun without their consent—had to stop at once; and (ii) the company had to present a proposal that did not involve the use of La Sal Creek for constructing the hydroelectric dam's output channel.

After learning of this case, the organizations Accountability Counsel, Educa, CIESAS, Habitat International Coalition–Latin America, and Fundar formed a support group to provide assistance to the communities. Thus, in September 2010, a representative from CIESAS visited the area to get to know both the case and the people involved. After that, a lawyer from the Accountability Counsel went to the zone to conduct research and interviews. And on November 30, 2010, we submitted a "Request for Compliance Review and Problem-Solving Related to Cerro de

Oro Hydroelectric Project” to OPIC’s Office of Accountability, in which the communities from Paso Canoa, Santa Úrsula, and Cerro de Oro⁴ were the complainants (Accountability Counsel 2010). The complaint demanded the following: (i) the project’s immediate suspension; (ii) the completion of an independent environmental impact assessment and the creation of a mitigation plan; (iii) the cessation of modifications to La Sal Creek; and (iv) the delivery of all project-related documents to the communities in an easy-to-understand format (such as models) so that communities could visualize and understand the project’s plans.

It had been a long day, with an intense exchange of information and opinions. After taking a break to eat some sandwiches, company representatives handed us a packet and began their presentation.

First of all, thank you. Thank you to all of you for your time, attention, patience, respect for the dialogue process, and the arrangements agreed to. Today we are going to present the original project; the alternate project; technical and environmental characteristics of both; the company’s philosophy; and next steps. (Electricidad de Oriente 2011)

This was written on the first page of the document given to us, as well as on the slide projected onto the screen, as the company representative read it aloud. He continued with a summary of the prior agreements that had been reached in the framework of the roundtable dialogues, and then presented the alternative project that would not use La Sal Creek to unload the water that would flow out of the hydroelectric dam. At the end of this long presentation, the representative pointed out that the communities had two options for their decision: one, to approve the continuation of the project, whether the original one or the alternative one; and two, to reject it, indicating the reasons why. Further, he requested that they provide the company with their decision no later than August 1, mere days away. His words were not very conciliatory, for there was a twinge of assuredness that indicated his certainty regarding the hydroelectric plant’s future construction.

4 Cerro de Oro was the last community to find out about the potential impacts of the project. It joined the complaint on January 17, 2011.

After the presentation, the mediator told us that we could go over to look at the models that the company had created for each of the proposals. Both models clearly showed the modifications to the environment that the construction of the hydroelectric plant would involve. Community members analyzed the models closely while whispering among themselves. I heard comments about the impacts that the construction of the discharge channel would have on their land; about the proximity of this channel to the dam's curtain; about the bridge that would be built in Los Reyes so that people could cross the discharge channel; and about the path of the transmission line and the plots of land that would be required to install the towers.

When the mediator asked for comments from the communities regarding the deadline for their decision—a mere eleven days away—the community representatives asked for a recess. This had been the general dynamic of the meetings: plenary sessions were held at the table, and at certain moments, one of the parties, usually the community leaders, asked for a recess so that they could discuss among themselves and return to the table with a common stance. Then, the community representatives and representatives from the civil society organizations would go to the hotel's *bodeguita* (small storage room) to confer. In this way, we began a discussion regarding the company's proposals and its request.

In general, the community leaders did not trust the company. Their main worry centered on the safety of the dam's curtain, since most community members learned of the project only after the company had begun to blast with dynamite, without having first informed, consulted with, or obtained consent from the communities. Some homes near the site of the explosions had become cracked, which is why community representatives feared that the dam's curtain—an enormous wall 1,662 meters long, 59.9 meters high, 433 meters wide at its base, and 10 meters wide at the crown—had suffered some kind of damage and had thus jeopardized the safety of both the people and the area.

To be certain that the dam's curtain complied with safety requirements, community leaders, the companies, and OPIC had agreed, during an earlier dialogue session, on the hiring of an expert engineer who could determine the security status of the Cerro de Oro dam (“Acuerdo de la segunda sesión de la mesa de

diálogo” 2011). However, the community representatives were not convinced by the methodology used by the engineer, and the final report remained to be completed. This, the leaders argued, had prevented them from consulting in their assemblies whether to support the project’s continuation. Furthermore, as some community members stated in the *bodeguita*, “The environmental studies for the projects have not been completed and so we do not know what the impacts would be.” In the middle of these heated arguments, time was running out in the hotel’s storage room. The company representatives were waiting outside impatiently. In a moment of cohesion and empowerment, the communities decided that they wanted neither the original project nor the alternative. “We are tired, and we don’t want any project that will cause harm to us” was their leitmotif.

We returned to the table, where one of the community representatives communicated the decision. The communities also noted that they no longer wished to continue with the dialogue, given that they had refused to accept either of the two options for the project. The senior investment manager from Conduit Capital interrupted angrily. Speaking good Spanish with a marked American accent, he acknowledged that things had been poorly managed in the past but insisted that the company had learned from this experience and had done its best to correct its mistakes. He asked the community representatives to please reconsider the hydroelectric project, which promised many benefits for their communities. He said that he held Mexico very dear and wished to contribute to the development of the country and its people. He finished, pausing to allow the community to respond. “Our decision is that we no longer want the hydroelectric dam. We are tired,” the *ejido* leader said. Upon hearing this, the senior investment manager turned red, grabbed his belongings, stood up from his chair, and said angrily, “Fine, if you do not want this development opportunity, then we’re leaving Mexico. We’re going to invest in Panama.” The exaggerated drama worked. The foundation of the communities’ firm decision began to shake.

I asked myself: The development opportunity will move instead to Panama? Just like that? What about the benefits for the people? Where is the supposed affection for Mexico and the concern for its development? Conduit Capital, on behalf of which

the senior investment manager was speaking at the session, is a private equity investment firm.⁵ Its name, Conduit Capital, literally means “passage for capital.” The company describes itself as “focused on the significant investment opportunities presented by the independent electric power industry in Latin America and the Caribbean” (Conduit Capital 2014a). Through its investment funds Latin Power I, II, and III, the company invests in projects and then sells these projects at a profit in the market. Conduit Capital generally seeks out investments that are low risk and profitable in the short term, reflecting the general tendency of private investment capital firms that have proliferated in the development field. Indeed, the phrase “impatient finance” has been coined to reflect the short-termism and immediacy of the movement of capital (see Hildyard 2012). As some observers have noted, financial capital has an “instantaneous” timeframe, “for which the long term is the next ten minutes” (Santos 2007, 3). These definitions clearly reflect the dynamics of investment funds.

The Project to Convert the Dam into a Hydroelectric Plant

The original project begun by the companies—without informing local communities—consisted of transforming the Cerro de Oro dam, located in the municipality of Tuxtepec, into a hydroelectric dam. They constructed and operated a turbine generator with a 10.8 megawatt output, an electrical substation to increase the voltage from the central station, and an electric transmission line (Electricidad de Oriente 2007a). Construction for the project’s infrastructure required the use of heavy machinery and explosives to clear the land and prepare the site. It also required fundamental changes to the local waterways, particularly the Santo Domingo River and La Sal Creek, both of which are indispensable for providing local communities with water. The energy that the hydroelectric plant would produce was promised to three plastic manufacturing companies.⁶ No specific long-term benefits were

5 For a critical and detailed analysis of private equity funds, see Hildyard (2012).

6 Plásticos Envoltentes, Envases Universales de México, and Envases Innovativos (see the 2009 Resolution whereby the Energy

MAP 6.1
Tuxtepec, Oaxaca



SOURCE: Adapted from googlemaps.com

offered to area residents, who not only stood to be affected by the project but also lacked access to the electricity that the state was obligated to provide to them.

Financing for the Cerro de Oro project was provided by OPIC, the US government's development finance institution. OPIC's mission is to "help US businesses gain footholds in emerging markets, catalyzing revenues, jobs and growth opportunities both at home and abroad" (OPIC 2014d). To carry out the project, Conduit Capital partnered with Electricidad de Oriente and Comexhidro, Mexican companies that make up the Corporación Mexicana de Hidroelectricidad, a subsidiary of the Italian multinational company Enel.

Regulatory Commission Grants Electricidad de Oriente Permission to Generate Electrical Power under the Modality of Self-Supply [Resolución por la que la Comisión Reguladora de Energía otorga a Electricidad de Oriente, S. de R. L. de C. V., permiso para generar energía eléctrica, bajo la modalidad de autoabastecimiento)].

The project to convert the Cerro de Oro dam into a hydroelectric one formed part of Conduit Capital's Latin Power III fund. Once constructed and functioning, the plant would be sold to another investment fund, just as happened with the projects of Latin Power II, which involved the construction of Mexico's first mini-hydroelectric plants (see "Conduit, Comexhidro Sell Three Mexico Hydro Plants to Enel" 2007; Dealbook 2007).

The private sector's protagonist role in the development field is a product of the mantra of the Washington Consensus: "stabilize, privatize, and liberalize" (Rodrik 2006). The Washington Consensus emerged in the 1980s and is considered to have been the leading development paradigm during the last two decades of the twentieth century (see Rodrik 2006; Gore 2000). It called for a reduced role of the state and for an increased reliance on the market. Countries thus began to open their economies to the rest of the world through the exchange and freeing up of capital and domestic products, and through privatization and deregulation (Williamson 1993).

These structural adjustments and regulatory reforms were promoted largely by international financial institutions such as the World Bank and the International Monetary Fund, whose development loans (which go directly to the external public debt of the lending country) were accompanied by conditions in line with economic liberalism in ten recommended areas.⁷ According to Peter Gowan (1999, ix), this monetary and financial regimen based on debt has been used by American administrations "as a formidable instrument of economic statecraft . . . to drive forward both the globalisation process and the associated neo-liberal domestic transformations." In this manner, in the process of neoliberal globalization, governance⁸ has emerged as "a nonstate expression of social regulation, supposedly capable of better governing the global economy," based on the collaboration of nonstate actors

7 Fiscal discipline; reorientation of public expenditures; tax reform; financial liberalization; unified and competitive exchange rates; trade liberalization; openness to direct foreign investment; privatization; deregulation; and secure property rights (see Williamson 2004).

8 There are several names for this phenomenon, including "soft law," "smart regulation," and "post-regulatory law" (see Santos and Rodríguez-Garavito 2007, 12).

(companies, grassroots organizations, NGOs, labor unions, and others) instead of solely government regulation from above (Santos and Rodríguez-Garavito 2007, 11, 12). At the same time, the free flow of capital determines what is done in the name of development, which is perceived simply as economic growth.

In this context, Mexico has modified its legislation during the last two decades in order to promote private investment (Preqin 2010, 21), which has claimed an important role in the country's development throughout this time.⁹ Such development financing through the private sector deprives the public of their rights, granting even more decision-making power to a small elite group of investors (Hildyard 2012, 42). Among the arguments used by the Mexican government to support this type of reform are "economic growth," "better use of energy resources in favor of greater investment," the "generation of jobs through initiatives that promote the supply of energy in sufficient quantities and at competitive rates," and "access to energy" (Presidencia de la República 2013).

The Cerro de Oro case illustrates the dynamics present in a large number of development projects throughout Latin America initiated by private equity investment firms like Conduit Capital.¹⁰ The priorities of such projects are based on effectiveness, the speed of capital investment, and the generation of profits. In Mexico, as in other countries, in the name of development, the role of the private sector has increased over the past two decades. This has resulted from the privatization of goods and services that were once the domain of the state and from the increase in public-private alliances for the financing of infrastructure (Hildyard 2012, 6). It stands in stark contrast to the approaches of the 1990s, when most infrastructure projects in developing countries were financed and implemented by national governments, with a substantial volume of loans from international financial institutions. The Cerro de Oro case illustrates both paradigms: on the one hand, the state-centrist development project that built the original dam between 1974 and

9 Two examples of this are the concept of self-sufficiency and the Capital Development Certificates, which were introduced into Mexican legislation in 2009 and which Conduit Capital has utilized (see Hildyard 2012, 12).

10 For an updated list of private equity investment firms, see Hildyard (2012, annex 1).

1989 and, on the other, the neoliberal development project run by the governance framework through the effort to convert the dam into a hydroelectric plan, which started in 2007. Seeing both projects over time allows one to comprehend the establishment of the governance framework in the development field, which appears to correct market failures (Santos 2007, 10). In such a setting, it is difficult to discern a space that allows for discussions about what development means, who it is for, what the impacts of the project will be, who is responsible for these impacts, and who will benefit from the project, among many other questions.

The Memory of the *Tsa Ju Jmi'* People: The Construction of the Cerro de Oro Dam

People from the community argue that the conversion project did not begin in 2007, when company representatives appeared in the area for the first time, but rather in the 1970s, when the Mexican state was promoting development through megaprojects, supported with funding from international financial institutions. Jorge, a leader from Paso Canoa who participated in the roundtable dialogue, is around fifty years old. Seated in his patio under the shade of a tree, he shared his reflections on the roundtable discussion, the hydroelectric project being proposed, and the construction of the Cerro de Oro dam in the 1970s and 1980s. He exclaimed, "They already did it once to us and now they want to do it again!" Jorge continued:

We know the behavior of the Santo Domingo River very well. When the rains would be about to begin, there would be a period that we called *barbaso* because the entire river would fill with mud. Then the fish would go crazy and jump out. People would go to the river with a machete or whatever they could use to hit the fish and get them out. I was a little boy at that time. You would be up to your knees in mud and you had to get the fish out. Then the rains would come and leave the river clean again. . . . We really know what the sediment discharge of that river is. With the dam's construction, it's not just the river's discharge but rather all of the hills that are filling it with mud, so it is filled with sediment. Before, the river used to run free, but since they dammed it, there is no longer any *barbaso*.¹¹

11 Interview with Jorge, September 25, 2013, Paso Canoa. All quotations from Jorge in this chapter derive from this interview.

In 1947, the Papaloapan Basin was established within the framework of the project known as “the march to the sea,” which involved the comprehensive development of the country’s main basins in order to generate electricity and guarantee the self-sufficient development of commercial irrigated agriculture (Velasco 1991). The purpose of this particular basin was to generate electrical power and control flooding in the area. As a result, between 1949 and 1955, the first large dam, Temascal, was constructed, which led to the involuntary displacement of 20,000 indigenous Mazatec people. In April 1972, when Jorge and other community leaders seated at the table were young boys, the then president of Mexico, Luis Echeverría, issued a decree initiating the construction of the Cerro de Oro dam over the Santo Domingo, San Juan Evangelista, and Tesechoacan Rivers in the state of Oaxaca. This dam would be joined to the Temascal dam through a channel and would help control flooding in the area, allow for the possibility of an irrigation scheme, and increase the production of the Temascal plant; however, the dam’s plans never involved a hydroelectric plant (Bartolomé and Barabas 1990).

President Echeverría approved the Cerro de Oro project without informing the indigenous peoples who would be affected by it, and in June 1973 he published the expropriation decree regarding the area that would be flooded (Velasco 1991, 30). “The government did not include us as conscious participants in the creation of our own destiny. All we had were confusing announcements and the presence of people operating machinery in the area,” stated one of the Chinantec people who had been displaced (Habitat International Coalition–América Latina and Environmental Defender Law Center 2010, 9). Thus began the expropriation of the territory of 26,000 indigenous Chinantec who inhabited thirty-seven *ejidos*, so that the government could flood 36,000 hectares of fertile land that would be used for the dam’s reservoir.¹² “When we found out that the waters would flood everything we had and everything we were, we reacted furiously, but we weren’t able to stop the construction,” recalled one of the displaced people (Velasco 1991, 8). According to a 1972 letter from

12 Studies have determined that some of the best soils of Oaxaca were flooded (see Bartolomé and Barabas 1990).

the National Campesino Federation addressed to the Mexican president, “A unanimous feeling of defiance and protest emerged from the deepest center of our being, because in our ignorance we fail to understand, alongside our women and our children, how it is possible that we must accept such an enormous sacrifice that robs us of everything we have” (Bartolomé and Barabas 1990, 52). The Mexican state employed verbal and physical violence to displace these populations, and in 1997, another 18,000 Chinantecs were displaced to make way for the dam’s expansion through the elevation of the reservoir’s water level (Tribunal Permanente de los Pueblos 2012, 32–35).

The Chinantecs refer to themselves as *tsa ju jmi’*, which means “people of ancient word.” Upon being displaced, they were not only forced to abandon the land on which their ancestors had settled in the Chinantla region (Comisión Nacional para el Desarrollo de los Pueblos Indígenas 2009), but they also had to abandon the region where their ancestors—an important part of this culture—were buried. Furthermore, they were obligated to leave the lands on which they worked and where they cultivated corn, beans, chilies, sesame, tobacco, rice, and sweet potato (Habitat International Coalition–América Latina and Environmental Defender Law Center 2010, 7), to be relocated by the Mexican government in the neighboring state of Veracruz. For the relocation, the Commission of Papaloapan, ignoring the conclusions of ecological studies, undertook massive clearing of the tropical rainforest in order to introduce intensive rice farming, which hindered Chinantec customs and led to their drastic loss of food self-sufficiency (Barkin and Suárez 1985, cited in Velasco 1991, 31). Several years after relocating the Chinantecs and imposing rice cultivation, the commission admitted that only 26.4% of the hectares set aside for the relocated communities to use for farming were productive (Velasco 1991, 32). As an emergency measure, the government encouraged livestock projects and rubber tree plantations, thus promoting crops for the market, which had the effect of altering traditional practices.¹³

13 For a closer look at the changes suffered by the Chinantec people, see Bartolomé and Barabas (1990, ch. 9).

The displaced indigenous communities were distributed randomly, meaning that a large number of people were not placed with the family members with whom they had originally formed a community. This resulted in disruptive processes that affected interpersonal relationships and in the fracturing of family communication and of the organizations used for working (Bartolomé and Barabas 1990). The relocations dissolved the traditional system of common work that the indigenous had traditionally practiced by forcing them to join the collective *ejidos*. Further, the houses that the indigenous peoples were relocated to were made of cement and had sheet-metal roofing, in drastic contrast to their traditional wooden huts with palmed roofs.

The dam's construction began in 1974 with the expectation that it would be completed in 1980, but it was not until 1989 that the filling of the reservoir began. This resulted in an extremely costly project (nearly seven times the originally budgeted amount). A substantial percentage of the extra costs were covered through loans from the World Bank. It is difficult to estimate in constant values the total cost of the project, including costs related to cultural losses, agricultural losses, and the relocation process (Bartolomé and Barabas 1990, 43).

"We were better off in Oaxaca—at least there we were treated with dignity and respect. There are so many people benefitting from the dams, and those of us who should benefit are the ones who are most affected," said Aurora, a woman who was displaced by the Cerro de Oro construction ("Lamentan indígenas desplazados por Cerro de Oro vivir en Veracruz" 2012). More than thirty years after being displaced and relocated, the Chinantecs continue to demand compensation and the provision of services from the Mexican government (Tribunal Permanente de los Pueblos 2012, 32–35). In a way, this demonstrates that the investments for the comprehensive rural development of the basin did not have the hoped-for effects. To date, the state of Oaxaca, where 34.2% of the population is indigenous, remains one of the poorest in the country (Consejo Nacional de Evaluación de la Política de Desarrollo Social 2012; Instituto Nacional de Estadística, Geografía e Informática 2011).

Projects like Cerro de Oro reflect "the purely functional conception of development, conceived of as the transformation of

a ‘traditional’ society into a ‘modern’ one, completely devoid of cultural considerations” (Morandé 1984). In the name of development and the eradication of poverty, the Chinantec rainforest was flooded; the Veracruzean tropical rainforest was razed to make way for their relocation in low hills and grasslands; traditional crops were substituted with rice, sugarcane, and rubber trees; *huipiles* (traditional Chinantec clothing) disappeared; and the language, the grammatical structure underlying their collective way of life, was lost (Bartolomé and Barabas 1990, 202). The men and women of ancient word lost their *tsa ju jmi’*.¹⁴

The Governance Framework and Development Projects

The spread of such development projects, along with the human rights violations and social and environmental changes that accompanied them, led to a collective discontent in the 1970s in many countries around the world, as well as serious questioning of the supposed benefits of “development” and nation-building (see Rajagopal 2003; Fox and Brown 2000). On the one hand, conditions of poverty remained largely unchanged. On the other, projects implemented in the name of development involved the violation of human rights, particularly those of indigenous populations, through massive relocations and deep ecological impacts, such as the imposition of certain models of livelihoods.

This led to resistance movements and civil society organizations in the global North and global South alike that denounced and pressured governments to respect citizens’ rights and to halt such projects. In this context, in 1980, the World Bank began to craft the first involuntary resettlement policies and a “set of guidelines for the World Bank to follow in situations where projects they funded threatened to infringe the rights of residual ethnic minorities” (David Price 1989, cited in Gray 1998, 270)—in other words, guidelines that allowed the World Bank to continue

14 Recently, the Permanent Peoples’ Tribunal ordered the Mexican state to provide compensation for the damages caused by the construction of the Cerro de Oro dam and to protect the rights of the people who were affected, denouncing the ethnocide of the Chinantec culture (Tribunal Permanente de los Pueblos 2012, 32–35).

moving capital according to its interests, regardless of whether the fostered projects violated the rights of indigenous populations. These norms were the predecessors to the many rules that exist today within the governance framework, which are followed by dozens of international and national financial institutions.¹⁵

As the disasters of development projects continued, by the end of the 1980s, resistance movements were able to ensure that no investments of the World Bank or other multilateral development banks would be voted for unless an environmental impact assessment was first carried out.¹⁶ Currently, these assessments are one of the key requirements for undertaking development projects. Meanwhile, in 1989—the year in which the Cerro de Oro reservoir was filled—the International Labour Organization (ILO) replaced its Convention 107 (1959) with a new text, Convention 169. The new convention abandoned the idea of assimilating indigenous populations in favor of an emphasis on “respect for identity of these populations and to promote increased consultation with, and participation by, these peoples in the decisions affecting them” (International Labour Organization 1985, cited in Rodríguez-Garavito 2010 6–7). The adoption of ILO Convention 169 strengthened the global discussion regarding the rights of indigenous peoples vis-à-vis development projects that affect them.

Nevertheless, the disastrous effects of these projects continued and, alongside them, so did mobilizations, which achieved changes in financial institutions. Among these changes were the World Bank’s creation of safeguard policies, its Access to Information Policy, and its Inspection Panel. Regrettably, however, its safeguard policies speak of “mitigat[ing] undue harm to people

15 In the aftermath of the World Bank’s reforms, other international financial institutions began to craft their own policies. For example, the Inter-American Development Bank started issuing its own safeguard policies toward the end of the 1990s. These policies addressed involuntary resettlement (1999); indigenous peoples (2006); environment and safeguards compliance (2007); disaster management (2008); gender equality in development (2010); and access to information (2011).

16 This was achieved through hearings before the US Congress at which affected individuals from countries such as Brazil and India provided testimonies. Among other things, this led to the 1989 passage of the Pelosi Amendment, which prohibited US directors at multilateral development banks from voting for development projects that did not have the appropriate environmental assessments.

and their environment” instead of speaking about human rights guarantees in relation to development projects (World Bank 2012). In general, the discourse of financial institutions such as the World Bank is an uncritical and apolitical one that carefully avoids creating conflicts with its own interests. As Boaventura de Sousa Santos writes, “rather than social transformation, [there is] problem solving; rather than popular participation, selected-in stakeholders’ participation; rather than social contract, self-regulation; rather than social justice, positive sum games and compensatory policies; rather than power relations, coordination and partnership” (Santos 2007, 8). The list is long, and it is important to emphasize that the concepts used in the governance framework operate at the service of the market and particular interests that exacerbate social exclusion.

In this manner, governance emerges as the sum of control mechanisms created to guarantee the flow of finance in the name of development and to legitimize the work of these institutions, without allowing this framework to clash with investment interests (Rosenau 2009). This was strengthened with the post-Washington Consensus, which did not really challenge the Washington Consensus, given that trade liberalization and privatization remained key aspects of macroeconomic policy. Rather, it brought the state in so that it could act as a complement to the market (Stiglitz 1998). For example, the World Bank’s Inspection Panel was created as an accountability mechanism to investigate complaints from people who claim that the bank has failed to comply with its policies. In 1995, two years after its creation, the panel ordered the cancellation of the World Bank’s involvement in the construction of the Arun III dam in Nepal in light of the effects that the project would have on local populations. This type of decision conflicts with the World Bank’s priorities, which consist of providing loans and increasing their capital. Therefore, in its ten years of existence, the Inspection Panel has been weakened and its effectiveness is now debatable (see Clark, Fox, and Treacle 2005). The same thing has occurred with similar accountability mechanisms of other international financial institutions and multilateral development banks.

Finally, the International Finance Corporation (IFC), the arm of the World Bank that offers financing to the private sector, was

forced to incorporate such policies after a history of catastrophes provoked by development projects that it financed (and that it continues to finance).¹⁷ As a result, the IFC took the World Bank's safeguard policies and adapted them to the private-sector context. In 1999, the IFC created the Compliance Advisor Ombudsman, a complaints and accountability mechanism similar to the World Bank's Inspection Panel. In addition, it created "performance standards" whose function is to define the responsibilities of its clients in "manag[ing] social and environmental risks" (International Finance Corporation 2012, 2).¹⁸ The IFC's performance standards have become relevant in the governance framework in that a number of institutions have adopted them.

Among the institutions that have adopted these standards is OPIC, which also has its own policies on transparency and on the evaluation of environmental and social issues, such as the obligation to establish complaint mechanisms in cases where its policies are not followed or where there are effects on the local population (OPIC 2014a, 2014b, 2014c, 2014e). This means that OPIC is responsible for ensuring that its direct lenders, as well as its indirect partners, comply with these policies. In other words, in the Cerro de Oro case, OPIC is responsible for ensuring that Conduit Capital, Electricidad de Oriente, and Comexhidro follow these governance policies throughout the execution of the hydroelectric project.

All of these governance regulations are created from above, in spite of Santos's (2007, 4) observation that "crucial to this matrix is the idea that it sees itself as cooperatively self-generated and, therefore, as inclusive as it can possibly be. . . . However, in this case, the excluded, rather than being present as excluded, are utterly absent." The governance framework rejects power

17 The breaking point was a project that involved a series of hydroelectric plants in the Bío-Bío River in Chile, which severely affected both the natural environment and the Mapuche people (see Hunter, Opaso, and Orellana 2005).

18 The eight performance standards are (i) assessment and management of environmental and social risks and impacts; (ii) labor and working conditions; (iii) resource efficiency and pollution prevention; (iv) community health, safety, and security; (v) land acquisition and involuntary resettlement; (vi) biodiversity conservation and sustainable management of living natural resources; (vii) indigenous peoples; and (viii) cultural heritage.

asymmetries, poverty, and systematic and structural inequality, and it “explicitly flees from any discussion about the preconditions necessary for collaborative governance, that is to say, it refuses to discuss the redistribution of resources that would help counteract the asymmetries among ‘stakeholders’” (Santos and Rodríguez-Garavito 2007, 13). The operation of this framework in the Cerro de Oro case assumes that the various actors involved—OPIC, Conduit Capital, Electricidad de Oriente, Comexhidro, the Mexican state, and community authorities and members—find themselves on equal ground and can interrelate to one another horizontally. However, a mere look at the reality of the local communities and the dynamics with which the companies operate reveals profound power asymmetries between the various actors and the ways in which structural issues such as poverty and inequality determine the development game.

Freehold Title: Companies’ Arrival to the Area

“When the company representatives appeared in the community, I wasn’t here. I was working illegally in the United States,” said Agustín, *ejidatario* of Los Reyes and representative of that *ejido* in the roundtable dialogue process. “I had to return, because I am an *ejidatario* [a member of an *ejido*] and I hadn’t chosen anyone to represent me. And [for each one of] the meetings that the meeting held with the *ejidatarios*, I had to pay 200 pesos.”¹⁹ When the Mexican government built the Cerro de Oro dam between 1974 and 1989, the *ejido* of Los Reyes did not exist. Some people from Santa Úrsula—which at that time was the community closest to the dam’s curtain and was not displaced—organized to take over the territory that had been left available after the dam’s construction. “We got into there because [this land] had been an impact of the dam and it was available. And we said, even though that’s what it is, let’s go live there,” said Agustín. “We came here to make a settlement, over there in the makeshift tent houses. We’ve been here for twenty-four years.” Thus, on January 6, 1989, the group of eighty residents arrived to the area that, in the 1970s, had been

19 Unless otherwise noted, all information on Los Reyes in this section comes from an interview with Agustín, September 25, 2013, Los Reyes.

expropriated from another community for the dam's construction and that, once the work had been finalized, was left available.

Six months after arriving, the forty-two people who had stayed in the settlement received the first official documents for becoming *ejidatarios*. The government did not complete the necessary paperwork to make the *ejido* official, instead registering the settlement as the Amplification of Santa Úrsula. "We decided to name the community after the day in which we arrived [Three Kings' Day] and began to construct our homes, to clean the brush, and to gather together the rest of our families," Agustín told me with pride. The new residents had to clean up the land, which had been degraded by years of housing the machinery and gravel used for the curtain's construction. In addition, the lack of infrastructure and basic services—which persists to this day—obligated the residents to expand their electricity network and install tubes from La Sal Creek for their potable water supply.

Employees of Comexhidro and Electricidad de Oriente appeared in the area in 2007, three years before works began for the conversion project. Los Reyes is the community closest to the dam and owns the lands that the companies needed for the construction of the power plant and the first towers for the power transmission lines. The *ejidatarios* of Los Reyes had spent more than ten years insisting that the Agrarian Attorney General's Office grant them the definitive titles and official documents for their lands. It was not until the end of 2009 that the agrarian office finalized their land titles so that they could sell the land to the companies. A few days after the titles were finalized, the company representative, accompanied by a representative of the Agrarian Attorney General's Office, spoke with *ejido* leaders. As Agustín explained with a twinge of discomfort, "[The office] gave permission to the community to sell their land, so the company representative would then become an *ejidatario* of Los Reyes."

Without explaining what the project consisted of, the company was able to convince the general assembly of the *ejido* to sell it two hectares of communal smallholdings for one million pesos; in other words, the company paid fifty Mexican pesos (US\$3.76) per square meter. Agustín explained:

The agreement says that if there were any problems, we would have to pay principal and 50% interest. That's a lot of money. We [also]

signed agreements stating that we could not belong to any organizations. That is why we were doubtful and we were afraid to say yes or no [to the hydroelectric project]. That is my worry, because [the company] purchased land and is a freeholder.²⁰ I don't know much about what being a freeholder means, but supposedly nobody can interfere and the owners are now Electricidad de Oriente, but we don't have any copy of that here in the *ejido*. The people from the company told us that the project was going to enhance our community. That there would be a lot of work and opportunities. Some agreements were made, because here the women asked for certain things, like a water purifier, a project for putting mojarras in the creek so that we'd have something to live off of, projects that help us earn money and work because we don't have anything to live off of. They didn't uphold the agreements.

In the meantime, in December 2007, without informing people from the other *ejidos*, the company representative met with authorities from Santa Úrsula (see URS Corporation Mexico 2009, app. G). "With just twenty-four of the eighty-two *ejidatarios* of the community, the company convinced them to sign a record authorizing the communal plot and part of La Sal Creek that passes through the community to become a freehold estate," Manuel, an *ejidatario* de Santa Úrsula, told us.²¹ "I realized that the project was maybe going to offer economic benefits in the moment, but after a while it would harm us. That they didn't really tell the truth about the project, how damaging it was going to be for us." In order for the record to have validity, the signatures of absent authorities were required. "A few signatures. My signature. And the case would be closed," Manuel said.

The company needed to knock down rubber trees for the project's construction, for which it paid the owners 6,000 pesos (US\$463) per tree. The four *ejidos* that would be directly affected all have communal plots planted with rubber trees. A rubber tree begins producing seven years after being planted. Each planted

20 Freehold title refers to the acquisition of plots by *ejidatarios* so that they are no longer subject to the *ejido* system but rather to the private property system governed by common law. This concept was introduced through Mexico's constitutional reform in 1992 and its 1992 Agrarian Law (see Procuraduría Agraria n.d.).

21 Interview with Manuel, September 26, 2013, Santa Úrsula. All quotations from Manuel in this chapter derive from this interview.

hectare yields about 100 kilograms of rubber each week, and in recent years, the people have earned an average of 10 pesos per kilo (US\$0.77). In other words, each hectare is capable of generating 1,000 pesos (US\$77) of income each week. During a workshop that our organizations held with the communities, we sat down with the *ejidatarios* to calculate their monthly earnings from rubber and compare that to the figure that the companies had paid for each tree. Our calculations revealed that the companies had paid, for each tree, the equivalent of six weeks of production. This was contrasted with the fact that one carefully planted tree has a thirty-year productive life. In the *ejido* assemblies of the four communities, there was indignation and debate upon learning how they had been cheated. “We are small communities in need. The companies are aware of our situation and they take advantage of it,” said one of the *ejidatarios* of Los Reyes. Others preferred to “tolerate these effects, if there’s the possibility that the company will hire us and we can have steady income.”²²

In the second half of 2010, the company began preparatory works for the hydroelectric plant’s construction. Many community members found out about the project only upon sensing the explosions that were used in anticipation of constructing the powerhouse and dredging La Sal Creek. These explosions caused fractures in some of the homes in Paso Canoa and Los Reyes (Accountability Counsel 2010, 15). Residents started to worry about the safety of the dam’s curtain: if faraway homes had been cracked, who would assure the communities that the dam’s enormous wall had not suffered some kind of damage and that its safety was not at risk? Worries about the project and the disappearance of La Sal Creek began to circulate throughout the *ejidos*. They very *ejidatarios* who had previously met with the companies found out, after the detonations, about the impacts that the project would entail for La Sal Creek—not because they had been informed but because of the channels that the companies had begun to dredge nearby.²³ Information about the hydroelectric project—and the companies’ lack of transparency—began to come to light.

22 Workshops with the assemblies of Los Reyes, Santa Úrsula, Cerro de Oro, and Paso Canoa, October 18–23, 2011.

23 Interview with Agustín, September 25, 2013, Los Reyes; inter-

It was also after the start of civil works that the organizations Accountability Counsel, Fundar, Habitat International Coalition, CIESAS, and Educa learned of the case, during a workshop in which Juan Zamora, who was displaced in the 1970s by the construction of the Cerro de Oro dam, participated. Juan has been a tireless advocate and is currently demanding compensation for his family. After this workshop, and together with colleagues from other organizations and members of the communities, we began to discover the grievous shortcomings of the companies and the notable absence of the state, guarantor and protector of rights.

When we asked Agustín about what had put the brakes on the project's construction, he told us:

The communities claim[ed] that the agreements were made in bad faith, that they were not legal. I only learned about the [evaluation of environmental impact] at the end [once the roundtable dialogue process had begun], after the people pressured. They didn't tell us how the issue of [impacts to the] environment was going to be, how they were going to handle it. They didn't present it.

When he reflected on the entire process, the *ejidatario* of Los Reyes said, "I regret having returned [from the United States]. There, with just a little work I can send [money], and in two years I was able to build my house. To get there, I walked for five nights in the desert of Sonora. Now it's dangerous to cross." Agustín returned to his country with the hopes that the hydroelectric project would provide an opportunity for bettering his quality of life. Uninformed and under precarious living conditions, the communities agreed to sign documents whose legal terms were incomprehensible to them, at the same time that the company promised them various compensatory measures (fish farms for mojarra, water filters, and seed money for cattle-raising projects). In reality, providing communities with the conditions for development and for improving their well-being should not be a benefit provided by companies in exchange for permission to undertake projects. It is an obligation of the state.

view with Manuel, September 26, 2013, Santa Úrsula.

Churning the Water: The Weak Side of Governance

One of the problems with governance is that its rules are nonbinding (Shavver and Pollack 2010). This opens the door for states to be selective in their implementation. When norms are not complied with, it is difficult to issue sanctions or threaten specific consequences. The human rights framework, unlike the governance framework, generates legal obligations for states; these obligations are standards that emerge from the sovereignty of the people and from the legitimacy of the international legal community. In governance, the state does not disappear—rather, as explained by Santos (2007, 9), what disappears is “the principle of sovereignty and the power of coercion that goes with it. The state is therefore a legitimate partner of governance, provided that it participates in a non-state capacity, ideally on an equal footing with other partners.” For example, although the *ejidatarios* of Los Reyes had been asking for their formal land titles for years, it was not until these titles were needed to facilitate the purchase of land for the hydroelectric plant that the state complied with their request and issued the certificates.

To finance the project and carry it out with Electricidad de Oriente and Comexhidro, neither OPIC nor Conduit Capital had to request the Mexican government’s prior permission. OPIC simply sent a brief notification to Mexico’s then secretary of energy describing the project, stating that it would not present a threat to the environment, safety, or public health, and confirming that the project would comply with relevant Mexican laws (OPIC 2010). Mexico’s 1992 Agrarian Law (*Ley Agraria*) establishes that meetings to determine modifications to plots of land of *ejidos* that are cultivated and collectively managed must be announced at least a month in advance and that at least three-quarters of the *ejidatarios* must be present (arts. 25, 26). However, the meeting that companies held with people from Santa Úrsula was announced just ten days in advance, and only twenty-four of the eighty-two *ejidatarios* were present. In addition, the concession permit for surface water granted by the National Water Commission and the Ministry of the Environment and Natural Resources was issued four months after the company had already begun civil works; in

other words, the works began without the necessary legal authorization (Comisión Nacional del Agua and Secretaría del Medio Ambiente 2010). Moreover, the project was going to be carried out in important bird conservation area, and the companies did not obtain the required permits from the National Commission for the Knowledge and Use of Biodiversity for its construction. Finally, in terms of international treaties, Mexico has signed both ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples (2007). Mexico grants constitutional status to the international treaties to which it is party, which means that the state must comply with these two treaties—but in the case of the Cerro de Oro project, it did not.

With regard to compliance with the international finance rules under the governance framework, Conduit Capital hired a consultant, URS Corporation Mexico, to draft a compliance report on the environmental policies to which the project was subject and to deliver this report to OPIC.²⁴ This reduces compliance to a mere procedure, without providing for true monitoring and evaluation. Furthermore, there is no implementation of serious measures in the case of noncompliance.

OPIC's "Initial Project Summary" classifies the hydroelectric conversion project as Category A,²⁵ which means that it entails numerous and irreversible impacts and that it must comply with all of OPIC's policies (OPIC n.d.). For Category A projects, OPIC's Transparency Initiative requires that companies "formally consult with the locally-affected communities, by providing project information in a language, format, and medium that is accessible" (OPIC 2014e), which did not happen. And when a project affects indigenous populations, IFC's standards,²⁶ to which OPIC

24 The documents regarding compliance with the project's environmental and social impact assessment can be found at https://www3.opic.gov/environment/eia/cerro/eia_cerro.html.

25 Projects financed by international financial institutions are categorized as A, B, C, or D, depending on their environmental or social impact.

26 In 2011, while we were in the conflict-resolution process of the roundtable, the IFC's standards went through a review procedure, which led to the incorporation of free, prior, and informed consent and strengthened performance standards from a human rights perspective. The complaint in this case is subject to the standards from 2006.

is subject, require that the consultation process involve the indigenous populations' representative bodies and that it be inclusive and culturally appropriate (International Finance Corporation 2006). They also require that the process ensure local communities' free, prior, and informed consultation and that it do the following: be based on the prior disclosure of pertinent and appropriate information, which includes the documents and plans for the project; occur early in the social and environmental assessment process; focus on the social and environmental risks; and be carried out on an ongoing basis and as the project advances and risks arise (*ibid.*, PS1: para. 21, PS7: para. 9). In addition, companies' engagement with the community must be "free of external manipulation, interference, or coercion, and intimidation" (*ibid.*, PS1: para. 19).

The companies in this case met with a only small fraction of the people who would be affected by the project. Nevertheless, they reported that the project enjoyed wide support from local communities and that local residents viewed it as an opportunity for job creation (Electricidad de Oriente 2007b, 113). After the meetings were held, the company made modifications to the project, which entailed a larger area of forest that would be affected (almost double, from 16,302.25 to 31,075 m²), a larger total area for the project itself (from 268,624 to 297,306 m²), a longer electric transmission line (from 10.5 a 13.08 km), more transmission towers (from 22 to 30), and more drastic works for the conditioning of the riverbed of La Sal Creek (Electricidad de Oriente 2008, 6). The communities were neither informed nor consulted about these changes.

In terms of the acquisition of land, IFC's guidelines establish that companies must provide "fair and appropriate compensation and other incentives or benefits to affected persons or communities, and . . . mitigat[e] the risks of asymmetry of information and bargaining power" (International Finance Corporation 2006, PS5: para. 3). Similarly, companies must "ensure that the development process fosters full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples . . . [and] minimize, mitigate, or compensate . . . [and] provide opportunities for development benefits, in a culturally appropriate manner" (*ibid.*, PS7: para. 2). In the case at hand, this standard was not complied with. The companies promised, in

writing, 100,000 pesos (approximately US\$7,536) to Santa Úrsula for a roof for the *ejido* meeting room, a new water system, and the construction of two bridges, all prior to the start of the civil works (URS Corporation Mexico 2009, app. G). They also verbally promised to dig two wells, construct community centers, and pave roads. In spite of failing to comply with these agreements, they reported to OPIC that they had complied with the land acquisition norms and mitigation measures (ibid.).

The rules require companies to establish a grievance mechanism upon undertaking the project, especially when the project is Category A (International Finance Corporation 2006, PS1: para. 23). This mechanism should allow community members to express their concerns over the project, solicit information, and file complaints about the project free of charge and without retaliation from the companies. The companies reported having established “a project office near the site” that functioned as a grievance mechanism and that had received complaints from the communities (URS Corporation Mexico 2009, app. G, 25). This office never existed.

The companies damaged part of La Sal Creek when they detonated explosives and began dredging. They also contaminated the creek, dumped waste into a ravine near Santa Úrsula, cut off the Los Reyes community’s access to the hill (where inhabitants retrieve gravel and rocks for construction), and cut off the access of people who have their cornfields and crops on the other side of the creek, among other things. They did all of this in defiance of Mexican regulations and relevant international norms.

When we asked Jorge how the general assembly of Paso Canoa learned of the hydroelectric project, he said:

We asked in the municipal presidency [of Tuxtepec] and I believe that, there, the [municipal presidency] asked the Agrarian Attorney General’s Office to inform us. . . . The [Attorney General] made an appointment with us for a Saturday, a weekend day so that we could be there. The representative from the project arrived . . . from the Electricidad de Oriente company. They showed us more or less what the project was like and they told us that they had already negotiated with Santa Úrsula and Los Reyes and that they were going to negotiate with the *ejidos* of Sebapostol and San Rafael—that we were not going to be affected, but that we were good neighbors and they would give us a [construction] project [for our *ejido*] if we signed an agreement.

Thereafter, Jorge and the other leaders returned to Paso Canoa to discuss it with the general assembly. At the assembly, people voiced their opposition to the project: the water from La Sal Creek was for irrigation, washing, fishing, and bathing, and it was a watering place for the animals. Further, the community recalled the impacts that they had suffered during the dam's original construction, despite the fact that, at the time, the government had also assured them that they would not be affected—the same promise that the company representative had made when chatting with them about the hydroelectric project. With this in mind, in July 2009, community members began to conduct further research into the project, contacting Daniel, a resident of Santa Úrsula, who in turn contacted local authorities and organized with people from his *ejido* to collectively make inquiries. In spite of the fact that Paso Canoa residents told company representatives about their opposition to the project, the civil works began. The *ejidatarios* continued with their mobilization, and in the second half of 2010, company representatives told them that “they were troublemakers, that they only wanted to make money and that is why they were rocking the boat.”²⁷

The Roundtable Dialogue

At the beginning of January 2011, shortly after the complaint was filed, representatives from OPIC's Office of Accountability visited the area to corroborate the allegations and agree on a dialogue process. Not long after this visit, the meetings that Daniel, Jorge, and others from Santa Úrsula and Paso Canoa had held with municipal and state authorities bore fruit. A state deputy for the municipality of Tuxtepec was able to get a commission of eleven members from the Congress of Oaxaca to visit the area. Community members gave the commission a tour of the area that would be most affected by the hydroelectric project. “They even took fish and turtles out of the creek to show us the creek's richness and all that the project would destroy!” said one of the deputies who participated in the visit.²⁸ The commission's observations were

27 Interview with Jorge, September 25, 2013, Paso Canoa.

28 Interview with Ángela Solís, state legislator, September 23,

contrary to what had been established in the companies' environmental impact assessment, which stated that the project would not endanger the biodiversity of La Sal Creek. A few days later, in February 2011, a meeting was held in the city of Oaxaca to discuss the project with the companies, community representatives, and local officials from Tuxtepec (see Harper 2011). At this meeting, the company, pressured by the group of deputies from the Oaxacan Congress, agreed to temporarily halt the project's construction and to provide the information required by the communities.

March 11, 2011, marked the first session of the roundtable dialogue and conflict resolution organized by OPIC. The session was attended by representatives of the companies, OPIC, the four communities, and the support group of civil society organizations. After hours of discussion, a landmark agreement was reached, which declared the following: (i) the companies would formally suspend the project's construction; (ii) the companies would propose an alternative project that would not affect La Sal Creek; (iii) the companies would present this alternative to the communities and would respect the communities' decision regarding whether to continue with its planning; and (iv) an expert would study the dam's curtain in order to ensure that it did not present any danger in light of the explosions and fractures that had occurred in some homes.

With the activities that the company undertook beginning in 2007 (the year that it arrived to the area), it effectively misinformed and divided the communities. When the first session of the roundtable dialogue was held, tensions among the representatives of the *ejidos* were evident. Rumors swirled around regarding the amounts of money that the companies had paid to different *ejidos*—above all, Los Reyes—so that the project's construction could move forward. The *ejido* of Los Reyes, which stood to suffer the greatest impacts from the hydroelectric project, had decided not to sign the complaint filed with OPIC. In fact, according to Agustín, community members did not want to sign it out of fear that the company would take back the money that it had paid them for their lands and which they no longer had. Their participation in the roundtable dialogue, then, was in response to a

2013, Tuxtepec.

request from the companies. “The company invited us and told us, ‘You are with us, but go and hear how things are and you guys say that you are not opposed [to the project] because the complaint was filed by the other *ejidos*.’”²⁹

Many community members looked favorably on the project, since company representatives had promised them jobs. The company reported that it had 200 community members on its payroll, but, as Jorge stated, “that was a lie. If anything, they might have seventy people working there, but from Paso Canoa there weren’t even ten.” Berta, a resident of Cerro de Oro, a Chinantec *ejido*, told us that during the roundtable dialogue

[the companies said] that we don’t want progress and that they were going to give us a lot of work, employment. . . . What employment, if they are bringing people from there, from outside? From here, only two men were working, and they said that there were many people . . . that there were 200, and from here, 100, and that we didn’t want the work—but they are already bringing in their people from outside. It’s a lie.³⁰

In fact, the people hired to begin the construction entered into a strike at the beginning of 2011, demanding, among other things, that their labor rights be respected and that community members from the area be hired (see Torres 2011; Valis 2011).

The decision of the Los Reyes *ejido* to not join the complaint dismayed leaders from the other communities. Nevertheless, upon participating in the dialogue and hearing about the negative implications of the project, leaders from Los Reyes began to have doubts about their alliance with the companies. “We realized that what [the communities] were fighting for was right. Most of the creek is in Los Reyes, and it benefits us more than anyone. It is only right that we get involved in defending something that provides for us,” explained Agustín in retrospect. “What if something bad were to happen with the dam and they were to say that we are responsible for the tragedy?” At the same time that leaders from Los Reyes began to doubt their position, company representatives offered a million pesos (US\$77,220) to indigenous authorities from

29 Interview with Agustín, September 25, 2013, Los Reyes.

30 Interview with Berta, September 25, 2013, Cerro de Oro.

Santa Úrsula so they would sign the agreement. “I did not allow myself to be bribed,” said Manuel.

A million pesos is a lot of money—we have never had so much—but I’m going to live my whole life here. I’m from here. This is my land. My family lives here. So why would I betray this? . . . I am not negotiating for my plot of land, what is being negotiated is an *ejido* heritage that belongs to everyone.

On his first visit, on June 3, 2011, the expert engineer hired by the company to determine the curtain’s safety confirmed that La Sal Creek was not a spring but rather run-off from the dam. This outraged community members, who argued that the creek had been there since before the dam’s construction. In this context, community authorities requested the presence of government officials at the roundtable so these officials could act on communities’ behalf, given that the government had the duty to protect them. Thus, members of municipal (Tuxtepec) and state (Oaxaca) agencies joined the discussion. José Manuel Barrera, the then municipal president of Tuxtepec, acknowledged that he changed his mind about the project and that the municipality had decided to revoke the permits in light of

the defense made by the *ejidatarios*. . . . They taught us a lesson about the deep-rootedness that they share with their ecological surroundings. In fact, with the construction of the Cerro de Oro dam [between 1974 and 1989], villages were buried and all of the roots that were there were lost. More than anything, I saw it as a lesson in defense. . . . It wasn’t a question of opposing development. It was a question of human rights and of defending lives. The prudent thing to do was to support that cause.

While it is true that the communities have great needs—for jobs, income, and development opportunities—the solution is not to be found in the development model promoted by private capital through investment funds. This model does not put forth a sustainable model for job creation that sparks the local economy; rather, it involves a specialized, temporary labor imported from outside. It also involves a private sector whose priority is not to provide public goods but to enhance its markets and, above all, increase shareholder profits. In this sense, Nicholas Hildyard (2012, 40–43) has argued that the type of development promoted

by the private sector, particularly private equity, is incompatible with positive results with regard to economic benefits for the public good, social justice, and human rights.

On the one hand, the development infrastructure financed and managed by the private sector is inherently exclusive: only those capable of paying may enjoy its benefits. On the other, financing from the private sector is profoundly antidemocratic: decisions regarding projects that will affect many people are made by private investors and companies, without incorporating public debate. This is even more worrying given that, today, the interests of the state and the private sector are tightly connected, and the state's role in protecting the public interest and guaranteeing human rights vis-à-vis development projects is diminishing.

The production model promoted by investment funds such as Conduit Capital does not create inclusive access to energy; instead, it feeds the same private sector and increases inequality. Further, the channeling of private capital investments through "tax havens" and "friendly regulatory environments" (such as Mexico) often means that the country where the investment occurs loses tax income that could have been invested in public projects and policies that truly benefit its residents (Hildyard 2012, 39). And the specific demands made by communities with regard to local projects remain unanswered by a state that is absent and concerned with ensuring capital investment. In this way, governance is a "genetically modified form of law and government that seeks to make itself resistant to two dangerous plagues: on one side, bottom up, potentially chaotic pressures; on the other, unpredictable changes in the rules of the game of capital accumulation brought about by the state or inter-state regulation" (Santos 2007, 13).

At the same time, governance is strengthened by the very international private financial institutions, national development banks, and regional multilateral development banks engaged in these investments (Hildyard 2012, 27). Their mandates on development financing aimed at eradicating poverty are thus controversial: "It is in this interaction that these institutions have invented and reinvented themselves as apparatuses of the management of social reality in the Third World" (Rajagopal 2003, 97). As a consequence, the normative frameworks of governance to which

these institutions are subject are called into question, since these frameworks inevitably create a conflict of interest.

The human rights discourse has been picked up, chewed, and spit out by different frameworks that allow financial institutions and the private sector to continue pursuing the dynamics and flows of capital. The new strategies of leading players in the development field (e.g., the World Bank, the Inter-American Development Bank, G-20, and the United Nations) emphasize the private sector's role in furthering development in countries and eradicating poverty (see, e.g., Bretton Woods Project 2013; Stephens 2013; International Rivers 2012; High-Level Panel of Eminent Persons on the Post-2015 Development Agenda 2013). The same happens with the normative frameworks for regulating the private sector's duties with regard to human rights, which preserve the principle of voluntariness in their implementation.³¹ The panorama reveals economic development models that increase structural problems. What is included as a legitimate aspect of development depends on the specific relations established in the midst of discourse. Relations between financial institutions, private companies, and the state exclude what one assumes is the fundamental objective of development: the well-being of people, the eradication of poverty, and the protection of human rights (Escobar 1995, 44).

La Sal Creek Is a Spring

By threatening to take his company's business to Panama, the senior investment manager at Conduit Capital was able to destabilize the strong and momentary consensus among authorities from the four communities seated at the table. And if that were not bad enough, one of the *ejido* authorities offered him words of consolation, thanking him for his presence and inviting him to have a seat to see if everyone could agree on a solution. Right away, the session's mediator took advantage of the opportunity to speak, and the supposed neutrality that he had demonstrated up until this moment disappeared: after all, he had been hired by OPIC and his task was to ensure that participants reached an agreement for

31 Examples include the United Nations' Guiding Principles on Business and Human Rights and the United Nations Environment Programme Finance Initiative.

carrying out the project. It therefore came as no surprise when the mediator asked the community leaders to reconsider their stance. Nevertheless, the community leaders stood strong in their decision to reject both of the proposals. The company representatives were visibly stressed, for they had not conceived of “no” as a possible answer.

During that same session, the expert engineer hired by OPIC to determine the safety of the dam and the possible effects of future activities on La Sal Creek handed in his report, which confirmed the following:

- a) The spring of La Sal Creek is not the result of filtration from the dam’s curtain; b) La Sal Creek existed prior to the dam’s construction, and its former course is identified. It ran through a zone consisting of geological fractures; . . . d) Any work that is located near the old course of La Sal Creek . . . brings the risk of intercepting groundwater flow that intercepts the spring. (Flores-Berrones and Velázquez 2011, 8)

Science confirmed the knowledge of the indigenous people and the campesinos—knowledge that they had held for a long time and that invariably gets discredited or ignored when “development” is discussed and when decisions are made in its name.

In spite of indigenous authorities’ unanimous position against the two proposals, upon ending the meeting, all parties agreed that both of the proposals and the study results would be presented to the general assemblies of each of the four *ejidos* represented at the table. The idea was that this would allow sufficient time for each general assembly to make an internal decision about the project. Nonetheless, after company representatives, engineers, and government officials visited each one of the four *ejido* general assemblies to present the two alternatives for the hydroelectric plant, the four indigenous communities rejected the project’s continuation and called for an end to the dialogue process. In the face of this unexpected outcome, representatives from OPIC and the companies turned to the government of the state of Oaxaca. The director of OPIC’s Office of Accountability and company representatives even met bilaterally with the Secretary of Governance of Oaxaca to present the project and demonstrate their interest in investing in the state. At that meeting, government representatives highlighted that “the administration of governor Gabino Cué is supportive and shares responsibility in the actions that are

implemented to encourage investment” (Gobierno del Estado de Oaxaca 2011).

The project was halted and, to date, has not been reinitiated. Until now, its cancellation could be considered a success story in the field of human rights and development. This victory was the product of a number of converging factors: community members’ historical memory and their struggle to defend their rights; the willpower and commitment of community leaders throughout the process; the exercise of good practices on the part of local authorities in Tuxtepec; support from civil society organizations; the political situation of the governor of Oaxaca, who was in his first year in office after having defeated the Institutional Revolutionary Party, which had governed the state for eighty years; the appalling practices of the companies and the undeniable violations of human rights and governance norms; and, finally, a context of national pre-campaigns for the 2012 presidential elections that avoided scandals and conflicts that could affect the ballot boxes. However, in January 2014, a new municipal president of Tuxtepec took office, and all signs currently point to a reactivation of the hydroelectric project.

Conduit Capital (2014b) is indeed in Panama with its private capital investment fund Latin Power III (the same fund used for the hydroelectric project at Cerro de Oro), as well as in many other countries in Latin America. While the actors, normative frameworks, and contexts may differ, some things remain the same: the asymmetry of power, territories rich in natural resources, and poor communities struggling to defend their territories. A few months ago, I was chatting with Berta about other projects being financed with foreign private capital in the state of Oaxaca that are being fought against by local communities. Berta remained silent for a moment, rocking thoughtfully back and forth in her hammock. Finally, she exclaimed, “And why don’t they do [these projects] in their own backyard? I think they believe that we people here cannot defend ourselves.”³²

32 Conversation with Berta, September 24, 2013, Cerro de Oro.

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CHAPTER 7

Exploring the Meaning of Community Participation in Uganda

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Introduction

In 2004, I joined the Uganda Human Rights Commission as a novice eager to learn about and change the world. The temptation to think of myself as a Joan of Arc of sorts—coming into the human rights arena to save the world—was great. However, I had forgotten to ask myself a key question: how would I understand human rights in a country whose human rights landscape is as complex as it is in Uganda? Over the past ten years, I have come to realize that the chain of human rights protection and promotion is tangled in some parts and broken in others. As a human rights worker at the commission, I receive, investigate, and play an active role in the resolution of human rights complaints lodged before the commission. My successes or failures as a human rights worker are influenced by the level of efficiency of other key actors in this chain. For example, my speedy and comprehensive investigation of a case does not ultimately translate into speedy remedies or reparations for victims. Nor do my numerous inspections of detention centers yield immediate positive transformations in the conditions of these centers. And the impact of the trainings that I conduct for law enforcement and security officials is dependent on the goodwill of key decision makers within the institutions to implement the recommendations made during these trainings.

In the jungle of human rights actors, which is rife with competing interests and competing sources of funding, it comes down to a scenario of “may the best jungle cat win.” Everyone is out to ensure that their specific needs are met and their interests advanced. Over time, it has become apparent that I must learn to manage my expectations. While I can effectively manage some situations, others fall outside my sphere of influence.

A recent case that I have been working on at the Uganda Human Rights Commission illustrates the complexity of factors and relationships that affect my ability to advance human rights in Uganda. One day while at work, I learned of a petition that had been lodged by community members from Kabaale Parish in Hoima District. The petitioners were contesting the valuation process and resulting compensation offered by the Ugandan government for their land, which was going to be used for the construction of an oil refinery. They felt that the process of deciding how much the land was worth had been conducted unfairly and that the compensation offered to them for this land was too low.

Like many other petitions, this one had all the elements that would compel any person to presuppose the facts and conclude in favor of the less powerful party. From the start, there had been a clear power imbalance between the government of Uganda and the affected communities. Yet for the sake of taking a fair and balanced approach, I decide to carefully examine the multiple external and internal factors involved in the case. While the petition involved a number of issues, I decided to focus on the issue of community participation, particularly the role that government institutions played in encouraging or hindering participation.

For guidance, I looked to the various definitions of community participation, ultimately deciding to use the simple definition provided by Danny Burns et al. (2004, 2) as my point of departure. The authors define community participation as “the engagement of individuals and communities in decisions about things that affect their lives.” I also relied on the United Nations Declaration on the Right to Development (1986), which states that participation must be active, free, and meaningful. I then identified the key actors in the case—from the grassroots to the national and international levels—and assessed their role in facilitating (or hindering) the participation of affected communities. As I delved deeper into my research, I found a labyrinth that sometimes felt like it had no exit.

Navigating the Maze of Local Actors

When I began my research in September 2013, a total of 7,118 people in thirteen villages were set to be displaced by the construction of an oil refinery in Kabaale Parish in Buseruka Subcounty,

Hoima District. Twenty-nine square kilometers of land had been earmarked by the government of Uganda for the project.

The Communities

I first set out to explore the nature of the communities in the affected villages. It was important for me to determine whether these communities were homogenous or fractured, as this would affect their sense of participation.

Hoima District is inhabited mainly by ethnic Banyoro people. However, the communities of Kabaale Parish, where the proposed refinery would be, are composed largely of migrants from the Democratic Republic of Congo and people from other districts in Uganda; indeed, just 7.3% of Kabaale Parish's population is ethnic Banyoro. Most of the land in Kabaale is communally owned, which means that decisions concerning the land must be made collectively. Although the majority of Kabaale's population consists of migrants, most have lived in the area for over twenty years. And although the communities are not homogenous, this does not seem to affect their ability to organize—I discovered that Kabaale residents had created the Proposed Oil Refinery Residents Association to raise public awareness of the construction project and to ensure that local communities were not marginalized during the compensation and resettlement processes.

According to the communities, the government's proposed construction of an oil refinery was a welcome development because it promised to bring, among other things, improved infrastructure and employment opportunities. Despite the communities' goodwill toward the project, they could not ignore their concerns regarding the offered compensation rates and the resettlement process. The communities argued that the compensation being offered by the government was too low to enable them to purchase land elsewhere because land prices in neighboring areas had skyrocketed as a result of speculation triggered by the oil exploration activities. The compensation ranged from US\$1,400 to \$2,800, depending on the land's precise location. The communities questioned the valuations carried out by the government and complained about the government's failure to explain both the valuation process and the method for calculating compensation.

The communities had been offered two options by the government: accept a compensation payment for their land or be resettled by the government. Some community members claimed that they had been forced to sign the compensation forms and that those who had questions about the forms' content were not given an opportunity to voice their concerns. They also said that even after some community members had agreed to the compensation option, there was an unexplained delay in payment by the government. Those who had opted for resettlement claimed that they were not provided with details about where or when they would be resettled. Nor were they consulted about their preferences for resettlement. Most of them wanted to be resettled in neighboring areas due to their ancestral attachment to the land. It was evident that the government had not provided the communities with a roadmap detailing the compensation and resettlement processes. To make matters worse, the government had not "cushioned" the disruption of life—for example, through development initiatives or new opportunities for the communities—experienced by these communities as a result of their displacement.

As I explored this information, I did not want to lose sight of the particular problems faced by women and children in these communities, who are often the most vulnerable. Researching this land compensation case gave me a chance to hear the voices of women and children and to try to understand their unique experiences. In this particular context, the communities' land tenure system and patriarchal way of life presented problems for women during the compensation and resettlement processes. For example, women worried that since men were in charge of signing the compensation forms, their husbands might sideline them once payments were made by the government. Widows living on their deceased husbands' land claimed that their in-laws had signed the compensation forms, excluding them and their children and leaving them to an uncertain fate. And although some women voiced a preference for resettlement, this preference was often overridden by husbands or male relatives who opted for compensation. Women claimed that they had not been given enough information to effectively advocate for their rights or to determine how best to benefit from the oil refinery. Moreover, the education of children whose families were waiting to be relocated

and compensated was gravely affected by the project; these children could not enroll in local schools because their families were waiting to be uprooted from the area at any moment.

Grassroots Leaders and Local Authorities

My conversations with local leaders offered a mix of interesting views. Grassroots leaders (leaders at the village level) claimed that they were viewed with suspicion by their communities after being accused of unduly compromising with the government. These leaders also said that the newly created community association, the Proposed Oil Refinery Residents Association, had been undertaking extensive advocacy campaigns against the oil refinery project without consulting or involving them. Despite the fact that their communities viewed them with suspicion for supposedly siding with the government, the leaders felt that they were actually being left out of the process by district authorities and the government ministry charged with overseeing the oil and gas sector activities. Although the Ministry of Energy and Mineral Development is in charge of the compensation and resettlement processes, the grassroots leaders are responsible for explaining these processes to the communities.

At the same time, district authorities claimed that they were allowed to play only a peripheral role in the compensation and resettlement processes, for a number of reasons. First, the compensation and resettlement processes were controlled centrally by the Ministry of Energy and Mineral Development, leaving little opportunity for district leadership to contribute. Second, the district offices suffered from a lack of funding from the central government, preventing them from being able to monitor the two processes or respond to emergencies arising from their implementation. Finally, unlike officials in the central government, who had benefitted from extensive training on issues related to oil and gas exploration and extraction, district officials did not have the skills that would allow them to play a meaningful role at the community level.

For example, according to district leaders, the communities were divided on the proposed project—some community members applauded the government’s decisions on compensation and resettlement, while others complained about the process and its potential effects—but because district authorities lacked a team to

handle issues emerging from the compensation and resettlement processes, they were unable to coordinate a response to address the issues raised by communities.

Furthermore, leaders from the Community Development Department—a district-level entity tasked with mobilizing and empowering communities—noted that the overly centralized processes sometimes led to harmful effects that the Community Development Department could have foreseen or prevented had it had the chance to be more involved. For example, they noted that the central government failed to consider certain issues that were triggers for violence during the implementation of the compensation process because the central government was out of touch with the realities on the ground. Thus, bank accounts were opened in men’s names only, which often led to domestic violence in cases where couples failed to agree on how to divide or spend the compensation monies.

Women in Parliament

It is important to note that women’s lack of voice is not limited to local processes—women do not have a strong voice at the national level, either. When I researched whether female parliamentarians had advanced the issues and challenges faced by women in local communities, I found that these two groups often did not even communicate. Under the national gender quota system, female members of Parliament are designated at the district level and not at the county or subcounty level, like their male counterparts. The female parliamentarians I interviewed represent larger jurisdictions than their male counterparts but are allotted the same amount of funding to represent these areas. As a result, they are unable to effectively access their female constituents at the grassroots level. These female parliamentarians claimed that, in light of this situation, they had been unable to support the participation of women in Hoima who stood to be affected by the proposed oil refinery.

Nongovernmental Organizations

Based on my research, the most active nongovernmental organizations (NGOs) at the grassroots level in this case were the Africa Institute for Energy Governance, Navigators of Development Association, and the Hoima District NGO Forum. These organizations

claimed that since the government was not being forthright in sharing information about the compensation and resettlement processes, they had a duty to help bridge the information gap and to educate communities about their rights and on how to demand accountability from relevant government institutions. However, in the process of doing this, the NGOs were vilified by security forces and the government and were accused of inciting the affected communities and of sabotaging government programs.

The organizations I spoke with also explained that the presence of “quack” NGOs in the area—groups that offered “solutions” to the problems arising from oil and gas exploration and extraction but that were really attempting to further their own agendas—exacerbated the already tense relationship between the NGOs in Hoima and the government.

The work of these NGOs was further complicated by their relationship with law enforcement. The resident district commissioner, in charge of security in the district, and the Uganda police force claimed that they had not registered any complaints from community members regarding the undervaluation of properties. They blamed the fracas arising from the compensation and resettlement processes on NGO activities that were confusing communities instead of mobilizing them for socioeconomic empowerment.

Looking for Answers at the National Level

Next, I examined the role that Ugandan laws and policies, multinational corporations, the Ministry of Energy and Mineral Development, and regional and international human rights law played in the Hoima case, in the hopes of finding clues or answers to the unresolved issues at the grassroots level. But given my experience working at the Uganda Human Rights Commission, I was prepared to find more questions than answers.

Legal and Policy Framework

I first set out to determine the extent to which national-level laws and policies established standards regarding participation, whether community participation specifically or participation in general. In particular, I looked at the Ugandan Constitution; the Land Acquisition Act and the Petroleum Exploration,

Development and Production Act; and the National Development Plan and National Oil and Gas Policy.

The Constitution

Perhaps one of the most striking provisions of the 1995 Constitution is article 1(1), which provides that “all power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.” The Constitution also emphasizes that the state of Uganda “shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance” (National Objectives and Directive Principles II[i]). It provides for the right to participate in the following ways: the freedom of speech and expression and the freedom to assemble and to petition (art. 29); the rights to participate in government affairs and to participate in peaceful activities with the aim of influencing government policies (art. 38); and, for citizens aged eighteen and older, the right to vote (art. 59).

Also relevant to the Hoima land compensation case is article 26, which provides for the right to own property. This article states that no one shall be compulsorily deprived of property except where the acquisition is in the public interest and is performed under a law that provides for “prompt payment of fair and adequate compensation” prior to the acquisition of the property. Unfortunately, the parameters of “public interest” are not defined. In the Hoima case, such a definition would have been useful for the government in trying to explain to affected communities why the proposed oil refinery was of national importance.

The Land Acquisition Act and the Petroleum Exploration, Development and Production Act

In trying to understand how the government might be defining the “public interest” in this case, I turned to the Land Acquisition Act of 1965. This act makes provisions for the compulsory acquisition of land in the public interest and for related compensation processes. The act states that in the event of the compulsory acquisition of property, the compensation amount is to be determined by an assessment officer. However, the act does not specify how the officer should arrive at the assessment amount. Furthermore, the act states that the minister of lands may draft regulations

concerning the assessment and payment of compensation; yet since the act's enactment in 1965, no such efforts have been made.

Another relevant piece of legislation is the Petroleum Exploration, Development and Production Act, enacted in 2013. The purpose of this act is to establish "an effective legal framework and institutional structures to ensure that the exploration, development and production of petroleum resources of Uganda is carried out in a sustainable manner that guarantees optimum benefits for all Ugandans" (sec. 1[a]). This act emphasizes the importance of accountability and transparency in the conduct of oil- and gas-related activities. Specifically, it provides for a complaints mechanism for parties affected by proposed exploration activities (sec. 55), as well as a compensation mechanism for landowners whose rights are disturbed or whose land is damaged by the activities of licensees (e.g., multinational corporations) (sec. 139). Finally, section 151 of the act requires that information be made available to the public through the Ministry of Energy and Mineral Development in accordance with Uganda's Access to Information Act and upon payment of a prescribed fee.

The National Development Plan and the National Oil and Gas Policy

Understanding the national context also meant looking beyond the specific legislation affecting this case. I thus explored two broader policy instruments: the National Development Plan and the National Oil and Gas Policy. Uganda's National Development Plan for 2010–2015 outlines the country's "medium term strategic direction, development priorities and implementation strategies" (Government of Uganda 2010, para. 1). The plan, which prioritizes economic development through its theme of "Growth, Employment and Socio-Economic Transformation for Prosperity," identifies the oil and gas sector as a key sector for economic growth. Within this sector, the construction of an oil refinery is designated as a top priority (*ibid.*, para. 149). The plan also identifies obstacles to the optimum performance of the oil and gas sector, including a lack of human resources, limited options for transporting material in bulk, and an insufficient legal, policy, and institutional framework (*ibid.*, sec. 5.5.2). It does not mention the lack of community participation as an inhibiting factor for the performance

of the oil and gas sector. Furthermore, under the plan, the government's responsibilities related to the development of the oil refinery include a feasibility study, project structuring, and refinery construction and engineering (*ibid.*, para. 302). The importance or relevance of community participation is not mentioned as a responsibility or relevant factor.

In contrast, the country's 2008 National Oil and Gas Policy does appear to consider the importance of public opinion and participation. Among the policy's guiding principles is the promotion of transparency and accountability, and among its key objectives is "to ensure optimum national participation in oil and gas activities" (paras. 5.1.3, 5.3.7). The policy states that "openness and access to information are fundamental rights in activities that may positively or negatively impact individuals [and] communities" and that "it is important that information that will enable stakeholders to assess how their interests are being affected is disclosed" (para. 5.1.3) The policy envisages that the timely dissemination of information and constructive dialogue among stakeholders will help reduce anxieties and manage expectations (para. 4.8).

Based on the National Oil and Gas Policy's recommendations, in 2011, the government developed a communication strategy for the oil and gas sector in Uganda (Ministry of Energy and Mineral Development 2011). This strategy aims to ensure national participation in the oil and gas sector and to manage expectations regarding the perceived benefits of oil and gas activities. It also seeks to ensure transparency and accountability, noting that "it is important that information that will enable stakeholders to assess how their interests are being affected is disclosed" (*ibid.*, 4). The communication strategy gives the government a leading role in communications related to the oil and gas sector in order to avoid problems that might arise from misinformation coming from other sources. Under the strategy, the government is supposed to identify and use channels of communication that are best suited to effectively deliver messages to stakeholders. The strategy acknowledges that low public awareness of the legal framework concerning the oil and gas sector might lead to a "limited understanding of the sector and government's intentions," which, in turn, might "reinforce misconceptions" and misinformation (*ibid.*, 9). However, the Hoima land compensation case shows

that what is recommended on paper does not always make its way to reality.

The Ministry of Energy and Mineral Development and Multinational Corporations

The outcome of the Hoima land compensation case was influenced by the interests of two important players at the national level: the Ministry of Energy and Mineral Development and multinational companies with interests in Uganda. On the one hand, the ministry is charged with overseeing the activities of Uganda's oil and gas sector, and, on the other, multinationals have a huge interest in the construction and operation of new oil refineries, which are likely to increase their profits. Yet, in my interactions with both of these actors, it became clear that neither was driving the process. Perhaps this lack of interest and accountability was part of the problem.

When I went to speak with ministry officials about the Hoima case, my main question was about the centralization of their compensation and resettlement decisions. I wanted to know if the ministry thought it was in any way problematic that decisions regarding compensation and resettlement were made without community participation. The officials responded by stating that human rights and participation were emerging issues and that the ministry did not have the expertise to deal with them. These officials nonetheless insisted that the compensation and resettlement processes had conformed to the procedures provided for under Ugandan law. Specifically, they said that communities had been given a three-month transition period to allow them enough time to vacate their lands.

The officials blamed the controversy surrounding the compensation and resettlement processes on the high levels of dishonesty, speculation, and bad will of people who generally did not support the government's development programs. Surprisingly, in our conversation, the officials brought up the National Oil and Gas Policy and the resulting communication strategy, and we ended up discussing the ministry's role in disseminating the contents of these two policy documents. The lingering question after my meeting with ministry officials was whether the concept

of participation had been a priority during the government's conceptualization of the proposed oil refinery.

During this same visit to the Ministry of Energy and Mineral Development, I learned that the ministry had engaged the services of a private firm, Strategic Friends International, to implement the compensation and resettlement processes. When I contacted the firm, I was told that the resettlement process had been implemented with active community involvement through the Resettlement Action Plan Committee, which had been elected by the affected communities themselves. Strategic Friends International also said that during the compensation process, members of the affected communities who contested the compensation rates were allowed to lodge complaints directly with the ministry and were permitted to remain on their land until their complaints were addressed. If the complaints were not addressed to the community members' satisfaction, they were at liberty to forward these complaints to court. As with my other interviews in this case, I came away pondering how each side could have such different versions of the facts on the ground.

The national picture was further complicated by the role of multinational corporations in Uganda. Two oil companies—Tullow Oil and Total E&P—operate in the area of the proposed oil refinery. In my interactions with both Tullow and Total, company representatives made it clear that these companies had not been involved in the compensation and relocation processes because building the oil refinery was an exclusively government-led initiative. Furthermore, they did not appear to have worked with the government to ensure that the oil refinery project was expeditiously completed, despite the fact that they stood to gain from its construction and operation.

The Influence of Regional and International Human Rights Law

Finally, in trying to understand the meaning of community participation, I explored how it is defined under regional and international human rights law. In particular, I looked at the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, and International Labour Organization (ILO) Convention 169.

The first of these, the African Charter on Human and Peoples' Rights (1981), is a regional human rights instrument that gives great importance to the concept of community by emphasizing the collective rights of "peoples" and by paying homage to the "oneness" of communities in Africa.

The second, the African Commission on Human and Peoples' Rights, is a quasi-judicial body responsible for interpreting the provisions of the African Charter and overseeing its implementation. The commission has emphasized the importance of community participation in a number of decisions, including the *SERAC* and *Endorois* cases.¹ The commission's *SERAC* ruling highlights the state's obligation to raise awareness and disseminate information that will empower citizens to exercise their rights and freedoms, as well as its obligation to enable communities to participate in decisions related to development projects that will affect them. Its *ENDOROIS* judgment describes the features of a "distinct community" that deserves "special protection," which include sharing a common history, culture, and religion.²

The third instrument that I looked at was ILO Convention 169, adopted in 1989. Although Uganda has not ratified this convention, it is relevant to the Hoima land compensation case because it outlines the internationally accepted standards for consultation and participation. As outlined in article 1(1), these standards are restricted to indigenous and tribal peoples "whose social, cultural and economic conditions distinguish them from other sections of the national community." The convention emphasizes the importance of free and informed participation in policy and development processes, as well as the importance of conducting consultations in good faith, "with the objective of achieving agreement or consent to the proposed measures" (art. 6[2]). Further, the convention calls for tribal and indigenous peoples' participation

1 African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, October 27, 2001; African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication No. 276/03, November 25, 2009.

2 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, para. 162.

“in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly” (art. 7[1]). Thus, relevant regional and international human rights instruments give great importance to the concepts of community and of community participation.

Emerging from the Maze and Reflecting on the Case

As I emerged from the maze of research, I reflected on my experience interacting with the different actors at their various levels of influence. Since the mandate of the Uganda Human Rights Commission includes investigating alleged human rights violations, our staff is often viewed with suspicion or wariness when we are out in the field. In this particular case, due to the nature of the issue at hand and the tensions arising from it, I had to proceed with caution. As a staff member of the commission, I am required to maintain a neutral stance at all times while executing the commission’s mandate. But in the Hoima case, pressure from stakeholders to take sides was very high. There was a strong possibility that NGOs and the communities would view me as a supporter of the government, while the government would view me as a supporter of the NGOs and communities. It was imperative that I not get caught in the crossfire. My role was to gather and understand stakeholders’ stories in order to shed light on and try to resolve the existing tensions.

Over time, I have discovered that it is hard for people to comprehend and appreciate the concept of neutrality. People often find it easier to deal with those who identify with and fight for their particular side of a problem or issue. Yet for me to do my job, I had to emphasize my neutral stance and win the trust of all sides in order for them to open up to me. Sometimes, what I learned when the actors did open up was troubling. For example, my interaction with the communities revealed that they were extremely hopeful that the Uganda Human Rights Commission’s intervention would solve all of their problems. I had to manage their expectations by informing them that I was there to learn about their side of the story and share it at a different or higher level of influence on the power ladder.

When I set out to research the issue of community participation in the Hoima land compensation case, I did not anticipate the multiple layers of facts and actors that I would encounter. As I mentioned at the beginning of this chapter, during the course of my human rights work, it has become clear that I do not always have solutions to the problems that I encounter. I try my best to do what I can and to understand the various factors that influence my work. Having this insight proved helpful as I tried to decipher the issue of community participation in the Hoima case and in Uganda more broadly. Although I did not expect to emerge from the maze with easy solutions, I did want to learn how things could be done better in the future. My hope was that I would be able to begin a discussion about the meaning of community participation and the role that government institutions often play in encouraging (or hindering) this type of participation.

Participation of the Various Stakeholders

In the Hoima case, the lack of information sharing was clearly a big problem, and one that was exacerbated by power struggles among the various stakeholders. Key actors that could have bridged the information gap—such as grassroots leaders and district government authorities—were disempowered in their ability to facilitate participation. In addition, communities' relationship with their leaders was fractured, which meant that they did not have an official voice through their leaders. As a result, the communities created the Proposed Oil Refinery Residents Association as a way to bypass their leaders and voice their concerns directly. However, with the general lack of information from the government and local leaders, the potential for effective and meaningful participation was limited.

For their part, multinational companies preferred to play it safe by not getting involved with the complaints arising from the contentious oil refinery project. Their decision makes sense if one considers that these companies need the government's goodwill to be able to continue with their oil exploration and extraction activities in Uganda. However, multinational companies could have played a more proactive role in advising the Ugandan government that it was in the best interest of all parties that the compensation and relocation processes be conducted in a fair and

transparent manner in line with regional and international human rights standards.

The nongovernmental organizations also played a less-than-ideal role in these processes. While the NGOs kept the spirit of activism alive, the results of their efforts were problematic. With speculation and anxiety rife in the communities, people desperately sought the information disseminated by the NGOs—but the reliability of this information was questionable since the NGOs themselves claimed to be victims of the government’s information hoarding. Participation can be effective only if it is based on accurate information. Furthermore, the proliferation of NGOs in this case reenacts the jungle-survival scenario whereby the “jungle cat” NGOs are competing to stay relevant to communities at all costs, regardless of their interests in the case. This creates a risk that community members will be taken advantage of as the jungle cats struggle to maintain their power.

As I reflected on the issue of participation at the community level, I was prompted to ask a number of questions about how the communities defined themselves and their relationship to their land. Did the communities in Kabaale Parish have a special attachment to the land? Were these ancestral lands? Did the communities have a distinctive characteristic as a people that deserved special protection? Was there a collective element to the impact suffered by the communities as a result of the government’s project? Based on my research, the answer to all of the questions is no. In the Hoima case, the affected communities do not meet the criterion of distinctiveness used for indigenous communities. The property rights issues that characterize indigenous and tribal communities do not characterize the affected communities in Hoima. In addition, the affected communities do not meet the standard of a homogenous community because they are composed of migrants from outside Uganda and people from other parts of Uganda. Nonetheless, the communities in Hoima still have a right to participate in major political and economic decisions that have a direct bearing on their lives and well-being.

What was clear when I looked back at the different types and levels of participation among the numerous stakeholders was that vulnerable and marginalized groups—namely, women and children—lacked a seat at the table. The effect of Uganda’s

patriarchal society permeates all levels of governance, from the grassroots level to district governance structures right up to the central government. It affects the design of programs and policies to the extent that these programs and policies often fail to provide for women's involvement or to consider the particular effects that they might have on women. At the central-government level, female parliamentarians are prevented from effectively representing their female constituents. And at the grassroots level, the less privileged women level are further marginalized and left out of decision-making processes that affect their lives. They suffer this marginalization in both their immediate family nucleus and the wider communities in which they live.

My research in this case uncovered numerous problems caused by a lack of information sharing. The disconnect between the central government and the district government meant that the Ministry of Energy and Mineral development did not have access to the same information that district leadership had. If there had been clear channels of communication, both levels of government might have better understood the social and cultural context of the case—particularly the gender issues involved—and anticipated the problems that could arise during the implementation of the compensation and resettlement processes. Special measures could have been devised to empower vulnerable groups, such as women, to participate and voice their concerns.

In addition to a lack of information sharing, there was also a lack of trust. My research showed that the communities were not making use of the grievance mechanism that allowed them to file complaints with the district commissioner and the police. There are many possible explanations for this, including a lack of trust in the complaints procedure, as well as the existence of physical and financial barriers to accessing this mechanism. This demonstrates that the promises made on paper—in this case, by the Petroleum Exploration, Development and Production Act—do not always transform into reality on the ground.

Disconnect between Law and Reality

There is a disconnect between participation as it is understood in the law and participation as it appears in practice. The reason for this disconnect may be rooted in Uganda's Constitution. First,

under the Constitution, the right to participate is interpreted in a narrow political sense, where it is conceived of largely as the right to vote and the right to be involved in political activities. Such a narrow interpretation is problematic, since the enjoyment of this right is closely connected to the enjoyment of other rights (Mbondenyi 2011). Second, article 43 of the Constitution allows for the enjoyment of constitutionally protected rights—including the right to participate—to be limited in the public interest. According to this article, the enjoyment of rights and freedoms must not “prejudice the fundamental or other human rights and freedoms of others or the public interest.”

According to jurisprudence of the African Commission on Human and Peoples’ Rights, when a government uses the “public interest” to impose limitations on constitutionally protected rights and freedoms, the justification for these limitations “must be strictly proportionate with and absolutely necessary for the advantages which follow.”³ But in the Hoima land compensation case, it is not clear whether this principle of proportionality was adequately applied by the Ugandan government. Did the government prove that building an oil refinery was in the public interest? Was the displacement and relocation of affected communities proportional to the public interest intended to be served by the oil refinery? Unfortunately, the answer to these questions is no. There is no information showing that the government made efforts to comply with the proportionality principle before it began compulsorily acquiring communities’ land in Hoima District.

On analyzing the constitutional provision on the right to property, I asked myself: Is this constitutional provision inadequate? Should it be expanded? The African Commission on Human and Peoples’ Rights has interpreted the right to property to include

not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also the right to undisturbed possession, use and control of property however the owner(s) deem fit.⁴

3 African Commission on Human and Peoples’ Rights, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communication Nos. 140/94, 141/94, 145/95, November 5, 1999, para. 42.

4 *Centre for Minority Rights Development (Kenya) and Minority*

The narrow interpretation of the right to property in Uganda does not favor communities because it does not recognize their right to undisturbed possession, use, and control of their land. This permits the government to expropriate their land without any qualms about violating the provisions of the Ugandan Constitution.

Because it is legal for the Ugandan government to compulsorily acquire land in the public interest, the only real recourse for communities is to challenge the compensation amount. Compensation is intended to restore the affected communities to the same position as if their land had not been taken from them. The state, as a trustee for the citizens of Uganda, should be responsible and careful when exercising its power to expropriate land.

In the Hoima case, it is evident that the power scale is tipped in favor of the state. For example, the Petroleum Exploration, Development and Production Act serves, above all, to protect and promote the interests of the state, not of affected communities or other constituencies. The complaints mechanism outlined in the act provides only for complaints against the granting of exploration licenses to third parties; importantly, it does not provide for complaints against government-led projects such as this one. And the complex process involved in obtaining information on petroleum exploration, extraction, and production activities is a stumbling block in itself to ordinary Ugandans, who do not necessarily have ready access to the Ministry of Energy and Mineral Development or to the funds required to obtain the desired information.

While some policies in Uganda appear to encourage community participation, such encouragement is meaningless if it is not backed by enforceable laws. Ideally, the principles of participation in general and community participation in particular should be protected by law, as it would give communities a concrete foundation on which to claim their right to meaningful participation. In this regard, constitutional and legislative reforms may be necessary.

Finally, for community participation to be effective, accountability mechanisms must function in such a way that people are able to direct their concerns to specific institutions and trust that

Rights Group (on behalf of Endorois Welfare Council) v. Kenya, para. 186.

they will receive appropriate and timely feedback. The central government structures in Uganda—in this case, the Ministry of Energy and Mineral Development—are too far removed from ordinary citizens. Good governance by these institutions means having processes in place that allow officials to carry out their responsibilities in an effective, transparent, and accountable manner. It also means that people must be “free to participate in, and be heard on, decisions that affect their lives” (Mbondenyei 2009, 187). Inefficient accountability mechanisms and a lack of participation negatively affect the functioning of Uganda’s democracy.

Reflections on Community Participation

As I sought to make sense of the various realities that were unveiled during the course of my research, I concluded that the right to decide and the right to act freely are key elements community participation. Could people in the community freely opt for compensation or relocation? Were there options that they were unable to explore due to a lack of information? The fact that many community members claimed that they had been coerced to sign the compensation papers demonstrates how crucial free consent is for meaningful participation.

Looking to regional and international law did not prove as useful as expected in helping me understand what “community participation” should mean as a legal term in Uganda. Because ILO Convention 169 and the African regional mechanisms focus on indigenous peoples’ rights, they do not provide much insight into nonindigenous “community rights.” Even if Uganda had ratified Convention 169, the convention would not be applicable in this case given that the communities in Hoima do not qualify as indigenous peoples. The government of Uganda would surely argue that the principles of consultation and participation outlined in the convention do not apply to the communities in this particular context. Nevertheless, I believe that the standards set forth in Convention 169 remain useful and should have been used as a guide in the Hoima case.

Moreover, although Uganda has ratified the African Charter on Human and Peoples’ Rights—which underscores the importance of “communities” such as the ones affected in this case—the charter remains largely unknown to the people of Uganda. This

brings me back to my earlier reflections about my effectiveness as a human rights worker at a national human rights institution. The public's general lack of awareness of the charter's provisions is an indictment of me and the institution that I represent. In order to stay relevant in the "jungle" that is our operating context, we must do a better job of raising awareness of African regional mechanisms—including jurisprudence of the African Commission on Human and Peoples' rights—so that people can see how these mechanisms are relevant to their daily lives.

From the grassroots context to the national, regional, and international levels, the tension among the various actors concerning community participation is evident. This tension is similar to the tension described earlier among the intricate web of actors that I encountered locally in the Hoima case. It plays out in a variety of ways and can sometimes alter the effectiveness of human rights interventions. A community's ability to thrive is affected by regional and international influences. We look to these influences for answers but are often disillusioned by the fact that regional and international mechanisms seem far removed from the realities on the ground. One cannot prescribe a remedy simply by considering the situation at face value; solutions must be multifaceted.

In any given human rights case, the different actors involved possess different levels of power. Local leaders must learn to work effectively within their positions of power. It is not acceptable for actors to be resigned to their fate of being at the periphery of important processes. As a human rights worker, I can relate to this type of defeatist attitude, especially in situations where I have a limited ability to influence or alleviate a situation involving multiple actors. This defeatist attitude offers fertile ground for the more powerful jungle cats to fight over power and ignore the communities' needs. The critical question in every case is the same: despite the limitations, tensions, and struggles, how have the various actors—especially those at the grassroots level—used their power to deal with affected communities' concerns? Even actors that have been seemingly disempowered can explore their potential to be of positive use to their communities.

Conclusion

I believe that the proposed oil refinery project is good for Uganda and its people. I also believe that the government of Uganda has the right to produce oil in order to generate revenue for the country's economic development. However, in pursuing avenues for economic development, the government must ensure that such development is not achieved at the expense of the rights of communities.

For me as a human rights worker, this case has demonstrated the importance of adopting a holistic approach when dealing with situations that call for interventions. It is obvious that where an intervention targets only one aspect of a situation, it is an ineffective intervention. For example, in the Hoima case, providing the communities with information while failing to engage key government ministries and politicians to inform them about the human rights concerns would be of no use. As a human rights worker, I must strategically situate myself in the human rights issue at hand, taking into account my strengths and my limitations and devising strategies that allow me to relate with the various levels of power in order to achieve a positive impact. The intricate and interconnected web of actors in Hoima showed me that one must consider each and every actor as important and develop strategies for them to communicate so that they can work together for the betterment of society. As jungle cats, we can all survive in the jungle—as long as we each play our part for the good of its inhabitants.

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CHAPTER 8

La Oroya: A Painful Wait for Justice

María José Veramendi Villa
(Peru)

*When we began to fight for our rights,
we all agreed that we would be together until the end.*

—MARÍA, VICTIM OF THE LA OROYA CASE

*It's taking a really long time, and not all of us
have the patience or desire to keep waiting.*

—JUANA, VICTIM OF THE LA OROYA CASE

Introduction

More than eight years have passed since Peru's Constitutional Tribunal issued a sentence ordering the Ministry of Health and the Office of the Director General of Environmental Health (DIGESA, for its Spanish acronym) to adopt measures to protect the health of people affected by the contamination produced by the metallurgical complex operating in the city of La Oroya. Juana,¹ one of the victims affected by the contamination, said that when the Constitutional Tribunal's judgment was handed down, the residents of La Oroya were very happy because Peru had vindicated them. However, as days turned into months, this happiness transformed into disillusionment. The sentence was not being complied with. As a result, Juana and a group of courageous residents of La Oroya filed a case before the inter-American human rights system. This suit has been pending for over seven years before the regional system, where it awaits a decision regarding the responsibility of the Peruvian state for the commission of human

1 Victims' names have been withheld to protect their safety.

rights violations against a group of inhabitants of La Oroya, as a by-product of the environmental degradation in that city.

Seven years after their legal actions, the victims are still waiting for justice to be served. During such a long wait, it is inevitable that feelings of desperation and hopelessness overtake the struggle and become themselves a new form of victimization. “It’s taking a really long time, and not all of us have the patience or the desire to keep waiting,” Juana told me with resignation and worry.

La Oroya is so geographically close to the country’s capital but at the same time so socially distant that it is a perfect example of the philosophy “if it doesn’t affect me, it’s not important to me” adopted by many Peruvians. In a country where the percentage of national territory licensed for mining has almost doubled in the last thirteen years, where mining is considered a key source of economic development, and where “throughout our lives there had been talk about how [the contamination of La Oroya] was a problematic issue, but [society] had ignored it,”² those who defend life—their own lives—in the face of the environmental contamination in which they live are stigmatized as “enemies of development.”

This chapter does not seek to perform a legal analysis of the human rights violations that the Peruvian state has committed against residents of La Oroya. This aspect has been demonstrated through years of litigation and will ultimately be determined by the inter-American system, hopefully soon. Rather, it aims to narrate, from a human point of view and through the lens of the victims and the people working on the case, what the wait for justice has been like. The chapter is written with the shared wish of the victims and all of those who have worked on this case that the wait will soon be over.

La Oroya: So Close yet So Far Away

We passed through La Oroya before that, however, a mining town we dearly wanted to see, but we weren’t able to stop. La Oroya is at an altitude of some 4,000 meters, and from its unrefined appearance you can picture the hardship in a miner’s life. Its tall chimneys throw

² Interview with Astrid Puentes Riaño, executive co-director of AIDA, December 11, 2013. All quotations from Astrid in this chapter derive from this interview.

up black smoke, impregnating everything with soot, and the miners' faces as they traveled the streets were also imbued with that ancient melancholy of smoke, unifying everything with its grayish monotone, a perfect coupling with the gray mountain days. We crossed the highest point on the road while it was still light, at 4,853 meters above sea level. Though it was still daytime, the cold was intense. Tucked up in my traveling blanket, staring out at the view extending on every side, I muttered all sorts of verses, lulled by the roar of the truck. (Guevara 2004, 133)

By June 2013, 21% (26,752,220 hectares) of Peruvian territory had been conceded for mining; of this, 1,014,449 hectares had been conceded in the department of Junín (where the city of La Oroya is located), whose total land area is 4,440,967 hectares (Cooperación 2013; Ministerio de Energía y Minas 2010).

During my childhood, in family trips to Peru's central Sierra, I passed many times through La Oroya, but La Oroya never passed through me. It was only in 2006 that I began to become aware of the grave health problems troubling the city, when I heard news about the decision of the Constitutional Tribunal and actions before the Inter-American Commission on Human Rights (IACHR) by a group of residents of La Oroya. These residents were suffering serious health problems due to the activities of the metallurgical complex—run by the US company Doe Run—that had been operating since 1997.

The first time I visited La Oroya as a lawyer of the Interamerican Association for Environmental Defense (AIDA, for its Spanish acronym)—an organization that represents the victims of the case and the beneficiaries of the IACHR's precautionary measures, together with the Association for Human Rights in Peru, the Center for Human Rights and Environment, and Earthjustice—the physical and emotional sensation that passed through me was horrific. As I departed Lima, the eyes with which I had previously seen only the main highway changed radically.

The main highway, PE-22, is one of the country's most important routes since it joins the coast with the valley of Mantaro in the Andes and with the central jungle. In this area of the central Sierra, large-scale mining appeared at the beginning of the twentieth century with the arrival of the US company Cerro de Pasco Mining Corporation (Saint Louis University Libraries Special Collections

2014). Thus, as my colleagues and I left Lima and drove along the main highway toward the center of the country, we came across an imposing natural landscape entangled with mines, concentrator and metal-processing plants, toxic-water reservoirs, and huge tailing piles.

In just the first few kilometers outside of Lima, we encountered a disheartening reality: mining companies carrying out their activities next to or almost on top of the population, a contaminated natural landscape, a social reality of poverty, and a political reality that seems defenseless against these circumstances as long as they serve to benefit the country's "economic growth." We began our journey at the Minera La Gloria, a company dedicated to the extraction and processing of nonmetallic minerals such as coarse sand and crushed stone. Although in January 2012 the Ministry of Energy and Mines issued its Mine Closure Plan (Resolución Directoral No. 002-2012-MEM-AAM) with the aim of "ensuring that the environment surrounding the mining unit recovers a high quality similar to that which it had before the commencement of the mining activity and/or obtains an alternative use that complements the environmental conditions of the sphere of influence," in November 2013 the company was still operating, and residents of the zone were protesting, demanding the mine's closure due to the environmental contamination that it was generating. During the protest, one of the area's inhabitants declared, "We demand that the mine go away. We are protesting against the issue of the contamination of our environment and our health—our children are getting sick every day. We want to see nothing more of the mine. We want it to leave" ("Bloquean Carretera Central en protesta por contaminación de minera" 2013).

This reality repeats itself throughout the climb to higher altitudes along the main highway: the tailings dump in the community of San Mateo de Huanchor, whose residents are the beneficiaries of the IACHR's precautionary measures due to the poisoning they suffered from the tailings;³ the concentrator plant from the Casapalca mine; the Morococha silver mine; and the Toromocho

3 Inter-American Commission on Human Rights, *Community of San Mateo de Huanchor and Its Members v. Peru*, Report No. 69/04, Petition 504/03 (Admissibility), October 15, 2004.

mining project of the Chinese company Chinalco, which required the relocation of the city of Morococha to a site approximately nine kilometers from its original location, leading to the division of its residents and to social conflict.

This is how the trip unfolded as we made our way to La Oroya. After crossing the mountain pass of Ticlio, more than 4,850 meters above sea level, we began our decline to La Oroya. Upon entering the city, one is struck by the grayish-white color of the surrounding mountains. This color is the product of toxic residues. La Oroya is the capital city of the province of Yauli, in the department of Junín. It has approximately 33,000 residents and is located in the central Peruvian Andes at 3,750 meters above sea level and 175 kilometers from Lima. It is so close to Lima, the country's capital, but at the same time so far away that if one asks random individuals in Lima whether they know about the contamination and the dire health crisis affecting residents of La Oroya, many will say, "Oh, yes, what a contaminated city," or "I have passed through there on the way to vacation in the Sierra, what a horrible city," or "Yes, I have passed through there and the altitude is harsh"—but they ignore the sufferings of its inhabitants just 175 kilometers away.

As one arrives to La Oroya and enters its old town, it is impossible not to focus on the enormous chimney of the metallurgical complex, constructed in 1922 by the US company Cerro de Pasco Copper Corporation. The complex is composed of three circuits for the processing of lead, zinc, and copper, and a subcircuit for the processing of precious metals. The copper circuit began operating in 1922, the lead circuit in 1928, and the zinc circuit in 1948 (Doe Run Peru 2014c, 2014d, 2014e). The complex converts the ore into various metals, such as copper, zinc, silver, lead, indium, bismuth, gold, selenium, tellurium, and antimony, and subproducts such as zinc sulfate, copper sulfate, sulfuric acid, arsenic trioxide, oleum, sodium bisulfate, zinc oxide, zinc powder, and zinc and silver concentrate (Doe Run Peru 2014b).

In 1974, the military government of General Juan Velasco Alvarado nationalized the complex, after which it was operated by Centromin Perú until 1997. In the 1990s, the Peruvian government undertook a privatization strategy, which included the privatization of various companies, including Centromin. The plan to

privatize the Centromin company as a whole was a failure, so the company's operations were divided into subsidiary and affiliate companies that would be privatized independently. As a result, the metallurgical complex was offered independently, and, in October 1997, the complex was purchased by Doe Run Peru, a Peruvian affiliate of the US company Doe Run Company, in turn an affiliate of the Renco Group (Proinversión n.d.; Doe Run Peru 2014f; Renco Group 2014).

A Long Road of Unfulfilled Obligations

What caught my attention at La Oroya [when I went there for the first time in 1997] was that the women walked around with their faces covered in scarves, but not because of the cold. When I asked them, they told me that it was to protect their lungs so it wouldn't hurt so much to breathe. I realized that, for the population there, this was normal. They didn't know what clean air was because they had never experienced it.⁴

Although the population of La Oroya was living and breathing contamination, they thought that living this way was normal. Indeed, they had never known any other reality. Juana, one of the victims of *Community of La Oroya v. Peru* before the IACHR, said that she had always felt the contamination burning in her eyes and throat but that she did not give it any importance.

But the residents of La Oroya were not the only ones who did not attach importance to this situation—neither did the state. For the state, too, the contamination had become normal. Prior to the 1990s, environmental legislation was rare, responsibilities were undefined, and regulatory agencies were almost nonexistent. This panorama allowed companies to carry out their work without checks on the activities that were harmful to the environment and, subsequently, human health. In 1990, the Environment and Natural Resources Code (Código del Medio Ambiente y los Recursos Naturales) was enacted, but there were no control standards regarding the contaminating emissions of these activities. And in May 1993, the Ministry of Mines and Energy issued

4 Interview with Anna Cederstav, executive co-director of AIDA, December 13, 2013. All quotations from Anna in this chapter derive from this interview.

Supreme Decree 016-93-EM (Decreto Supremo 016-93-EM), which named the Ministry of Energy and Mines as the authority responsible for regulating mining-metallurgical activity and, for the first time, regulated the Environmental Adequacy and Management Plans (PAMA, for its Spanish acronym) that had to be presented by the mining-metallurgical companies in operation. According to article 9 of the decree, the objective of PAMA was for “the owners of mining activities to successfully reduce their environmental contamination levels to the maximum levels permitted. PAMA will indicate the procedures for implementation, investment, monitoring, and effluent monitoring and, in the case of occupying protected areas, restoration efforts in work areas.” The idea was that mining operations already underway would gradually conform to established limits.

The metallurgical complex’s PAMA was presented by Centromin prior to Doe Run’s purchase of the complex and was approved by the Ministry of Energy and Mines in January 1997 (through Resolución Directoral No. 017-97-EM/DGM). It had a ten-year execution timetable and included the following projects:

monitoring stations and aerial photography, handling of copper and lead, environmental adjustment of slag deposit, arsenic trioxide deposit, conditioning of the ferrite deposit, bleed-off treatment plant in copper refinery, disposal of household waste and sewage, industrial liquid effluents and sulfuric acid plants.⁵

According to Doe Run Peru (2014a):

the previous owners of the Metallurgical Complex, including the Peruvian state between 1974 and 1997, did not adequately track environmental policies, which resulted in the accumulation of severe environmental liabilities to the detriment of the La Oroya population. As part of the agreements reached [in the purchase of the metallurgical complex] in 1997, the Peruvian state acknowledged its responsibility in the cleanup and solution of the problem regarding the land of La Oroya, as well as in addressing all of the issues related to environmental contamination resulting from 75 years of uncontrolled contamination, as well as during the period of PAMA and its enlargement.

5 Organismo de Evaluación y Fiscalización Ambiental, Resolución Directoral No. 0018-2011-OEFA/DFSAI, February 23, 2011.

Therefore, when Doe Run Peru purchased the metallurgical complex, it assumed certain obligations of the PAMA, such as those related to the effluents, emissions, and residues generated by the company's smelting and refining facilities, its service and living facilities, and the zinc ferrite deposits existing at the time of the conclusion of the transfer agreement (Notario Aníbal Corvetto Romero 1997). As Doe Run (2014a) has stated:

The Peruvian state retained responsibility for all of the issues pertaining to the health of third parties, including but not limited to the residents of La Oroya, and also those related to the operation of the Metallurgical Complex through the PAMA and its enlargement taking into consideration that Doe Run Peru would complete the PAMA projects, efforts that Doe Run Peru has always undertaken and that will continue.

Anna Cederstav, executive co-director of AIDA, went to La Oroya for the first time in 1997, with an appointment to visit the metallurgical complex. "It was humorous," Anna said. The company arranged the transportation so that the group would leave very early from Lima, and, upon the group's arrival to La Oroya, the company led them directly into the facilities. She said that it was clear the company wanted to "avoid having us discover how bad the contamination was." She explained that the visitors had to sit for several hours to listen to long-winded talks and presentations with very little content, and that the company informed the visitors that they had to leave the city at three in the afternoon so that they would not have to drive at night, given that the highway was dangerous. At the end of the visit, the group had only an hour to visit the smelting works and to see the arsenic deposits⁶ before quickly being taken away from La Oroya.

A few days later, she went back to La Oroya without notifying anyone in advance. "It was frightening, I felt bad just minutes after getting out of the car," she said. And only in this way was she able to truly appreciate the city's contamination and to meet with groups of environmental activists. Anna explained that based on the findings from her visit, AIDA drafted a report (Cederstav and Barandiarán 2002) in which it also directed comments at the

6 Anna said that the company had taken the arsenic dioxide and buried it next to the river in order to later cover it with crude petroleum and dirt.

PAMA: “The PAMA was horrible, we made a ton of comments. With the implementation of the PAMA, none of La Oroya’s problems was going to be resolved.”

The report explained some of the problems with the PAMA, such as its failure to address fugitive emissions,⁷ which constituted at least 50% of emissions. AIDA sent the report to the Ministry of Mines and Energy, with a copy to the company. Upon seeing the report, Doe Run Peru reacted angrily to its content and complained about not having had knowledge of it before it was sent to the ministry.⁸ The company’s attitude is just a sample of what Doe Run’s implementation of the PAMA has been like: a long road fraught with exceptions granted by the state in which the complex has operated with impunity while the population’s health has continued to deteriorate.

The PAMA was subjected to numerous modifications⁹ and two extensions, one awarded in 2006 and the other in 2009.¹⁰ The company’s requests for extensions were based on arguments of exceptional financial situations that would have inhibited the financing and construction of the complex’s sulfuric acid plant and copper circuit. Peru’s Congress authorized both extensions, to the detriment of improvements in the protection of air quality, public health, and the rights of the population. The company’s last attempt, fortunately a failed one, to obtain an extension occurred in 2012.¹¹

While all of this was happening, residents of La Oroya were suffering damages to their health. Juana said that it was not until

7 “Fugitive emissions are those that escape into the environment during the process of smelting or handling of concentrates and products, without passing through controlled emission points” (Cederstav and Barandiarán 2002, 23).

8 Interview with Anna Cederstav, executive co-director of AIDA, December 13, 2013.

9 Ministerio de Energía y Minas, Resolución Directoral No. 178-99-EM/DGM, October 19, 1999; Resolución Directoral No. 133-2001-EM-DGAA, April 10, 2001; Resolución Directoral No. 028-2002-EM-DGAA, January 25, 2002; Resolución Ministerial No. 257-2006-MEM/DM, May 29, 2006.

10 Ministerio de Energía y Minas, Resolución Ministerial No. 257-2006-MEM/DM, May 29, 2006; Congreso de la República, Ley 29410, September 26, 2009.

11 Congreso de la República, Proyecto de Ley 636/2011-CR.

2003 that she began to become aware of the contamination when, through her work in the parish, she was able to access information and learn about what was really happening. This led her to begin connecting the dots between respiratory problems in her family and the city's contamination.

Proof of the seriousness of La Oroya's contamination can be found in air-quality studies performed between 1997 and 2007. A fact sheet published by AIDA describes these studies:

For example, in 2007 studies were carried out with the full knowledge of the authorities and published by the complex's operator. These studies concluded that the situation had not improved and in some circumstances had worsened, as in the case of sulfur dioxide. Indeed, sulfur dioxide concentrations increased between 1997 and 2006, and the same trend was seen between May 2006 and April 2007. A similar situation applies to lead, cadmium and arsenic, as well as the emissions registered in 2008. (Interamerican Association for Environmental Defense n.d., 2; internal citations omitted)

This situation led the Blacksmith Institute, in 2006 and 2007, to include La Oroya in its list of the ten most contaminated cities in the world.

In May 2008, after one—yes, just one—visit to La Oroya by a team of experts from Blacksmith's Technical Advisory Board, La Oroya was removed from the list. The report from the team's visit stated that the plans and programs being implemented by the company and the government were effective. It also noted that although lead levels remained high, the team hoped that these programs and investments would be successful in controlling exposure to lead in the near future (Blacksmith Institute 2014).

AIDA harshly criticized Blacksmith's report on the basis that it was a mere uncritical summary of the information presented by Doe Run Peru and that it ignored company and government monitoring data that proved Doe Run's failure to comply with air-quality standards (Interamerican Association for Environmental Defense 2008, 10). The organization also noted:

The report implies that Doe Run is acting responsibly and that no additional measures need to be taken beyond those already outlined in its PAMA, even though some of the PAMA commitments have not yet been met and, even if they were all met, would not adequately protect the people and particularly children of La Oroya. (ibid., 11)

AIDA maintained that any report seeking to issue an opinion regarding atmospheric emissions and other environmental parameters in La Oroya should be based on more than assumptions and a previously announced visit—indeed, it should be based on publicly disclosed data, a literature review, and consultations with the company, organizations, and experts. Finally, AIDA concluded that the report presented a misleading outlook of the environmental and health situation in La Oroya, which undermined existing efforts to achieve adequate cleanup in the city (*ibid.*).

La Oroya's air quality had and continues to have serious effects on the population's health, especially that of children. A study on blood lead levels conducted in 1999 by DIGESA on 346 children from La Oroya yielded worrying data: just 0.9% of the children presented levels under 10 µg/dL; of these, none lived in La Oroya's old town, the area closest to the metallurgical complex (Cederstav and Barandiarán 2002, 27). In 2005, another study by DIGESA found that of 788 children, just 0.1% presented blood lead levels under 10 µg/dL (Gesta Zonal del Aire de La Oroya 2006, 44). According to the World Health Organization (2013), "There is no known level of lead exposure that is considered safe."

In 2009, the metallurgical complex suspended its operations in light of the company's serious financial troubles. Between 2009 and 2010, there were worker strikes, roadblocks, and pressure from company workers aimed at getting the government to extend the deadline for complying with the PAMA. During this time, the company filed for insolvency and entered into a restructuring phase. In addition, the National Society of Mining, Petroleum and Energy suspended and then expelled the company due to its lack of will in complying with its commitments. Doe Run's efforts to restore its image reached extremes; for example, it published newspaper advertisements portraying the company's president as a leader "who provides employment to thousands of people, improving the environment and benefiting the community" and who has "contributed to the population's health by providing medical facilities" (Renco Group 2009).

In his 2009 address to the nation, the president of the republic referred to Doe Run's situation:

Doe Run is a refinery in La Oroya that has signed commitments for ending environmental contamination in the coming months, but it has

only partially complied with them, and apparently it is used to mobilizing its workers with the threat of unemployment, trying to pressure the state and to extend the environmental solution a few years more.

If the company contributes new capital and provides Peru with sufficient financial guarantees that this time it will comply, the state will be able to have a dialogue and make arrangements; otherwise, the law will be relentlessly applied. We cannot submit to pressure, and laws should be complied with by those who must respect environmental standards. (“Mensaje a la Nación por Fiestas Patrias del presidente de la República Alan García” 2009)

On July 28, 2010, Doe Run’s noncompliance reached the government’s established limit, causing Peru’s president to announce the cancellation of the metallurgical complex’s operating license. In his message to the nation on independence day, the president stated:

Regulations . . . should prevent companies from taking advantage of or blackmailing the state, as is the case with Doe Run in Junín. Since the legal time limit has been reached without a resolution of the environmental contamination, the law will be strictly applied and [the company’s] operating license will be cancelled. (“Mensaje a la Nación por Fiestas Patrias del presidente de la República Alan García” 2010)

The following year, in November 2011, and with the complex still closed, authorities conducted a study of the blood lead levels of 803 children between the ages of six months and nine years, as well as of pregnant women. The results revealed that 52.9% of the sample had levels of less than 10 µg/dL, showing a substantial decline in blood lead levels during the complex’s closure (International Federation for Human Rights 2012, 14). Juana said that during the time in which the complex was closed

I was happy because I didn’t feel anything. . . . Before, when I would go to visit Juan in the high part [of La Oroya’s old town] my head and throat would hurt. [But after the closing] I would go up and nothing would hurt me—I wouldn’t get tired, I didn’t have constant respiratory sicknesses.

Unfortunately, that sensation of well-being for Juana and the rest of the population would not last long. On July 28, 2012, the metallurgical complex partially recommenced its operations, running just the zinc circuit. The complex was under new management, the Right Business company, which was appointed by the

Creditor Assembly to move the company's restructuring process forward. After the recommencement of operations, sulfur dioxide emissions were detected at levels at which states of alert should have been activated—however, this did not happen.

In a public interview, the then president of the Movement for Health in La Oroya (MOSAO), Rosa Maro, said, "It was a black dawn." The air density was so thick that "we breathed black smoke like that from a burning tire, due to the reactivation of the complex's ovens. The smoke was so bad you couldn't see the front of my house" ("Población de La Oroya seguirá vigilante" 2012). In December of that year, the lead circuit also began operating again.

After the recommencement of operations, Doe Run and the administrator Right Business, under an arrangement with the provincial municipality, installed four electronic screens in the city with the aim of transmitting information from DIGESA's air-quality monitoring system for La Oroya (Dirección General de Salud Ambiental 2014). The local newspaper headlines read, "With Gigantic Screens, the Population of La Oroya Will Control Air Quality" ("Con pantallas gigantes población de La Oroya controlará calidad de aire" 2012). After speaking with the victims of the case and seeing the screens with my own eyes, I should say that they are far from gigantic, are installed in such a way that it is almost impossible to see the information being displayed, and, finally, do not emit any kind of beeping or buzzing sound that would inform the population when contamination levels reach an alert status. In conclusion, they are of no use for residents.

Justice That Has Yet to Arrive

Environmental impact studies that have been conducted in Peru and other countries indicate that mining activities can significantly disturb the natural environment surrounding the mining complexes.

—SAINT LOUIS UNIVERSITY (2005) STUDY ON ENVIRONMENTAL CONTAMINATION IN LA OROYA

What most caught my attention [the first time I went to La Oroya] is that I couldn't breathe. You feel the contamination in your throat, on your skin, on your face

—ASTRID PUENTES RIAÑO, EXECUTIVE CO-DIRECTOR OF AIDA

The first time I visited La Oroya as a lawyer for the case's victims was in 2012. After spending twelve years outside the country, in November 2011, I returned to Peru with a strong desire to continue working in the human rights field and to contribute all that I had learned. Two of the main reasons for my return were the desire to work directly with victims and to do something for my country. Upon my return, following a brief but important stint at the Legal Defense Institute, I joined AIDA with the expectation of learning, contributing my experience from having worked on the defense of human rights and the environment, and working to achieve change.

I knew that it would not be easy, and I knew after having worked at the IACHR that it would be difficult to explain to the victims of our two very important cases before the inter-American system (the *La Oroya* case against Peru and the *Belo Monte* case against Brazil) why the system was taking so long to answer their claims. I knew then, and I know now, that there are logical explanations for such delays. But for the victims, these procedural explanations are not enough—what they most need are clear and direct answers. With all of these thoughts running through my head, I arrived to La Oroya, where, upon entering the city, I was struck by the graffiti painted on the walls flanking the train tracks. The graffiti was written in defense of the metallurgical complex and in denial of any contamination. One of the most striking tags said, “No to the anti-mining NGOs . . . Get out of La Oroya, damn it.”

The graffiti was threatening and reflected the sentiment of the majority of the population dedicated to mining activities. In the province of Yauli (of which la Oroya is the capital), 39.38% of the population is economically active; of this subset, 20.6% is dedicated to the “exploitation of mines and quarries” (Municipalidad Provincial de Yauli 2012, 83–85). The employees of the metallurgical complex, which represent a significant portion of the economically active population, see the nongovernmental organizations that have worked to defend the population's health and reduce contamination as enemies of development and mining, and thus as a constant threat to their source of employment. For many years, this sentiment was fueled by the absence of reliable information about the true state of the city's contamination—a form of obscurantism in which information was absent, provided only

partially, or manipulated in order to avoid alarming the population. This fact was combined with a company that did not comply (and still has not complied) with its environmental obligations, that incited its own employees to pressure the state to grant more extensions, and that provided the rest of the population and even the press with manipulated information to attack the supposed “anti-miners,” its own neighbors.

Today, in an effort to improve the company’s image, the threatening graffiti has been replaced with positive messages about caring for the planet and the natural environment. I am still waiting to see how those positive and important messages will become a reality in La Oroya.

But going back to my first visit to La Oroya: after spending a few hours there—particularly in the old town, which is in front of the metallurgical complex, separated only by the Mantaro River—my throat was hurting intensely and my skin was notably irritated. My first meeting with the case’s victims was held at the home of one of the victims. As I had anticipated, one of the first questions they asked was when their case was going to be decided. The question hurt, and at that moment, as their legal representative before the IACHR, as a human rights lawyer, and as a former employee of the same commission, I felt a lump in my throat. How could I explain to them that the IACHR was facing an intense crisis that prevented it from concentrating as it should on its cases and that all of its efforts were focused on defending itself against attacks from member states? How could I explain that there are so many cases and that its human resources are limited? How could I explain the unexplainable, the frustration shared with the victims because of the delay?

For La Oroya residents, this case began when the metallurgical complex puffed the first cloud of smoke from its enormous chimney—when the parents, grandparents, and maybe even grandparents of those who, today, are victims of the case before the IACHR were still alive.

For AIDA, this case began in 1997, when AIDA’s executive co-director, Anna Cederstav, began to explore, together with the other founding organizations, which cases should be taken on. La Oroya was an important yet problematic case and had been seriously ignored in Peru. In previous decades, reports and

evaluations about damages to the health of complex workers had been written, but there had been nothing about the impacts of smelting on the population's health.¹²

In light of this, together with the Peruvian Society for Environmental Law, Anna went to Lima and began to work on research and documentation for the case. After a visit and some initial trips to La Oroya, Anna and Alberto Barandiarán began to draft an analysis of and follow-up to Doe Run's atmospheric emissions reports issued between 1996 and 2001. As Anna told me, the company had refused to provide copies of these emissions reports in electronic format. In response to the requests for access to information that the company did respond to, "the company sent lists and lists of monitoring data but without any kind of analysis. There wasn't anyone in the government who was evaluating whether it was complying or not." This, together with the fact that the company irresponsibly argued that the contamination came not from the complex but from La Oroya's automobile emissions, demonstrates the panorama of misinformation that existed in the city.

In 2002, as a result of the research conducted by Anna and Alberto, AIDA and the Peruvian Society for Environmental Law published the report *La Oroya Cannot Wait*. The publication describes the grave health impacts suffered by La Oroya's population and recommends a series of measures that both the state and the company should adopt to improve the situation (Cederstav and Barandiarán 2002). Anna noted that after the report's publication, people in the city finally realized that the population's health was in serious danger: "No one had told them nor did they know about the risks to their health. They didn't know that life wasn't supposed to be like that. They were scared and began to realize that someone had to do something."

In 2002, a group of people who were suffering negative health impacts from the contamination decided to do something. Astrid Puentes, executive co-director of AIDA, recalled that the first meeting held in La Oroya with this group was a workshop in a restaurant. "It was a very beautiful experience. As lawyers, we explained the options for human rights protection that were

12 Interview with Anna Cederstav, executive co-director of AIDA, December 13, 2013.

available to them. The people were scared but also hopeful that something could be done.”

The victims decided to file a claim against the Ministry of Health and DIGESA, requesting the design and implementation of a “public health emergency strategy” for the city of La Oroya in accordance with the provisions of the 1997 General Health Law (*Ley General de Salud*). Their claim also called for the implementation of measures aimed at improving the health of those affected and the application of the provisions of Supreme Decree 074-2001-PCM (*Decreto Supremo 074-2001-PCM*) regarding air-quality standards. After a four-year process and a serious judicial delay, on May 12, 2006, the Constitutional Tribunal decided in favor of the victims and ordered the Ministry of Health and DIGESA to take the following actions within thirty days:

Implement an emergency system to attend to the health needs of individuals contaminated by lead in the city of La Oroya, prioritizing specialized medical attention for children and pregnant women, for the purposes of their immediate recovery;

Undertake actions aimed at the issue of a baseline, in accordance with the Regulation Law of National Standards for Environmental Air Quality, in such a way that, as soon as possible, the respective action plans can be implemented for the improving of air quality in the city of La Oroya;

Undertake all actions aimed at declaring a State of Alert in the city of La Oroya; and

Take actions aimed at establishing epidemiological and environmental surveillance programs in the area that constitutes the city of La Oroya.¹³

When Juana began her work in the parish, she began to learn about contamination and the problems it was causing. She also began to connect her sister’s asthma to the city’s contamination and began to internalize the fact that La Oroya’s situation was not normal. At that moment, she thought about her daughter, who was just a little girl. As Juana told me, “I don’t want her to suffer.”

13 Tribunal Constitucional, *Pablo Miguel Fabián Martínez y otros c/ Ministerio de Salud y la Dirección General de Salud Ambiental (DIGESA)*, Exp. No. 2002-2006-PC/TC, May 12, 2006.

When the Constitutional Tribunal issued its sentence in 2006, Juana said that the claimants were very happy because Peru had vindicated them. They believed that something was finally going to be done. However, with the passage of time came disillusionment due to the company's failure to comply with the tribunal's sentence. Astrid explained that in the face of this noncompliance and upon seeing a lack of results—along with the fact that the state was not doing anything, either—the claimants began to prepare a request for precautionary measures and the presentation of a case before the IACHR.

Those years were complex one for the victims and their lawyers. Astrid remembered with sadness that during the case's preparation, one of the victims—a fourteen-year-old girl—passed away. Further, because of their human rights work, some residents and victims of the case were (and continue to be) stigmatized by other community members.

Astrid said that when she and her colleagues would travel to La Oroya, "everyone knew where and what we were going for." The Constitutional Tribunal's sentence led to a series of attacks against the victims: "They put a dead dog on one woman's front door, and they threw stones at another man's store," Astrid said.

As Juana recounted to me, she would arrive to her house and cry due to the constant threats. "On the radio they would say that we were enemies of the population and that they were going to burn our houses. We also felt hugely deceived [by the attitude against us] by the company's employees because they were suffering the same problems as us," she said. "When María and I would walk along the street, they would point at us and say, 'There goes the MOSAO.'"

MOSAO was founded in 2002 by a group of La Oroya residents with the aim of fighting for the protection of their health and their city. As Juana recalled, "We were afraid. They blamed us for everything. They said that we were paying people to say lies [about La Oroya]." For these reasons, when the group of victims requested precautionary measures before the IACHR, they unanimously requested that their identities be withheld.

On August 31, 2007, the IACHR asked the Peruvian state to adopt the necessary measures to carry out a specialized medical diagnosis of sixty-five residents of La Oroya and to provide

specialized and appropriate medical treatment for those individuals whose diagnosis revealed irreversible damage to their personal integrity or lives (Inter-American Commission on Human Rights 2007, para. 46). Juana said that receiving the news about the precautionary measures was a happy moment:

We knew that we were winning something. At the beginning, everything went well and we believed that everything could be fixed, [but] with the passing of the months, years, there were no answers. . . . When they would take us to Lima for the medical exams, not everything could be done in the five days [we were there], and on top of that there were doctors biased toward the company. That made us lose confidence in the Ministry of Health.

On August 5, 2009, the IACHR issued a report of admissibility on the case. The commission established the following:

The Commission finds that the alleged deaths and/or health problems of alleged victims resulting from actions and omissions by the State in the face of environmental pollution generated by the metallurgical complex operating at La Oroya, if proven, could represent violations of the rights enshrined in Articles 4 and 5 of the American Convention, with reference to the obligations established in Articles 1.1 and 2 of that instrument. In the case of children, the Commission finds that these events could also constitute violations of Article 19 of the American Convention.

The Commission finds that the alleged delay of over three years in the decision on the constitutional motion, as well as the alleged failure to comply with the final decision in that proceeding, could represent violations of the rights enshrined in Articles 8 and 25 of the Convention, with reference to the obligations established in Articles 1.1 and 2 of that instrument. The Commission also finds that the alleged lack and/or manipulation of information on the environmental pollution pervasive in La Oroya, and on its effects on the health of its residents, along with the alleged acts of harassment toward persons who attempt to disseminate information in that regard, could represent violations of the right enshrined in Article 13 of the American Convention, with reference to the obligations established in Article 1.1 of that instrument.¹⁴

14 Inter-American Commission on Human Rights, *Community of La Oroya v. Peru*, Report No. 76/09, Petition 1473-06 (Admissibility), August 5, 2009, paras. 74–75.

As the years have passed, the case continues to await a decision, the precautionary measures have yet to be enforced, and the organs of the inter-American human rights system have yet to establish the Peruvian state's responsibility for these acts. In each of our meetings with the victims, the same question is asked: when will a decision be issued? In the face of that question grows the frustration of the victims and us as their lawyers—and me as a person. During those moments, I often think of a popular phrase that is said when someone dies: "Let time do its work." That phrase is supposed to help make the mourning process easier because it suggests that some day the pain of the loss will disappear—but in this case, time has a counterproductive effect. The passage of time has a harmful and frustrating effect on victims.

Time passes and hope fades. Astrid said that when the admissibility report was issued, there was great hope that justice would finally be served and that something would be done to stop the impunity that the company had demonstrated for years. But we continue to wait, and this wait is having adverse consequences on the victims and their right to obtain justice.

La Oroya's Wait Continues

Leaving La Oroya is impossible for my family because here we have work. But we are confident that we're going to achieve something with the lawsuit and that there will be change.

—JUANA, VICTIM OF THE LA OROYA CASE

In children's bodies, the lead competes with calcium. When children are growing, their bones are porous, and the little holes must be filled with calcium.

When they are in a contaminated environment, the lead in their blood begins to reside in those spaces in the bones, so each day that passes, the possibility that they have more lead in their bones is greater, and this constitutes an irreversible damage since it is very difficult to eliminate it afterward.

—ASTRID PUENTES RIAÑO, EXECUTIVE CO-DIRECTOR OF AIDA

In my work at the IACHR, I learned about cases of grave human rights violations in many countries. In some cases, I was able to personally meet the victims or their relatives and put faces to the case files. But during those years at the commission, I was also

able to see the other side of the coin: the impact of these long processes on the search for justice. Cases that already had histories of interminable domestic legal proceedings and that were presented to the IACHR in search of a last chance for justice would find themselves in a long waiting line that would make that yearned-for justice seem an unreachable goal.

I should clarify that in this chapter I do not analyze the reasons for the procedural delays that ail the commission. This issue has already been explored by various analyses and proposals that have sometimes even been utilized to attack and question the IACHR's Petition and Case System, which constitutes the very essence of the inter-American system. Nevertheless, we should be conscious that the passage of time is a great enemy of justice. It is an enemy of the victims who seek it and the enemy of their lawyers, who demand agility from the system and who, at the same time, have the responsibility to inform and explain to our clients why such a long wait is happening.

Unfortunately, the law is not always at the service of justice, and La Oroya is an example of the confluence of various factors that have caused this long wait: benevolent legal norms that have offered extension after extension to the company as it tries to comply with its obligations, as well as a company that has manipulated information about the city's state of contamination and, in the process, deceived an entire population about the possible impacts to its health while also manipulating its own employees, who, fearful of losing their jobs, have stigmatized fellow workers fighting for their health and for positive change.

The Renco Group, Doe Run's parent company, has also used intimidating legal tactics. For example, in December 2010, Renco notified the Peruvian government that it intended to sue the government for \$800 million in damages before an international investment tribunal for violations of the US-Peru free trade agreement, including indirect expropriation (Warren 2012).¹⁵

In this context, the Constitutional Tribunal's decision has still not been complied with, and the long wait has become an instance

15 Indirect expropriation is the "set of measures that a state can take that would affect the investor's expectations for future earnings" (de Echave n.d.).

of revictimization. During this wait, two claimants have died: one of them rejected medication because he was afraid it would poison him, and the other suffered from heart problems. "What a shame that we couldn't save him. The examinations were very delayed, and with a solid diagnosis we could have done something," Juana told me sadly. "[The victims] felt cheated, they are already dying and nothing has happened." Astrid noted that these were very sad moments: "We felt totally helpless that these individuals left us and that we weren't able to help them in any way."

Astrid remembers two children who were at the initial workshop and who fell asleep while eating soup, for sleeping disorders are one of the many effects of lead poisoning. Now those children are adults and have had to leave La Oroya in search of work. Several victims have moved to other cities, fleeing the contamination and harassment that they suffered in La Oroya. But when the victims leave, it becomes harder to evaluate the damages.

I remember one of the first meetings that I had with the claimants. At that meeting, they unanimously declared that when the case began they would be together until the end, fighting for the state to repair the damage to their city, their community, and their health. As time has passed, though, it has become more difficult to maintain a united group, and hopes have begun to waver. Juana remarked that the passing of time, in addition to the pressures of the city, has led several claimants to lose sight of the lawsuit's ultimate goal: to obtain justice through a declaration of state responsibility. She said that the company has used tricks to manipulate the victims, even giving one of them a house. The company has taken advantage of their necessities and desperation. "That jeopardizes the group," she said with worry.

Time affects the victims, wearing them out until they begin to waver and give up their right to justice. It makes them vulnerable in the face of a city hostile to anyone who fights for their rights to life and health, in the face of a state that denies its responsibility and looks for any excuse to avoid such responsibility, and in the face of a company that wants to polish its reputation and use its economic power to manipulate. Where is the law in these cases? Where is the justice?

Over the past two years, I have witnessed how some organizations, working under the banner of "environmental" causes, have

launched a campaign to show the “best” of La Oroya: tourist activities, reforestation, and photo exhibits, all under a slogan of a city reborn from contamination and of a new management at the metallurgical complex that wants to do things the right way, that wants to help the population, and that is supposedly no longer the source of contamination.

Efforts to improve the city and its inhabitants’ quality of life are valid as long as they are truly aimed at that. These efforts should not seek to hide a situation in which the environmental degradation is evident. Although various factors have contributed to a reduction in the atmospheric contamination in La Oroya in recent years, the problem is still not resolved. Much remains to be done, and both the state and the company have obligations that they must meet. How long must La Oroya wait?

Conclusion

The *Community of La Oroya v. Peru* case has been an important source of learning for each and every one of us who has worked on it. A few months ago, as I was writing a blog about another case, I thought about the thousands of stories that were behind that case. *La Oroya* is the same: behind it are thousands of stories of families whose lives were radically changed due to the city’s contamination and the subsequent damages to their health and lives. People who had to abandon their homes because they did not see a future in the city, people who have been unable to leave La Oroya because their entire lives and family are there, people who have suffered painful attacks and insults from their own neighbors and the community but who march forward with the conviction that, one day, change will come and La Oroya will be a better and fairer place for them, their children, and their grandchildren. I hope and trust that the law will deliver justice to recover those years of waiting.

My work on this case, and the testimonies and experiences of the victims, has done nothing but reaffirm my commitment to the defense of human rights. In addition, it has led me to see from the victims’ point of view how the long wait for judicial decisions affects their rights—above all, their right to justice.

For the family of a disappeared person, it is crucial that an efficient investigation take place in order to determine the

whereabouts of the individual and to identify and punish those responsible. For communities whose territories are affected by projects that did not involve the communities' prior consultation, it is crucial that these projects be suspended until the communities are properly consulted. For the victims of the *La Oroya* case, it is critical that the state assume its role as the state and make the company comply with its obligations without delays or excuses, attend to victims' health effectively and comprehensively, and repair the damages caused. In all of these situations, time can be either an important ally or a feared enemy. Delayed decisions can have serious impacts on the victims, causing mental harm, physical harm, and in some cases even death. This should lead those of us who work with victims and those who make decisions on these cases to reflect on the effectiveness of our actions.

This chapter is a tribute to each of the victims of *Community of La Oroya v. Peru*. It is a tribute to their courage in defending their rights. It is a tribute to their tireless search for justice, not just for themselves as individuals but for their fellow community members. Claimants, you yourselves have said it many times: "This case is for all of La Oroya."

But it is also important to pay tribute to those who, whether out of fear of losing their jobs or a desire to avoid stigmatization and persecution from their own communities, have not raised their voices to demand justice. To all of you, it is important that you know that there is a group of brave members of your community who are fighting on your behalf.

Finally, we must never forget that behind each case are human beings awaiting justice. The victims need answers today.

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CHAPTER 9
Marikana:
The Absence of Justice,
Dignity, and Freedom?

Asanda Benya
(South Africa)

It was late afternoon, I was outside my shack brewing traditional beer and suddenly I saw scores of people running this direction [pointing away from the hill]. Some were screaming and crying, others just running, I tried to stop some of them, but they were all running. . . . I knew that they were coming from the hill. I quickly ran towards the hill, when I got there some men were turning us back, telling us that women were not allowed nearby. I kept trying to get close so I could check if my brother was there, but we were not allowed. All this time I kept calling my brother's phone but it was off. . . . Finally, I left and came back home. When I got home, I called one of his friends but it was difficult hearing him because there were people screaming in the background. What I heard was that they were with my brother on the hill. . . . The phone cut while we were talking. . . . I didn't know whether they were still with him or they left him on the hill. . . . My daughter arrived and slept here that night, my neighbor also came to sleep here and my sister [a woman from the same village back home]. I stayed up all night, crying and worried about my brother because no one knew where he was and people's phones were off. We couldn't go out to look for him because it was late and we were afraid, there were police driving around and harassing people in their houses looking for mineworkers. . . . Around four in the morning my phone rang, on the line it was a nurse from Paul Kruger Hospital and she said my brother is in hospital . . . alive but badly hurt. . . . It was such a relief.¹

On August 16, 2012, South Africa and the world were shocked to see police open fire on striking mineworkers at the Lonmin platinum mine in Marikana, leaving thirty-four of them dead. In the most brutal state-sponsored massacre since the height of apartheid, the workers died while protesting for a living wage on a hill in Wonderkop, just outside the employer's premises. A

1 Interview with Thembeke, November 22, 2013, Marikana. All quotations from Thembeke in this chapter derive from this interview.

further seventy-eight were seriously injured, and, in the days that followed, two hundred seventy of the strikers were arrested, tortured, and, under an arcane apartheid-era law, charged with the murder of their colleagues. Meanwhile, the names of those who had been killed, injured, and incarcerated were withheld, as their families earnestly searched for them in morgues, hospitals, and police stations.

When the massacre took place, I was conducting my fieldwork in the mines in Rustenburg. Since my method for collecting data was participant observation, I had relocated to Rustenburg to work and live with mineworkers. The main focus of my fieldwork was women who had recently been incorporated into the underground workforce; I wanted to understand how they made sense of themselves in a space traditionally defined as masculine. To do this, I worked in mixed teams, where I observed both men and women. Being in these teams afforded me the opportunity to be an insider and an outsider at the same time. Because of production demands—and thus little time to focus on newcomers—workers quickly accepted me, paying more attention to my ability or inability to contribute to production targets than to my being a research student. When I told workers about my research project, most of them usually confused it with my being a vacation student who needed training in mine work. The quick acceptance was good but often resulted in what I sometimes considered merciless work allocations. While I participated in the day-to-day work underground, I also had to reflect on its meanings for workers, especially women, who were my main interest.

On the day of the massacre, we were underground and had no idea what was happening just thirty kilometers away. The rock drill operators had just finished their eight hours of drilling, and we were preparing to place the explosives and blast our panel. It was not until late afternoon that we became aware of what had happened in Marikana. Workers later told me that at the dining hall they had watched the evening news in shock, unable to fathom that such brutality had happened on their doorstep.

Although the atmosphere in the shaft is always fast-paced and noisy, the morning of August 17 was different. When I arrived at the shaft, the mood was somber, the air thick with sadness. Workers were standing in groups: those from Lesotho together

in one part, and groups from different parts of the Eastern Cape together in another, as if providing accounts to one another about the whereabouts of their homeboys² and relatives who worked in Marikana. That morning, most workers did not want to go underground, and some were not even at work—they had gone to search for their homeboys, friends, relatives, fathers, and siblings who were mineworkers at Lonmin or residents in the Marikana vicinity. It was not surprising that most workers did not want to go underground; after all, it is an environment that requires one's complete attention and presence.

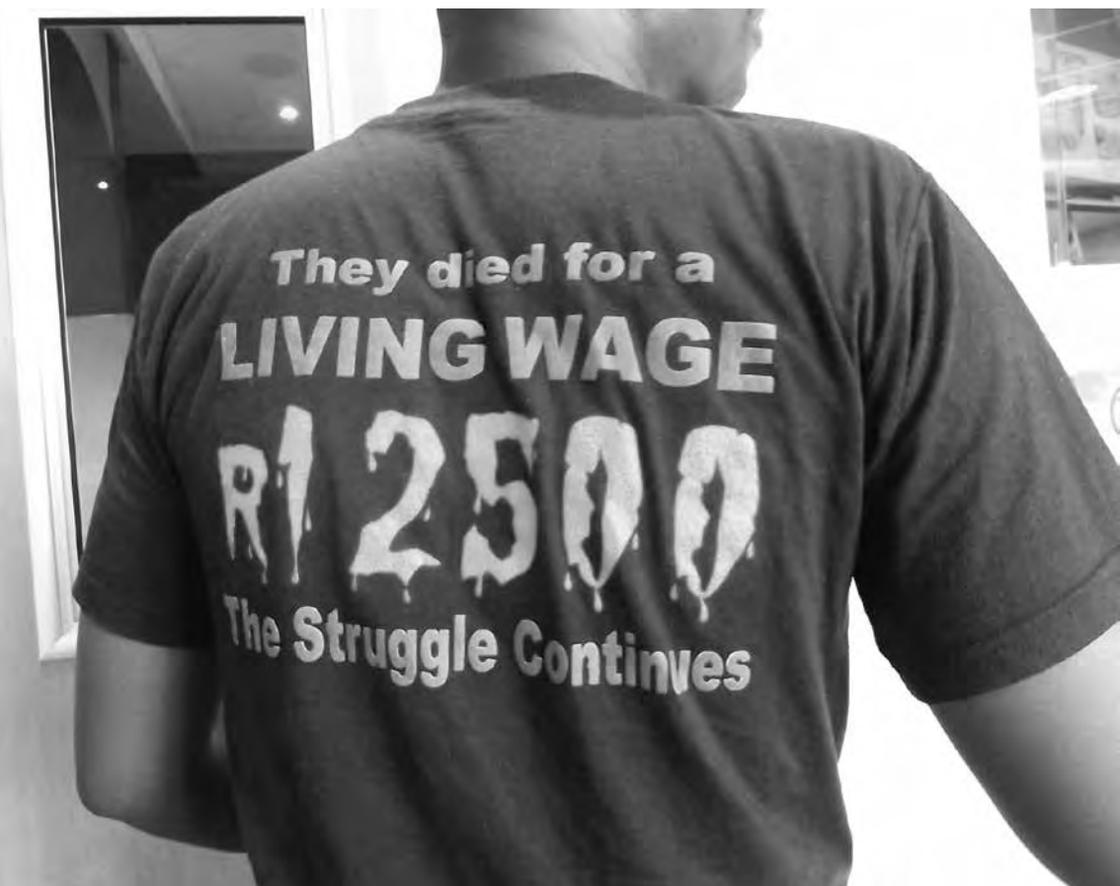
Working underground exposed me not only to the highly technical side of mining and the market-driven production targets set by management but also to the physically excruciating and mentally unforgiving work in the hot and humid underground, with rocks constantly threatening to fall. Watching workers negotiate and navigate the dangers of the underground world on a daily basis, while simultaneously stomaching the humiliation from condescending, usually young, managers, all for the sake of providing for their families often left me questioning whether it was all worth it—whether the price they were paying was not perhaps too high for the rewards they were getting.

In the days that followed, workers continued to visit Marikana to see their families and friends. Some had not come to back work because they had lost close family members and were helping prepare for the funerals. Our conversations underground took a turn from the daily topics of production targets, women, and safety, and we instead talked about the Marikana massacre, the lack of genuine representation of workers by unions, and the extremely low wages that mineworkers take home. These conversations shed light on the difficulties that workers face in trying to support their families and send their children to school, in trying to realize a truly “better life for all.”³

The demand for R12,500 by Lonmin workers provided a partial answer to some of my questions. It was clear that their daily

2 A homeboy or homegirl is a person who hails from the same place as another person.

3 “A better life for all” is the slogan of the ruling party, the African National Congress.



Picture 9.1

A Lonmin worker wearing a T-shirt with the demanded wage

Photo: Asanda Benya

sacrifices underground were not met by similar sacrifices by their employers and investors—hence, their demand for a decent wage, a living wage. In my conversations with workers, especially women, it became clear that sacrifices are made not only by workers at the rock face but by households and communities. It is these sacrifices and experiences in which I became interested. While my initial research focus was on women working underground, Marikana exposed me to another group of women in mining: those who sustain mining communities, making sacrifices at home while their male partners make sacrifices at work.

While the main focus of this chapter is on human rights, what becomes clear as one learns about the lives of these women and

men is that these legal and economic issues have a political dimension to them. As a result, what is happening in Marikana cannot be addressed merely through a rights-based legal approach. The struggles faced by these communities run much deeper than that—they are about systematic and structural forms of injustices and oppression rooted not only in current politics but also in South Africa's political history, which privileged and protected corporate capital at the expense of the black masses. To look to the law alone is to depoliticize and abstract these problems from that historical reality. Instead, we must look to multiple strategies to resolve these injustices (Robins 2008).

Thus, while I illustrate the experiences of these communities through the eyes of women and against the background of South Africa's constitutional promise, I am by no means arguing that the Constitution is the only tool for solving these challenges. Rather, I seek to demonstrate the other side of the industry that we embrace as a brimming model for growth and development. The continued gap between the country's Constitution and its realities on the ground point precisely to the limitations we encounter when we look only to the Constitution and neglect structurally embedded injustices.

Dominating the narratives in this chapter is the daily struggle for survival. This is despite the fact that the Bushveld Complex in South Africa, the area where Marikana is located, has the largest known platinum group metal deposits in the world (Jones 2005, 3).

As one looks deeper into the daily experiences of this mining community and juxtaposes them against the South African Constitution of 1996—hailed as one of the most progressive in the world—the gap becomes clear. The community's lived realities offer a glimpse of what it is like to live in an informal settlement located on top of mineral wealth. They demonstrate the crack between the constitutional promise and people's actual lives: how mining complexes have paved roads, running water, and state-guaranteed electricity, while workers live in squalid conditions, in shacks made of corrugated iron sheets and in settlements that lack basic provisions and infrastructure.

Embedded in their stories are a number of phenomena: the multiple ways that the mines have eaten away at their lives through harsh and humiliating working conditions and stripped

them of their dignity by sustaining and reproducing the cheap labor system in the post-apartheid era; the way that the state, through local government, has shown its disdain for the rights enshrined in the Constitution; and the exclusions that community members often face from tribal authorities and from the ruling party, which has blurred (and in some instances erased) the lines between government provisions and privileges for party members. Despite these conditions, we see how this mining community navigates the challenges it confronts and remains optimistic. The stories told here capture the nature of the post-apartheid order for many black mineworkers.

After the Massacre

It took me a week to pluck up the courage to make my first trip to Wonderkop in Marikana. My colleagues had been making daily trips to Marikana and returning with shocking stories of how the police were harassing residents. But I was engulfed with fear. I was fearful because the massacre was too near—what if our mine was next?

Marikana was a defining moment on many levels: for the country, for mineworkers, and also for me professionally. I could choose to leave and go to a “safer” place (the university) or I could stay in the mines and make a contribution, no matter how small or insignificant. Professionally, Marikana was a chance to practice what Michael Burawoy (2004, 2005) terms “organic” public sociology without sacrificing my commitments to professional sociology. As an ethnographer, it was essential to be on the ground; but as an actor in this “public,” I also had a responsibility to be present and thus contribute.

What my contribution would be was not exactly clear at this stage, for this was a massacre and I am a sociologist.

On the day of the memorial service, most of the mines halted operations to observe a day of mourning. I decided that it was time to go to Marikana to see what was happening. Traveling with a relative and colleague, I arrived early in the morning to attend the cleansing ceremony, scheduled for 6 a.m., and the memorial service, scheduled for 10 a.m. However, when we got to Marikana, we were told that the cleansing ceremony had been cancelled. We used this time to walk around the settlement,

visiting the hill where the massacre had taken place and then the area where women were cooking and men were erecting tents in preparation for the memorial service.

What shocked me was how close the massacre had been to the community. It had occurred fewer than 300 meters away, alongside a road that people use to walk to and from work and school. Walking past this hill was like walking past a haunted killing site; we saw stains of blood in some parts and were told that one body still lay on the hill.

Interacting with people in the community was fairly easy, though emotionally wrenching, as most women spoke Xhosa, my native language, and most men also spoke Fanakalo, a pidgin language spoken in the mine, which I learned while doing my research. We held these conversations while helping the women finish preparing food for the memorial service. These women told stories of harassment by the police, of missing family members and homeboys they were still trying to locate, and of the body that remained on the hill because the family of the deceased (a migrant worker from Mozambique) wanted the person who shot their son to apologize to his spirit so that his soul could rest in peace.

It was during these conversations that I knew I needed to document and make known what I had heard. While I did not have the answers to the questions that community members asked me about our government, the police, the justice system, and post-apartheid South Africa, it dawned on me that I could at least make their questions known by posing them to bigger audiences. I realized that my role as a sociologist was to document what was happening in the Wonderkop community and to document it with a human face. This is how my relationship with the women in Wonderkop began: it started on the day of the memorial service day and extended to various meetings and to marches against the police, who were constantly harassing them. It is an ongoing relationship, for to this day I have not been able to answer, even for myself, some of the questions they asked me on that first visit to Marikana.

What Led to the Strike?

While the reasons for the strike were numerous, the most prominent was mineworkers' low wages. Workers were earning approximately R4,500 (about US\$450) per month and wanted a raise to



Picture 9.2
Women in Marikana preparing food for the memorial service
Photo: Asanda Benya

R12,500 (about US\$1,250). The strike was initially focused on rock drill operators but was later extended to other underground occupations.⁴ In addition to a pay raise, striking workers demanded a breakdown in industrial relations between workers, the union, and employers. The mineworkers' union, the National Union of Mineworkers, was increasingly seen as serving the interests of capital at worker's expense—the very capital that violates workers' rights, that “relies, increasingly on the exploitation of women's

4 See Alexander et al. (2012) for the reasons behind the strike and the conditions in the mines.

unpaid work for its survival” (Grant-Cummings 2013, 325), and that exploits natural resources for the benefit of investors.

The strike was also very much driven by crises in the reproduction sphere: workers were unable to support their families’ basic needs even though they were working long hours under dangerous and inhumane conditions. Wives whose task is to manage the household budget were failing to make ends meet, and the children of these hardworking miners were sometimes going to bed on empty stomachs, not getting access to primary health care when sick, and unable to complete high school due to limited funds. The frustrations caused by meager wages were felt by all household members; hence, the Wonderkop community as a whole played an integral role in supporting the strike (Benya 2013). What was not anticipated, however, especially in a democratic country, was the killing of workers for exercising their constitutional right to demonstrate peacefully, the brutality with which the police killed them, and the blame that has since been placed on workers and their families.

Sikhala Sonke Women’s Association

Unlike most strikes, the Lonmin (Marikana) strike did not occur on the employer’s premises. Rather, it took place on a hill situated midway between the mine shafts and the informal settlement where most workers live.⁵ The location of the strike allowed for the community’s involvement—unemployed men were reported to be among those on the hill, and women were reported to have played a supportive role by cooking for strikers at the mountain top and by holding vigils to offer emotional and spiritual support. After the massacre, however, women’s role shifted; outside the courthouse, it was women who were protesting and demanding the release of those arrested.

The exasperation with daily police harassment following the massacre and the yearning to see justice done led to the formation of the women’s association Sikhala Sonke (“We Cry Together”). Every weekend, women from various nongovernmental organizations in Gauteng visited Marikana to lend assistance to the association. Early one morning, as we were making our way to

5 See Alexander et al. (2012) for a clear geography of the area.

our regular Saturday meeting with these organizations, we were called by Zakaza, one of the members of Sikhala Sonke. She told us to go to the clinic instead of the regular meeting spot, for “women had been shot at by police while standing outside a tuck shop and others making their way to the venue.”⁶

At the mine clinic we found one woman, Pauline, being attended to by a nurse. Three other victims arrived later. It took a while for the nurses to provide care to the women since they were not mine employees. We were told to wait outside the clinic’s premises while they treated Pauline. Later that day, she was transferred to the state hospital in Rustenburg.

Four days later, as I finished my shift underground, I saw several missed calls on my cell phone from women in Johannesburg and Marikana. I called one of them back, and she told me that Pauline had died that morning. No one knew what had happened, since all Pauline had suffered was a “rubber” bullet wound in her leg (“Marikana Woman Dies of Police Rubber Bullet Wound” 2012). Paulina’s death at the hands of state agents left a deep scar in many of us. Her death could not be in vain. We resolved to organize a march to the police station and to call for the police and military to leave the settlement.

In trying to organize the demonstration, the women of Sikhala Sonke faced resistance from public safety officials, police officials, and Madibeng and Rustenburg municipality officials. First, they were told that their letter informing the municipality of their intention to gather and present a petition was late, which led the women’s association to reschedule the gathering. A few days later, after numerous calls to the municipality by Siphso Mthathi, one of the demonstration organizers from Johannesburg, the association was told that the Madibeng municipality alone could not “grant them permission” to gather, since the route to the police station from Wonderkop would cross over a section of Marikana that belongs to the Rustenburg municipality. This led to another postponement of the gathering. Meanwhile, the police and army continued to brutally “maintain civil order” in the community, sometimes entering shacks to terrorize women and children in the

6 For more on the shooting, see Sokari (2012).

absence of their male partners, who were in hiding out of fear of being taken away by the police.

Finally, Sikhala Sonke was able to arrange a meeting with both municipalities to inform them of their intention to gather. Since gathering is a constitutionally enshrined right, the women were not seeking permission *per se* but rather informing authorities in accordance with the country's 1993 Regulation of Gatherings Act. At this meeting, which I attended with several female colleagues from Marikana, we were informed by the two municipalities that our gathering would disrupt "normal business operations" in the area and would thus not be permitted. After the meeting, we were then presented with a letter from Rustenburg's Public Safety Directorate formally denying "permission" to march. However, the reasons cited in the letter were different. Among them were that "the purpose of the march does not meet the requirement of the Gathering Act"; that our application before the municipality of Madibeng had been "disapproved"; and that "the application was not done within seven days as per the Gathering Act" (Makinita 2012). These points were unfounded, as a ruling from the North West High Court would soon show (discussed below). The last point was particularly untrue, since the women's association had submitted two applications weeks prior and had not been advised of the jurisdictional limitation of the Madibeng municipality.

Sikhala Sonke had thus been illegally banned from protesting. After the massacre, Marikana had become a highly politicized area, which influenced the local municipality's attempt to blatantly deny the women access to a public space. Public spaces are essential in any democracy; by definition, these spaces should be open to everyone unless a threat to the peace or safety of others is posed. They should not be closed down because a person or group of people wishes to critically engage the state. In the Marikana case, it was interesting to note that the heightened regulation of public activities and public spaces was not even marginally matched by a regulation of police violence.

After this meeting, it became clear that if we wanted to exercise our right to gather and march, we had to go to the provincial high court. Papers for an urgent court interdict were prepared by Siphso Mthathi and Samantha Hargreaves of the Johannesburg support team and were submitted to the North West High Court



Picture 9.3
Women sitting outside the community office after preparing their placard
Photo: Asanda Benya

in Mafikeng. The women won! The court ordered that the women be allowed to gather and march peacefully:

The decision of the First and Second Respondent to prohibit the Applicant's intended gathering on the 29th day of September 2012 in terms of the Regulation of Gatherings Act 205 of 1993 . . . is ultra vires and of no force and effect and is hereby set aside.

The Applicant has a right to hold the intended gathering on the 29th day of September 2012.

The Applicant may gather five hundred members of the Association at the Wonderkop Community office under the supervision of the 27 marshals stipulated in the notice.

Two hundred and fifty members of the Association will thereafter disperse.



Picture 9.4
Women holding a vigil before the march
Photo: Asanda Benya

The remaining two hundred and fifty members of the Association will peacefully march along the route indicated on Annexure “A” under the supervision of the 27 marshals stipulated in the notice, directly to an open field adjacent to the South African Police Services Station, Marikana. They will hold a vigil for two hours and then disperse.⁷

On September 29, 2012, the Wonderkop women came together with other women from mining communities around Johannesburg and marched peacefully from Wonderkop to the Marikana

⁷ North West High Court, *Wonderkop Community Women’s Association v. Rustenberg Local Municipality, Madibeng Local Municipality, and Others*, Case No. 1407/12, September 28, 2012.

police station (“Marikana Women Hold Peaceful Protest” 2012). When they arrived at the police station, they handed in their petition, which called on the police to “immediately withdraw from Wonderkop, and to stop the violence, harassment, intimidation and unlawful arrests of Wonderkop residents. The women will also be demanding an impartial public judicial commission of enquiry into the Marikana massacre, and justice for workers and community members that have been tortured and beaten by the police” (Sonti and Thumeka 2012).

Following their demonstration, there was withdrawal of police from the community, albeit slowly.

The Commission of Inquiry

The Marikana Commission of Inquiry was established by President Jacob Zuma under the leadership of retired Judge Farlam (Marikana Commission of Inquiry 2014). The commission’s main objective is to establish exactly what happened in Marikana on August 16, 2012. The women of Sikhala Sonke have been religiously attending the commission’s hearings, which began in October 2012, to listen on behalf of their brothers, fathers, and partners who cannot attend due to work or because they are injured and cannot walk properly.

The commission’s slow process has been a source of frustration for workers in general and the women who have been going daily. Unemployed women and men have had to stop searching for employment to be able to attend the commission’s sessions. Some of the women who were employed have lost their employment because “employers are tired of giving us days off to go and sit at the commission.”⁸ The commission that is supposed to deliver justice is exposing some of these community members to great injustices—unemployment and poverty. While the commission is supposed to be about them, they feel that a lot of what goes on is simply a display of legal muscle by the government.

A sore point for most women is that nothing has changed in their community, even after the massacre. They are still exposed to forms of structural violence—namely, the violence of poverty,

8 Interview with Portia, November 2013, Marikana.

which eats away at the human spirit daily. Moreover, their male counterparts are still earning miserable wages despite the dangers and physical demands of their work underground, and the mine has done little to help alleviate poverty or address the social injustices faced by residents.

The Politics of Location

Marikana is a small town in the North West Province of South Africa. This province has the largest single platinum group metal deposits in the world. Forty percent of the province's mining activities happen close to Marikana (Benya and Webster 2013).

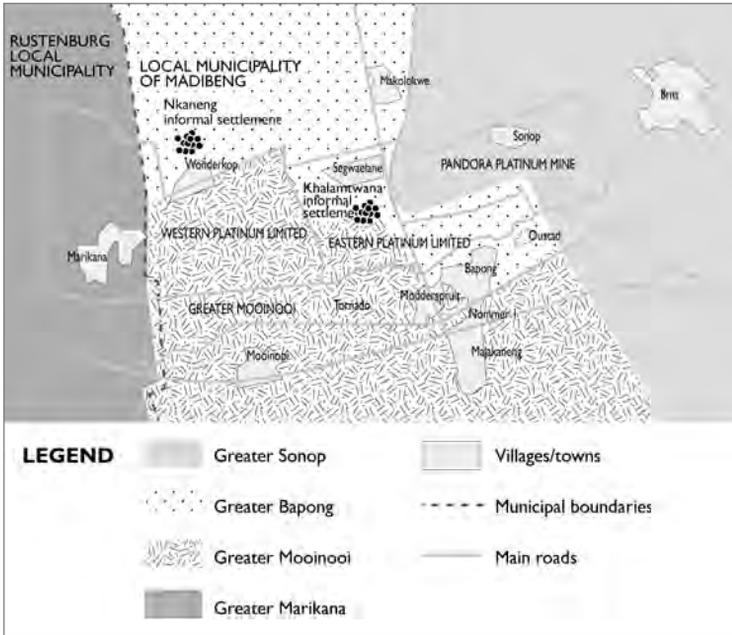
Marikana is home to a mine operated by Lonmin, the world's third-largest platinum producer. Most Lonmin workers reside in Wonderkop, a residential area within Marikana. The Wonderkop settlement is divided into two settlements, a formal one and an informal one. The formal settlement, Emzini, has roads, running water, proper houses, and electricity. The informal settlement, where most workers live with their families, has some of these

MAP 9.1
The North West Province



SOURCE: "The Rental Fraud Game" (2011)

MAP 9.2
Marikana



SOURCE: Lonmin (2013, 135)

things. This settlement, known as Enkaneni by Xhosa speakers and Nkaneng by Tswana speakers, is divided into three areas: the old site, the semi-old site, and the new site. The geography of Wonderkop closely resembles that of the apartheid homelands, with most Tswana speakers living separately from Xhosa speakers.

The settlements in Marikana fall under two different municipalities: the Rustenburg local municipality and the Madibeng local municipality, both of which pertain to the greater Bojanala district municipality. The administering of the town's sections by two different municipalities has been a contributing factor to the lack of service delivery in Marikana.

Additionally, within Marikana, issues related to belonging, language, and tribal affiliation have proven deeply divisive and often have costly implications for access to resources and services. When rendering services, for example, local municipalities prioritize those who are from the area and speak the local language before they consider migrants.

Migration and Employment

While many people have migrated to Marikana in search of employment, not all are successful. Sometimes, families have only one permanently employed member, with the rest being either unemployed or in unstable part-time work. The permanently employed members are usually men with jobs as mineworkers.

For migrants, especially females, getting a job is difficult. For one, jobs are scarce. Second, those that are available are generally reserved for locals. Migrants are sometimes able to “purchase” these jobs by paying corrupt labor brokers who can place them in a job or by paying the tribal authorities who are responsible for writing references for unemployed community members. Migrants I spoke with reported paying between R3,000 (about US\$280) for temporary contractor jobs and up to R10,000 (about US\$940) for permanent jobs at the mine.

Most of the women I spoke with were either self-employed—often selling cannabis, traditional beer, chickens, or clothes—or unemployed. One of the most significant ways they survived was through relationships with employed men, usually mineworkers.

A Land of Contradictions

Upon entering Rustenburg, one is struck by the “development” taking place around the area. Along the highway are lavish and highly secure houses whose construction was fueled by the region’s mineral wealth. In addition, the mines boast high-grade infrastructure and modern technological equipment. But while there is growth in the area, not everyone is benefiting. As much as the new economic growth is creating new upwardly mobile classes, it is also creating many poorer communities, who live in informal settlements that lack basic infrastructure and running water (Hattingh 2014). The Rustenburg municipality recently recorded thirty-eight informal settlements, which accounted for 45% of all settlements in the town (Housing Development Agency 2012; Sosibo 2013). In addition, the town still has many fully functioning hostels that house migrants who work in the mines.

Amid these contradictions is the South African Constitution, whose Bill of Rights “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom” (sec. 7). Included in the Bill of Rights are the right to

life; the right to human dignity; the right to freedom and security; the right to assembly and demonstration; the right to citizenship; political and labor rights; the right to adequate housing; the right to health care, food, water, and social security; the right to education; and the right to language and culture. Although these rights are not without limitations, the Constitution states that they “may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society” (sec. 36).

While these rights look impressive on paper, for the residents of Wonderkop, they remain a mere dream. Indeed, a great number of these rights—the “guaranteed promise” of the new post-apartheid South Africa—have been and continue to be ignored. Sadly, it seems that their violation by mining companies, tribal authorities, and local governments is the order of day, and their observance an exception.

Services

Services for the community are very limited—but for the mines, they are abundant. Although water pipes can be seen all around the area, residents struggle to get water. Upon entering Wonderkop, one can see women walking about carrying twenty-five-liter buckets and young boys pushing wheelbarrows with water drums in search of water. In some yards, residents can be seen sitting in long queues as they wait for water.

The struggle to obtain water consumes a large portion of women’s time in Wonderkop. Because the queues are so long and the taps deliver water so slowly, women often leave their buckets in the queue or under the tap, go do chores, and then walk back an hour or two later to check on the status of their queue position or their bucket. Most women in Sikhala Sonke reported having to wake up at odd hours—between 2 a.m. and 4 a.m.—to get water daily. And to make matters worse, since January 2013, the water taps in Wonderkop have been drying up (see, e.g., “Madibeng Residents to March over Ongoing Water Shortages” 2014). The only areas with constant water are the where the Tswana-speaking people generally live and where the local councillor stays.⁹

9 Local councillors monitor the performance of municipalities,



Picture 9.5
Road in Wonderkop and a woman queuing for water
Photo: Asanda Benya

In addition, the roads in Wonderkop are in a deplorable state. They have ditches and potholes as big and deep as a bathtub. Children playing on the streets must be careful, because it is all too common for one of them to fall into one of these potholes and drown. Furthermore, many of the roads are not even paved; they are dirt roads that make it impossible for cars to pass when it rains. There were times when I went to visit the women and was told to

act as intermediaries between their communities and the local state, and conduct follow-ups on behalf of their communities. They are meant to encourage public participation and citizen involvement in governance.



Picture 9.6
Residents of an informal settlement washing clothes with water recycled from the mine shafts
Photo: Asanda Benya

turn back because the roads were wet and unusable; other times, I had to abandon interviews because it was threatening to rain.

Housing

There are different places where people live in Wonderkop: the hostel, the formal settlement, and the informal settlement. The most populated of these is the informal settlement because it is the cheapest and because it can accommodate female partners (unlike the single-sex hostel). In most stands (plots of land measuring about 600 square meters), there are between five and twelve shacks, with different families.

Shacks are usually small—about ten feet by eight feet. The zinc



Picture 9.7
A typical shack

Photo: Asanda Benya

sheets used to construct them are mainly scrap material. According to Nozamile, a member of Sikhala Sonke, when it rains:

we get up and sleep on the floor or move the bed to the center of the shack so that we are far from the side walls with seepage The problem is the soft rain, the one that you do not hear, it makes you fall into deep sleep—with that rain you can wake up with all your blankets soaking wet.¹⁰

If it is very windy, the shacks can be easily uprooted. As one

¹⁰ Nozamile, interview with the author, November 21, 2013, Mari-kana. All quotations from Nozamile in this chapter derive from this interview.

woman from Sikhala Sonke told me, "We do not like rain or wind here, they're an inconvenience."¹¹

In Wonderkop, residents either rent a shack or rent a space to build their own shack. Nomsa, who has been living in Wonderkop since 1997, used to live in a shack that her ex-boyfriend built for her. After she broke up with him and could not afford to pay rent, she was kicked out of the yard but kept her zinc sheets. She later used them when building in her new stand.

A significant number of women, both young and old, shared stories about depending on men in order to get by and getting into relationships in order to have food and a roof over their heads. It took a while for women to open up about this because they felt embarrassed and did not want their relationships to be reduced to material benefits or exchanges. They talked about having to adjust their conceptions of dignity, love, and relationships in order to survive.

Education

While there are many Xhosa-speaking migrants and their families in Marikana, Xhosa schools are hard to find. Consequently, children must attend schools that teach in Tswana. This is despite the constitutional guarantee of basic education in the language of the learner's choice. Parents from the Eastern Cape told me that when their children move to Marikana, it is almost inevitable that they will have to repeat the same grade during their first two years in the local schools.

Zakaza, who has two grandchildren studying in Wonderkop, said, "The problem is that there are no Xhosa schools in this community. . . . The first year in the local schools, our children understand very little in class because everything is taught in seTswana."¹² From my conversations with women, it seems that it is only in the second and sometimes third year that children perform their best. As Zakaza explained, "This becomes a problem again when they move back to the Eastern Cape. . . . They forget how to read and write in isiXhosa." The older children, consequently, tend to drop out of school after failing the first or second time.

11 Interview with Majola, November 23, 2013, Marikana.

12 Interview with Zakaza, November 2013, Marikana.

This looked like a systematic and structural denial of education. With only mine work “available,” I wondered what the children who give up are going to do. Upon hearing these stories, I was left thinking that in some parts of South Africa, only locals and their children matter. Migrants and their children are condemned to poverty and failure since they are denied one of the most important weapons to fight and reverse the cycle: education.

Health Care

In Wonderkop, there are two health clinics: the community clinic and the mine clinic. The latter services mineworkers, particularly those working at Lonmin. The community clinic, which is meant to service the entire community, has been absorbed into ethnic politics. In focus groups, meetings, and interviews, migrant women told stories of nurses and administrators who refused them service because they did not understand the local language spoken at the clinic.

Nozamile, a single migrant mother from King William’s Town, said that it was difficult to even open a file at the clinic because she did not understand Tswana:

When I first moved here, I didn’t understand a word of seTswana. . . . I got sick and went to the clinic . . . I registered, and when I was supposed to be weighed and my blood pressure taken, the nurse kept saying something I could not understand. . . . I didn’t know how to respond. . . . I told her I only speak isiXhosa and understand a bit of Shangaan and English. . . . She called another patient and told me to move aside and that was the end of my service. . . . I went back the second time and luckily a man sitting next to me translated everything for me and I was serviced.

Due to similar treatment, Mama Thembeke, who has diabetes and high blood pressure, said that she has stopped taking her medication. She could not tolerate the way that Xhosas and Shangaans are treated in the clinic by the local nurses.

The refusal of service and mistreatment by nurses shows not only unfair treatment but also how a public clinic has been reconstructed by local nurses as a private clinic, whose access is limited to a few “privileged” locals. Female community members also cannot go to the mine clinic, even in cases of an emergency. In the incident discussed earlier in the chapter, in which women were

shot with rubber bullets by the police in September 2012, some of the injured were rushed to the nearest clinic, which was the mine clinic. For the women to receive care, however, there first had to be negotiations with the clinic's management; eventually, the management agreed to let the women come in for help. Other women who were injured that day simply went home to nurse their own wounds, knowing that the mine clinic generally refused to provide care to community members.

Moreover, getting an ambulance in Marikana is a challenge. Since Marikana falls under two municipalities, there have been instances where ambulances were called to pick up a sick person only to refuse service because the sick person lived in a different municipality. One female resident, Portia, told me about a time that she witnessed this confusion:

My neighbor's child was playing and fell into a ditch . . . [so] we called the ambulance in Rustenburg because they are faster. . . . They came but did not take the child. . . . They called the ambulance in Marikana, which only arrived after two hours and the child was dead by then . . . I'm not sure if the child was already dead when the first one came, but I know that when the second ambulance came the child was gone already. . . . When we reported this to the local councillor, he told us to go to [Julius] Malema, our father.¹³

Not only are community members not being serviced by the emergency services, but the local councillor seems uninterested in resolving problems since the community members are now largely supporting a rival party, the Economic Freedom Fighters party.

Furthermore, when it rains, even the emergency services that are willing to assist do not enter the settlement out of fear of their vehicles getting stuck in the mud. In a focus group meeting, many women described the difficulties of not having proper roads when a sick family member needs medical attention. As one woman explained:

If the ambulance comes and is afraid to drive through the settlement we tell them to wait at Fish's shop [a popular meeting spot in Won-

13 Interview with Portia, November 2013, Marikana. Julius Malema is the commander-in-chief of the Economic Freedom Fighters, a new rival political party whose main base consists of youth and the unemployed. Malema was once a leader of the young wing of the ruling party.

derkop, which is also where the tarred road ends]. . . . We carry the sick person . . . [but] when you try to walk carrying the person, you stagger, get locked up in the mud, and cannot move. . . . You sit and hope that the person holds through the night or until it is dry and safe for vehicles to come in. . . . But sometimes people die while waiting for help.¹⁴

Linda, a migrant from Queenstown, told a similar story:

When I was pregnant with my second baby, I used to get these massive headaches. . . . One night I could not sleep, so eventually my husband called the ambulance to come get me. It arrived three hours later and the headaches were worse. . . . They took me to the hospital, and when we got there, they said I had to be operated on immediately because I was bleeding internally and my blood pressure was extremely high. . . . Doctors were upset that I took long to go to the hospital. . . . They did not know I had been waiting for an ambulance for three hours. . . . I gave birth through a C-section and because my baby was a premature, we stayed in hospital for three months. . . . We were discharged and came home because the baby was slowly recovering. . . . A few days later, his breathing got worse. . . . It was rainy and cold, and he was just battling to breathe. . . . I kept waking up every hour or so to check up on him. . . . Around eleven at night, I noticed that he was looking strange, we called the ambulance and they kept saying they were on their way. . . . An hour later, I noticed that he was very cold, there was water coming out of his nose and mouth, not saliva. . . . I think it was water from his lungs. . . . He died that night, and I had to stay with my dead baby the whole night, holding him because I didn't know what to do. . . . It was too late when the ambulance arrived. . . . The hearse only came in the morning.¹⁵

What becomes apparent from the stories above is that Lonmin has invested very little in the community where it operates. Indeed, while community members continue to die as a result of unsuitable roads, the roads between the shaft and railway lines are in perfect condition. Improvements that would benefit the community are routinely overlooked by the mining company; only what benefits the company is developed and maintained.

14 Statement by Nolundi, focus group discussion, November 2013, Marikana.

15 Interview with Linda, November 2013, Marikana.

Livelihood Strategies

Women use a number of methods to try to supplement the wages of their partners. Some sell goods or services, some rely on state social grants (especially the child support grant),¹⁶ and some join community *stokvels*.¹⁷ Not all needy children get the child support grant, however: women who give birth in other towns or who are not using the same surname as their children often experience difficulties in registering for and claiming the grant.

This was the case for Thobekile, a woman from Eastern Cape living in Marikana. After spending an entire day waiting in line to register her infant son for the child support grant, she was told that she needed to go to the police station to get an affidavit confirming that she was indeed the mother of her child (since the child uses his father's surname). She could not go that same day, though, because she did not have the money to pay for the taxi ride to the police station, which is located a few kilometers away. A few months later, she finally raised the money to visit the police station, where she secured the affidavit. However, when Thobekile went back to the local government offices to register her son, she was told that her son's birth certificate and hospital papers lacked a required stamp. To get this stamp, she needed to go to the hospital in the Eastern Cape where she gave birth. Until she did this, she could not register her son for the grant. In the meantime, Thobekile must watch her children starve and quit school because they are too weak to focus in class, as their father toils underground, extracting valuable minerals that will never help alleviate his family's poverty.

When Thobekile was telling me her story, I could see her frustration and disappointment. A part of her seemed resigned to these hardships, yet each time her nursing infant started to cry, she seemed resolute to try again despite the red tape; then, the

16 The child support grant is given to the primary caregivers of children. To qualify, the child must be under the age of eighteen and the caregivers must earn an annual income of less than R34,800 for single parents or R69,600 for a married couple (South Africa Government Services 2014).

17 A *stokvel* is a community-based saving scheme in which members regularly (usually monthly) contribute an agreed-on amount and receive a lump-sum payment at the end of the year. To increase the lump sum they receive, members are often encouraged to borrow money from the *stokvel* and return it with interest.

disappointment would slip in again. The very system meant to protect her makes it difficult for her to register her children for a child support grant. This experience plays out against the backdrop of a Constitution that seeks to protect these very rights. Section 27 of the South African Constitution states that “everyone has the right to have access to . . . social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.”

Nozamile admitted to selling dagga (cannabis) to make ends meet. She buys three buckets from a nearby town for R700 a bucket and makes a profit of R600–800, depending on how she has packaged it. She confided, “It is humiliating that for my kids to eat I have to break the law.” Nozamile’s family does not know that she sells dagga to survive. She does not want them to know because “it is against their morals. . . . We are church people at home.” At the same time, she said that there is no other way to survive because, as a migrant, she is overlooked for jobs.

Conflicts in the Community

There are multiple levels of conflicts in Wonderkop, from the micro level (e.g., family, community, and workplace) to the macro level (e.g., political parties, unions, and tribal and language groups).

Micro Level

All conflicts experienced by people in Wonderkop seem to be embedded in the social crises experienced by the community, which are very much intertwined with the wage and economic crisis.

Many women mentioned the excessive use of alcohol by male partners, which sometimes leads to conflicts in the household. When asked what the reasons could be, most women pointed to alcohol as a temporary means of forgetting one’s misery and poverty. One woman, Buli, said that having “no money and no job” and “depending on men” plays a role in the excessive use of alcohol by men and women, respectively. As she explained, “It is humiliating [for a woman] to depend on a man for everything. . . . And for men, it is the financial pressures that drive them to the bottle.”¹⁸

18 Interview with Buli, November 2013, Marikana.

Buli's ex-husband started being physically abusive after she moved to Marikana. The reason she moved to Marikana was because he had stopped sending money home. "His drinking led to more violence whenever I asked for money for food or for his parents back home," Buli stated. "He would drink [and] beat me up. . . . I eventually had a miscarriage because of the beatings."

Family conflicts can also occur as a result of a cheating spouse who no longer sends money back to his rural home. This often leads to the wife moving to Marikana to be with her husband and to have a bigger say in the family finances. As several women noted, this can cause conflicts, especially when the husband has a "town wife."

There are also conflicts at the community level. Some conflicts in Wonderkop are perceived to be caused by "newcomers," whom community members blame for crimes and for draining the community's already thin resources. As one woman said during a focus group discussion:

The locals blame us [migrants]. They say we are taking away their land, their men and money. . . . The old migrants who have jobs blame the new migrants who are unemployed for crime and for stealing their women. . . . Everybody's blaming everybody for their troubles.¹⁹

Macro Level

The small-scale conflicts mentioned above are connected to and influenced by conflicts rooted in national politics. In the wake of the Marikana massacre, workers felt abandoned and betrayed by the African National Congress (ANC) and the National Union of Mineworkers (NUM). In an effort to find "political consistency," workers have since shifted their political membership from the ANC to the newly formed Economic Freedom Fighters (EFF) and have shifted their union membership from the NUM to the Association of Mineworkers and Construction Union (AMCU). They interpret it as politically inconsistent to support AMCU and be with the ANC, or to support EFF and be with NUM. This transfer of membership has caused commotion in Wonderkop.

¹⁹ Statement by Sisa, focus group discussion, November 2013, Marikana.

Most men I spoke with said that they are now supporting EFF and AMCU. They decided to abandon the ANC and NUM after these entities sided with employers as workers were being killed on the mountain. As one man pointed out, they are disappointed that their liberation party, the ANC, and their union, NUM, “failed to defend and protect us when we were on the hill demanding a living wage,” deciding instead to “tighten the chains of our exploitation [and] ignore our misery and poverty.”²⁰ Wives voiced the same sentiment: “our husbands were injured and others killed on the hill by police who are working for the ANC government, for demanding a living wage.”²¹ Some women, however, were caught between supporting their husbands and EFF or sticking with the ANC, since community jobs—which are largely available to women—come through the ANC community office.²² They were also acutely aware that with elections on the way, many short-term jobs would be available through the ANC office and that these jobs would be given only to party members, not just anyone in the community.

Thus, local government employment opportunities meant for community members have often been turned into rewards for loyalty. If one belongs to the “wrong” political party, is from a “wrong” ethnic group, or has a husband who supports the “wrong” union, employment opportunities pass them by.

In Wonderkop, local government and union politics seem intertwined with ANC party politics. Belonging to a party other than the ANC may mean that one is refused assistance from the local councillor. Many residents, particularly those who support the newly formed EFF, are being excluded from the government’s Expanded Public Works Programme²³ because these programs are “informally” reserved for ANC members and supporters.

20 Interview with Lukholo, November 2013, Marikana.

21 Interview with Majola, November 2013, Marikana.

22 Strictly speaking, these jobs are called “job opportunities” and are only part-time, requiring a maximum of three days a week. In Marikana, these jobs are usually available only around election time.

23 According to the Department of Public Works (2014):
The Expanded Public Works Programme (EPWP) . . . *provides an important avenue for labour absorption and income transfers to poor households in the short to medium-term. It is also a deliberate attempt by the public sector bodies to use expenditure*

Justice for Marikana

The South African Constitution of 1996 seems to exist only on paper for the residents of Wonderkop, for their lived realities tell a different and disheartening story. Most of the rights enshrined in the Constitution's Bill of Rights are violated daily, despite the fact that they are nonderogable rights—in other words, nonnegotiable rights that should not be violated under any circumstances.

As stated in its preamble, the Constitution seeks to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.” Yet what is happening in Marikana seems to be reinforcing, not healing, divisions created by the apartheid government—divisions on the basis of ethnicity, citizenship, and gender. South Africa's Constitution was founded on the value of human dignity. But one wonders what dignity there is when one does not even have a toilet in his or her yard and must go to the nearest bush or ask a neighbor for permission to use their toilet. Under these circumstances, how should citizens make sense of the rights enshrined in the Constitution?

The Constitution boasts that citizens have a right to make political choices and participate in the activities of any political party of their choice (sec. 19). In Marikana, however, the ruling party tramples on this right on a daily basis. In addition, section 26 of the Constitution protects the right to have access to adequate housing. And section 27 protects the right to have access to health care, sufficient food and water, and social security, stating that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.” In reality, however, the people of Wonderkop seem to fall outside this protection; they seem to reside within the cracks of the Constitution. Despite living atop a vast source of mineral wealth, they live in inexcusable poverty. These community members have become the forgotten people

on goods and services to create work opportunities for the unemployed. EPWP Projects employ workers on a temporary or ongoing basis either by government, by contractors, or by other non-governmental organisations under the Ministerial Conditions of Employment for the EPWP or learnership employment conditions.

amidst the squandering of resources and profiteering by mining companies that are acting with the state's approval.

The conflicts and horrendous living conditions suffered by Wonderkop residents are directly manufactured by the pitiful wages paid to mineworkers. Employers do not want to pay them decent wages that can sustain their families and improve their livelihoods. And when workers go on strike to demand better wages, they are subjected to gruesome shootings and killings by the police.

When I asked women about justice in their communities and in relation to mining, many of them agreed that there was no justice. Thembeke recounted her particular experience:

I don't know much about human rights. . . . My brother got injured last year during the massacre. To this day he still wobbles around with a bullet in his leg. . . . He can't go back to work because, for him to work underground, he has to walk properly. . . . He's been sitting at home . . . with no income. . . . It is as if he has lost his life.

Many mineworkers I spoke with expressed their disappointment with the state. One worker was angry at the government "for siding with the employers and for even releasing the police to restore 'order' by killing our brothers."²⁴ Others said that the post-apartheid state was colluding with capital at their expense; in the words of one worker, "We are paying the employers with our lives."²⁵ And one of the women said, "How can you even talk of human rights or justice when no one has been arrested for the killings of the thirty-four miners? . . . And we are sent to a commission where the state is hell bent on defending those who killed our husbands."²⁶

These conversations often left me asking myself many questions. What exactly is justice and why hasn't this community experienced it? If these are the conditions under which mineworkers live—unable to afford to carry a lunch box to work, forced to rely on government grants for their children (if they are in fact fortunate enough to receive these grants), compelled to buy food on credit, and unable to afford proper houses with running water,

24 Interview with Lukholo, August 2012, Marikana.

25 Interview with Tar Rog, August 2012, Marikana.

26 Interview with Majola, November 2013, Marikana.

electricity, and toilets—how can we claim that they earn a living wage? Should not a living wage be enough to cover at least the basics? How is it, then, that very few, if any, workers in Marikana can afford these basics?

We need not wonder what kind of communities are being created in South Africa’s resource-rich areas, for Marikana (specifically Wonderkop) gives us a clear answer. What we should continue to ask ourselves is this: What is development and what is its role? Is it for its own sake or is it meant to improve people’s lives? Is mining in South Africa really the success story we claim it to be? Should our experiences of a post-apartheid South Africa be reduced to mere parliamentary representation or should they be based on inclusion and the quality of our lives?

In building a new South Africa—one rooted in human rights and driven by human dignity, justice, and equality—it is crucial that we deal honestly with these questions. The case of Marikana demonstrates the shortcomings of the mining industry. It displays how workers are shortchanged in return for sacrificing and gambling with their lives underground for the benefit of the few.

“We Stand United”

“We stand united and we are crying together” was the definition that one woman gave me when I asked what Sikhala Sonke meant to her. The women I have had the privilege of working with at Sikhala Sonke embody this. Despite contradictions between South Africa’s constitutional promise and their lived realities, they continue to walk tall, with dignity and grace.

What the massacre has helped workers across South Africa see clearly is that they face a common adversary: are all exploited for the gains of capital and are subjected to inhumane working and living conditions. This realization has reverberated across the entire mining industry, especially the platinum sector. In the wake of the massacre, these workers have solidified Karl Marx’s concept of “class consciousness”—when workers become aware of their shared experiences with other workers.

However, in Marikana, the issue goes beyond class consciousness to what Émile Durkheim (1982) and Carl Jung (1970) call “collective consciousness”—when an autonomous individual comes to identify with a larger group. In this case, ordinary and

unemployed community members (including both men and women) who are crucial in reproducing workplace-ready labor have also come to identify with the struggles of mineworkers. Because they can see their role in the production line, they have become directly involved in mine-related events—hence, their participation in the march after the massacre and their leadership role in court cases demanding the release of detained workers. Their resolve to march, even after municipal authorities tried to prevent them from doing so, is a direct result of the collective consciousness that has been forged in Marikana.

Amidst the mistrust that has developed between migrant women and local women, Sikhala Sonke members have been building bridges to establish unity among women in the community and to reinforce their commonalities instead of their differences. Migrant women I spoke with talked about how the organization has helped them make acquaintances with local women; for example, when there is no water in the informal settlement, they now have people they can go to for help. Local women also pointed to the support structure that they now have through Sikhala Sonke. The organization has allowed them to connect with other women who can sympathize with their struggles and provide encouragement. Moreover, migrant women have been learning the local language through these interactions, which has had a positive effect on how they are serviced in other parts of the province, though not necessarily in Marikana.

During one of my visits to Marikana, women were building a community crèche to help working mothers with child-care responsibilities. After the crèche is built, they plan to start a community garden and do crop and animal farming to help support their families.

In addition to these strategies and organizations, they have used the law, through the Marikana Commission of Inquiry, to seek justice for their community and the thirty-four slain workers. While progress has been slow, some continue to hope that the commission's conclusion will bring about justice and will improve the lives of the workers who produce the wealth of this country. Others, however, have little hope.

As the commission continues its work and the community awaits justice, residents of Marikana are working together to

build a better life for themselves. To ensure that we do not forget the massacre, every year on its anniversary, the women stage a play showing what happened, which they perform in different communities. And each year, on March 21 (South Africa's Human Rights Day) and August 16, the women and men of Marikana and South Africa organize marches calling for respect for human rights and justice for the people of Marikana.²⁷

Conclusion

When looking at communities like Marikana, there are a lot of things that do not make sense about post-apartheid South Africa. The discrimination, exclusion, and exploitation that they deal with on a daily basis closely resemble and have reproduced apartheid South Africa, where the poor are constructed as less human and thus less deserving of the rights enshrined in our Constitution. This situation then begs the question, is there justice in Marikana, or, more broadly, for the poor in post-apartheid South Africa? The poor serve as shock absorbers for market-related crises, they “pick up the slack” (Grant-Cummings 2013), and they are the first to be sacrificed by the government and mining companies for the country's “development.” South Africa's Constitution is hailed as one of the most progressive constitutions in the world, though I wonder how this “progressiveness” is measured—by what is written on paper or by how the Constitution truly protects the most vulnerable?

To help me make sense of the lived experiences of men and women in mining communities and the rights enshrined in our “progressive” Constitution, Wilmien Wicomb, an attorney from the Legal Resources Centre (see chapter two), explained what it means to have one's constitutional rights respected, protected, promoted, and fulfilled:

27 On August 20, 2014, two years after the Marikana massacre, the Ga-Rankuwa Magistrate's Court finally dropped the murder charges of the 270 mineworkers who had been accused of murdering their colleagues on a hill in Wonderkop. Although this development was welcomed by Marikana residents and civil society in South Africa, two other charges remain pending before the court—namely, charges of public violence and the murders of two police officers, two security guards, and nonstriking workers (“State Drops Charges against Marikana Miners 2014; “Charges Dropped against Marikana Miners 2014).

To respect a right means the state shouldn't interfere with existing rights, to protect means the state should ensure that others don't interfere with the rights we have. To promote means that the state must ensure that our rights are always improving, by however little . . . and finally, to fulfil means that the state cannot stop until we all have all our rights realised.²⁸

She went on to point out, as the Constitution does, that the state carries all these duties. In the case of Marikana, however, the state failed—"not only by failing to protect the bodily integrity and security of the Marikana miners through the shootings, but also by outsourcing the realisation of their socio-economic rights to the company, an 'evil' replacement." This begs the following question: if the state fails to respect, protect, promote, and fulfill, as it did in Marikana, who will defend South Africa's citizens?

One of the ways we will know whether South Africa has truly transformed—whether it truly belongs to all who live in it—will be not only when our democratically established structures uphold and respect the Constitution, but also when our most vulnerable are protected against exploitation, discrimination, and humiliating experiences.

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CHAPTER 10
Hydrocarbon Extraction in
the Guaraní Ñandeva Territory:
What about the Rights
of Indigenous Peoples?

Maximiliano Mendieta Miranda
(Paraguay)

Introduction

The indigenous peoples of the Paraguayan Chaco have been engaged in a longstanding struggle to defend their ancestral territories, which have been taken from their hands to make way for cattle ranching. Added to this injustice is a new challenge: this territory's attractiveness to the global capital market and extractive industries in light of its rich subsoil and hydrocarbon supply.

This chapter discusses the concession of part of the traditional territory of the Guaraní Ñandeva indigenous people to the oil company CDS Energy. It uses this case study to analyze the fulfillment—or lack thereof—of the Guaraní Ñandeva people's right to free, prior, and informed consent.

Currently, there is a dearth of academic analyses of fossil-fuel extraction in indigenous territories in Paraguay. This chapter represents an interdisciplinary attempt to highlight and analyze the causes and consequences of the Paraguayan state's failure to adequately consult with indigenous populations, with the aim of helping avoid a repetition of this history in the future, both in Paraguay and elsewhere.

In the first half of the chapter, I provide an overview of the situation of the indigenous peoples in the Paraguayan Chaco, including their struggle to defend their ancestral territory. I then discuss human rights legal work in Paraguay as it relates to indigenous peoples. I end the section with a brief description of the Chaco and the lived reality of the Guaraní Ñandeva people. In the

second half, I explore how the state's absence in this territory has influenced the results of prior consultations conducted for hydrocarbon projects.

The Essence of the Indigenous Guaraní Ñandeva People

The Guaraní Ñandeva Struggle

Paraguay is home to nineteen indigenous peoples, whose total population of approximately 112,848 brings a beautiful cultural diversity to the country (Dirección General de Estadística, Encuestas y Censos 2013, 19). The vast majority of them live within communities that show a remarkable connection to their ancestral territories and natural resources. The Guaraní Ñandeva people make up approximately 2.1% of Paraguay's indigenous peoples (ibid., 20). The Guaraní Ñandeva live in the Paraguayan Chaco—the western region of the country—in the department of Boquerón, forty-five kilometers from the Bolivian border.

The Chaco region is home to thirteen indigenous peoples who form thirteen distinct cultures and one shared struggle: the struggle for nondiscrimination, respect for their culture, and, above all, the recovery, defense, and protection of their territory. When we speak of the Guaraní Ñandeva people, we should pay special attention to the word “territory,” keeping in mind that the Guaraní Ñandeva demonstrate not only a notable internal organization and knowledge of their rights but also a profound cosmivision in the context of their territorial struggle as an indigenous people.

One summer night, after a typical Paraguayan day of radiant sun and intense blue sky, I found myself in the city of Asunción, having a relaxed chat with Isabelino Bogado Báez. Forty-five-year-old Isabelino is the deputy leader of the Pycasu¹ community of the Guaraní Ñandeva people. He was telling me about the start of his activism in defending his people's right to their traditional territory. With a simultaneous show of pride and sincere humility, he said that 1996 was a year that he remembered with joy.

1 In the Guaraní language, *pycasu* means dove. In their territory, there are many doves, which are hunted by children and are an important source of food.

That year, while he was serving as a leader of the Guaraní Nandeva people, Isabelino and his fellow members of the struggle successfully obtained formal title to part of their territory after holding various demonstrations consisting largely of marches and roadblocks. As Isabelino recounted, after he and his colleagues had organized a protest with about eighty other community members, in which they closed off a street in front of the Paraguayan Institute of Indigenous Affairs, the Paraguayan government announced that it would title 84,000 hectares of their territory.

Although this was a critical gain for the Guaraní Nandeva, the struggle did not end there, and they continued in their crusade to protect and extend the formal title of their land. Indeed, worldwide, the struggle of indigenous peoples is never-ending in light of the systematic violation of their rights, whether at the hands of states or private entities.

Thus, Isabelino explained, more than once, representatives from the Public Ministry have threatened to detain him for leading—within the framework of his constitutionally protected right to demonstrate—roadblocks as a form of protest against the violation of his people’s human rights. In this way, the criminalization of campesinos’ and indigenous peoples’ struggle for land is a systematic practice of the Paraguayan state, a country whose history and present are marked by the social exclusion of indigenous peoples, the most discriminated against and marginalized group in society.²

With conviction, Isabelino told me that they are prepared for—and in fact, are having—confrontations with cattle ranchers,

2 As an example, Paraguay’s practice of criminalizing and repressing the struggle for land, largely in relation to campesinos, has been described to include the following:

a) Arbitrary executions and forced disappearances; b) torture and other cruel, inhuman and degrading treatment; c) arbitrary or abusive detentions and prosecutions; d) implementation of punitive legal regulations. In 2007, the Human Rights Coordinator of Paraguay (Codehupy) lodged a complaint before the United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions regarding 75 arbitrary executions, and two forced disappearances of leaders and members of rural workers’ organizations during the period between February 3, 1989, and June 26, 2005. (Coordinadora de Derechos Humanos del Paraguay 2012, 25)

business people, and the state. The state, which is responsible for protecting his people's rights, is seen by Isabelino as simply another actor against which to struggle. In fact, as we will see, in the case of the extractive activities of CDS Energy in Guarani Ñandeva territory, the Pycasu community had to confront not just the company but the state.

In this context, in the face of so many human rights violations committed by the government, there is an important qualitative change in which, many times, indigenous peoples want the state to refrain from intervening in their territories altogether—a situation that strengthens indigenous peoples' autonomy and positions them as guarantors of their own rights.

Indigenous Peoples and Human Rights Legal Work in Paraguay

Between 1954 and 1989, the Paraguayan state, during the longest dictatorship in South America, violated the fundamental rights of its citizens. Under the platform of the Colorado political party (which is currently in power) and during the military dictatorship of Alfredo Stroessner, many political opponents—as well as members of organizations, social movements, and campesinos—were persecuted, tortured, and assassinated in the name of “national security and anti-communism.” In this context, the civil, cultural, economic, political, and social rights of indigenous peoples were also profoundly affected. The Paraguayan state privileged and promoted the concentration of land and the cattle-ranching model to the detriment of indigenous culture and survival.

Hence, the indigenous peoples of Paraguay, throughout history, have been victims of social, structural, and systemic discrimination within the framework of dispossession of and expulsion from their land. Today, given their lack of formal land titles, among other things, indigenous peoples in the Paraguayan Chaco are exposed to usurpations and invasions of their land by companies and individuals, largely those involved in livestock farming. This is one of the reasons that “45 per cent of the indigenous population do not own land” (Muñoz 2010, para. 54).

In Paraguay and throughout Latin America, there are other practices aside from cattle raising that fail to respect indigenous communities' territories, cultural practices, and human rights.

These include indiscriminate deforestation, mining, the production of “agro-fuels,” the use of pesticides, and hydrocarbon extraction. This chapter addresses this last item in light of its prevalence in the Paraguayan Chaco.

In October 2013, the Paraguayan state announced that it would start drilling the ground in Chaco in search of oil in the first trimester of 2014. During the announcement, the vice-minister of mines and energy confirmed that geological evaluations in the Chaco region and other areas would continue to be carried out to determine “the best places to drill” (“Paraguay anuncia búsqueda de petróleo en 2014” 2013).

These hydrocarbon extraction activities should be more deeply analyzed, however, with the aim of evaluating not only the benefits that they might imply for the country but also the negative impacts and human rights violations that they might involve for local communities. It is imperative that these activities conform to a policy that is sustainable and that involves the effective use of natural resources in order to promote social justice with regard to the distribution of wealth. It is also crucial that indigenous peoples’ equitable participation be ensured, in addition to their right to free, prior, and informed consent, as enshrined in the International Labour Organization’s (ILO) Convention 169 (1989) and the United Nations Declaration on the Rights of Indigenous Peoples (2007).

In this sense, human rights advocates should be prepared to confront the violations that arise not only from the cattle-raising model but also from extractive activities. For twenty years, the human rights organization Tierraviva has done just that. Tierraviva works on the defense of indigenous lands and territories, as well as access to justice for indigenous communities, mainly those from the Paraguayan Chaco. In addition, the organization works to ensure that the state guarantees human rights and complies with its international human rights obligations. Through my work as a human rights lawyer at Tierraviva, I have had the opportunity to interact and connect with the Guaraní Ñandeva people in the context of hydrocarbon extraction in their territory. I have decided to highlight their case in this chapter in light of the fact that the extractive activities taking place in their territory were initiated without their prior consultation.

Human rights legal work, while important, faces a critical limitation in Paraguay: most justice operators in the country do not incorporate international human rights law into their interpretations or applications of domestic law. This situation is not limited to indigenous peoples—it affects other vulnerable groups, too, such as people living in poverty and those unable to access the justice system under conditions of equality and nondiscrimination.

This failure to properly interpret and apply human rights treaties is often due to a lack of knowledge and capacity. Furthermore, the vast majority of decisions of public prosecutors and tribunals are directed toward the protection of the interests of the country's elite and powerful classes.

To give an example, in practice, tribunals do not recognize indigenous communities' property rights over ancestral land when these communities lack a formal title, contradicting the extensive international jurisprudence of the Inter-American Court of Human Rights, which has affirmed that "traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title."³ Nor does the Paraguayan judiciary interpret or apply another important standard established by the Inter-American Court: that the legitimate owners of traditional lands are indigenous peoples, even when these peoples may not currently possess these lands as a result of forced abandonment due violent acts against them.⁴ This is despite the fact that Paraguayan judges, when issuing judgments, are obligated to consider the standards established by the Inter-American Court of Human Rights and other organs of the regional and international human rights systems.

In spite of these limitations, I consider human rights legal work to be an important tool for social change. We human rights lawyers have in our favor the fact that Paraguay has ratified key international human rights instruments. What is lacking is an understanding among Paraguayan justice operators that it

3 Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), March 29, 2006, para. 128.

4 Inter-American Court of Human Rights, *Moiwana Village v. Suriname* (Preliminary Objections, Merits, Reparations and Costs), June 15, 2005, para. 134.

is they—fundamental players in the judicial framework—who must work to encourage social justice and to change the destiny of the vulnerable, excluded, and marginalized. But to achieve this objective, they must have capacity, commitment, courage, and determination.

It is also crucial to advocate for the application and protection of the international principle of progressivity in relation to economic, social, and cultural rights. This principle means that the state, through its judicial branch, must move toward compliance with the economic, social, and cultural rights that are not guaranteed by other branches of government. Once these rights have been protected, there can be no going backward.

Clearly a long road lies ahead, considering that Paraguay has utterly failed to comply with three sentences of the Inter-American Court regarding the violation of the ancestral land claims of communities living in Chaco. These legal victories, achieved by Tierraviva after exhausting domestic remedies, relate specifically to the Yakyé Axa and Sawhoyamaxa communities, both part of the Enxet people, and the Xákmok Kásek community of the Sanapaná people.⁵

Paraguay has failed to comply with the Inter-American Court's judgments largely because the state has opted to protect cattle raisers, who have a long history of appropriating indigenous territory in the country. This protection is why the regional tribunal holds the state internationally responsible for the deaths of various members of the Sawhoyamaxa and Xákmok Kásek communities, children among them.

Not only have I played the role of professional researcher, but I have also worked directly with the Guaraní Nandeva people. This latter position affords me the opportunity to tell this and other experiences from within and to thus try to arrive at a deeper understanding of the problem from both a theoretical and practical perspective. It also allows me to understand that there is a wall against which we human rights defenders must struggle—a

5 Inter-American Court of Human Rights, *Yakyé Axa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), June 17, 2005; *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), March 29, 2006; *Xákmok Kásek Indigenous Community v. Paraguay* (Merits, Reparations and Costs), August 24, 2010.

wall constructed through decades of corruption and influence-peddling, impositions by ruling classes, and the concentration of land in the hands of agribusinesses and other companies, such as hydrocarbon ones.

Nonetheless, the conviction, passion, and honesty needed for the defense of human rights are nonnegotiable and absolute. This does not mean colliding against the wall but rather erecting a new one. As a friend of mine says, as human rights activists we must play the role of legal worker—we must create, brick by brick, a new wall that replaces the one that has been permeated by injustice. This is why we cannot stop believing in our work, even though it may be slow and difficult. Successful cases influence other cases; they inspire, show the way, and set important and indisputable precedents. One example of this can be seen in the victories won by Tierraviva that establish critical precedents not just for Paraguay but for the region.

The Guaraní Ñandeva Territory

To arrive to the Guaraní Ñandeva territory, one must take the Trans-Chaco Route, a road that, during the first 268 kilometers, is in relatively good condition. From that point forward begins the “adventure”—the poorly maintained road sometimes becomes dangerous due to, among other things, a lack of signposts. Traveling this route time and again has helped me understand why a friend of mine believes that the Paraguayan Chaco is like “a large hacienda”: the land is concentrated in the hands of just a few families, mainly cattle ranchers, who have fenced off and deforested large areas, directly affecting the territories and natural resources of the indigenous peoples who live there.

The Paraguayan Chaco, home to the Guaraní Ñandeva people, is separated from the eastern region of the country by the Paraguay River. It represents a quarter of the Gran Chaco⁶ and makes up 60.7% of the country’s total area. This region’s soil has a high level of salinity, and its climate falls somewhere between semi-arid and humid, which translates into an intense and dry heat. In

6 The Gran Chaco is an eco-region in central South America that is shared by Argentina, Bolivia, and Paraguay.

MAP 10.1
Guaraní Ñandeva territory



SOURCE: Instituto Paraguayo del Indígena (2014)

terms of the area's hydrology, one of the most negative factors for development and its inhabitants is the scarcity of freshwater.

As a result, in some places in the Chaco there is no groundwater, and in others where there is water, it is too salty. The Guaraní Ñandeva territory, however, is privileged to find itself located on the Yrenda Aquifer,⁷ the largest freshwater reserve in the region. The region's fauna includes reptiles, deer, armadillos, snakes, owls, monkeys, anteaters, and leopards.⁸

This beautiful diversity is juxtaposed with indiscriminate and extensive deforestation of the natural forest and the implementation of pasture destined for cattle raising, which creates a devastating panorama and threatens the area's biodiversity and the

⁷ In Guaraní, *yrenda* means "the place where there is water."

⁸ I am grateful to the organization Alservida for providing this information on Chaco's diversity.

well-being of future generations. It is worth pointing out that cattle ranchers in the Paraguayan Chaco are responsible for the highest rate of deforestation worldwide, as documented by a study of the University of Maryland (2013).

As one goes deeper into the Chaco and arrives to the district of Mariscal Estigarribia, about 472 kilometers from Asunción, the adventure becomes an odyssey. The route ceases to be a road and becomes a jumble of earth, stone, and asphalt chunks. From this point, the journey could be described euphemistically as “turbulent and thorny,” and the average speed should be kept between 20 and 40 kilometers in order to protect the vehicle.

After finishing this route, a dirt path finally leads to the communities of the Guaraní Ñandeva territory. These are the Syrakua, Segunda Trinchera, Ñu Guasu, and Pycasu communities. This last community was our final destination, where we arrived with leaders from the other mentioned communities to converse and spend some days together. One can observe a notable respect, connection, and harmony among the communities of the Guaraní Ñandeva people as they meet, talk, and make decisions.

The Pycasu community is composed of about 500 individuals who make up about 120 families and who earn their livelihoods through crops and subsistence hunting. In family gardens, they plant, among other things, beans, watermelon, and squash, which grow properly when there is enough rain. They also maintain goats, cattle, and a tractor, all community property. These activities allow the community to feed itself relatively self-sufficiently. However, there are other communities that do not enjoy the fulfillment of their most basic rights, or that still do not have land, which obviously weakens their organization and mobilization.

In addition to providing a source of livelihood for the Guaraní Ñandeva people, the territory also makes up their core essence. As Isabelino explained to me, “We fight for the Guaraní Ñandeva territory in order to safeguard and recover our sacred sites and our culture.”⁹ Similarly, Isabelino noted that although children attend school within the community, they also learn about cultural

9 Interview with Isabelino Bogado Báez, deputy leader of the Pycasu community, November 2013, Asunción. All quotations from Isabelino in this chapter derive from this interview.

practices through their daily activities—for example, young boys accompany men into the bush to hunt, and girls work in the garden with the women.

In the context of land claims, Isabelino understands that the right of indigenous peoples goes beyond the concept of ancestral lands (of the communities) and encompasses the concept of land claims (as an indigenous people). In this respect, ILO Convention 169, ratified by Paraguay, establishes that indigenous peoples' right to use land extends to "lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities" (art. 14).

The Guaraní Nandeva People and the Failure to Consult

Free, Prior, and Informed Consultation?

One morning, after eating breakfast in the Pycasu community together with leaders from other communities, we prepared to enter the community meeting room. The room's walls featured a photograph of the community's historic leader, as well as a worn-out chalkboard. The chalkboard had some writing on it: in one column was the community's territorial claim, and in another column were several issues of concern to the community. Among these issues was oil extraction.

As children played nearby, adolescents, men, and women participated actively in the meeting. Pycasu community leader Eusebio Giménez Sosa, transmitting a tranquility imbued with conviction, welcomed us and thanked Tierraviva for its concern and interest in the case. Composed, gentle, and with a natural ability to teach, Eusebio expressed himself through emphatic gestures, particularly when talking about defending his community's cultural practices and territory.

Eusebio has extensive political training and a profound knowledge of indigenous peoples' rights, especially with regard to territory. Leading the meeting in a democratic manner, Eusebio explained that the concession of part of the Guaraní Nandeva territory to CDS Energy and the works that the company was performing in this territory were in blatant violation of the right to free, prior, and informed consultation established

in ILO Convention 169. He talked about how, on April 9, 2010, in Guaraní Ñandeva territory, the Secretary of the Environment held a sort of consultation with members of the Guaraní Ñandeva people regarding the concession to CDS Energy for prospecting, exploring, and exploiting hydrocarbons.

But how could this be a “prior consultation” if the concession had already been granted by law to the company in question? Worryingly, not only was this not a prior consultation, but the “consensus”—as it was referred to in a one-and-a-half-page record—was achieved in an improvised manner, in violation of both Paraguayan constitutional law and international human rights law. Present at the meeting with indigenous communities of the Guaraní Ñandeva people were representatives of the state: from the Ministry of Public Works and Communications, the Vice-Ministry of Mines and Energy, and the Department of Hydrocarbons, as well as the governor of Boquerón. Also present were representatives of CDS Energy, who, as we will see below, often assumed commitments and undertook obligations that fall within the state’s domain.

According to the record, the purpose of the meeting was to “reach an agreement on the position of the Guaraní Ñandeva nation regarding the renovation of the environmental license for the ‘Prospecting and Exploration of Hydrocarbons in the Western Region – Boquerón Block’ project on behalf of CDS Energy S.A.” (Secretaria del Ambiente 2010). The record does not cite to the articles of ILO Convention 169 regarding free, prior, and informed consent. Further, it does not indicate the presence of any representatives from the Paraguayan Institute of Indigenous Affairs, the state institution that would be the most competent on this issue due to its status as the lead agency on indigenous peoples’ rights.

According to the record, the hydrocarbons director at the time (who, today, is head of the Vice-Ministry of Mines and Energy) stated that petroleum “is not going to leak or drain off because, on the one hand, this implies loss and, on the other, should this be the case, the relevant authorities will impose sanctions, for these companies intend to stay and look after their work” (ibid.). He concluded by stating, “There will always be consultations with the affected indigenous communities and they will be given

appropriate compensation, as the indigenous people are owners of the land and are those who should benefit" (ibid.).

Although the indigenous people are the legitimate owners of the territory in question, during the consultation process it was not made clear, in any form, how they would receive their fair share of benefits from the company's intervention. On the contrary, the entire consultation process and the "offers" from CDS Energy were performed in a profoundly asymmetrical fashion and without a plan that resembled a fair distribution of benefits. Furthermore, as Isabelino explained, CDS Energy committed itself to assuming obligations that fall within the domain of a "social state of law," as Paraguay declares itself to be.¹⁰ Among these obligations was the commitment to provide school snacks to children, medicines, several heads of cattle, means of transportation, and sources of employment. It is also worth mentioning that the company was the one that took care of transporting the indigenous people to the site where the meeting took place and the consensus record was finalized.

Despite the legal and substantive inconsistencies of the consultation process, leaders from some communities of Guaraní Ñandeva accepted the concession on the grounds that the company would perform all of the necessary studies and would provide the requested basic services not provided by the state. This acceptance was due, in large part, to the state's absence with regard to the guarantee of human rights and basic services. In this sense, the words of Tomás Gamarra, member of the Canaan community, are extremely telling: "[We] welcome the consultation with indigenous communities, highlight the need for sources of jobs, [and] regret seeing our brothers begging due to lack of resources" (Secretaría del Ambiente 2010).

This event demonstrates the unjust and asymmetrical situation in which these communities find themselves in relation to extractive companies, which have exorbitant amounts of capital available to palliate the absence of the state. In this sense, as explained

10 Article 1 of the Constitution reads: "The Republic of Paraguay is forever free and independent. It constitutes itself as a social State of law, unitary, indivisible, and decentralized in the form established by this Constitution and the laws."

by César Rodríguez-Garavito, the asymmetry repeats itself in the vast majority of consultations with indigenous communities:

Within the enclave economies where many consultations occur, the company, for practical purposes, *is* the state: access to the locale depends on the company, local authorities coordinate and interact with the company, and a large sector of the population is subordinated to it, either through labor relations or indirect economic dependence. . . . profound economic inequalities that consultation leaves intact. (Rodríguez-Garavito 2011)

Further strengthening Rodríguez's position, the governor of Boquerón openly declared during the meeting that the concession to CDS Energy had to be supported because the government's budget was limited and indigenous communities in the area had great needs.¹¹

On the other hand, it is necessary to understand, respect, and fight for the position of the Pycasu community, which, in the words of its leader, Eusebio, "will perish in its territory. [The community's] decision is its own decision, which should be respected. In time, problems will come. The community does not agree with the works of CDS Energy and its position should be respected" (Secretaría del Ambiente 2010). According to Eusebio, the Paraguayan state does not appear to be concerned with the life or practices of indigenous culture.

To better understand the state's position, I set off one October morning to visit the Vice-Ministry of Mines and Energy, where I was received very kindly by Narciso Cubas, the director of hydrocarbons. He explained that the concession for the prospecting, exploration, and exploitation of hydrocarbons in Guaraní Ñandeva territory had initially been given to Morrison Mining in 2005. This company then reached an agreement with CDS Energy, which began undertaking seismic surveys in the territory. According to the director, these seismic surveys consist of "small explosions."¹² A puncture is made in the ground and an explosive charge is placed ten meters deep. The explosion generates waves. At that moment,

11 Interview with Victor Pereira, technician at Altervida, October 2013, Asunción.

12 Interview with Narciso Cubas, director of hydrocarbons at the Vice-Ministry of Mines and Energy, October 7, 2013, Asunción. All quotations from Narciso in this chapter derive from this interview.

a signal consisting of a type of electrocardiogram is transmitted, which produces images showing where hydrocarbons are likely to be accumulated. The next step is the drilling of wells.

With regard to the Yrenda Aquifer, the director stated unequivocally that the aquifer consists of salt water. It is important to clarify that this statement is incorrect, given that the aquifer's water is in fact freshwater. Indeed, during the days that I shared with the communities of the Guaraní Nandeva people, I drank that water, which is without a doubt apt for drinking (Benítez 2007).

To better understand the Paraguayan state's current vision regarding extractive industries, and the political context in which this vision has been developed, it is important to add that in June 2012, the country's then president Fernando Lugo was impeached and removed from office. Lugo had been accused of poorly performing his duties by conservative parties in Congress, the body responsible for carrying out impeachment proceedings. Lugo's impeachment was supported by agribusinesses, including the Rural Association of Paraguay, the only trade association that defends the interests of cattle ranchers ("Los Agroempresarios apoyan proceso de destitución del Presidente Lugo" 2012). However, both the Inter-American Commission on Human Rights and the United Nations Human Rights Committee objected to Lugo's impeachment, which they deemed a violation of his human rights, particularly his civil rights. The Inter-American Commission stated in a press release that it

considers unacceptable the speed with which the impeachment of the constitutional and democratically elected President was conducted. Considering that it was a process for the removal of a Head of State, it is highly questionable that this could be done within 24 hours while still respecting the due process guarantees necessary for an impartial trial. The Commission considers that the procedure that was followed affects the rule of law. (Organization of American States 2012)

Similarly, in March 2013, the Human Rights Committee questioned the Paraguayan state regarding its failure to comply with the basic principles of due process during Fernando Lugo's impeachment proceedings and recommended measures to avoid similar situations in the future (Coordinadora de Derechos Humanos del Paraguay 2013).

Immediately following Lugo's removal from office, Federico Franco, who had supported the impeachment, assumed the presidency. The country's new president stated that "on March 1, 2014, we are going to bathe in petroleum; we have gas, we have minerals. The iron, copper, and nickel mine in Chaco is bigger than that of Bolivia. We also have uranium, titanium, gold" ("Franco dice que Paraguay se bañará en petróleo" 2013). However, March 2014 came and went and Franco's promise did not become a reality. Previously, he had made other inconsistent statements; for example, in 2012, Franco stated that Chaco would be the richest petroleum area in all of South America. He made these statements during a ceremony for extractive industry projects in the Paraguayan Chaco, where public-private initiatives were discussed as the key to combatting poverty ("Franco: El Chaco será la zona más rica de petróleo en Sudamérica" 2012).

In this context, the Paraguayan state's granting of concessions to hydrocarbon companies for the prospecting and extraction of natural resources in the Chaco—without considering the interests or rights of indigenous communities and peoples, the ancestral holders of these lands—was a flagrant violation of ILO Convention 169.

Hydrocarbon Law: And the Rights of Indigenous Peoples?

When I was a law student, I always asked myself whether law is justice and whether justice is law. Years later, after living, feeling, observing, and advocating for human rights, I realize that innumerable laws have nothing to do with justice and that true justice, many times, is also not law. Nor can a just law that is not respected be called justice. In the case at hand, Paraguay's 1995 Hydrocarbon Law (*Ley de Hidrocarburos*) is not just; or put another way, it is just only for transnational capital. And therefore, the right thing to do in this case is to disobey it.

Victories in human rights advocacy are not achieved exclusively through litigation—and much less through negotiations. This is so because the Paraguayan state sets itself up, as we have seen, on a political-economic-judicial structure that benefits a small group of powerful people who serve their own interests at the expense of a large majority that lacks basic rights, making Paraguay

one of the most unequal countries in the world and one of the poorest in Latin America (Coronel 2012).

This majority is who we are fighting for in terms of human rights legal work. The nature of this struggle is two-sided, requiring a legal arm and a political arm. The political arm is critical for disobeying unjust laws like the Hydrocarbon Law. It includes elements such as militancy, organization, mobilization, and pressure. These are the actions that the Pycasu community took in the face of the subjugation of their rights based on a law that discriminates against them. Along with other factors, these political actions were critical for positioning themselves and defending their territory.

This chapter does not seek to perform an exhaustive analysis of Paraguayan law in general or of the Hydrocarbon Law in particular. Nonetheless, it is important to discuss, at least briefly, the Paraguayan legal system in relation to international human rights law, constitutional law, and the Hydrocarbon Law to be able to understand the case at hand.

The supreme law of the Republic of Paraguay is the Constitution, proclaimed in 1992 after a long dictatorship. Articles 142 and 143 establish the principle of the international protection of human rights and institute a constitutional prohibition on derogating from international human rights treaties, except by the procedures that apply to the amendment of the Constitution.

Furthermore, articles 137 and 145 of the Constitution accord more weight to international human rights treaties ratified by Paraguay than to the laws passed by Congress, which are “juridical provisions of inferior hierarchy.” In other words, the Hydrocarbon Law is lower on the hierarchy than ILO Convention 169.

Nevertheless, the Hydrocarbon Law not only fails to respect Convention 169 but also openly transgresses it, which is why, as stated earlier, indigenous peoples and Paraguayan people in general are justified in disobeying it. In this respect, it is important to note that while there have been important attempts on behalf of indigenous organizations to create regulations around Convention 169, particularly in the context of free, prior, and informed consultation, these efforts have been rejected by the Paraguayan state. The state has prioritized individual interests and those of businesses over human rights and human dignity.

Article 6 of Convention 169 instructs states to “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.” However, as this chapter has demonstrated, not only was the consultation carried out in a manner that failed to follow any of the parameters protecting the rights of the Guaraní Nandeva and that ignored the state’s obligations, but it was also conducted after the concession to an extractive company had already been made. The consultation was not prior, nor free, nor correctly informed. Convention 169 is thus a dead letter in Paraguay.

Furthermore, on the one hand, the Hydrocarbon Law is drastically outdated in terms of national sovereignty and the Paraguayan state’s ability to profit from the outcomes of extractive activities and thus be able to ensure a fair distribution of wealth among socially excluded groups, particularly indigenous ones whose territories are frequently home to such activities. In this sense—and this is not a minor detail—the concession to extractive companies and multinationals is performed “in order of arrival”; in other words, there is no logical bidding process. The law says that “licenses and concessions will be granted in the order of presentation” (art. 7).

On the other hand, getting deeper into the indigenous question, the Hydrocarbon Law neither conforms to international human rights law nor respects or protects the rights of indigenous peoples. In fact, as stated earlier, the law does not even mention the word “indigenous” nor the concept of human rights. This demonstrates the degree to which Paraguayan law puts the interests of extractive industries above the rights of indigenous peoples.

Therefore, although article 5 of the Hydrocarbon Law establishes that “all licenses and concessions granted under this law shall be subject without restriction to the laws of the Republic,” the procedures that it outlines for the consultation process are not subject to these laws. Within that framework, article 13 of the Hydrocarbon Law, upon establishing that concessions will be granted by the signing of a contract approved by executive decree, does not even comply with its duty to conform to constitutional law

and Convention 169 because it fails to require a free, prior, and informed consultation.

Further, when the law refers to charges, royalties, and taxes, it does not specifically establish a fair sum or share for indigenous communities whose human rights to survival, health, and cultural practices are affected by the activities in question. This last point should not be confused with allowing the state to award indigenous lands or territories to extractive companies without a consultation.

With regard to compensation for damages caused to third parties or the state, the law establishes a sum of US\$35,000 to be lodged as collateral by the company, in addition to the possibility of litigating disputes through a national or international arbiter in conformity with the provisions of the concession agreement (arts. 6, 21). Arbitration should conform to the validity of constitutional rights and international human rights treaties ratified by Paraguay. In this sense, Convention 169 establishes that “peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities” (art. 15).

Regarding the extremely low obligation to lodge just \$35,000 with the aim of ensuring compensation to third parties—who are often indigenous communities—the law does not take into account the profound harm that can be caused to indigenous peoples’ fundamental rights to health, life, and survival as a community. Returning to my interview with the director of the Department of Hydrocarbons: when I asked him about compliance with international human rights norms in the concession contract, he responded that “model contracts” now contain a clause in which “the concessionaire must comply with the current legislation on native populations. In addition, it must implement assistance and/or compensation programs in native communities directly affected in their lands by the works at any of the stages.” This clause, aside from failing to comply with Convention 169, is confusing and subjective, which exacerbates the enormous asymmetry between companies and indigenous communities.

ILO Convention 169 obligates the state to “establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their

interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands" (art. 15). This obligation cannot be complied with through such an isolated and imprecise "clause" described by the director of hydrocarbons. It is also important to emphasize that the problem of extraction is not limited to the "traditional" indigenous way of life but also includes indigenous groups who live in the Paraguayan Chaco in a state of voluntary isolation in the forest and whose way of life, simply and plainly, would collapse if extractive activities take place in those territories.

In sum, the Hydrocarbon Law must be urgently modified to incorporate international human rights legal standards and to thus comply with the right to free, prior, and informed consent. Furthermore, consultations should be conducted in a manner that guarantees the protection of the human rights, land, and territory of indigenous peoples and considers the enormous asymmetry between transnational capital and these communities.

Lastly, according to what the director of the Department of Hydrocarbons told me, there is sufficient evidence to suppose that the Hydrocarbon Law is in the process of being modified—not exactly in order to defend the rights of indigenous peoples but rather to modify the law so that it addresses bidding processes. It is imperative that indigenous organizations and human rights organizations be watchful of this process so that they can play a role in ensuring that the law guarantees appropriate protection to indigenous communities. Not only should these organizations lobby the executive and legislative branches, but they should also take part in the reform process themselves, helping to ensure that it takes their concerns into account.

Finally, it is important to make clear that, currently, the Guaraní Ñandeva territory is, in the words of the director of hydrocarbons, "free" for any other concession to an interested extractive company. We should take the case of the Guaraní Ñandeva people, particularly the Pycasu community, as a model struggle in the face of transnational extractive capital—because what is coming our way, with the deepening of the neoliberal model on behalf of the Cartes administration, are more failures to consult and more violations of these peoples' rights. The words of Isabelino serve

as a guide: “The struggle may be difficult, but I’m going to keep on fighting.”

Conclusion

The concession of a part of the Guaraní Ñandeva territory to CDS Energy without first conducting—or, conducting in an incorrect manner—a free, prior, and informed consultation violates ILO Convention 169 and transgresses the constitutional rights of indigenous peoples. Not only is the Paraguayan state absent (a fact that it accepts it manifestly) in relation to its obligation to guarantee the human rights of indigenous peoples in Paraguay, but it also delegates its function of holding the consultation to an extractive company. It is therefore essential to ensure the Hydrocarbon Law’s harmonization with international law and constitutional Paraguayan law, with the purpose of protecting indigenous peoples’ fundamental rights.

In addition, the proper regulation of free, prior, and informed consultations is critical. To meet this objective, as we have seen, the efforts of indigenous and human rights organizations are essential. And after we achieve this goal, we must struggle to ensure that the Paraguayan state complies with its role as guarantor and that indigenous communities are on equal footing to negotiate with extractive industries.

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CHAPTER 11

A Land for Moisés

Marisa Viegas e Silva
(Brazil)

*I dedicate this chapter to Edvard
and the inhabitants of Piquiá de Baixo.
I also dedicate it to all those who have helped
that community—especially the members
of the Network for Rail Justice—in spite of the threats
and difficulties that they have endured.*

Introduction

Scenario: a missionary center in the Santa Teresa neighborhood in the city of Rio de Janeiro. Gathered atop one of the hills that is so characteristic of carioca scenery, men and women shared stories about their struggle, reflected on past and recent events, and planned their next steps. It was nighttime, and the Christ the Redeemer statue—which was lit up thanks to financial support from Vale, one of the world’s largest mining companies—shone softly in the background. Edvard was feeling fatigued because of all the traveling, as well as the struggle in general. But as he thought about the activities of the days to come, his energy was renewed.

It was April 16, 2013, and the third meeting of the International Movement of People Affected by Vale (known as AV) was taking place. AV emerged on the scene in 2010 with the aim of denouncing the impacts of Vale’s mining operations around the world. Families, mine workers, trade unionists, environmentalists, feminists, politicians, members of indigenous populations, riverside dwellers, fishermen, peasants, students, professors, non-landowners, and migrants are just some of those affected by the company’s practices in countries such as Argentina, Brazil, Chile, Peru, Mozambique, Canada, and Indonesia.

The day after the meeting, numerous members of AV staged a protest in front of the company's headquarters in downtown Rio de Janeiro. Meanwhile, other members attended the company's shareholder meeting—which was taking place in a different part of the city—where they voiced their concerns about the impact of the company's actions on the territories where it operates.

After these events, five residents from the community of Piquiá de Baixo, Edvard among them, arranged a meeting with several families from Santa Cruz, a neighborhood on the west side of Rio de Janeiro, so that residents from the two communities could share stories about their suffering and their experiences of resistance. Just like the residents of Piquiá, whose health and lives have been negatively affected by the five steel plants operating in their town, Santa Cruz's inhabitants are suffering negative effects from the installation and operation of a steel plant in their neighborhood. Vale plays a similar role in both cases: in the case of the Santa Cruz plant, the company retains 26.85% of stock in the undertaking. In the case of Piquiá, the steel plants exist as a function of Vale, since almost all of the ore that goes through processing is extracted from Vale's Carajás Mining Complex.

Several months later, the two communities met again, this time in Piquiá. The meeting was organized by the Network for Rail Justice and the Institute of Alternative Policies for the Southern Cone, with support from Global Justice (Justiça Global).

AV, which focuses on the impacts of Vale's mining operations, is but one of many such social movements that have sprung up around the globe in recent years. As Gabriela Scotto (2011) explains, these movements have come to occupy, over a short period of time, the center of a transnational political arena that involves mining companies, environmental and human rights organizations, and local and indigenous groups. The rapid growth of these movements is related to the increase in social conflict around mining, particularly open-air "mega-mines."

But why should one be opposed to mining today when humans have carried it out for thousands of years (Departamento Nacional de Produção Mineral 2014)? Its defenders assert that anyone who opposes mining is failing to consider that mining has been a part of human beings' existence since the beginning of time and has been necessary for the development of civilization. Why,

then, is the number of people who oppose this activity growing? To what extent is modern mining different from that carried out during other periods of history?

The discourse on mining almost always uses the discourse of development for its defense. Proponents of mining assert that by providing ores that are necessary for the production of items such as cell phones and airplanes, mining is indispensable for modern life and brings large-scale economic and social development along with it. Thus, the argument goes, any damage experienced by “sacrificial zones” like Piquiá is far outweighed by the economic and social benefits that result from mining activity.

According to a report on Brazilian mining published in the *Engineering and Mining Journal*, the industry’s operations have promoted economic growth and improved the Brazilian population’s quality of life (especially in remote places like the Amazon) through the management of regional projects and infrastructure, and have moved local economies forward (Global Business Reports 2011). Backing that theory, a recent report published by the Brazilian Mining Association and the International Council on Mining and Metals (2013, 7) highlights the case of Vale’s mining operations in southeast Pará, where “for every R\$1 in output generated by the mine, an additional R\$1.3 of income is generated in the rest of Southeast Pará (i.e., a multiplier of 2.3).” According to those organizations’ prediction, “the induced employment multipliers are expected to be 3–4 times larger than this” (ibid.).

In macroeconomic terms, factors such as the mining sector’s substantial contribution to Brazil’s trade balance, the considerable revenue generated by taxes imposed on the mining sector, and the creation of jobs beyond local fields of activity stand out as examples of the importance of the mining industry for the country’s economy. Still, according to the Brazilian Mining Association and the International Council on Mining and Metals (2013, 7), in 2009, the total number of direct formal jobs in extractive industries (including petroleum and natural gas but excluding small-scale mining) accounted for about 300,000 jobs, with the mining sector accounting for 232,000 of those jobs.

Mining companies have used these arguments to weaken the impact of criticisms leveled at the social and environmental impacts of their activities. For example, Vale’s *Sustainability Report*

2012 boasts that 745,000 individuals have directly or indirectly benefitted from the activities of its philanthropic arm, the Vale Foundation (Vale 2013d, 50). The company is able to minimize and compensate for any social impact through these activities, which include educational opportunities, science and technology hubs, the promotion of culture and sports, and the building of infrastructure (Vale 2013d).

The Brazilian government's vision for the mining industry does not differ much from that of mining companies to the extent that it sees mining as fundamental to consumption and quality-of-life standards for modern society. Indeed, the government's National Mining Plan 2030 seeks to triple Brazil's output of iron ore, nickel, copper, and other metals (Ministério de Minas e Energia 2011, xvi).

Justiça Global's Work on This Issue

One of Justiça Global's areas of focus is economic, social, and cultural rights. In this area, we work on issues related to land rights, violence against village communities, rural workers, indigenous communities, the negative impacts of dams, land titling policies and agrarian reform, human rights violations committed by companies, social and environmental impacts caused by development projects, and mental health.

As part of this work, Justiça Global created the Human Rights and Extractive Industry Project in light of the growing impact of mining activities on Brazilian citizens' rights to land, health, housing, and education, among others. By exchanging ideas with other organizations outside Brazil, we became increasingly attuned to the magnitude of the global mining industry and the negative impact that Brazilian mining enterprises are having in the communities where they operate. The organization thus created this project in order to denounce the violations of economic, social, and cultural rights that accompany these corporations' activities inside and outside of Brazil.

In this vein, Justiça Global has also been an active member of AV. We have collaborated with AV on initiatives such as *The Vale 2012 Unsustainability Report* (a shadow report to Vale's *Sustainability Report 2012*); the 2012 Public Eye Award, popularly referred to as the "Nobel prize of shame," which was awarded to Vale in

2012; and the organization of protests in front of Vale's headquarters in 2012 and 2013. Two other members of AV—the Network for Rail Justice and the Institute of Alternative Policies for the Southern Cone—are partners in our Human Rights and Extractive Industry Project.

AV's work, and its close collaboration with the Network for Rail Justice, has shed light on the tensions created by mining activities in Brazil in recent years, as well as the impact of these activities on local communities. The Network for Rail Justice is a coordinated effort of social movements, associations, and civil society groups that work on behalf of the more than one hundred communities affected by Vale's mining network in the Brazilian states of Pará and Maranhão.

The Piquiá de Baixo case, which is paradigmatic of these impacts, has been closely monitored by Justiça Global and the Network for Rail Justice. It has also been the subject of human rights impact assessments and fact-finding missions (see, e.g., International Federation for Human Rights, Justiça Global, and Justiça nos Trilhos 2012; Faustino and Furtado 2013).

Using Piquiá de Baixo's experience as a case study, this chapter reflects on the following questions: How did the tension arise between "development" at the national level and impacts at the local level with regard to mining activities? What are the similarities and differences between the Brazilian context and that of other countries in Latin America? What role has the Brazilian government played in the development of this tension?

In exploring these questions, I use the story of Edvard, based on accounts provided in the comic strip "Uma cobra de ferro," created by the Network for Rail Justice (Justiça nos Trilhos forthcoming);¹ in "Letter from a Piquiá Resident to His Grandson," a letter written by Edvard to his grandson, Moisés (Associação Comunitária dos Moradores de Piquiá 2011); and in the report *How Much Are Human Rights Worth in the Brazilian Mining and Steel*

1 The original version of the comic strip is in Italian ("Il treno"). It exposes the chain of suffering and struggle that unites the communities of Piquiá de Baixo (in Brazil) and Tamburi (in Italy), the latter being close to the largest steel plant in Europe, which also processes iron ore extracted by Vale.

Industry?, published by the International Federation for Human Rights, Justiça Global, and the Network for Rail Justice (2012).

A Land of Sweet Fruit

Edvard lives in Piquiá de Baixo, a village located just outside the city of Açailândia, in the northeastern Brazilian state of Maranhão. The village, which sits on land that was once very fertile, used to be a lively place—but nowadays, nobody wants to live there. When Edvard arrived there at the end of the 1960s, he was enchanted by the village's name: it alludes to one of the most prevalent tree species in the region (the *pequiazeiro*), which bears delicious fruit that is much appreciated by Amazonian populations. The land was fertile, the climate was pleasant, and there was work. People from the region were hired to work on the construction of the BR-222 highway connecting Amazonia to the rest of the country. They were good times.

Like many others who showed up to build BR-222 (which connects Açailândia to São Luis, the capital of Maranhão), Edvard ended up settling down in that abundant land of sweet fruit. However, the tranquility of the village did not last long; its inhabitants were surprised by the sudden arrival of sawmills and landowners, who were drawn to the area by tax incentives. This led to an increase in the price of basic commodities and to landholding disputes throughout the region. As if these developments were not enough, several blast furnaces, a thermoelectric power plant, a cement factory, and a steel mill—all of which are linked to the region's mining activities—were erected.

Ore extraction in the Carajás mountain range, which is in the southeastern part of the neighboring state of Pará, began in the 1960s and gained steam over the following decade, when the then state-run Vale do Rio Dolce (CVRD) company assumed complete control over exploitation in that area. In 1979, CVRD initiated the Carajás Iron Project, whose goal was to produce ore on an industrial scale so that Brazil would be able to supply the international market. This plan required the development of infrastructure, including the Tucuruí hydroelectric plant in southeastern Pará, the Ponta da Madeira port in São Luís, and the Carajás Railway.

The company's arrival was heralded as a sign of progress and prosperity for the entire region. Edvard, like his friends in the

neighborhood, did not understand what exactly was happening, but he believed what he was hearing. After all, he felt that public authorities and key leaders would know what was good for Açailândia and Piquiá. Yet as time went on, Edvard and his fellow neighbors would gradually come to experience the negative impacts of this “progress.”

Vale and the River That Was Never Gentle

Edvard and other residents of Piquiá de Baixo were not aware of the company’s plan or the impact that its activities would have on the local community.

CVRD was created in 1942 for the purpose of exploiting mineral deposits in the Itabira region, in the state of Minas Gerais. From 1952 to 1997, CVRD was under the state’s complete control. In 1997, CVRD was privatized; this privatization process was marked by accusations of fraud regarding the company’s actual value, which was estimated to be twenty-eight times greater than the amount paid for it (Faustino and Furtado 2013, 32). Long after its privatization, in 2007, the company changed its name to Vale. Today, Vale is a global enterprise, with operations in thirty-eight countries on five different continents. Its headquarters are in Rio de Janeiro.

Vale is currently the world’s largest producer of iron ore and pellets. It is also active in the production of nickel, copper, fertilizers, manganese, and iron alloys. Until 2000, Vale also played a significant role in the extraction of aluminum. It also invests in hydroelectric plants, natural gas, and biocombustibles to guarantee that it will have recourse to the kinds of energy needed to carry out its operations.

Since 1986, Vale has enjoyed the legal right to use nearly 412,000 hectares of land owned by the Brazilian state. Today, this area corresponds to the Carajás National Forest (which was established by Decree 2486 of 1998 [Decreto 2486], in the wake of the privatization process), and is where the company carries out the extraction and processing of iron ore. Vale is an active participant in the forest’s management (which includes the exploitation of ore) and in the operation of the 550-mile-long Carajás Railway (Faustino and Furtado 2013, 15).

In the different countries where it operates, Vale has had an abhorrent environmental, social, and human rights record. When

accused of the same by affected communities, union representatives, and social movements, the company has offered unsatisfactory responses and has attempted to absolve itself from its responsibilities. As described in AV's shadow report, *The Vale 2012 Unsustainability Report*:

The recurrence and grave nature of the denunciations, the company's failure to comply with effective reparation measures, the lack of dialogue and its arrogant attitude put the corporation's image at risk, which, in some cases, could affect its high profits. To deal with this threat, Vale chooses the easiest and most profitable way out: invest massively in propaganda, publicity and marketing. (International Movement of People Affected by Vale 2013, 3)

Vale's current activities have had countless effects on the Carajás corridor: territorial conflicts; environmental degradation; the extensive use of water in mining operations, which affects available water supply for local residents; disorganized migration; accidents on the Carajás Railway; noise pollution and fractures in buildings caused by passing trains; violations of the right to free movement (for example, due to barriers imposed by railway crossings); flooding in communities due to a lack of adequate drainage systems along the rails; the diversion of streams; and the phenomenon known as "train children," discussed below (Faustino and Furtado 2013, 22).

Other harmful effects have also been observed, including the intimidation and surveillance of community leaders who have denounced the company's activities; pressure on the federal government to not recognize Quilombola and indigenous land claims, thus ensuring the availability of these lands for mining operations; the removal of families and the appropriation of land; and individual negotiations with community members, aimed at weakening communities' claims (Faustino and Furtado 2013; International Federation for Human Rights, *Justiça Global*, and *Justiça nos Trilhos* 2012; International Movement of People Affected by Vale 2013).

As far as surveillance activities are concerned, according to information offered by Vale's ex-intelligence service manager, the company has maintained an intelligence network so that it can spy on social movements and organizations in the states of Rio de Janeiro, Espírito Santo, Minas Gerais, Pará, and Maranhão

(all of the Brazilian states where the company operates, whether directly or through subsidiaries). The company's surveillance activities include telephone tapping; e-mail interception; the review of confidential information from INFOSEG, Brazil's national system for gathering personal data related to security, judicial proceedings, and arrest warrants; and dossiers on the private lives of individuals. Public officials have also been involved in these efforts by helping the company obtain confidential information. Other actors involved include private detectives and agents from the Brazilian Intelligence Agency; the latter have helped train personnel to infiltrate the Network for Rail Justice and the Landless Workers' Movement (International Federation for Human Rights 2013; Agência Pública 2013; Filho 2013).

The Place Where No One Wants to Live

With the passing of time, the village of Piquiá lost its prosperity, its peaceful nature, and even its name: it came to be known as Pequiá—with an “e”—which is short for “Petrochemical Açailândia.” It also lost its clean air, the food that fed its inhabitants, and the freshwater from its river. The pollution in Piquiá can be seen by the naked eye, and the village's land is dry because of deforestation. The trees are now covered in dust, houses have turned gray, and noise is omnipresent. As noted in a recent magazine article, “after just one hour on top of a table, a sheet of paper will end up with a thick layer of dust” (Campagnani 2013).

Steel Plants

Starting at the end of the 1980s, residents began reporting extensive damage to their health, due largely to the steel plants operating in their village. Their symptoms included sore throats, coughing, runny noses, ear pain, difficulty breathing, vision problems, and eye irritation (International Federation for Human Rights, Justiça Global, Justiça nos Trilhos 2012, 45). These symptoms almost never disappear, even after medical visits, because they are nearly always caused by air, water, and ground pollution.

Accidents have also been common and have generally gone unpunished. Gilcivaldo Oliveira de Souza was only seven years old when he walked over of a pile of *munha*, or pulverized

charcoal waste, that had been deposited along the roads leading up to the steel plants, in September 1999. The pile caved in and the boy's legs were burned up to his pelvic area. After twenty days of agony, Gilcivaldo died (*ibid.*, 41).

This charcoal waste is a residue from the production of pig iron (which is an intermediate product in steel production) and is discarded into the environment by the steel plants located in Piquiá. When it is extremely hot, but not yet incandescent, *munha* has an appearance similar to a pile of dark earth, which looks innocuous at first glance but which can lead to accidents. When not disposed of properly, it can lead to the poisoning of plants, animals, and people, as well as to dangerous or fatal accidents, as in the case of Gilcivaldo. Currently, the disposal area in Piquiá is partially surrounded by barbed wire, and danger signs have been set up. Nevertheless, it is easy for an individual to enter the area, and it is especially dangerous for animals. The most recent accident occurred in September 2013, when nine-year-old Alan Victor dos Santos suffered serious burns on his legs and feet while walking in the area where the Gusa Nordeste plant deposits its *munha*, at a spot adjacent to the village (Associação Comunitária dos Moradores de Piquiá 2013).

The five steel plants operating in Piquiá are Viena Siderúrgica, Gusa Nordeste, Ferro Gusa do Maranhão, Siderúrgica do Maranhão, and Companhia Siderúrgica Vale do Pindaré. These plants are directly tied to Vale's mining activities to the extent that they process the iron ore that comes out of the Carajás Mining Complex, which is operated by Vale. Despite the fact that Vale does not assume responsibility for the harm caused by its chain of production, it does supply iron ore to the five steel plants and delivers the pig iron that it produces to the São Luis port.

After native vegetation had been almost completely deforested, the large-scale planting of genetically modified eucalyptus trees was put into motion in order to feed the furnaces at the steel plants. The benefits of planting eucalyptus trees (for example, sparing native scrublands from being used in the furnaces) proved illusory: the eucalyptus plantings acted aggressively against the natural vegetation since they consumed a lot of water and then impoverished the soil, turning it sterile through their continuous planting and cutting. In addition, they had a negative

impact on the community because they inhibited the full utilization of land that could have been used for family farming and because they involved the use of pesticides that were harmful to residents' health.

Vale monopolizes the supply and delivery of iron ore along the Carajás corridor. Located at the Piquiá/Açailândia stop on the railway is one of the warehouses that the Brazilian federal government gave to Vale for its exploitation activities. The train stops here so that it can drop off the raw ore to be processed by the steel plants, and then picks up the pig iron that it will transport to the Ponta da Madeira port in São Luís. From there, the pig iron is exported to the United States, where it is added to scrap metal during the recycling process. The iron ore is then exported, for the most part, to China.

Carajás Railway

The Carajás Railway, which is nearly 555 miles long, connects Parauapebas (in Pará) to São Luís (in Maranhão). It is traveled over by the biggest freight train in the world, which is a little more than two miles long and has 330 cars. As of 2012, the fleet of trains included 247 locomotives and 14,975 cars (Faustino and Furtado 2013, 57). Vale has been operating the Carajás Railway with the government's permission for thirty years; its concession expires in 2027. While iron ore is the main cargo that it carries, the company also transports other kinds of ores, as well as freight for third parties. Further, it operates passenger trains on the Carajás Railway; in 2012, these trains transported 360,367 passengers (*ibid.*).

Because of the company's Carajás S11D Iron Project, which seeks to expand the company's iron ore mining and processing activities at the Carajás Mining Complex, the capacity of the Carajás Railway will be doubled in order to enable the transportation of all new production. The railway in southeastern Pará will then be extended to connect the Carajás Railway's Parauapebas station with the Iron Ore S11D project in Canaã dos Carajás (*ibid.*, 51).

A significant problem that has devastated the communities living near the Carajás Railway is that of *meninos do trem*, or "train children"—young children and teenagers who secretly ride on Vale's cargo and passengers trains. This phenomenon has come about because of the children's precarious living circumstances

and the company's failure to appropriately monitor its train cars. According to Açailândia's child welfare council, the majority of these children come from homes where the family structure is weak and where there is drug or alcohol use (ibid., 73).

The search for a better life, or simply a need to escape from their families, causes these children to stow away on Vale trains headed to São Luís. These clandestine trips are extremely dangerous: when hiding in train cars carrying iron ore, the little travelers hide in the ore, with their heads barely sticking out, and use the upper part of a soft drink bottle as a funnel for breathing. In addition, the act of hopping onto the cars is dangerous since it is performed when the train is in motion. There have also been reports of physical aggression and threats committed by Vale security personnel against the children.

In light of the publicity that this phenomenon has garnered, as well as legal proceedings against Vale on the issue, the company agreed to draw up a safety plan with the goal of putting an end to this stowaway behavior and ensuring that such children are taken back home when found.

The railway is also the cause of a range of other problems, including the running over of residents and domestic animals; noise pollution; the shaking of homes and cracks in their structures; the leveling of wells due to vibrations caused by passing trains; and fires caused by sparks from the grinding of train wheels against the rails, among others (Faustino and Furtado 2013, 58–68).

There are also environmental impacts, though they have been downplayed by Vale. When the company applied for an environmental license that would allow it to expand the Carajás Railway, it presented its proposal in a fragmented way (ibid., 46). This facilitated the granting of the license and made it more difficult to perform an integrated analysis of the impacts of railway-related activities.

“The Big Mother”

In spite of the negative impacts caused by the chain of production (mine, steel plants, and railway), the Piquiá community did not react right away. This was due in part to Vale's publicity and marketing efforts, as well as the perceived benefits related to the industry.

Vale's arrival was (and continues to be) sold to local residents as a positive development that would lead to employment opportunities and a dynamic economy. It is interesting to observe the fascination—stimulated by both the company and the government—that Vale engenders in the population in general, and even in local authorities. There exists a mixture of anger and admiration, which undoubtedly comes from the natural attraction that many feel toward a company of such giant stature, whose volume of business is enormous and whose influence on local and national agencies is undeniable. This tendency is accentuated within a local context characterized by scarce economic resources and an absence of basic public services.

Part of the company's propaganda is aimed at convincing residents that they will one day have the chance to work for Vale and earn a good salary. However, what the company does not mention is that, in practice, it is nearly impossible for a local resident to be hired by the company. And when this does happen, the job is almost certainly a menial one—the more desirable jobs are given to individuals who come from outside the area and who have more skills and training. The same holds true for jobs in the steel mills. The company's marketing campaign also fails to mention the negative impacts that its mining activities will have on the health of residents and their environment.

Further, by sponsoring a variety of cultural events and social projects, Vale sells itself as a socially responsible and caring company. The size of its propaganda arsenal is such that Vale has come to be thought of as a “mother enterprise” (good and generous to its children who inhabit the land). Yet, as Edvard concluded one day after unsuccessfully attempting to discuss his community's problems with the manager of a steel plant in Piquiá:

We poor people are valuable only as a decoration whenever companies want to demonstrate some “socially responsible” gesture, such as sponsoring the local soccer team, offering a movie viewing so families can enjoy themselves, or literacy classes for adults, in an attempt to not compromise themselves any further. (Associação Comunitária dos Moradores de Piquiá 2011)

One of the characteristics of Vale's social responsibility policy is that the company's social efforts are not related to the company's business activities. Generally speaking, the projects sponsored by

Vale center on peripheral issues. The task of mitigating the effects of its activities usually rests with local and federal agencies.

As a complement to its marketing strategy, Vale has signed several international agreements that address social responsibility, transparency, and sustainability. For example, the company has affirmed its commitment to the United Nations Global Compact and is currently a member of the environmental task force of the Brazilian Committee of the Global Compact (Pacto Global Rede Brasileira 2013). In addition, it is a member of the International Council on Mining and Metals, the Extractive Industries Transparency Initiative (an initiative focused on transparency in the sharing of information about extractive activities and their impacts), and the Global Reporting Initiative (an initiative that promotes sustainability reporting among companies). As a result of these memberships, Vale produces annual reports presenting statistics that justify the sustainability of the company's activities. The problem with these reports, however, is that they are written by the company and are based on information generated by the company itself; in other words, there is no third-party mechanism that verifies the veracity of the reports' content.

Giants with Clay Feet and the Beginning of Community Resistance

Twenty years after the first train passed over the Carajás Railway in 1985, community resistance started to become organized. By that point, Edvard felt that the suffering that had resulted from "development" was already way too much. Why did the residents of Piquiá, who arrived before the companies, have to pay such a heavy price while the companies reaped the profits and avoided responsibility for their actions?

The companies' profits were indeed huge. In 2008, for example, despite the fact that the steel mills laid off many of Edvard's friends, those same mills exported R\$138 million (about US\$72 million) in product, representing a considerable improvement on the previous year's levels (Associação Comunitária dos Moradores de Piquiá 2011). With regard to Vale, its net profits were US\$17 billion in 2010 and US\$23 billion in 2011. And in 2012, the company paid US\$6 billion to its shareholders, representing the

second-largest such payment in the company's history and the largest among big mining companies that year (Vale 2013c, 1).

Vale's biggest iron ore operation is the Carajás Mining Complex, which sits atop the world's largest iron ore deposit. The mine currently produces 110,000,000 tons per year. The Carajás complex is, in fact, the biggest producer of iron ore on the planet, and offers a product with a high iron content (about 67%) and low concentrations of impurities (Vale 2013a, 12).

With the establishment of Project S11D, Vale expects its current production levels to double. Overall, about US\$19 billion will be invested in the project, with US\$8 billion allocated to the mine and processing plant, and the rest to infrastructure (*ibid.*, 13). According to the company, "Carajás S11D Iron will be the largest private investment in Brazil of this decade" (*ibid.*, 10).

At the same time that it will increase iron production, the project will affect other entities and procedures tied to it—such as the steel mills, charcoal production, and the planting of eucalyptus trees—thereby increasing the already significant impacts of the region's mining activities.

Despite Vale's considerable revenue, it recently owed approximately US\$19 billion in taxes to the Brazilian government, due to profits from the company's foreign operations. In November 2013, Vale was able to cut this tax bill in half when it agreed to join the government's tax recovery program (Blount 2013).²

When Edvard—who had been acting as a member of the Piquiá de Baixo's residents' association since 1989—shared his ideas with fellow villagers in the early 2000s, they listened to him with surprise. When has one ever seen someone fighting with the big fish in a region such as theirs? The residents all agreed that they faced a difficult situation, but they felt that nothing could be done.

But Edvard did not give up. The memory of the fertile land of the past, and the dream of leaving something better behind for his grandchildren, compelled him to act.

² Upon accepting the government's offer, Vale agreed to pay US\$2.5 billion to the government that same month, and another US\$7 billion in installments over fifteen years. Thus, Vale was able to have half of its tax debt forgiven (Blount 2013).

Feeling desperate, his first idea was to write to President Lula, who had been recently elected. Was Lula not a man of the people, and had he not experienced hunger? Edvard was certain that the Brazilian president would understand and have compassion for what the community was going through. Although his writing skills were poor, Edvard wrote. And the president wrote back: "One can count on the authorities to handle these kinds of issues." Edvard had already taken it upon himself to count on them, Mr. President, but that did not accomplish anything.

It was then that Edvard showed up at the Açailândia Center for the Defense of Life and Human Rights, which had been created fifteen years earlier with the support of Comboni missionaries so that slave labor in Açailândia's steel mills could be denounced. Thanks to this center, Edvard became aware that he and other residents, in spite of their humble origins, also had rights. At this stage, the Comboni missionaries had already identified the need to carry out work addressing the region's social and environmental issues. Their meeting with Edvard simply underlined the need to unite forces.

The task of raising community awareness about mining and its impacts thus had a slow but progressive start. During meetings that took place in churches and in public spaces, Piquiá residents began to get a glimpse of the magnitude of the problem facing them, but also of the possibility of uniting with other communities, both inside and outside of Brazil, who were suffering similar problems.

It was in that context that the Network for Rail Justice campaign came to the fore, in preparation for the 2009 World Social Forum, which took place in Belém. The forum brought together civil society organizations from around the world to discuss a range of issues related to global and economic justice, including the harmful impacts of mining.

Reflecting on the exchange of ideas generated within the Piquiá community and in the World Social Forum, Edvard and his colleagues began to see how interdependent these issues were.

Up until today, it has been said in Piquiá that the giant companies operating in the region have feet of clay. While the poor inhabitants struggle simply to survive, the companies continue to grow—and it is the poor people who have served as the clay for

these giants, facilitating this growth. As long as the poor people continue to be quiet and obedient, the corporate giants will remain afoot. But if the clay begins to shift, many things could happen.

A resistance movement had begun.

Calm Descends on Brazil: Leftist Governments’ “Social Redistribution” and the Role of Mining

As Edvard came to learn, everything that was happening in Piquiá had to do with, among other things, the development model and economic policies adopted by Brazil.

At the beginning of the new millennium, Brazil was touted in the international press as an economic power, and the country gained renewed status on the world’s political and economic stage. In 2001, economists from Goldman Sachs, an international financial group headquartered in New York City, coined the term “BRIC” to designate the group of countries made up of Brazil, Russia, India, and China, whose economies were projected to be dominant in the not-so-distant future.

Eight years later, *The Economist* published a feature story entitled “Brazil Takes Off” (accompanied by an illustration of Brazil’s Christ the Redeemer statue lifting off, in reference to the Brazilian economy), exalting the Brazilian government’s good sense. It credited the country’s emergence as an economic power as having started in the 1990s, when the country established a series of economic policies that included controls on inflation and government spending, autonomy for the Central Bank, the opening up of its economy to foreign trade and investment, and privatization. According to the article, these policies also opened the door for the emergence of a group of new and ambitious multinational Brazilian enterprises, including Vale and Petrobás (“Brazil Takes Off” 2009).

The ascension of the Lula administration brought with it the promise of economic prosperity and a redistribution of wealth in the country. The labor party president continued the policy of inflation control that had been used by previous governments, which ensured the stabilization of currency and promoted an average annual GDP growth of 4% during his two terms, which is almost double the rate registered between 1981 and 2002 (Salatiel 2010). In addition, Lula’s government was famous for its social inclusion

programs, such as the Bolsa Família, or family allowance, program. When he left the presidency at the end of 2010, Lula enjoyed high approval ratings (83%), thus ensuring that his successor, Dilma Rousseff, would be elected and that similar economic policies would continue (Instituto Humanitas Unisinos 2011).

In 2009, with Lula's administration still in place, fourteen Brazilian companies were included in a list of one hundred "global challenger" companies—that is, companies based in developing countries that demonstrate the potential to challenge their developed-country counterparts. Among these fourteen were Vale, Petrobás, Votorantim, Gerdau, and Embraer (Vialli 2009). Several months later, Brazil, for the first time, assumed the role of financier for the International Monetary Fund to the tune of US\$10 billion (Campos 2009), which was an unprecedented and symbolic event in a country that had previously been afflicted by foreign debt.

The success of Brazilian policies was such that in 2011, under the Dilma administration, Brazil reached the number-six ranking on the list of major world economies, surpassing the United Kingdom ("Brasil supera Grã-Bretanha" 2011). By this time, Brazilian transnational companies were already operating in eighty-four countries and were at the forefront of Brazil's successful image. Among those, Vale stood out as the leader, with thirty-one subsidiaries in different countries ("As 17 empresas do Brasil mais difundidas pelo mundo" 2013).

The image of Brazil as an economically powerful country with bold policies of social inclusion has spread widely, both inside and outside of Brazil. But there is another side to this success that is noticeably absent from economic journals and the international press: To what extent is Brazil's spectacular economic growth due to mining and related activities? What are the costs of such large-scale "development"?

Mining Expansion in Latin America and Throughout the World

The minerals boom at the beginning of the twenty-first century was prompted by various processes, among them the digital and information age (which brought with it the mass production of new electronic products) and the new green revolution (and its

spreading of agribusiness, which requires the increased production of agrochemicals). This increased demand for minerals—including ores, which previously had no market value—brought an increase in prices and an expansion of mining activities at the international level (Taddei, Seoane, and Algranati 2011, 6).

This phenomenon was particularly strong in Latin America, which, because of its significant reserves of mineral resources, was transformed into a “chosen” region that is representative of the extractive-export model (Giarraca 2006). Indeed, between 2002 and 2008, the region became the main destination for mining-related investments (Taddei, Seoane, and Algranati 2011, 13). The main characteristic of this model is extraction for the purpose of exportation, based on the exploitation of nonrenewable resources by transnational actors and their local partners (Scotto 2011). This model leads to these countries’ increased dependency on international markets, leaving them more vulnerable with regard to international prices for raw materials and to the arrival of foreign investments.

In terms of mining techniques, open-air mega-mining is widely used in South America. This is an aggressive technique that affects large land surfaces (often in rural areas and areas with fragile ecosystems), destroying tons of soil and rocks, using excessive amounts of water and energy, and causing other serious environmental impacts. Moreover, this type of mining often uses substances that are extremely dangerous to one’s health, like cyanide and mercury.

Since the most valuable mineral deposits—those with the largest concentrations of minerals and which are more easily accessible—are already being exploited and exhausted, companies are now seeking out deposits of lesser quality. Such deposits are often in areas where it is necessary to remove large masses of rocks in order to extract the same quantity of ore.

Mega-mining is an activity that is necessarily targeted toward exportation and whose goal is to meet the demands of international trade. And with regard to the new global political economy of extraction, three trends can be identified: the expansion of mining to new territories, rural transformation by virtue of mining activities, and state intervention to ensure that such activities continue (Capps 2013).

The Greatest Mining Power in the World

Within this context of Latin America's immersion in the extractive-export model—which is dependent on foreign investment and the international price of raw materials—Brazil stood out in 2011 as the largest producer and exporter of ore on the continent. That year, it extracted 410 million tons of its main ores. Just for the purposes of comparison, the other South American countries that carry out a significant amount of mining (Argentina, Bolivia, Colombia, Chile, Ecuador, Guyana, Peru, Surinam, and Venezuela) extracted, *together*, around 147 million tons that same year—a mere third of the total volume of Brazilian extraction (Gudynas 2013).

To get an idea of the importance of mining for the modern Brazilian economy, all one needs to do is look at recent economic data for the country: in 2012, while the national trade balance amounted to US\$19 billion, the trade balance for the mining industry was US\$29 billion (Brazilian Mining Association 2012, 8).

As indicated in the magazine *Exame*, the top Brazilian mining companies in 2010 were Vale, Samarco, CBMM, Alunorte, Namisa, Magnesita, Votorantim Metais Zinco, Votorantim Metais Niquel, Hispanobrás, and BHP Billinton, among which Vale is, without a doubt, the leader (“As 15 maiores empresas de mineração” 2011).

The Role of the Brazilian State

Extractive activities, especially those involving mega-mining, require large volumes of investment in research, technology, and energy. And the state—particularly in the case of Brazil—is often the one to provide the necessary funding.

There are two pillars that connect states to companies: foreign policy and credit policy. As Ana Saggiore Garcia (2009) explains, companies need to abide by public policies so that they are able to become international. This has not been any different in the case of Brazil.

One of the greatest supporters of this process is the Brazilian Development Bank. Between 2003 and 2009, the bank's annual expenditures increased almost fourfold, reaching, at the end of that period, a record value of R\$137.40 billion, which exceeded the International Bank for Reconstruction and Development's and the

Inter-American Development Bank's annual expenditures (Tautz et al., 2011).

In 2012, the biggest loan that the Brazilian Development Bank made to a single company was to Vale, in the amount of R\$3.9 billion. The funding was given within the framework of the Carajás S11D Iron Project and was meant to support the expansion of the complex's loading and delivery capabilities (Brazilian Development Bank 2012; Vale 2013b, 95). In the same way, a substantial portion of Vale's shareholders are under the control of a pension fund for employees of the Bank of Brazil, which is another federally controlled institution (ibid., 114).

In addition, Brazil's National Mining Plan 2030, which was drawn up by the Ministry of Mines and Energy, foresees an almost five-fold increase in mining production by 2030. It also predicts approximately US\$350 billion in public and private investments for research related to the mining sector.

The Brazilian government thus has the aura of a "corporate state" in that it intervenes quite heavily with regard to companies like Vale and Petrobás. These companies do not pollute any less or commit fewer human rights violations than other companies. Nevertheless, they enjoy financial and political support from the government, since their images are associated with it.

In practice, the state's theoretical cause has been misconstrued: it has been negligent in ensuring the rights of its citizens in affected areas but is present enough when it comes to making sure that companies' interests prevail in those communities. Therefore, besides the funding itself, the Brazilian state provides guarantees regarding companies' investments, grants, and environmental licenses (often of a dubious legal nature), and provides energy subsidies, water supplies, and infrastructure.

President Rousseff's official speeches have touted the government's proposal for a new legal framework for the country's mining sector, which is being sold as a strategic initiative that will create jobs and promote the country's development. Yet the debates over the wording of the bills have been carried out almost entirely in the government arena, with some degree of dialogue with mining companies and a near-total absence of dialogue with affected communities and civil society organizations that are monitoring this issue.

A Land for Moisés: The Process of Resettlement in Piquiá de Baixo

Several unions and organizations had already been holding dialogues among themselves, but it was the World Social Forum in Belém that ended up generating a nucleus of ideas and contacts so that the International Movement of People Affected by Vale could be formed. From the start, AV prioritized the Piquiá de Baixo case and helped shed light both nationally and internationally on the community's suffering.

At first, there was doubt about what could be done to confront the challenges posed by the mining chain in Piquiá. Should the community look for ways to soften the companies' impacts? Should it force the steel plants in Piquiá to leave? Should the community resettle elsewhere? In the event of the latter, would resettlements be accomplished in an individual or collective manner?

After a period of debate that called on the community's mass participation, a strong preference emerged for collective resettlement. A new neighborhood would be built in the same region. It would have characteristics similar to the former one, but it would be far enough away from the pollution so that inhabitants could continue with their traditional lifestyle.

As the years passed, the Piquiá community began to make headway. Today, Edvard is no longer called crazy because of his ideas—very much the opposite. No one questions the need to relocate the community from the area around the steel mills. That idea, up until a few years ago, had been controversial.

Over time, the case of Piquiá became known. Its visibility increased thanks to published studies (such as the 2012 human rights impact assessment carried out by the International Federation for Human Rights, Justiça Global, and Network for Rail Justice), protest activities during 2011 and 2012 (such as the blocking of entrances to some of the steel mills, the initiation of roadblocks, and the uniting of residents so that a workers' strike could be carried out at one of the steel plants), and dissemination of the case among national, regional, and international networks. This, in turn, helped the community achieve some important victories.

For example, in May 2011, a compromise was reached during a mediation carried out under the auspices of the Public

Prosecutor's Office and the Public Defender's Office. As a result, municipal authorities in Açailândia agreed to designate thirty-eight hectares for the community's resettlement, while the steel companies agreed to assume responsibility for the relocation costs. The following year, municipal authorities approved an urban housing project in the new area, which would be designed by residents with support from an independent technical advisor.

In June 2012, representatives from the Piquiá community went to Rio de Janeiro for activities related to the People's Summit, which took place at the same time as the United Nations Conference on Sustainable Development. While there, they joined forces with representatives from other affected communities in a protest that brought together more than 2,000 people in front of Vale's global headquarters.

In addition, in April 2013, several Piquiá residents visited the community of Santa Cruz, located in Rio de Janeiro, to take part in an exchange between communities that have been affected by the mining and steel production cycle. That same month, one of Piquiá's residents took part in the general shareholders' meeting of Vale, which gave him the opportunity to compare the remuneration proposed for the company's executive directors (it was voted on during the meeting) with the financial contribution proposed for the Piquiá resettlement process: the latter corresponded to just half of the monthly earnings of a Vale executive director.

In December 2013, the urban housing development project, along with its budget, was officially handed over to the Federal Savings Bank of São Luís and the Ministry of Cities' National Housing Secretariat. The next steps will consist of the federal bank's analysis of the project. Once it is approved, more than 70% of the project's total cost will be guaranteed. Meanwhile, the community, with the help of its partners and advisors, will continue to fight to guarantee financing for the remaining 30%, while questioning, above all, those responsible for the environmental impact on their region: Vale and the five steel plants operating there.

The Piquiá residents' association has been one step ahead of the project and has received help from the Maranhão Public Prosecutor's Office, its Public Defender's Office, Maranhão's state government, the Federal Savings Bank, and the Ministry of Cities.

For its part, Justiça Global, working in collaboration with the Network for Rail Justice, has organized and participated in public hearings on the issue, supported human rights defenders in the region, promoted the exchange of stories of personal experiences and community resistance, carried out academic and field research, participated in debates on mining and the legal framework surrounding it, and administered, alongside public agencies, programs that investigate human rights violations.

On the day of a public hearing regarding their resettlement process, Piquiá's inhabitants were congratulated for the struggle that they had taken on. They received praise for their efforts from, among others, Leonardo Tupinambá, Açailândia's promoter of justice. He emphasized the developments in the Piquiá struggle and the fact that the resettlement plan had been created by the community itself, not by public authorities or companies.

While looking through his papers at the hearing, Edvard ran across a letter that he had written three years earlier. The letter was addressed to his grandson, Moisés, who had just been born:

Dear Moisés:

Please forgive me.

After you learn how to read and will be able to read this letter, I don't know if I will still be here (because they say that all of this pollution, besides destroying one's heart, also destroys people's lungs!).

But right at this moment, I ask for your forgiveness for the fact that I am going to leave you a house in a village that is as dirty and in such a ruined condition as this one is.

I'll try, in as many ways as I can, to put a stop to all of this violence, you know.

I would like, for one of your first two birthdays, to give you, as a present, a new land—one that is clean, healthy, and free! And it is really because of that that, when you were born, I insisted on your being given the name Moisés: I am sure that your generation will, together, open up new paths in the direction of life and liberty inside of this abusive model known as "development."

As a matter of fact, I have the impression that for all of us in Piquiá, the path toward liberation was already created some time ago. That the people have gathered together, so many times, and without becoming discouraged, is the miracle of resistance: we have managed to confront the companies with a united voice, without giving in to any

specific or attractive-sounding proposal that might have caused dissension among group members. That is the miracle of being united.

Besides all of that, something else took place. The public ministry, because of pressure from the people, entered the fray in a more decisive manner and proposed that we undertake negotiations.

How proud it makes me to be able to sit, finally on an equal basis, at a roundtable with the presidents of the companies and the union bosses, lawyers, and promoters . . . your simple but courageous grandpa! (Associação Comunitária dos Moradores de Piquiá 2011)

Edvard stopped reading and held on to his emotions. He did not want to cry in front of all the people there. The giant corporations were still big, but their clay feet had started to shift. Edvard grew excited as he thought about how one of his dreams was closer to being achieved: resettlement, and the promise of a new land for Moisés and the entire community of Piquiá.

The fight had just begun.

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PART TWO:
COMMENTARIES

CHAPTER 12
Action Research in the
Field of Human Rights

Michael Burawoy

For ten days, I watched and listened to youthful but also experienced human rights advocates wrestle with their legal training as they recounted their experiences defending communities that had lost their livelihoods through the expropriation or despoiling of land, water, and air. In each case, these human rights advocates documented the way communities had fought back against an array of enemy agents that included multinational corporations, regional governments, and nation-states, while seeking to contain their own internal divisions.

I heard these chronicles from the trenches as we traveled across the Colombian landscape—itsself the scene of invasive extractive industry and violent battlegrounds. Even though Dejusticia took meticulous care to open our eyes to a panorama of atrocity, it was difficult to appreciate the traumas that lay hidden in the beautiful Colombian landscape.

Recognizing the limits of my knowledge, my hosts have nonetheless asked me to reflect on the presentations made during those days, now written up as a series of complex case studies. I have no expertise in the area of human rights, so my contribution is inevitably limited, based on my interest in action research and public sociology on the one hand, and in responses to neoliberalism on the other. I have struggled to make sense of these studies of dispossession.

Coming from practicing lawyers, the presentations were concerned with the way the law has become entangled in these struggles. As an autonomous field, the legal system operates with its own established rules that, in principle, can be changed only in rule-defined ways. In the social and political “minefield”—to use César Rodríguez-Garavito’s felicitous phrase—of dispossession,

full of undetonated and unknown explosives, the law loses its autonomous character. Instead, it becomes a manipulated resource, used by opposing parties, in a much broader struggle. It is a single stand in a complex patchwork of unstable relations. How then to conceive of the prosecution of human rights in this minefield?

What distinguishes all these cases is the willingness of the human rights advocate to leave the courtroom and the library and to join her “clients” in the minefield of daily struggles. This raises four issues with regard to the character of action research—that is, research undertaken with a view to alleviating misery and marginality. First, what is to be the relation between the activist and the community for whom she seeks to be an advocate? While the law may provide an important point of entry to the community, participation leads to relinquishing the protection of professional status and plunging into an indeterminate and complex set of relations. Second, to be effective in this context, it is necessary to reconnoiter the nature of these relations of the minefield, to analyze the balance of forces that they embody. Third, that minefield itself has conditions of existence and change that lie outside its terrain, and here too the activist must undertake an assessment of what those external forces are, and how they constrain as well as facilitate change. And we should be careful not to reify those external forces as either static or homogeneous. Finally, it is necessary to conceive of the individual cases as connected to one another, both conceptually in the way they are understood as a common project, and materially in the way they face common antagonists. I will draw on the cases in this book to underline these four dimensions of action research.

Taking a Position in the Field

How can the human rights advocate enter the minefield? She can, most straightforwardly, treat the community as a client, *representing* its interests in the legal arena, and in that way hoping to alleviate some grievance. But in so many of the cases described here, the advocate is doing something else beyond the law—*documenting*, as Asanda Benya writes, so that others will know the human toll of dispossession. The advocate is bearing witness to the suffering of the people whom she represents.

But, as Ida Nakiganda writes, the advocate may also see her role as *educating* people about their rights, as so many indigenous communities are ignorant both of their rights and of the ways in which those rights can be violated. Powerful actors such as multinational companies are experienced in the art of deception, in concealing the consequences of their interventions, presenting their interests as the interests of all. Advocates can map out the maze of actors within a minefield, determining the interests that lie behind each.

Often, advocates will work with and conscientize community leaders, believing that these leaders represent their communities. And here there is always the risk that the community leader—deliberately or not—presents a misleading image of the community as a harmonious whole, bound by spiritual unity, thereby concealing divisions that become apparent only after extensive engagement. Thus Arpitha Kodiveri, writing about indigenous communities living in the Sariska Tiger Reserve in India, comes to recognize that they do not all share the same interests—some are interested in relocation whereas others are committed to fighting for their rights within the reserve. She sees her role as *mediating* between different groups with conflicting interests, trying to build consensus so that divided they can still move forward together.

Outside actors with interests of their own will try to create rifts within suffering communities through discriminatory interventions (such as intimidation or bribes), a point made in Mariana González Armijo's account of the struggles between communities in the Mexican state of Oaxaca in the course of defending their water supply. The human rights advocate is concerned with counteracting this *war of position* from above with a war of position from below.

Human rights activists do not and cannot act alone. Their strength depends on a supportive community both within and outside the minefield. As Omaira Cárdenas Mendoza and Carlos Andrés Baquero Díaz demonstrate, collaboration is especially important when one is dealing with a confrontation of legal systems, traditional and modern, tribal and state, customary and capitalist.

Examining the Dynamics of the Field

The relations that human rights advocates adopt toward a community will, in part, depend on the depth and scope of their field

research—research that develops an understanding of the dynamics of the minefield, including the place of the law. A not unusual situation is the one described by María José Veramendi Villa regarding the Peruvian metallurgical complex at La Oroya, where copper, zinc, and lead are smelted and refined, leading to heavy contamination of the air. Doe Run Peru, an affiliate of the US company Doe Run, has owned the complex since 1997. Though it has denied the existence of environmental problems, investigations show the city to be dangerously polluted. Residents had assumed this to be part of a reality about which nothing could be done, until various environmental groups and human rights activists informed them that it was a violation of law. Arousing the collective in this way eventually led to, on the one hand, a constitutional tribunal ruling that called for the complex's closure and, on the other, threats and public humiliation directed at those who had cooperated with the investigation—threats arising from employees who feared for their jobs. The state's ruling came in 2006, and when nothing was done, residents of La Oroya took their case to the Inter-American Commission on Human Rights. Residents are still waiting to hear from this body. Here is a straightforward case in which the law, seemingly in their favor, has so far had little effect on industrial practices. The fight continues. Understanding why there has been no action for seven years, whether from the Inter-American Commission on Human Rights or the Peruvian state, requires us to take the investigation beyond the hierarchies defined by the minefield.

Wilmien Wicomb, an attorney working for the Legal Resources Centre in South Africa, offers a slightly more optimistic narrative of legal intervention. She organized the legal defense of a community's fishing rights in the Dwesa-Cwebe Nature Reserve in the Transkei, specifically their customary rights of access to waters that had been declared a "marine protected area"—protection mandated as part of the racial structures of the old South Africa. The local community continued to fish there as a matter of survival but was subject to harassment, arrest, and even killings by the reserve's rangers. The situation came to a head in 2011 with the arrest of three fisherpeople found in the protected area. During the trial, the defense, organized by the Legal Resources Centre, appealed to the post-apartheid constitution that recognized

customary law as equal to state law. The judge pronounced the fishermen guilty under the law but also declared the law to be unjust, and so sentences were suspended. The fisher community celebrated this public acknowledgment of their rights as a great political victory, but the next steps brought out unanticipated conflicts within the community that threatened a successful challenging of the law. The law becomes a vehicle for articulating grievances and mobilizing political support, which in turn draws wider forces into the battle for social change—a battle whose outcome is far from assured.

A parallel case of the confluence of indigenous and state law can be found in the collaboration of Cárdenas (representing the Indigenous Legal Aid Clinic of Santa Marta) and Baquero (from *Dejusticia*) to defend sacred sites in Colombia's Sierra Nevada against the construction of a new port. Together, they draw on international law—particularly the right to free, prior, and informed consultation as articulated in the International Labour Organization's (ILO) Convention 169. The meaning of "prior consultation" becomes a terrain of mutual incomprehension and antagonism between corporations and indigenous communities, leading the latter to withdraw from the engagement. Instead, they petition the Constitutional Court, which had previously supported their cause, while the construction continues.

From these cases emerge lessons about the potentiality and limitations of the law when defending indigenous rights. First, the law requires the creation of a fictitious community, the adoption of what Wicomb calls "strategic essentialism," that can mask internal divisions when it comes to implementation. Second, pursuing legal channels can be mobilizing, but it can also be distracting. Ultimately, the outcome is dependent not on what is "right" by the law—always subject to interpretation and manipulation—but on the balance of forces that can be calibrated only by going beyond the minefield.

Exposing the Wider Context

If the case studies offer one lesson, it is that the outcome of any struggle for human rights cannot rely on the law, which is only a strategic resource in a wider struggle. This assemblage of case studies points to the cumulative power behind the forces of

dispossession. Maximiliano Mendieta Miranda chronicles the extreme case of Paraguay, where the state opens its arms to foreign capital for the exploration of hydrocarbons. Companies run roughshod over the rights of indigenous people, regardless of their enshrinement in the Constitution and in Convention 169, ratified by the state and calling for free, prior, and informed consultation. Consultation, when it exists at all, is a ritual that is neither free, nor prior, nor informed. Paraguay's hydrocarbon law openly violates Convention 169, and when companies move in, they become the state, ruling in their own interest. Here we are dealing with a dictatorial state that serves the interests of the extractive industry and cattle ranchers by its absence as much as by its presence; and a president who might be willing to recognize the rights of indigenous peoples is peremptorily impeached.

Cristián Sanhueza Cubillos paints a similar picture for Chile. Whether it be the right to free, prior, and informed consent or the Environmental Impact Assessment System, the stipulations are either ignored or turned into a ritual acknowledgement that pays little attention to the rights of indigenous people facing expropriations through hydroelectric plants or extractive industries. In his view, the law facilitates the access of companies, even if it also offers a terrain for defensive and ultimately ineffective protest by their victims.

Yet there are occasions when the balance of forces can favor indigenous communities. González writes of rural settlements (*ejidos*) that oppose the conversion of a dam into a hydroelectric plant that threatens their water supply. Community representatives courageously rejected the alternatives proposed by Conduit Capital, despite all sorts of concessions, and the project was actually cancelled, at least temporarily, to the chagrin of the company. What factors led to this outcome? In her assessment, it was the company's egregious violations of human rights and governance norms, combined with the community's memory of the devastation wrought by the original dam, its determination to defend its rights at all costs with the support of local authorities and other civil society organizations, and the oppositional stance of the new governor, all overdetermined by impending presidential elections. In short, a series of political contingencies turned the balance of power in favor of the community—contingencies

that might easily dissipate and restore Conduit Capital's plan. One might say that her case is the exception that proves the rule: namely, that the commodification of nature prevails except under very unusual circumstances.

One way of extending struggles beyond the immediate minefield is to take on a multinational company at the global level. This requires the extensive collaboration and networking of human rights activists, environmentalists, and other transnational groups. Marisa Viegas e Silva works for one such organization, *Justiça Global*, that partakes in the international movement against the Brazilian colossus Vale, one of the biggest mining companies in the world and the biggest producer of iron ore, much of it coming from the Brazilian Amazon. The movement, known as AV (the International Movement of People affected by Vale), documents Vale's destructiveness across the planet, its strategies of cooptation and minimalist "social responsibility," and its ideology of development that hides staggering profits, all made with the support of the Brazilian state. This giant with feet of clay, as she calls it, has a particularly appalling record of devastation along the railroad created in the Carajás National Forest, where the company mines the iron ore. Through exemplary campaigns—such as the resettlement struggle of the small community of Piquiá, a place made uninhabitable by steel plants—AV was able to call global attention to Vale's egregious human rights record.

In extending beyond the minefield of local engagement to the broader set of forces operating at the national or even global level, action research has both analytical and political importance. On the one hand, it offers a more realistic assessment of the conditions of possibility and change at the local level; but, on the other hand, it invites strategic moves to organize support beyond the immediate situation. Convention 169 and the Inter-American Commission on Human Rights offer opportunities for leveraging human rights issues in contexts where there are no other openings. Such an approach may put pressure on nation-states to recognize human rights violations, revealing who is on whose side. It is important, therefore, not to think of the world beyond the minefield as a homogeneous one, uniformly hostile to human rights. The world beyond the minefield can be as divided and fractured as the minefield itself—as we saw, for example, in the

case of Colombia's Constitutional Court, which is often at odds with apparatuses of the state. Even in limited democracies, parties can make political hay by taking the offensive against external agencies or corporations that violate human rights. Again, the analytical and the strategic importance of extending out reinforce each other.

Developing a Broader Framework

We come now to the final focus of action research, going beyond not just the minefield but beyond the individual case itself to develop a more general approach to human rights—an approach nonetheless based on these individual cases. Perhaps it is in the nature of legal advocacy to think in terms of detailed “cases,” but we also need to go beyond cases. Taken one by one, each of these cases represents what David Harvey calls “militant particularism”—in each instance, human rights advocates help an indigenous community fight for its rights against overwhelming odds. Even if they appeal to common agencies or ideas, the narratives of our ten cases conceive of indigenous communities in their particularity. Here, AV is a partial exception because the focus is on Vale's global operations rather than on a single community, potentially tying together the experiences of different communities strung out across the world. Still, the bonds of solidarity are a response to Vale. Can we develop a framework that would facilitate networks of solidarity, linking social movements seeking redress for different modes of dispossession?

The cases described here, with the exception of the women of Marikana, all involve dispossession from nature—that is, from land, water (clean water or fishing waters), or clean air. This process of dispossession is a violent one, supported and enacted by the state and corporations, often in collaboration with each other. The dispossession is in pursuit of profit through the transformation of natural resources into commodities. Thus, dispossession may lead to commodification, but it also leads to ex-commodification—that is, the production of useless entities, toxic air, polluted water, and contaminated land. Dispossession, then, is simultaneously the production of useful commodities for profit and waste resources for communities. But commodification and ex-commodification apply to other entities apart from nature. When

labor and money are commodified in an unregulated fashion, they can also lose their use value—labor becomes precarious and money turns into debt. They are all what Karl Polanyi calls fictitious commodities—entities that lose their use-value when they become objects of exchange.

We are living in a period of marketization that deepens and extends commodification on behalf of capitalist profit. Such an understanding of the world brings together the struggles in Wonderkop at the site of the Marikana massacre, in Piquiá, in the Sariska Tiger Reserve, in Guaraní Ñandeva, in La Oroya, in Santa Marta, in Los Reyes, and in Hobeni Village. For these struggles to be enjoined in practice, they first have to be connected in theory—a theory of capitalism that drives market expansion, a theory of *regimes of dispossession* (to adopt Mike Levien’s term) that makes such unregulated marketization possible and that shapes the interests of the dispossessed. These fragmented and apparently disconnected struggles have to be seen in their unity both what they are against and the alternatives they harbor. In this era of marketization, what is at stake is planetary survival, and that is what human rights must ultimately be about: the right of human survival against the forces of capitalism. And such is the project that Dejusticia has unleashed in bringing together these resolute human rights advocates.

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CHAPTER 13
Our Common but Fragmented
World: Questions of Law,
Power, Community

Karl von Holdt

What Is the Law Good For— Justice or Exhaustion?

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Our Common but Fragmented World: Questions of Law, Power, Community

What is the law? What is it good for? Does law produce justice? Or does it serve to exhaust the poor and marginalized? How does law and the guarantee of rights work in the face of massive and ruthless corporations, avaricious local elites, and indifferent, distant, or hostile state institutions? Can law curb power? Can paper rights be translated into substantive rights, or are they fictions that mislead the victims of power?

These are some of the profound questions raised by these moving and reflective accounts by young human rights advocates engaging at the interface between law and power. The chapters in this book originated in the Global Action-Research Workshop for Human Rights Advocates organized by Dejusticia in 2013. It really was an extraordinary event: young activists flying into Colombia from all corners of the global South—Latin America, Africa, and Asia—together with a group of socially engaged academics, to explore the relation between research and human rights struggles, and in particular to reflect critically on our own involvement in concrete struggles, with a view to drawing broader lessons for practice. And all this while the entire workshop traveled across the country by plane and bus, from the cool and cloudy mountain city of Bogotá, down to the lowland city of Santa Marta, and then across the arid and mountainous terrain to the warm Caribbean city of Valledupar, in a series of amazingly well-coordinated logistical operations organized by the Dejusticia team under the indefatigable leadership of César Rodríguez-Garavito. En route we paid a visit to the Wiwa indigenous community high in the Sierra

Nevada, as well as to one of the biggest open-pit coal mines in the world, located in the Guajira province.

But while this marvelous journey acquainted us with some of the contrasting realities of the landscape and society made vivid in the fiction of Colombia's towering literary genius, Gabriel García Márquez, we were grappling with difficult questions about the law, human rights, and the struggle against oppression and marginalization. Law emerges from these narratives as highly ambiguous and deeply contested.

Thus, María José Veramendi Villa finds that "the law is not always at the service of justice" in Peru since it involves processes that are drawn out over years, and that "the passage of time is a great enemy of justice" for communities trying to prevent the poisoning of their lives by industrial pollution. Omaira Cárdenas and Carlos Andrés Baquero describe a similar experience, where the attempt in Colombia to fuse indigenous and Western law in a struggle to prevent a large port development leaves the Constitutional Court paralyzed and silent for more than three years. Asanda Benya observes the gap between constitutional rights and oppressive reality in the mining fields of South Africa, while Ida Nakiganda becomes entangled in the proliferating local, national, and regional layers of power, authority, and rights in Uganda, so that the field of human rights becomes a "jungle" of contestation.

Arpitha Kodiveri finds that resorting to the law threatens to divide forest communities in India and decides instead to "move beyond the law" and develop her understanding of community dynamics by learning to "hear all sides." Wilmien Wicomb, paradoxically, wins a victory when a local magistrate in South Africa is compelled to find her clients guilty of trespass but recognizes the justice of their cause and the injustice of the law by suspending their sentences—which everyone recognizes as a tacit acceptance that the law is probably unconstitutional.

Though it seems invidious to single out any of the chapters in this book, as each has its own flavor and grapples with its own dilemmas, it is nonetheless worth drawing from a small selection to explore in a little more depth the paradoxes of struggle on the terrain of human rights and the law. Thus, in Veramendi's account of the struggles of the community of La Oroya, the long wait for court decisions—and, when these decisions eventually

come, the failure to implement them—increases the frustration and exhaustion of a community that is already suffering health problems caused by pollution: “Time affects the victims, wearing them out until they begin to waver and give up their right to justice.” Towards the end of the chapter, though, Veramendi rededicates herself to the defense of human rights and pays tribute to the “tireless search for justice” of the victims. Juxtaposing these two contrary observations—that victims begin to waver and give up, and that their quest for justice is tireless—gives some sense of the tensions at the heart of this kind of struggle: for example, the tension between the commitment, outrage, and demand for justice, on the one hand, and the attrition, tiring, and loss of hope suffered in the face of powerful oppressive forces, on the other.

In Marisa Viegas e Silva’s account of a community’s struggles against the massive Brazilian mining conglomerate Vale, Edvard really is a tireless hero. Together with others who live in the “land of sweet fruit,” Edvard mobilized a struggle, with the support of nongovernmental organizations, that involved protests, research, publicity, and political lobbying, and finally won the commitment of state and municipal institutions and the company to set aside land and finance the community’s resettlement in a new site far from the pollution of the old. It is indeed a “miracle of resistance,” as Edvard writes in a letter to his grandson. However, the tensions involved in such struggles remain apparent in the fact that the community was unable to save its own region from pollution and destruction caused by the mining company and its associated steel plants, and was instead driven to abandon it and seek a new land far from mining operations.

Mariana González describes another miracle of resistance when four indigenous communities in the state of Oaxaca, Mexico, engaged in lengthy dialogue with a consortium of US and Mexican companies, as well as with government officials, over the companies’ plan to expand the hydroelectric capacity of a dam that threatened local water sources. The community struggle began with a demand that the companies cease construction—which had already begun—and develop a proposal that would protect the community’s water sources. At the end of this process, the communities unanimously rejected the two options presented by the companies, along with the hydroelectric project as a whole.

Government agencies supported the communities' stance, and the project was halted.

This is a highly unusual success story, in which indigenous communities stand together and successfully call on the support of the state to halt the implementation of a large-scale infrastructural project driven by corporate capital. However, González is cautious in her conclusion: the success was linked to a particular political moment that had recently shifted, "and all signs currently point to a reactivation of the hydroelectric project." As she observes, the asymmetry of power relations remains, and the communities are vulnerable.

The enshrining of human rights in constitutions, legislation, and international charters is revealed in these cases as tenuous; defeats outnumber victories, and victories themselves are partial and sometimes temporary. What is not so easy to discern is whether the accumulation of human rights struggles and the accretion of victories, together with publicity and media campaigns that resonate across societies, hold the potential over time to shift the balance of forces, increase the responsiveness of judiciaries, political parties, and state institutions, and raise the costs for corporate capital, thereby entrenching rights and strengthening the rule of law. Or whether the reverse is the case—that the proliferation of campaigns and litigation on the terrain of human rights and the law will lead to the exhaustion and dissipation of popular energy and hope.

It is worth observing, though, that other struggles for rights over the centuries (for example, against slavery, for labor rights, for democracy, for liberation from colonial domination, and for women's emancipation) have often started in this way, with many reverses and lengthy cycles of struggle before establishing rights on paper, and then again before paper rights were established as real rights on the ground.

Divergent Histories, Contrasting Communities

The narratives collected in this book lead to two further observations: one related to the notion of "community" and the other related to the concept of indigenous people. In both cases, there seems to be a degree of contrast between the Latin American chapters and the South African chapters, while the Indian case

perhaps contains features of both. These contrasts also emerged in some of the discussions that took place in the Global Action-Research Workshop.

For those of us from South Africa, the concept of “indigenous community,” which is so important in Latin American struggles against extractive industries, was an unfamiliar one, and one that we were interested in hearing more about. In South African law and the struggle against extractive industries, the concept of “indigenous” plays little role—although the communal land tenure regimes in South African rural areas (the former Bantustans), as well as the idea of “customary law,” which is central to the case study presented by Wicomb, are central to the forms of resistance against and collaboration with corporate capital, and present a similarity with the situation in Latin America.

Why is this concept of “indigenous community” absent in South Africa? Several reasons come to mind. First, all black South Africans—in other words, the great majority of citizens—are indigenous in relation to European settlers, and the liberation struggle mobilized this majority in a struggle of African liberation against colonial and European domination. In this greater African struggle, the forging of unity of the black population through overcoming ethnic (“indigenous”) division took precedence, so that it seemed to make no sense to distinguish “indigenous” communities from one another.

Second, a key characteristic of colonial domination and apartheid was a strategy of divide and rule, through which ethnic divisions were elevated and “traditional authorities” in the form of chiefs and headmen were incorporated into the colonial system to serve as local proxies for colonial and white domination. In the process, “custom” was reconfigured and codified into rigid regulations to buttress the unilateral and despotic rule of traditional authorities. Thus, the entire system of “indigenous” was co-opted to serve the interests of domination—and a central plank of the liberation movement was to reject these “puppet” authorities and mobilize against them, thoroughly discrediting the notions of indigeneity and ethnic identity that underpinned them.

However, it is one of the greatest ironies of post-apartheid South Africa that, as mining has shifted into these former traditional-authority areas characterized by communal land tenure,

the new African National Congress government has acted increasingly to reinstate the authority and despotic rule of the chiefs and the forms of “custom” that were codified under apartheid, at the same time that mining corporations have struck deals with the same chiefs whereby shareholdings and revenues are allocated to the chiefs to dispose of in the name of “the community.” These trends in post-apartheid South Africa have led to increasing struggles within rural communities and among traditional authorities over the nature of custom, the powers and boundaries of chieftaincies, community and ethnic identity, and historical rights to and ownership of contested land.

In other words, the meaning of community, identity, and custom have become the central sites of contestation and struggle, generating fracture lines within and between ruling lineages as well as between villagers and chiefs. As a result, mobilization and litigation take place along these fracture lines, and the meaning of “community” becomes a contentious one. For social scientists, therefore, these concepts are subject to a great deal of skepticism.

The situation in many Latin American countries seems to be quite different, and I am insufficiently familiar with their histories to understand the reasons for this. I can make a couple of guesses, though. In the first place, many of the Latin American struggles for liberation from Portugal and Spain—which took place in an earlier period of world history—were led by settlers of European origin who had made their lives in the New World. After independence in the first half of the nineteenth century, the expansion of this elite, along with more porous attitudes to race than in South Africa, led to a corresponding increase of mixed-race populations. The end result appears to be that a minority of citizens are able to trace their ancestry in some way back to the original indigenous populations. In this case, the struggle of indigenous minorities appears as the last frontier of resistance to neocolonial or postcolonial land grabbing, which has a kind of continuity with earlier periods of colonial conquest and resistance. Thus, “indigenous community” becomes a core communal identity in this resistance—and one which, moreover, has gained official recognition in constitutions, laws, and charters.

This history—schematically presented—may explain why the establishing of authentic indigenous identity, along with authentic

leadership and custom, has been central to the struggles against land grabs and land destruction, both in the courts and in protests and the public sphere. This may also explain why the defense of a concept of an organic and coherent community has been so important for resistance in Latin America—in striking contrast to the contestation of community, leadership, custom, and identity that has been so central in South African struggles.

These observations suggest the critical importance of historical processes of dispossession and domination, nation formation, and anticolonial struggle for understanding current struggles and future trajectories in different countries and on different continents. I would like to argue that these kinds of differences and similarities make encounters in the global South, such as that in which we participated in Colombia, even more imperative. By comparing experiences of resistance on different continents, activists and advocates are able to sharpen their understanding of the specificities of their own struggles, and to reflect more critically on the forms these struggles take and the strategic choices they make.

But just as important is the role of comparative research in exploring and deepening our understanding of divergent historical trajectories and how we might find a language to communicate a shared resistance to the expanding forces of domination and plunder. I hope that from this may emerge not only scattered speculative comments on historical differences but also a truly grounded commitment by scholars of the global South (together with colleagues from the global North) to undertake comparative research projects that provide deeper insight into our common but fragmented world.

CHAPTER 14
Situated Storytelling:
Vision in the Writing
of Law and Justice

Meghan L. Morris

We were nearing the end of one of our long days of collective conversation in Valledupar—the air was hot and thick with humidity, and everyone was tired, but there was still so much the participants in the Global Action-Research Workshop wanted to say. One raised her hand to ask a question: “What if the stories we tell in our articles contradict what we have to argue on behalf of communities in our legal cases?” Though not everyone in the room was a lawyer, everyone was an advocate of some kind—and everyone understood that this question was at the heart of one of the fundamental tensions of doing action research. How do we tell stories that are strategic for advocacy and that at the same time ring true? How might we resolve the tensions between these stories and the multiple hats we wear as advocates and researchers? Or are those stories and hats simply in contradiction? In work that takes the ethics of research, advocacy, and writing seriously, these questions are always on the table. And though not all of the chapters in this book address these questions explicitly, they undergird the choices that all of these authors made from the time their pieces were an idea in formation in Colombia in 2013 to the final written versions *Dejusticia* has the honor of featuring in this volume.

Lawyers in general—not just activist lawyers—are taught to be strategic storytellers. In my first-year legal writing class at law school, our core assignment involved a mock case in which each student was assigned to argue a particular side. I was one of a team of two students who played attorneys for the fictional plaintiff, a university math professor who had filed suit for defamation against an online company that opposed math curriculum reforms. We were given a booklet of the “facts” of the case, including information about the parties and the dispute. Our assignment

was to prepare a brief on behalf of our client and argue the case before a panel of judges. We were instructed to prepare the brief based on a standard legal writing template, which included a statement of facts, followed by an argument that would apply the law to the facts we had presented.

Our instructions emphasized that the brief had to present facts accurately based on the booklet of information we had received—but it also had to present them strategically. This meant, for example, leaving out facts that would humanize the online company or their arguments regarding why math curriculum reforms should be opposed. It also meant emphasizing the facts that were favorable to our math professor client and de-emphasizing facts that were unfavorable to her. And, most importantly, it meant presenting the facts that would most strongly support the legal argument we were making on behalf of our client, leaving other elements of the story aside. This kind of strategic storytelling is the meat and potatoes of any legal brief, and of legal argument more generally.

At the time, I did not find this kind of strategic storytelling particularly troublesome. I didn't care much about the math professor, and I didn't see very deep stakes in her dispute with the online company. Plus, it was a fictional case. I had a responsibility to perform legal argument effectively for the class, but I had no responsibility to real clients or places. But as I began working on real cases—first as a student and later as a lawyer—the ethical and political implications of this kind of advocacy writing began to emerge for me. My perspective as an actual advocate changed both my understanding of stakes and my sense of the kinds of stories I wanted to tell. At the same time, it made me question the kinds of stories I could tell responsibly.

One of the cases I worked on most closely involved representing communities that had been affected for several decades by contamination from the oil industry. Their primary complaints involved the environmental effects of the contamination. The rivers and streams on which the communities relied had received so much chemical dumping from the oil industry that they literally steamed, with vapor rising from the water's surface. I once put my hand in the river to quickly rinse a bucket, and my hand itched for days afterward. This was the only water the communities had for washing, bathing, and drinking. When I went to visit community

members' farms, one man took me to a cassava field next to the river. He wiggled the branch of one of the plants to pull up the long, starchy roots that were the basis of their diet, and in its place was a dusty crumble of soil. His entire farm was like that, he said, as were other families' crops. Plus, the contamination had gotten so bad that they had been forced to move entire villages from one place to another, seeking less contaminated soil. They were also constantly seeking better access to health services from the state, which were nearly nonexistent in the area, causing the communities to rely on limited emergency care they had negotiated with the oil company.

As we built our case against the company that had carried out oil activities in the area, however, these stories that were so central to the communities' situation could not be central to the case. We were filing our case in a US federal court, which required telling a story that fit a set of specific human rights violations that were more likely to be recognized by US federal judges. Any deaths or injuries that could be directly connected to oil activities had to be foregrounded, while claims regarding things like contaminated crops or the lack of state health care had to take a back seat. What US judge was really going to care, in the end, about that farmer's crumbled cassava roots? Or the state's provision of health care in some other country?

Over time, these cases and the advocacy around them represented valuable contributions to community efforts to change their situation and advocate on their own behalf with respect to both the oil industry and the state. But on a personal level, these cases and others like it left me with a number of contradictory feelings about the kind of strategic storytelling that they required. On the one hand, I had a sense that I was never really telling the whole story. Here there was a complex social world in which the long histories of interactions between local people, the oil industry, and the state, as well as the breadth of the industry's effects on communities, rarely entered into the legal documents that became the narration of the problems in the area. What community members often narrated as histories of layered dispossession, oppression, and abandonment over decades—involving not just the oil industry but also the state—turned, through strategic legal storytelling, into a narrow story about individualized harm and corporate accountability.

On the other hand, not telling the whole story sometimes also felt like not telling the true story. This was particularly the case when representing plaintiffs who were politically active. Notions of clean victimhood were crucial to these cases, and it was imperative to tell a story that emphasized the plaintiffs as victims rather than as complex political actors. But the plaintiffs in these cases were sometimes highly political, having spearheaded multiple forms of resistance to their situation over time. It felt wrong and untrue to portray a seasoned activist as a helpless victim, even when it might be the right immediate strategic choice.

But what might it mean to tell a story that felt more whole, or more true? Pushing the boundaries within legal advocacy by providing a more complex picture could easily backfire. Had we presented the problem in our case as one of crops rather than deaths—or presented the plaintiffs as activists rather than victims—we would have done a disservice to the plaintiffs' own legal advocacy goals. They had not invested so much time and effort in their case just to lose it because we felt that it was important to tell a more nuanced story about their struggle in our briefs.

And are there more whole or more true stories, anyway? I now do work in anthropology, in which I often find there are not more whole or more true stories—just more complicated ones. Writing these more complicated stories is more possible and acceptable in anthropology than in legal advocacy—but to a certain degree, the telling of them is still selective, and it is still strategic. While anthropologists do not select facts to which they then apply law, they do select facts to which they then apply theory, or which drive it.

How, then, might one write stories that are strategic but also account for the complexity of the worlds in which we work? That are unavoidably partial but in a way that rings true, without necessarily holding aspirations to being something that is universally true or wholly complete? This is part of the challenge that the inspiring advocates who authored chapters in this volume have taken up. By telling different, more complex stories in a distinct space—without the strategic pressures of immediate advocacy goals—they are figuring out what are important stories for them to tell, and how to tell them. This is the gift of the openness to complexity that writing stories outside of the strictures of pure legal advocacy provides. In turn, one of the gifts that legal advocacy

provides them for this challenge is the recognition that there is never just one clean truth. As Arpitha Kodiveri writes in chapter four, “Lawyers are not mere legal technicians but storytellers who appreciate the strangeness of truth in its multiple forms.”

In the end, these are stories that are simultaneously narrating both contingency and accounts of the real and difficult worlds in which these advocates work. They speak to big questions from particular, grounded perspectives that come from committed advocacy work, embodying a type of what Donna Haraway (1988) calls “situated knowledge,” in which partial perspective provides a kind of objective vision. Haraway uses the notion of vision in part to avoid binary oppositions and to privilege perspective, insisting that all vision is particular and embodied—and that it is precisely in specific perspective that the possibility of knowledge that is objective, but also responsible, lies.

Some of the authors in this volume do this type of situated storytelling by thinking about the multiple narratives that are imploded in a dispute or struggle. Asanda Benya begins with the story of the Marikana massacre in South Africa, and builds from there to talk about the kinds of structural injustices related to housing, education, and health care that undergirded the lives of mine workers and nearby communities, and the massacre itself. Arpitha Kodiveri complicates a simple narrative about advocating for rights for forest-dwelling communities to think about the complex dynamics between different forest communities—as well as her own shifting approaches to legal advocacy—and how the implementation of the Forest Rights Act in India played out against and with these dynamics.

Other authors explicitly address the multiple forms of knowledge that are implicated in these struggles and the ways they can come up against one another, while also sometimes coming into unexpected alliance. Omaira Cárdenas Mendoza and Carlos Andrés Baquero Díaz discuss different relationships between indigenous and Western law, and the ways that communities in Colombia’s Sierra Nevada have negotiated these relationships both through broad institutional approaches—such as through the formation of the Indigenous Legal Aid Clinic—and in specific moments and struggles around the Puerto Brisa port project. Mariana González Armijo emphasizes the distinct forms of knowledge

that were mobilized in determining the safety of the Cerro de Oro hydroelectric dam, highlighting the ways that forms of knowledge like indigenous resistance and engineer reports can even become aligned in unpredictable ways. Marisa Viegas e Silva explores how creative collaboration across communities affected by a single company, Vale, helped build the knowledge to advance a specific struggle in Piquiá de Baixo.

Other chapters bring the multiple roles of the author, and the ways the author is perceived, to the forefront. Ida Nakiganda describes her role as a lawyer for the Uganda Human Rights Commission and how she negotiates the complexities of how she is perceived by different actors through a kind of investigation that navigates work in multiple worlds. Wilmien Wicomb narrates her arrival in Hobeni village in South Africa with a list of rights and legal questions in tow, only to find that what she called rights, they called life—leading her to question the kinds of essentialism that are implied in legal advocacy, as well as the consequences of the cleavages between the significance of law for advocates and the significance that law holds for the communities for which they advocate.

Several other chapters highlight the many relationships, encounters, and disjunctures between law and justice. Maximiliano Mendieta Miranda discusses how laws—even just laws—that are part of broader structures of economic and political power are far from justice, arguing that true justice requires political action alongside legal struggle, as demonstrated by the indigenous communities he works with in the Paraguayan Chaco. María José Veramendi Villa also argues that law and justice are not equivalent, finding that a seemingly simple thing—the passage of time—can determine whether something resembling justice can emerge from struggles like those she supports in La Oroya in Peru. Cristián Sanhueza Cubillos finds that law is a legitimating force for state decisions around extractive projects affecting indigenous groups in Chile—but at the same time insists that even so, the law holds emancipatory potential.

These are all stories that are situated—in specific communities, specific professional roles, specific politics. And they speak, simultaneously, to some of the big questions of our time: the nature of state power, the complex encounters between law and justice, the

multiple relationships between the state and capital, and the role of advocacy both on behalf of communities and within and against these broader structures. They also speak to the desire to write stories that can effectively grapple with these questions in a way that is responsible—both to the specific communities with which these authors work and to a broader sense of politics and justice.

In their stories, the authors narrate contradictions that, for some, could lead to a sense of paralysis. But despite the difficulty of negotiating the tensions between the stories they write and the multiple hats they wear, they retain a sense of commitment and of hope. In his work on storytelling and the law, Marshall Ganz (2009) describes how he went to work with the civil rights movement in Mississippi in part because it was a movement of young people. He writes that there is something particular about young people that gives them what Walter Brueggemann calls “prophetic vision.” Ganz argues that young people have the two necessary elements of this prophetic vision: a critical eye and a hopeful heart—and that it is this combination that brings change.

One of the aims of the Global Action-Research Workshop, as César Rodríguez-Garavito outlines in chapter one of this volume, is to build a kind of action research that is amphibious. Being amphibious, in the simplest of senses, means being able to breathe in different worlds. In the writing of these stories, these advocates are figuring out and doing precisely that—how to move between different worlds of research and action in ways that allow them to breathe. But they are also doing it in a way that brings a specific kind of vision to the world. It is a vision that is situated, which is precisely what allows it to speak to big questions in a way that is responsible. And it is a vision that is prophetic, in the sense of combining a critical eye and a hopeful heart. It is this vision that allows them to tell complicated stories and, at the same time, work for change.

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CHAPTER 15

Violence, Resources, and the Law

Nandini Sundar

Extract from my diary of August 2013:

In the morning, Gavin Capps from Witts gave an overview of global mining trends. In the afternoon, we went to meet the “Wiwa community,” one of the four indigenous groups in this area, the Sierra Nevada de Santa Marta—Wiwa, Kankuamo, Kogi, and Arhuaco. The road there was wide and smooth and had been built by paramilitaries, part of the infrastructure of extraction and repression. We passed a huge military installation on a flat plain, with a big signboard at the entrance. Occasionally a man in fatigues roared past on a motorbike. At one place there were people standing next to large jerry cans of oil, and on the way back we filled at one of these roadside makeshift stations, in front of a large storage shed packed with jerry cans. These are smuggled in convoys from Venezuela, and nobody dares stop them. The paramilitaries levy taxes on goods passing through these areas. The FARC [Revolutionary Armed Forces of Colombia] used to be active in this area, but then the paramilitaries drove them out. We passed a Kankuamo village with solid brick houses, a big cemented playing field, and church—perhaps it was a model, because it was the first one after the military base. According to César [Rodríguez-Garavito], most of the Kankuamo were wiped out.

Later, as we ascended into the Sierra, it turned into a dirt track just like the tracks in Bastar [central India] full of ruts, and one small stream. The Wiwa village smelt familiar—wood smoke cooking, and the houses were built on scrubby ground, with almost nothing inside, except for a few plastic chairs, and in one—wooden logs for sleeping and sitting—sort of like a Naga bed [from Northeastern India]. As soon as we arrived, women wearing white with red sashes came and gave us crackers with guava cheese inside. We walked across the village to a meeting place which was under a big tree. We had to take our shoes off and sit on a rock. The Wiwa—a few of them dressed in loose white pants and a loose white tunic but others in normal pants and shirts, sat opposite us. They were all Wiwa functionaries of one sort or

the other, such as P., the head of the Wiwa human rights organization, a couple of teachers and so on.

The meeting started off with a spiritual moment where the Saga, an old woman shaman, waved her hands, and P. said we all needed to give our thoughts to the tree as tax for meeting there and get permission from the tree and earth for holding our meeting. He talked of how they were being displaced by the dam and the Cerrejón coal mine—and it had taken over their sacred space—the black lines that invisibly mark their territory; he also talked of the continuing actions of the paramilitaries. The domestic Colombian law explicitly incorporates ILO 169, so P.'s language was full of references to 169 and international humanitarian law. Hardly any of the indigenous communities in India are as articulate with international law—Colombian politics seems far advanced in this respect. We talked till it turned dark.

The FARC apparently killed a lot of them on grounds of helping the paramilitary, and the paramilitary, of course, wiped out a lot. According to C., there are three kinds of evidence to connect paramilitary violence with large projects like the dam: 1.) a paramilitary checkpoint just before the dam, 2.) the arrival of the paramilitary in this area coincided with the dam, and 3.) some of the paramilitaries have confessed to their connection.

P. said that although the paramilitaries have been officially disbanded, in this area they have simply changed their names and continue to do the same things. He says it's more problematic now because you can't identify them—earlier at least you knew who the general of the paramilitary group was. . . . P.'s own family was wiped out by the paramilitaries and he continues to be threatened—three months ago, someone threw a grenade at his house. He referred to the attack always in the third person. It's amazing how they invoke the law, when all it offers is such thin protection, but that's all there really is. People's bravery in the face of all this also never ceases to amaze.

Weds 14 August: We set off early morning to visit the Cerrejón coal mine—went through forest, and then from Cerrejón to Santa Marta—through small villages with thatched huts like India; each house in its own little acreage; small towns with rows of small shops selling groceries, petrol etc. just like in India but much cleaner; a basketball field where women were playing, a police station with an armoured tank in front of it. Apart from that and a few checkpoints, did not see too much army presence, though both Cesar and Santa Marta have FARC and paramilitary presence.

At Cerrejón we got off our own bus into two company buses and were provided with yellow jackets and helmets. Cerrejón is owned by BHP Billiton (Australian-South African), Extrata (Swiss), and Anglo-Amer-

ican—one third shares each. The Colombian government also had a stake which they sold out. First we were taken to see 3,200 ha which have been recovered and is now scrub forest. It took them 20–30 years to do this, 12,700 ha is being mined in 5 lots; and the company has leased 69,000 ha in all till 2034. Then we went to see the mining site—which was along a huge ridge—it was heavily mechanized. Finally we had lunch and discussions with the CSR [corporate social responsibility] people. The company did a good job at presenting their best face—but our gang bombarded them with difficult questions. They pointed out how the company was trying to divert a river and were distributing goats to bribe the villagers. Finally, the company stopped consultation as they abandoned the project. The company pamphlets noted that they had opened a complaints office to deal with complaints about private security guards and paramilitary molesting village women and stealing their livestock. The company's answer was to run conscientisation programs to teach the security guards "culturally appropriate ways" of dealing with the indigenous community! She also complained that the community representatives took money and were not really representative of their community.

From 2005 to 2014, I was actively engaged in litigation before the Indian Supreme Court on the unconstitutionality of vigilante and paramilitary forces in central India who are engaged in fighting Maoist guerillas and have inflicted huge damages on villagers, burning and looting their homes and killing residents. Bastar is a heavily forested, mineral-rich area with very poor indigenous people. This is an area where the gods live on the hilltops that mark the territories of each clan, and the villagers ask the earth for permission before they begin to cultivate. But the government does not recognize these gods—and its vision sees only the iron ore beneath the land, and not the people who live on it. The Supreme Court ruled in our favor in 2011, but the state simply ignored the order. In the last few years, security forces have set up barbed-wire camps every five kilometers or so across the area. Visiting the Wiwa village in Colombia's Sierra Nevada and the Cerrejón mine was like coming to a place that was both new and familiar—a portend of what Bastar might look like once all the mines are in place.

The chapters in this volume provide that similar sense of déjà vu, showing how common the struggles of indigenous people all over the world are, as well as their reliance on spiritual and ancestral customs and on the law in the face of forces that follow neither. Extractive industries, especially mining, are imbued

with the blood of those who once lived on that soil and who were either killed for resisting or forcibly moved off the land. Mining sites are essentially violent sites—thick with fear and suspicion as people from these same communities are suborned or bribed into working in the mines, acting as scabs, or fighting as foot soldiers in military projects to grab the land of others. This, in turn, feeds into violence against women, as traditional household economies change under the impact of loss of resources, migration, the influx of cash, alcohol, and commercial sex work. Extractive industries are also powered by the lost life years of those who stay and suffer the dust and pollution and the loss of those resources that once ensured nutrition and subsistence even in the absence of cash.

When people resist or mobilize to demand their rights, as the chapters in this volume show, mining companies have a standard repertoire of reactions: they use money to buy off and divide communities who oppose them, use force when this fails, use the law to arrest community leaders, threaten to take their capital elsewhere, cloak their damages in euphemisms and conduct propaganda regarding corporate social responsibility, blame the residents of affected communities for their indiscipline, and use the courts and legal procedures to tire out and destroy the communities when they dare litigate against the company.

In the language of rights, the rights that are violated on an everyday basis include the right to life; the right to land, resources, and property; the right to a clean and safe environment; the right to cultural self-determination; and the right to consultation and free, prior, and informed consent (see Burger 2014).

Increasingly, the role of governments—which are supposed to implement and ensure these rights—is coming into question. Mining or industrial enclaves are fast becoming spaces governed by private capital, from which states purposely withdraw the protective cover of national laws, as is the case in India's special economic zones, where labor laws do not apply. Even the normal monopoly over violence by which the Weberian state traditionally defines itself is increasingly bypassed in favor of private military companies (see Singer 2003). The specific form of these nonstate militarized actors engaged in ground clearing for mining may vary—from professional companies to privately raised paramilitaries or what in India are called "special police officers." When the regular army

is deployed, it in turn acquires a stake in the resource extraction, creating a close nexus between resource extraction, militarism, and neoliberal states. As the boom in mining accelerates, we notice a parallel growth in the security industry, which is becoming one of the major sources of employment in the world. In the name of growth and “development,” governments have no compunction in redefining their role as the agents of private capital.

As for the protective laws that have been drawn up under the pressure of affected communities, these are used to draw votes or legitimacy that will help push through the larger project of industrialization, and they are ignored in practice. Many states have incorporated provisions from the International Labour Organization’s Convention 169 and the 2007 United Nations Declaration of the Rights of Indigenous Peoples, or have adopted parallel legislation like India’s Panchayat (Extension to Scheduled Areas) Act of 1996, which mandates consultation with the affected residents of a scheduled (indigenous people’s) area. But despite provisions for free, prior, and informed consent, the standard narrative is that residents of a site on which a company has set its eyes come to know of the company’s plan only much later through indirect means; are not given proper information regarding the social and environmental impacts; and are dismissed as ignorant (or as having been incited by outside activists) when they refuse to part with their land. When it comes to the state’s “welfare functions,” the state is interested only in developing infrastructure for the extraction of natural resources and for moving paramilitaries or armies in, not in serving the needs of vulnerable communities.

For most poor people, their “encounters” with the law are unhappy. As Ugo Mattei and Laura Nader (2008) argue, the “rule of law” has served more as an instrument of plunder, as a way of harassing local communities through prolonged disputes, and as a way of rendering entire populations illegal by penalizing their traditional livelihoods.

Yet, with all the violence of the law, the law is the only fragile protection against violence. The chapters in this volume—written mostly by young lawyers—show an awareness of this knife-edge nature of the law. They bring out both the debilitating effects of the legal system and the hope and inspiration that only justice can provide.

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Human Rights in Minefields

Extractive Economies, Environmental Conflicts,
and Social Justice in the Global South

Human Rights in Minefields: Extractive Economies, Environmental Conflicts, and Social Justice is the first in a series of books resulting from the annual workshop hosted by Dejusticia on human rights action research. Featuring chapters by talented activist-researchers from around the globe, it embodies a new way of telling human rights stories in the voice of the protagonists themselves.

The contributions of these activist-researchers—which combine academic analysis, personal experience, and the tools of narrative and reflective writing—document the impact of extractive economies on human rights and the natural environment. They explore in depth the consequences of these economies for the rights of communities around the world, from rural populations in countries like Brazil, India, Mexico, Peru, South Africa, and Uganda to indigenous peoples in places like Chile, Colombia, and Paraguay.

The volume also features chapters on the meaning of action research and the rationale for this new genre of writing in the current human rights arena.

Due to its focus, language, and topic, *Human Rights in Minefields* appeals to a wide international audience, including academics, activists, journalists, students, public officials, and individuals interested in human rights stories and how to write them.

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