



**Foreign Investment and the Privatization of Coercion:
A Case Study of the Forza Security Company in Peru**

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by

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Abstract

This paper explores the reorganization of security and coercive power in Peru in response to the needs of foreign owned mining companies in an environment of social protest and opposition. It begins with an analytical description of the domestic legal regime that structures security services in Peru. In this context, it undertakes a case study of Forza, one of Peru's oldest and most powerful private security companies, recently purchased by a transnational security company. Forza's human rights record is explored through the trajectory of three ongoing human rights cases. These cases signal a deep interpenetration of the economic and political power of foreign-owned mining companies, Forza and the Peruvian justice system. The paper then analyzes the Forza case study in terms of the applicable systems of law. At the level of domestic law, the Peruvian system and the investors' home state legal systems are considered. At the international level, three distinct normative systems are reviewed: public international human rights law, private international foreign investment law, and corporate social responsibility mechanisms. This overview provides some insight into how the "global gap" in the enforcement of domestic law and the asymmetry in the enforcement of international law function together to produce the conditions of impunity in the Forza case study. Using the case study itself as an example, this paper concludes by proposing a methodological approach to international lawyering and legal academic work in relation to social movements.

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INTRODUCTION

This paper explores the reorganization of security and coercive power in Peru in response to the needs of foreign-owned mining companies in an environment of social protest and opposition. Peru is a relatively poor developing country dominated by foreign-owned mining activity. Between 1990 and 2000, former president Alberto Fujimori completely privatized mineral production¹ and restructured the country's legal regime to create favorable conditions for foreign investors. As a result, in 2001 the International Monetary Fund assessed Peru to be one of the most open and liberal economies in the world.² Subsequent governments have reinforced the neo-liberalization of Peru's economic and legal order.³ By 2006, Peru was one of the top mineral producing countries on

the globe and net project profits in the mostly foreign-owned mining sector were over seven billion dollars.⁴

A record level of social conflict matches these record profits. The majority of Peru's six thousand Campesino Communities own or occupy land in areas affected by mining.⁵ The term "Campesino Community" was introduced in 1969 to replace the term "Indigenous Communities" in reference to those communities that live primarily in the Peruvian Andes.⁶ These Communities are recognized in a legislative and constitutional framework that recognizes communal property rights, autonomous communal self-government and protected cultural institutions.⁷ In 2005 there were thirty-three recorded conflicts related to resource extraction in Peru, constituting the majority of the social conflicts in the country.⁸ The common issue underlying many of these conflicts relates to the question of the consent of affected communities to mining development as well as the concern that the wealth generated by mining has not sufficiently benefited local communities.⁹

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¹ State control of mineral production declined from half to approximately one percent of total production: David Szablowski, "Mining, Displacement and the World Bank: A case Analysis of Compañía Minera Antamina's Operations in Peru" (2002) 39:3 *Journal of Business Ethics* 247.

² Jeffery Bury, "Neoliberalismo, minería y cambios rurales en Cajamarca" in Anthony Bebbington, ed., *Minería, Movimientos Sociales y Respuestas Campesinas* (Lima, CEPES & IEP: 2007) 49 at 54 [Bury].

³ For an overview of the ongoing reforms in the area of land law, see: Pedro Castillo Castañeda, *El Derecho a la Tierra y los Acuerdos Internacionales: el Caso de Perú* (Lima, CEPES & International Land Coalition: 2009).

⁴ Alfredo C. Gurmendi, "The Mineral Industry of Peru" in *2006 Minerals Yearbook: Peru* (U.S. Department of the Interior & U.S. Geological Survey, 2008) at 15.1.

⁵ Anthony Bebbington, *et. al.*, *Mining and Development in Peru: With Special Reference to the Rio Blanco Project, Piura* (London, Peru Support Group: 2007) at iv [Bebbington, *et. al.*].

⁶ Law N° 17716, *Agrarian Reform Law* (1969).

⁷ Supreme Decree N° 37-70-AG, *Campesino Communities Special Statute* (1970); Law N° 24656, *Campesino Communities General Law* (1987); Law N° 24657, *The Demarcation and Tiling of the Campesino Communities' Territory is Declared a National Need and a Social Interest* (1987).

⁸ Ormachea, 2005 in Bebbington, *et. al.*, *supra* note 7 at 6.

⁹ These issues have been central to each of the high profile mining related conflicts in Peru in the recent years: Tambogrande (2002), Quilish (2004), Majaz (2005-2006), Combayo (2006) and Bagua (2009).

In the face of widespread organized opposition to mining, transnational companies increasingly employ a mix of public police services and private security companies to protect their investment interests. These practices, and their interface with international and domestic law, will be examined in this paper. Part II begins with an analytical description of the domestic legal regime that structures security services in Peru. In this context, a case study of Forza is undertaken. Forza is one of Peru's oldest and most powerful private security companies, recently purchased by a transnational security services corporation. This section presents the allegations raised against Forza in three on-going human rights cases: the *Majaz Case*, the *GRUFIDES Case* and the *Business Track Case*. These cases signal a deep interpenetration of the economic and political power of foreign-owned mining companies, Forza and the Peruvian justice system. Taken together, they map how the privatization of coercive force and the conflation of private foreign power and public state power have created an arrangement of institutionalized and internationalized impunity for foreign investors and their security companies who commit human rights violations.

In this context, Part III analyzes the Forza case study in terms of the applicable systems of international and domestic law. At the domestic level, this consists of a discussion of the viability and the efficacy of the potential legal actions that could theoretically be brought to the various applicable domestic legal systems. At the international level, three distinct normative systems are similarly considered: public international human rights law, private international foreign investment law, and corporate social responsibility mechanisms. This overview provides some insight into how the "global gap" in the enforcement of

domestic law and the asymmetry in the enforcement of international law function together to produce the conditions of impunity in the Forza case study.

Finally, by way of a conclusion, Part IV describes the Forza case study in terms of a methodological approach to international lawyering and legal academic work on the issue of impunity. This approach may respond to some of the imperatives of Third World Approaches to International Law (TWAIL) scholars and, most importantly, to the needs of social movements targeted by the privatization of coercive force in favor of foreign investors. Further, it suggests to advocates that a careful reflection is in order before engaging legal mechanisms to address the issue of impunity, in particular the potential adverse effects of voluntary corporate social responsibility mechanisms are touched upon.

TRANSNATIONAL RESOURCE EXTRACTION AND THE PRIVATIZATION OF COERCION

Domestic Legal Framework and Practice

It has been observed that one consequence of the neo-liberal restructuring of the economy and reduction of public expenditure is the proliferation of private security companies.¹⁰ This hypothesis certainly

¹⁰ Bonnie Campbell, "Good Governance, Security and Mining in Africa" (2006) 21 *Minerals & Energy – Raw Materials Report* 31; Alexis P. Kontos, "'Private' security guards: Privatized force and State responsibility under international human rights law" (2004) 4 *Non-State Actors and International Law* 199; Mark Ungar, "The Privatization of citizen security in Latin America: from elite guards to neighborhood vigilantes" (2007) 34 *Social Justice* 20; Robert P. Weiss, "From cowboy detectives to soldiers of fortune: private security contracting and its contradictions on the

finds support in the Peruvian experience. While the Peruvian government has not increased the number of public police officers since the early 1990s, there has been an enormous expansion of private security personnel.¹¹ A recent study conducted by the United Nations Working Group provides an insightful starting point for characterizing the private security sector in Peru.¹²

The United Nations study estimated that there are now 100,000 private security guards in Peru, outnumbering the public police force of about 92,000.¹³ It also concluded that approximately half of the private security guards in Peru work for companies in the informal sector.¹⁴ Since the applicable legislation requires companies to register pursuant to its terms, these informal companies are essentially operating illegally.¹⁵ The fact that approximately half of the private security sector in Peru operates illegally suggests that the State is either unable or unwilling to exercise effective regulatory control over the sector. However, at the same time the United Nations study observed the close relationship between the private security sector, the police force, and the military:

In many cases, these companies are run by former members of the Armed Forces or the Police, or they

occupy senior positions. Peru also seems to experience the “revolving door” syndrome whereby, when they retire, members of the military and police are hired by private security companies or start their own. The Ministry of the Interior apparently authorizes these companies to hire off-duty police officers to protect buildings; the officer’s weapon is the property of the police, not of the company.¹⁶

Thus it would appear that the private security industry in Peru is defined first, by its high degree of illegality and second, by its close relationship with the military and the police.

As a result, it is useful to consider the relevant provisions of the corresponding domestic legal regime. In 1994, Fujimori introduced Peru’s first law specifically pertaining to the regulation of private security services.¹⁷ In 2006 the *Private Security Services Act*¹⁸ replaced its predecessor, thereby creating the current legislative context for the factual observations presented above. Perhaps not surprisingly, the *Act* appears to regulate the private security sector so as to facilitate its accessibility for police and military personnel. The Ministry of the Interior is responsible for the regulation, control and supervision of all three institutions¹⁹ and authorizes the operation of privately owned Private Security Training Centers which security personnel are required to attend.²⁰ However, police or military officers may bypass this training requirement because Centers are empowered to recognize the equivalency

new frontiers of capitalist expansion” (2007) 34 *Social Justice* 1.

¹¹ José Luis Gómez del Prado, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, UN GA HRC, 7th Sess., A/HRC/7/7/Add.2 (2008) at 13 [UN Working Group].

¹² *Ibid.*

¹³ *Ibid.* at 5, 13.

¹⁴ *Ibid.* at 6.

¹⁵ All private security companies duly register themselves in accordance with an array of administrative specifications: see *Private Security Service Act*, *infra* note 18, arts. 4, 23,

¹⁶ UN Working Group, *supra* note 11 at 14.

¹⁷ Supreme Decree N° 005-94-IN, *Approval of the Regulation for Private Security Services* (12 December 1994).

¹⁸ Law N° 28879, *Private Security Services Act* (2006) (17 August 2006).

¹⁹ *Ibid.*, art. 3.

²⁰ *Ibid.*, art. 23.1(e).

of police or military training.²¹ The *Act* explicitly allows retired military or police officers to supervise private security companies²² while it does not prohibit these companies from employing actively serving police/military officers.

While the *Act* clearly facilitates the integration of the public security labour force into the private sector, it nonetheless imposes a division of labour on these officers as they cross between private and publicly paid positions. The *Act* prohibits private security companies from performing functions within the jurisdiction of the military or the police; the specific examples given are the investigation of crime or espionage.²³ This said, in exceptional circumstances, private security officers may be required to provide support, collaboration and help to the police force. However, when doing so, the *Act* stipulates that these private officers do not acquire the legal status of public authorities.²⁴

The privatization of the Peruvian police force extends beyond the parameters of the *Private Security Companies Act*. There is strong evidence to suggest that transnational mining companies in Peru regularly enter into agreements with the police force to facilitate the special provision of security services.²⁵ Since these agreements are not publicly available, it is difficult to determine how widespread they are, although the information gathered in an ongoing journalistic investigation suggests that between 2008 and 2010 there were approximately thirty-three such

agreements actively in place across the country.²⁶ There is only one copy of these agreements available in the public sphere, located on the website of the Peruvian National Police force. It is an electronically scanned copy of the original document, signed between the General of the National Police Force and representatives of the Japanese owned Santa Luisa Mining Company²⁷ in 2009.²⁸ This document contains terms that are similar to what is publicly known about other arrangements of its kind.²⁹ They also coincide with the documents collected by the previously mentioned journalistic investigation.

The Santa Luisa agreement, titled a “Cooperation Agreement for the Provision of Extraordinary and Complementary Services beyond Police Duties”, has three named objectives. First, it aims to offer Santa Luisa “exceptional police services, complementary to the [ordinary] police function, utilizing the human resources of the Peruvian National Police”.³⁰ Second, the police are to “detect and neutralize” any risks that threaten the personnel or

²⁶ Fowks, *ibid.*

²⁷ Compañía Minera Santa Luisa S.A. is a wholly owned subsidiary of Mitsui Mining & Smelting Co. Ltd. of Tokyo, Japan. It realizes zinc and lead mining activities in the Andean region of Ancash: <http://www.creditosperu.com.pe/pp-cia-minera-santa-luisa-s-a.php>.

²⁸ This document was located on the website of the Peruvian National Police: <http://www.pnp.gob.pe/transparencia/convenio.html>. It can be downloaded at: <http://www.pnp.gob.pe/transparencia/documentos/CONVENIO%20STA%20LUIZA%20SA%20-%20PNP.pdf>.

²⁹ For example the terms of the Santa Luisa agreement coincide with a description of Yanacocha’s agreement with the police force: Costa, *supra* note 25.

³⁰ This is my translation of the Spanish phrase used: “servicio policial extraordinario complementario a la función policial con los recursos humanos de la Policía Nacional del Perú”.

²¹ *Ibid.*, art. 27.3.

²² *Ibid.*, art. 27.2.

²³ *Ibid.*, arts. 24(c)-(e), 29.

²⁴ *Ibid.*, arts. 23.1(j), 28, 38.

²⁵ Gino Costa, *Comprehensive Review of Minera Yanacocha’s Policies Based on the Voluntary Principles of Security and Human Rights* (12 Mayo 2009) at 11 [Costa]; Jacqueline Fowks, *IDL Reportero* (*forthcoming*) [Fowks].

property of the mining company, therefore guarantying the normal development of mining activities. Third, the agreement will serve to generate the financial and logistical support that the police force requires to fulfill its institutional goals in service of the wider community.

The agreement founds its existence on the constitutional duty of the police force to “maintain order”.³¹ Beyond making reference to this general duty, the agreement does cite any specific provision of Peruvian police law pertaining to private agreements or private funding. Rather, it is designed like a private contract, although it specifically states that controversies are to be resolved directly between the parties, as such presumably not by the courts.

In this framework, the police force commits to providing the mining company with officers from the Special Operations Division, who are specifically trained in leading operations against drug trafficking, subversion, and violent conflict. The commitment on the part of the police force is to furnish the company with a rotating force of uniformed and armed off-duty police officers to protect the mine site 24 hours a day. In exchange, the mining company agrees to provide the off-duty officers with residence, food, life insurance, health care and a daily salary. Further, the company provides the police force, as an institution, with two different types of financial payments. The first is equivalent to 20% of the total salaries paid to individual officers, and the second

constitutes an unspecified amount designated to assist the police force in the fulfillment of its overall institutional objectives.

On the surface, this funding arrangement appears to suffer from at least one constitutional irregularity. Article 170 of the Peruvian Constitution states that the funds designated to satisfy the logistical requirements of the police force must be assigned by law. It further dictates that these funds must be dedicated exclusively toward institutional ends, under the control of the authority assigned by law. As noted above, the Santa Luisa agreement does not found itself upon any specific constitutional or legislative provision. In particular, there appears to be no regulation or law that governs the payments made between Santa Luisa and the police force. Further, it is unclear that the “exceptional” services offered to Santa Luisa fall within the scope of the “institutional ends” contemplated by the Constitution.

Taking into account the terms of the Santa Luisa agreement, together with the findings of the United Nations study and the applicable legislative framework, some general conclusions can be drawn in regard to security in the resource extraction context. First, it is clear that security services in Peru are being reorganized in accordance with a number of processes of privatization, in ways that are not yet fully understood. Second, law and practice are facilitating the provision of coercive resources to transnational mining companies. These resources consist of private security companies, which are significantly staffed by former and active police and the military personnel. Further, these resources include fleets of off-duty police officers which are organized to function liked the company’s private security force pursuant to private agreements like the Santa Luisa agreement. Third, public security

³¹ Article 166 of the *Political Constitution of Peru, 1993* states: The fundamental objective of the National Police is to guarantee, maintain and reestablish the internal order. To offer protection and help to people and to the community. To guarantee the observance of the laws and the security of private and public property. To prevent, investigate and combat crime. To control the borders.

institutions have adapted to compensate for their apparent lack of public funds. Mechanisms have been created whereby mining companies may essentially fund the police force as an institution while also supplementing the income of individual officers.

These observations suggest that the police force, as an institution and as a labour force, has been partially privatized in the service of mining companies. The demand generated by mining companies for security services must be understood in the context of the widespread observation that the increase in resource extraction in Peru has encountered growing community-based opposition,³² or in the words of the Santa Luisa agreement, “risks”. In the course of these conflicts, companies (and not communities) have the economic resources to generate a market demand for security services. Security services are obviously employed to physically protect the property of foreign investors. This is especially salient because the source of conflict between mining companies and communities often relates to the fundamental issue of land and land rights.³³

³² See generally Bebbington, *et. al.*, *supra* note 5; Anthony Bebbington, ed., *Minería, Movimientos Sociales y Respuestas Campesinas* (Lima, CEPES & IEP: 2007); José De Echave, “Mining and Communities in Perú: Constructing a Framework for Decision-Making” in Liisa North, *et al.*, *Community Rights and Corporate Responsibility* (Between the Lines: Toronto, 2006) 17.

³³ See: Charis Kamphuis, “Law & the Convergence of Public and Corporate Power in Peru: Yanacocha Mine, Campesino Dispossession, Privatized Coercion” in Obi Aginam, ed., *Transnational Corporations, Human Rights and Environmental Justice in Latin America* (Tokyo, United Nations University Press: *forthcoming*) [Kamphuis]; Carlos Meléndez Guerrero, “Movilización sin movimientos. El caso de los conflictos entre comunidades y la empresa minera Yanacocha en Cajamarca” in Romero Grompone & Martin Tanaka, eds., *Entre el Crecimiento Económico y la*

However, security companies have recently been tied to a “new development”. Specifically, they have become implicated in the surveillance, coercion, harassment and intimidation of human rights organizations working to defend the economic, social and environmental rights of mining-affected communities.³⁴ This suggests that the coercive relationship between private security companies and communities has two dimensions, namely, the classical function of the protection of property, together with “new” practices of surveillance and even political persecution. Both of these dimensions are manifest in the following case study.

Case Study: The Forza Security Company

Forza was created in 1991 by retired personnel from the Peruvian Armed Forces specialized in subversion and espionage work. Forza’s objective is to offer complete corporate security services to diverse companies with a specialization in the industrial, mining and energy sector.³⁵ In addition to its work for transnational mining companies, Forza has had an impressive array of other international clients, including the British Embassy, the Inter-American Development Bank, the Standard Bank London Limited, as well as subsidiaries of Coca Cola, Eli Lilly, and Hewlett Packard.³⁶ As Forza became one of Peru’s most important and powerful private security companies, its status garnered the interest of Securitas, one of

Insatisfacción Social: Las Protestas Sociales en el Perú Actual (Lima, IEP: 2009) 321 [Meléndez].

³⁴ UN Working Group, *supra* note 11 at 5, 15, 21.

³⁵ Securitas Peru, Segmentos, online: <http://www.securitas.com/pe/es-pe/Customer-Segments/>.

³⁶ CreditosPeru, Forza, online: <http://www.creditosperu.com.pe/pp-forza-s-a.php>.

the largest multinational private security corporation in the world.³⁷ Due to Forza's "prestige, experience and position in the Peruvian market", Securitas acquired Forza in 2007 as part of its expansion into Latin America.³⁸

Ironically, Forza's power and status as the security company of choice in Peru for a significant number of international organizations and corporations seems to be proportionate to its growing reputation as a systematic human rights violator. The following section describes three on-going legal processes that raise serious allegations against Forza of systematic violations of the human rights of activists and human rights defenders working on mining issues in Peru. The cases are presented in chronological order of the human rights incidents they represent.

The Majaz Case

The Rio Blanco project is one of the largest undeveloped copper resources in the world. It has the potential to become one of the largest copper mines in South America and to create momentum for the creation of a larger "mining district".³⁹ It is located in a "cloud forest" in the Piura region of the Peruvian Andes between 2,200 and 2,800 meters above sea level. In 2003 the British company Monterrico Metals acquired the exploration rights to the Rio Blanco project. Monterrico began operations in Peru through its wholly owned subsidiary Minera Majaz, whose

name has since been changed to Rio Blanco. In 2007 the capital share of Monterrico was sold to the Chinese conglomerate Xiamen Zijin Tongguan Investment Development Company.⁴⁰

Majaz's exploratory operations at the Rio Blanco site were conducted on the communally owned territory of two Campesino Communities. These activities occurred without the permission of these Communities and in violation of Peruvian and international human rights law.⁴¹ Although the affected Campesino Communities repeatedly and clearly notified state and mining authorities of their opposition to the project, these efforts were met with "profound deficiencies" on the part of national authorities.⁴² In response to the resulting unprecedented level of social conflict in the region, an independent delegation of UK experts, including one Member of Parliament, was created to engage in an in-depth evaluation of the social, political, cultural, environmental and economic issues raised by the Rio Blanco project. The delegation concluded that "non-violent protest and the democratic process [had] completely failed local populations."⁴³ In 2004 community members marched on the Rio Blanco mine site and one Campesino was killed in a confrontation with police. No police officers have been prosecuted or found responsible for this death.⁴⁴

A second march began in late July 2005 with the participation of between two and three thousand Campesino leaders and communal authorities from

³⁷ Securitas has 12% of the global market share and employs over 240,000 individuals to offer services in over 40 countries on every continent: see Securitas, About Us, online: <http://www.securitas.com/en/About-Securitas/>

³⁸ Securitis, About Us, Securitis Peru, online: <http://www.securitas.com/pe/es-pe/About-Us/Securitas-Peru/>.

³⁹ *Guerrero & Others v. Monterrico Metals PLC & Another*, [2009] EWHC 2475 (Q.B.) at para. 3 [*Guerrero*]; Bebbington, *et. al.*, *supra* note 5 at iv.

⁴⁰ *Guerrero*, *ibid.* at para. 4.

⁴¹ This conclusion was reached in a report issued by the Peruvian Ombudsperson's Office: Defensoría del Pueblo, Oficio N° 0178-2006-DP/ASPMA-MA (Lima: Defensoría del Pueblo, 2006).

⁴² Bebbington, *et. al.*, *supra* note 5 at 17.

⁴³ *Ibid.* at vi, 51.

⁴⁴ *Ibid.* at 17.

across the region.⁴⁵ This march was initiated after mining authorities failed to respond to an ultimatum from Communities demanding the cessation of exploration. Marchers referred to it as the “sacrifice march” because they had to walk for several days through difficult terrain in order to arrive at the Rio Blanco mine site. The protestors marched unarmed and waving white flags, with the expectation of negotiating with a special high-level delegation of civil society leaders to be flown in by helicopter. The delegation had been formed at the instigation of the Ministry of Mining in order to facilitate negotiations between marchers, Majaz and state authorities. However, unexpectedly, the delegation’s helicopter was grounded a short distance from the mine site and police prevented delegates from proceeding to the site.⁴⁶

With the delegation grounded nearby, the marchers’ campsite was allegedly bombed with tear gas from helicopters and raided by Forza and police officers.⁴⁷ In subsequent confrontations with police one protestor allegedly shot a police officer in the leg with his own revolver.⁴⁸ Approximately 28 Campesino leaders were then detained and brought to the mine site. The shocking testimony of these Campesinos in regard to the events that followed was finally substantiated over three years later when photographs were leaked in late 2008 to a national newspaper by an anonymous source.⁴⁹

The photographs depict officers engaged in cruel acts of abuse and torture of the Campesino detainees. Officers bound the Campesinos, placed sacs over their heads, and forced them to walk barefoot. Their clothes were completely or partially removed and they were savagely beaten, tortured, subjected to tear gas, and deprived of food and water. One Campesino did not survive these events.⁵⁰ Two female detainees reported being subjected to sexual abuse. After three days of torture in captivity, the Campesino detainees were released and charged with crimes such as terrorism.⁵¹

In June of 2008 a group of lawyers at the Peruvian NGO FEDEPAZ filed a complaint to the Prosecutions Office requesting the investigation of the Forza security officers, police officers, and mine officials allegedly responsible for the crimes committed against the detained Campesinos.⁵² In spite of the supporting photographic evidence, the local prosecutor rejected the complaint and closed the investigation. This closure was successfully appealed and in April 2009 the Prosecutions Appeals Office ordered that the investigations be reopened. At this stage, it was reported that the investigation and prosecution had been impeded by the refusal of the police force to provide the names of the officers who participated in the police operation in question as well as the refusal of Majaz to

⁴⁵ *Ibid.* at 18.

⁴⁶ *Ibid.* at 18-9.

⁴⁷ *Guerrero, supra* note 39 at subparas. 15 (iv), 15 (v).

⁴⁸ *Ibid.* at subpara. 5 (vii).

⁴⁹ Elizabeth Prado, “En Majaz sí se torturo el año 2005” *La Republica* (9 January 2009); The National Human Rights Coordinator & the Ecumenical Foundation for Development and Peace, *Formulate Criminal Charges Request*, Prosecutor’s Office (6 June 2009) [*Criminal Charges Request*]. Also see Stephanie Boyd, Documentary Film: *The Devil Operation* (Guarango 2010) [Boyd].

⁵⁰ It is disputed whether this individual was killed in confrontations at the protestors’ campsite, or as a result of the mistreatment that occurred at the mine site.

⁵¹ “Instancia internacional vería torturas en Majaz” *La Republica* (14 January 2009); Edmundo Cruz, “Defender el medio ambiente es delito de terrorismo en minas del norte de Perú” *La Republica* (10 May 2008); *Guerrero, supra* note 39 at para. 15.

⁵² *Criminal Charges Request, supra* note 49.

provide a list of the mine staff, including Forza personnel, on site at the time.⁵³

One year later, in April 2010, the local prosecutor closed the investigation for a second time. After another appeal, the Appeals Office again ordered that the investigation be reopened in August 2010. The appeals prosecutor pointed out that the local prosecutor had failed to take into consideration that the police officers had detained the victims and subjected them to torture and other crimes while carrying out a police operation that had to have been previously planned by high level police Commanders.⁵⁴ As of the writing of this article, the domestic investigation continues.

The victims have brought parallel proceedings against Monterrico and its Peruvian subsidiary Rio Blanco before the English High Court. Their case alleges that the company's directors, managers and personnel directly participated in events related to the torture and detainment of the Campesino marchers.⁵⁵ The victims claim that Monterrico is liable under the British *Private International Law Act*⁵⁶ for failing to fulfill its "responsibility for risk management". They also claim that both Monterrico and its subsidiary are liable under the Peruvian *Civil Code* for culpable or intentional damage on the basis of willful misconduct, for the failure

to take adequate steps to prevent known risks, and vicariously for the actions of their employees, including Forza security guards.⁵⁷ Finally, the victims make a claim for negligence.

The nature of Majaz's security arrangement is a major issue of contention in the UK action. It is clear that Majaz employed Forza to provide the Rio Blanco site with security services and that both Forza and police officers were at the mine site when the torture and abuse of protestors occurred.⁵⁸ The victims testify that both Forza officers and police officers participated in the acts of torture, detention and cruelty.⁵⁹ The company alleges that Forza officers refrained from such behavior and that any wrongdoing was solely committed by police officers, for which the company is not liable.⁶⁰ Unfortunately, at this point it is difficult to identify the institutional identity of some of the officers on the basis of the photographic evidence because the officers are not always fully uniformed or their uniforms are not always fully visible.

In terms of the institutional relationship between the company and the police force, it is not known if Majaz had a security services agreement with the police such as the one described in the previous section. However, at a minimum, the nature of police participation in the events described above suggests a relationship of informal collaboration. The company liaised with the police force to ensure the presence of hundreds of officers from the Special Operations Division to protect the Rio Blanco site.⁶¹ In a statement to the press, a police General declared that Majaz was

⁵³ "Policía no brinda los nombres de los posibles responsables" *La Republica* (12 January 2009); "Aún no dan los nombres de policías que habrían torturado a campesinos de Majaz" *Perú 21*" (31 January 2009).

⁵⁴ FEDEPAZ, *Fiscalía Ordena Continuar con Investigación por Caso de Torturas a Comuneros en Piura* (1 September 2010), online: http://www.fedepaz.org/index.php?option=com_content&task=view&id=113&Itemid=1.

⁵⁵ *Guerrero, supra* note 39 at paras. 8, 10, 45. Also see: "Bristow se niega a responder por supuestas orden que dio para torturar a comuneros" *Coordinador Nacional de Radio* (14 January 2009).

⁵⁶ *Private International Law (Miscellaneous Provisions) Act* (1995).

⁵⁷ *Guerrero, supra* note 39 at paras. 9-10.

⁵⁸ *Ibid.* at para. 25; Boyd, *supra* note 49.

⁵⁹ *Ibid.* at subparas. 10 d., 10 k., 56 (3), 16.

⁶⁰ *Ibid.* at para 25.

⁶¹ *Criminal Charges Request, supra* note 49 at 21-2; *Guerrero, supra* note 39 at paras. 8, 15.

not paying the police but that it was providing food and some transportation.⁶² Finally, the detention of the Campesino marchers occurred on company property and officers allegedly used the company's facilities to carry out the logistics and coordination related to the detention and torture.⁶³

The UK proceedings are in their initial stages. To date, the Court has imposed a worldwide freezing injunction that restrains Monterrico from removing any of its assets up to the value of just over 5 million pounds from the jurisdiction.⁶⁴ The Court held in October 2009 that the allegations against Monterrico for responsibility and participation in the brutality against the protestors constitute a "good arguable case" for the purposes of upholding the injunction.⁶⁵ The final hearing in the UK proceedings is set for February 2011.⁶⁶

The GRUFIDES Case

Minera Yanacocha began operations in 1992 in the Cajamarca region of the Peruvian Andes, located between 3500 to 4000 meters above sea level. Yanacocha is owned and operated by three shareholders: the Peruvian Compañía de Minas Buenaventura and the International Finance Corporation hold a minority interest; the American Newmont Mining

Corporation, the largest gold mining company in the world, is the majority shareholder. Yanacocha has employed Forza since 1993 as its exclusive private security company. Yanacocha also has a confidential contract with the police force to provide security services similar to those described in the Santa Luisa agreement.⁶⁷ Yanacocha is the largest gold mine in Latin America and one of the most profitable in the world.⁶⁸

Like Majaz, Yanacocha also began its operations on the communally owned territory of a Campesino Community. There is strong evidence that Yanacocha acquired the portions of the land it now mines in violation of the Campesino Community's land rights as protected by domestic and international law.⁶⁹ In addition to the problematic legal and political underpinnings of Yanacocha's presence in the area,⁷⁰ a recent study of the United Nations Economic Commission on Latin America and the Caribbean identified Yanacocha as one of the least successful industrial clusters in terms of its contribution to local development.⁷¹ With these antecedents it is not surprising that large-scale protest began in 1999 against Yanacocha's expansion.⁷² These protests were

⁶² *Criminal Charges Request, ibid.* at 22.

⁶³ *Guerrero, supra* note 39 at 10, 15. For example, the company provided the barefoot and seminude detainees with rubber boots before they were transported from the mine site in helicopter. There are allegations that some of the implements used to torture the Campesinos were company property.

⁶⁴ *Ibid.* at paras. 6, 41. Monterrico is also ordered to not diminish the value of any of its assets within or outside the jurisdiction up to the same value and not to dispose of any of its shares in its subsidiary, now called Rio Blanco.

⁶⁵ *Ibid.* at paras. 26-7.

⁶⁶ "Confian en fallo favorable" *El Peruano* (8 March 2010).

⁶⁷ Costa, *supra* note 25.

⁶⁸ Bury, *supra* note 2 at 50-6.

⁶⁹ Kamphuis, *supra* note 33. The alleged violations relate to domestic legislation, the Peruvian Constitution, the ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries* and the OAS *American Convention on Human Rights*.

⁷⁰ For example there is evidence of high-level corruption between the Fujimori government and Yanacocha's principle shareholder Newmont: Jane Perlez & Lowell Bergman, "Tangled Strands in Fight Over Peru Gold Mine" (Series: *The Cost of Gold: Treasure of Yanacocha*) *New York Times* (25 October 2005).

⁷¹ See Dirven in Bebbington, *et. al., supra* note 5 at 36.

⁷² Anthony Bebbington, *et. al.*, "Mining and social movements: struggles over livelihood and rural

essentially grassroots uprisings of local Campesino Communities affected by Yanacocha's activities.

Two high profile protests are relevant. In 2004 a Campesino led general strike and road blockade occurred in the city of Cajamarca with ten thousand urban and rural residents engaging in sustained protest for a period of two-weeks.⁷³ The size and strength of the protests eventually forced Yanacocha to withdraw its planned expansion to a nearby mountain called Quilish. In 2006, another protest against Yanacocha sparked in the rural area of Combayo. Approximately one hundred Campesinos blockaded Yanacocha's use of a local highway while 500 Campesinos protested peacefully in the town square. In response, Yanacocha deployed almost 200 armed officers, consisting of a mixture of Forza officers and off-duty police officers in the employ of Yanacocha pursuant to its private agreement with the police force.⁷⁴ In the first few days of what became weeks of protest, Yanacocha's security forces shot and killed a Campesino protestor.⁷⁵ In an investigation of Forza's warehouse, located on Yanacocha's property, authorities allegedly found "war ammunition".⁷⁶ The possession of war

weapons ammunition by private security companies is illegal under the *Private Security Services Act* and a violation of the Peruvian Constitution.⁷⁷

In each of the above instances of political deadlock between Campesino protestors and Yanacocha, state officials called upon members of the local NGO GRUFIDES to mediate.⁷⁸ GRUFIDES was awarded the 2004 National Prize in Human Rights for its role in contributing to the peaceful resolution of the Quilish conflict. However, the rise in Campesino organizing in Combayo in 2006 heralded the escalation of "*Operación Diablo*" a systematic program of constant digital surveillance, intimidation, death threats and defamation, primarily targeting GRUFIDES personnel, but also spanning to include approximately 30 other related local environmentalists and Campesino leaders.⁷⁹ Later that same year, hit men murdered one of the Campesino leaders identified in the surveillance program as a "threat to Yanacocha".⁸⁰

The Peruvian justice system has refused to prosecute the perpetrators of *Operación Diablo*.⁸¹ In 2009 GRUFIDES personnel filed a petition with the Inter-American Commission on Human Rights, alleging that the Peruvian State has violated its obligations under the *American Convention on Human Rights* to prevent and

territorial development in the Andes" (forthcoming) *World Development*.

⁷³ Lisa J. Laplante & Suzanne A. Spears, "Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector" (2008) 11 *Yale Human Rights & Development Law Journal* 69 at 104.

⁷⁴ "Yanacocha anuncia suspensión total de sus actividades" *La República* (28 August 2006); Edgard Jara & Herbert Holguín "Han tomado una decisión apresurada" *La República* (29 August 2006).

⁷⁵ Ángel Páez & Wilson Castro, "Forza' no ha sido exculpada" *La República* (8 December 2006) [Páez & Castro]; Milagros Salazar, "El último guardián de las aguas" *La República* (10 September 2006).

⁷⁶ Páez & Castro, *ibid.*

⁷⁷ *Political Constitution of Peru, 1993*, art. 175.

⁷⁸ Milagros Salazar "Yanacocha amenaza con paralizar todas sus operaciones si continúan protestas" *La República* (28 August 2006).

⁷⁹ Boyd, *supra* note 49.

⁸⁰ *Ibid.*; "A Un Año del Asesinato del Líder Ecológico Esmundo Becerra" (31 October 2007) "El Maletero" *Red Verde Cajamarca*, online: <http://caballeroredverde.blogspot.com/2007/10/un-ao-del-asesinato-del-lider.html>.

⁸¹ Quinta Fiscalía Provincial Penal de Cajamarca, *Resolución N° 76-2007-MP-5FPPC* (21 May 2007); Primera Fiscalía Superior Penal de Cajamarca, *Resolución N° 111-2007-MP-1FSEP-CAJ*, Ingreso N° 2006-495 (6 June 2007).

sanction these crimes.⁸² The petition documents the overwhelming evidence that Forza implemented *Operación Diablo* pursuant to its security services for Yanacocha. This includes hundreds of photographs of GRUFIDES personnel and other activists, who are also featured in a PowerPoint presentation entitled “Existing Threats to Yanacocha 2006”. Further evidence includes police-styled surveillance reports that document the activities of these activists. These reports and photographs were produced by employees of a subcontracted security company who directed this intelligence to a Forza manager “in accordance with the terms of *Operación Diablo*”.⁸³ Finally, there is documentation of payment for service between Forza and personnel from the subcontracted company. The GRUFIDES petition also documents the specific acts of complicity of the Peruvian police force with *Operación Diablo*.⁸⁴

The Business Track Case

Business Track was a private security company officially registered in 2004 with the ostensible purpose of offering counterespionage and information security such as debugging telephone lines and information technology systems.⁸⁵ A retired military Capitán, who served under the Fujimori regime, founded the company, which employed active and

retired military officers.⁸⁶ The clients listed on the Business Track website included oil, mining and gas companies as well as a number of private security firms, such as Forza, that primarily provide security services to companies in these extractive industries.⁸⁷ In early 2009, Peruvian authorities arrested Business Track managers and employees on charges of illegally tapping telephone conversations, bugging offices, and intercepting emails on behalf of third parties.

The illegal operation fell in the wake of an oil-kickback scandal. Business Track allegedly recorded a discussion between a senior state official and a high profile lobbyist regarding payments in return for favoring a certain Norwegian company’s bid in a petroleum exploration auction. The contract was subsequently awarded to the same Norwegian company.⁸⁸ Business Track allegedly sold the recorded conversation to a competitor company who then leaked the audio file to the press.⁸⁹ The scandal affected some of the highest officials in the Peruvian government and Business Track personnel are now being prosecuted. The illegal surveillance company apparently made a political miscalculation in its pursuit of intelligence on behalf of transnational corporations.

Following the arrest of Business Track personnel, the prosecution began to obtain victim statements while it reviewed and cataloged the enormous quantity of audio and electronic recordings of email, telephone and web-based conversations that were confiscated from Business Track

⁸² On file with the author.

⁸³ The reports were directed to a pseudonymed individual. This pseudonym corresponds to that of a Forza manager as set out in Forza’s operations manual at the time. Also see Boyd, *supra* note 49.

⁸⁴ Specifically, police returned all evidence to the known perpetrators. Police were also filmed allegedly facilitating the escape of an accused perpetrator from police custody.

⁸⁵ Ángel Páez, “Rights-Peru: Spying on Social Movements” *InterPress Services* (12 March 2009) [Páez].

⁸⁶ Carla Salazar, “Peru naval officers arrested for illegal wiretaps” *The Associated Press* (9 January 2009) [Salazar]; Criminal Court Resolution, *infra* note X.

⁸⁷ Páez, *supra* note 85.

⁸⁸ “Oil contract scandal shakes Peru” *BBC News*.

⁸⁹ Salazar, *supra* note 86.

personnel.⁹⁰ This process revealed that only about 20% of Business Track's surveillance information related to possible criminal activity.⁹¹ The vast majority of the illegal surveillance was undertaken of citizens as well as private and public institutions in relation to questions of security or matters of national interest.⁹² Further, the confiscated audio files are dated beginning in the early 1990s, during the Fujimori era.⁹³ On the basis of these dates, it appears that the military intelligence personnel who founded Business Track took their intelligence files with them upon retiring from military service after the fall of the Fujimori government.

The evidence made public by the Court to date reveals that a significant number of the victims, from the 1990s onward, are human rights activists, mining activists and grassroots community organizations, as well as several lawyers' collectives,⁹⁴ including FEDEPAZ, the NGO that provides on-going legal support to the Campesino victims of torture in the *Majaz Case*.⁹⁵ The investigation also revealed that GRUFIDES was also heavily surveilled. Numerous recordings were found of telephone calls made from the GRUFIDES office between October 2006 and February 2007. Specifically,

conversations were recorded between GRUFIDES personnel and activists from mining affected Campesino Communities. Electronic files were also found with annotations pertaining to the personal email and telephone numbers of GRUFIDES personnel.⁹⁶

A 2009 study by the International Working Group on Indigenous Affairs (IWGIA) observed that the scandal has caused otherwise opposing political forces to align in order to prevent an investigation into Business Track's client base.⁹⁷ These political forces are the Fujimori political camp and the government of the day. As noted above, while the Business Track case first broke in relation to the apparent corruption of the current government, the files confiscated also include recordings of communications made by civil society members made during the Fujimori era through to the present. The IWGIA's concerns about the investigation in the Business Track case seem to have been borne out. After almost a year and a half of reviewing Business Track's audio files, at the end of July 2010 the Criminal Court Judge issued her final decision regarding the judicial investigation.⁹⁸ The 1,135 page decision is essentially a recitation of the 1,300 pieces of evidence reviewed. The key outcome of the report is that the Judge refused to authorize the Prosecutions Office to commence an investigation into the identity of Business Track's clients, in other words, the individuals and institutions that paid for its telephone tapping and email hacking activities.⁹⁹ Ironically, the Judge reasoned

⁹⁰ Exp. N° 527-09, Thirty-Fourth Criminal Court of Lima, *Resolution* (30 November 2009) [Criminal Court Resolution].

⁹¹ "¿Para quién trabajaba Business Track?" *La Republica* (23 August 2009).

⁹² *Ibid.*

⁹³ Criminal Court Resolution, *supra* note 90.

⁹⁴ This includes but are not limited to: el Equipo de Promoción y Desarrollo de Ica, la Asociación Civil Foro Democrático, el Instituto para una Alternativa Agraria, la Asociación Pro Derechos Humanos, la Fundación Ecuémica para el Desarrollo y la Paz, el Instituto Peruano para los Derechos Humanos, y el Estudio para la Defensa de los Derechos de la Mujer.

⁹⁵ Criminal Court Resolution, *supra* note 90.

⁹⁶ *Ibid.*

⁹⁷ UN International Work Group for Indigenous Affairs, "Country Report: Peru" in Kathrin Wessendorf, ed., *The Indigenous World 2009* (IWGIA: Copenhagen, 2009) 161 at 172 [IWGIA].

⁹⁸ "Juez Martínez presenta informe final de Business Track" *La Republica* (27 July 2010).

⁹⁹ *Ibid.*

that such an investigation would be *premature*. As such, to date there is no indication that Business Track's powerful clients, among them Forza and a number of transnational mining corporations, will be subject to a criminal investigation. Finally, it should be noted that there have been numerous allegations that the evidence was tampered with during the judicial investigation and a Commission has been struck to investigate these allegations.¹⁰⁰

Beyond the politics and the complexities of the Business Track investigation, the surveillance evidence documented to date is directly relevant to the *GRUFIDES Case* now before the Inter-American Commission on Human Rights. It is undisputed that at the very least Business Track tapped GRUFIDES during the height of *Operación Diablo*. It is further documented that Forza was a client of Business Track. As detailed in the previous section, the *GRUFIDES Case* alleges that Forza was the perpetrator of *Operación Diablo*. Thus, taking the *GRUFIDES Case* into consideration together with what is publically known of the *Business Track Case*, at least two strong inferences arise. First, there is reason to believe that Forza contracted Business Track pursuant to the security services it provides to Yanacocha. Second, there is a strong indication that the surveillance information collected by Business Track was ultimately used by Forza to advance the objectives of *Operación Diablo*, namely the persecution of activists working with Communities negatively affected by Yanacocha's mining activities.

¹⁰⁰ "Jueza Martínez asegura que USBs no fueron cambiados en dependencias judiciales" *La Republica* (16 July 2010).

THE LEGAL ARRANGEMENT OF IMPUNITY

To the extent that systems of international and national law fail to bring the perpetrators of human rights violations to justice, impunity becomes a legal and moral issue. The Forza case study tells a story of impunity for private security companies and public police officers working in the service of transnational mining companies in Peru. Impunity refers to the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account in legal proceedings for the reason that they are not subject to an inquiry that might lead to their being tried and, if found guilty, sentenced to appropriate penalties and to make reparations to their victims.¹⁰¹

In order to confront impunity, justice advocates must begin with a sustained study of the legal mechanisms that facilitate it. Fully examining the shortcomings of the present arrangement of law is a crucial first step toward meaningfully contributing to debates regarding law reform, transnational corporations and human rights. This issue has been considerably contentious at the international level. For example, the United Nations the agenda on the issue of transnational corporations and human rights has been reincarnated several times in the last two decades.¹⁰² In this context,

¹⁰¹ Diane Orentlicher, "Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher" to the United Nations Commission on Human Rights. UNESCOR, 61st Sess., 17th Item, Un Doc. N° E/CN.4/2005/102/Add.1 (2005).

¹⁰² Some examples are: (1) the UN Code of Conduct for Transnational Corporations, UN Doc. E/1990/94 (1990); (2) the Global Compact, UN Doc. SG/SM/6448 (1999); (3) the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); and (4) the

the following section reviews the *de jure* international and national systems of law that govern Forza, but that have been *de facto* ineffective in preventing or sanctioning the violations alleged in the above case study.

Domestic Law: the Global Gap

The legal system in Peru has failed to initiate proceedings against Forza in any of the cases reviewed. This is arguably due to the limitations created by a politicized prosecutorial system in a context where there is no political will to hold Forza to account. In the *Majaz Case* the criminal investigation of the police and Forza officers was only initiated under pressure from local human rights lawyers, over three years after the incidents. The prosecutor subsequently closed the investigation twice in spite of a preponderance of evidence. While the investigation was reopened each time after appeals made by local lawyers, five years after the incidents of torture and abuse the perpetrators have yet to be charged or prosecuted. In the *GRUFIDES Case* the criminal investigation of Forza and Yanacocha followed a similar pattern, although in this case the appeals made by local lawyers against the prosecutor's decision to close the investigation were ultimately unsuccessful. Finally, in the *Business Track Case*, the institutions, such as Forza, that allegedly paid for the surveillance of mining activists, including

creation of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations in 2005 and renewed in 2008: United Nations Office of the High Commission for Human Rights, *Human rights an transnational corporations and other business enterprises*, Human Rights Resolution 2005/69 (2005), chap. XVII, E/CN.4/2005/L.10/Add.17; United Nations Office of the High Commission for Human Rights, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, Human Rights Council Resolution 2008/7 (2008).

GRUFIDES, have yet to be officially named. Indeed, the Court has specifically decided not to investigate these institutions.

In light of the apparent failure of the Peruvian justice system, one must examine the capacity of other domestic systems to address the impunity alleged in the Forza case study. Indeed, Forza's operations in the cases at issue implicate corporate actors from a variety of jurisdictions. In the *Majaz Case*, the rights to the Rio Blanco mine site have passed from a British company to a Chinese consortium. In the *GRUFIDES Case*, an American company, a Peruvian company, and the International Finance Corporation (IFC) jointly own Yanacocha Mine. All of these companies employ Forza, owned by a Dutch corporation. Finally, Forza allegedly employed Business Track, a Peruvian company. Thus, Forza's alleged human rights violations are linked to the interests of corporations based in at least six jurisdictions: Peru, the United Kingdom, the United States, China, and the Netherlands as well as one truly international corporation, the IFC.

Notwithstanding the intersection of multiple domestic jurisdictions in the Forza study, it is nonetheless extremely difficult to address the issue of corporate impunity in the "home state" of these foreign investors. The first major challenge is doctrinal. In practice, many home state courts generally refuse to take jurisdiction over the harm investors have allegedly caused abroad.¹⁰³ The *Majaz*

¹⁰³ Forcese, Craig. "Deterring 'Militarized Commerce': The Prospect of Liability for 'Privatized' Human Rights Abuses" (1999-2000) 31 *Ottawa L. Rev.* 171. For example, in Canada the courts have adopted such a narrow approach to the doctrine of "forum *non-conveniens*" that only in the most unusual of cases would litigants be able to convince a Canadian court to take jurisdiction over the harm allegedly caused by a Canadian corporation abroad: *Recherches*

Case is a notable anomaly in that the UK Court took jurisdiction over the action. However, the company has challenged the existence of a legal basis of liability in UK law. While the Court found that the claimants had an “arguable case” (a low threshold), it further commented that the case undoubtedly had potential legal and factual weaknesses.¹⁰⁴

The *GRUFIDES Case* could theoretically be brought to an American Court under the *Alien Tort Claims Act* (ATCA),¹⁰⁵ although the litigants have yet to explore this option. However, the issue of jurisdiction is a formidable first obstacle for an action brought pursuant to the ATCA. As of 2004, there were approximately twelve active cases against corporate defendants under the ATCA, only three or four of which had survived a motion to dismiss on the basis of jurisdiction.¹⁰⁶ Indeed, most of the ATCA cases against private corporations have been dismissed for lack of jurisdiction and none have resulted in a final judgment against a US corporation.¹⁰⁷ This indicates that on the few occasions that claims manage to survive a jurisdictional challenge, they are either dismissed later on other grounds or settled out of court. Not surprisingly then, there have only been a handful of successful settlements

in cases brought under the ATCA for corporate human rights violations.¹⁰⁸ Thus, to date, a resolution by way of a settlement is a common feature of every one of the few cases that have been successful under the ATCA.

This observation makes it worthwhile to consider the dynamics of these types of settlements. If an NGO is litigating the claim, a settlement is often the only option. While NGOs generally do not stand to obtain financial gains from the settlement, they may lack the resources to pursue a trial especially when litigation may promise to draw out over a period of decades.¹⁰⁹ However, claimants are usually represented by law firms working for a substantial contingency fee. In these cases, settlement is likely the best business option for the firm. Conveniently enough, Yanacocha offers a case in point. In 2009 Yanacocha paid \$3 million to settle an action brought to US District Court by the Municipality of Cajamarca in reference to a spill of 151 kilograms of mercury in the area that occurred in 2000. The Municipality’s American lawyers took \$1.2 million of the settlement pursuant to a contingency fee and a further \$115 thousand in additional general costs. The Municipality was left with just over 1.66 million. This settlement was marked by significant

internacionales Quebec v. Cambior Inc., [1998] Q.J. N° 2553; *Bil’In (Village Council) v. Ahmed Issa Yassin*, [2009] Q.J. N° 9668, 2009 QCCS 4151. A recent claim in tort brought to the Ontario courts by the Ecuadorian victims of violence perpetrated by the private security officers of a Canadian mining company was successfully framed so as to avoid the *forum non conveniens* challenge. The judgment of the motion to dismiss that action will be released in April 2010.

¹⁰⁴ *Guerreiro*, *supra* note 39 at 23 and 26.

¹⁰⁵ 28 U.S.C. 1350 (2000).

¹⁰⁶ Harold Hongju Koh, “Separating Myth from Reality about Corporate Responsibility Litigation” (2004) 7 *Journal of International Economic Law* 263 at 298.

¹⁰⁷ *Ibid.* at 269-70.

¹⁰⁸ Centre for Constitutional Rights, *Statement of the Plaintiffs’ Attorneys in Wiwa v. Royal Dutch/Shell, Wiwa v. Anderson, and Wiwa v. SPDC* (8 June 2009) at 2 online: http://ccrjustice.org/files/Wiwa_v_Shell_Statement_of_the_Attorneys-1.pdf.

¹⁰⁹ Centre for Constitutional Rights, “Wiwa et al v. Royal Dutch Petroleum et al”, online: <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>. In its recent settlement of the Wiwa Case, the website of the Centre for Constitutional Rights stated that the settlement would “cover some of the legal costs and fees associated with the case” which the Centre had worked on for a period of thirteen years.

controversy, which involved allegations of fraud, misrepresentation and incompetence against the Municipality's American lawyers and their Peruvian counterparts.¹¹⁰ These examples are mentioned in part to flag the serious ethical questions that can arise when elite (Northern) lawyers purport to represent marginalized communities in Third World countries. But more directly, these examples highlight the fact that enormous financial costs can create a significant challenge to the viability of bringing home state litigation to trial and ultimately to obtaining a final judgement from the Court.

In sum, in addition to its inherent financial challenges and doctrinal hurdles, it appears that an endemic feature of civil law home state litigation against corporate defendants, at least in the United States, is the tendency to settle. A settlement is undoubtedly a positive achievement in the sense that it offers the victims some compensation. However, as a systemic practice in response to corporate human rights violations, settlements have some drawbacks. Private settlements most certainly do not "bring the perpetrators to account in legal proceedings" as the definition of impunity presented above requires. Further, the private nature of the settlement, and the location of the proceedings in the investor's home country, undoubtedly militates against national or international policy reform. Moreover, social movements are deprived of a court sanctioned public record of events that might bolster their moral and political claims for reform.

These observations raise serious questions about the capacity of home state litigation to address transnational corporate impunity and privatized coercion. It seems arguable that home state litigation is better positioned to

maintain the status quo of impunity rather than change it. Further, the presence of Chinese investors in the *Majaz Case* signals a new challenge created by the emerging shift in the character of the "home country". Foreign investment increasingly originates in countries where international lawyers have very little history of home state litigation and where new, and as yet unexplored, legal challenges undoubtedly reside to transnational corporate accountability. For example, China has become the second largest foreign investor in Peru while Peru is the number one destination in Latin America for Chinese investment.¹¹¹

The above review depicts the global gap in domestic regulation and law enforcement with regard to transnational corporations. The gap results from an array of deficiencies, patterned along North and South lines. Taken together, these deficiencies create the conditions of impunity for transnational corporations, even in the midst of systems of law ostensibly available to address the alleged violations. The Forza case study suggests that the conditions of impunity are particularly heightened where transnational corporations avail themselves of privatized and internationalized sources of coercive power. The following section will examine the extent to which current international law mechanisms are capable of filling in the global gap in domestic law.

International Law: Asymmetrical Enforcement and Privatized Norm Development

The Forza case study engages three key systems of international law: public international law, private international investment law, and private corporate

¹¹⁰ Documents are on file with the author.

¹¹¹ "Perú es el principal destino de la inversión china en América Latina al superar los US\$ 1.400 millones" *El Comercio* (21 April 2010).

social responsibility mechanisms. Each of these will be considered in turn.

There are two international public law human rights treaty administration systems of relevance to the study: the Organization of American States (OAS) system¹¹² and the United Nations (UN) Human Rights Committees.¹¹³ Both systems have articulated norms that are relevant to the Forza case study. As a bedrock principle, they have both recognized that the state has a fundamental duty to appropriately prevent, investigate and sanction all private and public actors that violate human rights.¹¹⁴ Further, they have declared that these violations become the state's responsibility in international law when it fails to fulfil this duty.¹¹⁵ A study of the norms and jurisprudence in these two systems concluded that the privatization of the use of force traditionally associated with public law enforcement arguably contravenes state obligations under international human rights treaties and customary international human rights law.¹¹⁶

There has been very little international public law jurisprudence that addresses human rights violations

committed jointly by the state, private security actors, and transnational corporations.¹¹⁷ Nonetheless, in principle, the norms referenced above appear to confront the problem of impunity depicted in the Forza study. These norms would obviously require the Peruvian State to carry out the criminal investigation and prosecution of those responsible in the *GRUFIDES* and the *Majaz Cases*. Further, they arguably establish that at least some elements of the various arrangements of private security services used by mining companies in Peru are unlawful under international human rights law.

However, in practice, both the OAS and the UN human rights treaty oversight systems lack enforcement capacity with regard to their state signatories. A positive decision made by either of these bodies would require voluntary implementation by the Peruvian State. This is of course circular because it returns the analysis precisely to the originating problem: the Peruvian State's explicit commitment to the privatization of security together with its evident lack of political will to address the human rights violations in the case study. It is widely acknowledged that the Inter-American system faces serious problems in achieving "meaningful and lasting implementation" of its reparations orders.¹¹⁸ Even without taking into account the influence of powerful foreign

¹¹² Of particular relevance is the *American Convention on Human Rights*.

¹¹³ Of particular relevance is the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

¹¹⁴ *Velásquez Rodríguez (Honduras)* (1988) Inter-Am. Ct. H. R. (Ser. C.) at paras. 172, 174; Human Rights Committee, General Comment N° 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para. 8.

¹¹⁵ *Ibid.*

¹¹⁶ Alex P. Kontos, "Privatization of State Security Services" (Paper presented to the Canadian Council on International Law 34th Annual Conference *Fragmentation: Diversification and Expansion of International Law*, October 2005) [unpublished] at 28.

¹¹⁷ August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed., *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) 37 [Reinisch].

¹¹⁸ It should be noted that even while the decisions of international tribunals may not often be directly implemented by state signatories, they still may have indirect and derivative positive effects on policy issues: James Cavallaro & Emily J. Schaffer, "Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas" (2004-2005) 56 *Hastings L.J.* 217 at 235.

investors and the dynamics of privatization, the obstacles to implementation are identified as a lack of political will and the powerful position of the armed forces and the police in Latin American countries.¹¹⁹

The current enforcement deficit inherent in public international human rights law is contrasted by the enforcement capacity of “international” foreign investment law.¹²⁰ Bilateral investment treaties (BITs) protect the interests of each of the foreign investors implicated in Forza’s alleged human rights abuses: the American company Newmont in Yanacocha, the Dutch company Securitas in Forza, and formerly, the British company Monterrico in Rio Blanco.¹²¹ Yanacocha’s investors further benefit from a private investment contract.¹²² The terms of the applicable BITs create enforceable rights for investors through a system of international private arbitration tribunals that can impose financial penalties on the offending state. A study of the BITs applicable to four Andean countries, including Peru, concluded that they present major fiscal risks to governmental decision-making in the extractive sector by dramatically shifting political bargaining power in favour of transnational firms and against other

social interests that stand to benefit from measures to regulate extractive industry investors.¹²³ Since these BITs do not create any corresponding human rights responsibilities, they are clearly unable to assist with the problem of impunity in the Forza study. Rather, it is possible that they may strengthen the hand of investors to resist regulation aimed at addressing the conditions of impunity.

Finally, Forza is indirectly governed by an emerging patchwork of privatized human rights norms.¹²⁴ Forza’s multinational owner Securitas has signed the UN Global Compact,¹²⁵ a private-public policy initiative for businesses that are committed to aligning their operations with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.¹²⁶ Pursuant to the Global Compact, Securitas has agreed that its business should support and respect the protection of internationally proclaimed human rights and ensure that it is not complicit in human rights abuses.¹²⁷ However, according to its website the UN Global Compact is “voluntary and network

¹¹⁹ James L Cavallaro & S. Brewer, “Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court” (2008) 102 *American Journal of International Law* 768 at 788.

¹²⁰ For a critique of the colonial and Western origins of the foreign investment contract see: Muthucumaraswamy Sornarajah, “Economic Neo-Liberalism and the International Law on Foreign Investment” in Anghie, *et. al.*, *infra* note 137.

¹²¹ Gus Van Harten, “Policy Impacts of Investment Agreements for Andean Community States” (September 2008) [Van Harten].

¹²² Christian Aid, *Undermining the Poor: Mineral Taxation Reforms in Latin America* (September 2009) at 9, 16.

¹²³ Van Harten, *supra* note 121 at 33. Also see: Ibronke T. Odumosu, “The Law and Politics of Engaging Resistance in Investment Dispute Settlement” (Paper presented to the Third World and International Law (TMAIL III) Conference at Albany Law School, April 2007); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).

¹²⁴ Privatized human rights norms are self-regulated voluntary codes of conduct. They are not state regulated and are not mandatory: Reinisch, *supra* note 117 at 42-3.

¹²⁵ Securitas, Responsabilidad Social, online: <http://www.securitas.com/pe/es-pe/About-Us/Responsabilidad-Social/>.

¹²⁶ Overview of the UN Global Compact, online: www.unglobalcompact.org/AboutTheGC/index.html.

¹²⁷ See Principles 1 and 2 of the Global Compact: online: www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

based” and its “light and non-bureaucratic” governance framework is focused on promoting corporations’ capacity to *prospectively* conform to the Global Compact. As such, this initiative offers no mechanism for addressing the criminal behavior of Forza officers alleged in the *GRUFIDES* and *Majaz* Cases.

Yanacocha, Forza’s employer in the *GRUFIDES Case*, is governed by the most celebrated private human right mechanisms. Yanacocha’s majority shareholder, Newmont, has directly signed onto: (1) the UN Global Compact; (2) the Global Reporting Initiative; (3) the Voluntary Principles for Security and Human Rights in the Extractive Industry; and (4) the Position Statement on Mining and Indigenous Peoples of the International Council on Mining and Metals (ICMM). Due to Newmont’s status as an American company, Yanacocha would also be governed by the corporate responsibility regime of the Organization for Economic Cooperation and Development (OCED). Finally, because of the IFC’s share in Yanacocha, the human rights policies pertaining to the IFC are applicable. Of these mechanisms, the OECD, the ICMM, the Voluntary Principles, and the IFC all permit the submission of complaints. The outcomes of complaints made against Yanacocha under the Voluntary Principles and IFC mechanisms will be reviewed here.

Since 2000, three complaints have been filed with the IFC Office of Compliance/Advisor Ombudsmen (CAO). While these complaints do not directly relate to Forza, it is nonetheless instructive to evaluate how they have fared. In general, the complaints alleged that Yanacocha had not made good on its commitments to help the victims of the mercury spill (referenced in the previous section), and that the Mine was adversely affecting local communities in a myriad of ways. However, each of the three CAO

complaints brought against Yanacocha lacked a conflict mediation component and none of them have entered into the compliance or the follow up phases of the CAO process.¹²⁸ Further, there is no indication from the information presented on the CAO website that the substance of the complaints was ever successfully addressed. By August 2006, all three of the complaints had been closed.

The CAO had attempted to address two of the three complaints through the creation of a “Dialogue Roundtable” in 2001. At the time, this initiative was a celebrated innovation for the CAO. Yet a 2005 independent evaluation of the Roundtable questioned its capacity to serve as a dispute resolution mechanism and observed that it had failed to respond to a number of key conflicts in its midst.¹²⁹ Due in part to this inaction, the evaluation concluded that its the Roundtable had “never been able to gain the legitimacy and broad community acceptance that would enable it to [help ameliorate] the tension, distrust, and volatility that pervade the relationship” between Yanacocha and the community.¹³⁰ These conclusions are important because, at a minimum, to resolve the issue of impunity at the heart of the Forza case study the CAO would have to engage in public fact finding and conflict mediation between GRUFIDES, Forza and Yanacocha such that the

¹²⁸ Office of the Compliance Ombudsmen Advisor, CAO Cases, Latin America & Caribbean, online: http://www.cao-ombudsman.org/cases/default.aspx?region_id=3.

¹²⁹ *Ibid.* at 26-9.

¹³⁰ Manuel Rodríguez, *et. al.*, *Report of the Independent Evaluation of the Mesa de Dialogo y Consenso CAO-Cajamarca*, Prepared for The Office of the Compliance Advisor/Ombudsman (CAO) of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), (May 2005).

perpetrators of the alleged violations would be “brought to account”.

One testament to the CAO’s unsatisfactory resolution of the three complaints against Yanacocha is the fact that in the wake of these complaints, and their closure, the events documented by the *GRUFIDES Case* ensued. In 2004 and again in 2006 there were mass protests against Yanacocha, resulting in the death of a protestor, the murder of a Campesino leader, and the subsequent persecution of GRUFIDES personnel. The conduct of Yanacocha’s security forces during these events resulted in another voluntary human rights proceeding, initiated in 2007 by Oxfam America against Newmont under the Voluntary Principles for Security and Human Rights. The Oxfam complaint was not formulated by lawyers, rather it consisted of a general antidotal description of many of the allegations that would later be documented and articulated in legal terms in the *GRUFIDES Case* presented to the InterAmerican Commission for Human Rights.

In response to the Oxfam complaint, Newmont agreed to an independent review of Yanacocha’s security and human rights policies and procedures. The 2009 report of the independent reviewer¹³¹ recommended that Yanacocha create a Risk Assessment and Conflict Resolution Office and commit to “drastically investigate and sanction” violations of the Voluntary Principles and to urge the justice system authorities to do the same. Further, it recommended that Yanacocha-paid police officers no longer carry firearms and that Yanacocha collaborate with the police force to train these officers to respect human rights. Finally, the review recommended the termination of

Yanacocha’s contract of service with Forza.

A critical assessment of the independent review suggests that the appeal to the Voluntary Principles failed to effectively address the issue of impunity and privatized coercion portrayed by the Forza case study. First, the review failed to specifically address the outstanding criminal allegations raised by the *GRUFIDES Case* and pertaining to *Operación Diablo*. Indeed, the criminal investigation, which had been closed by the time the review, was not even specifically mentioned. Second, the review did not critique the model of privatized force. It did not question Yanacocha’s economic support for the police force. Rather, it further conflated the roles of Yanacocha and the justice system by suggesting, first, that Yanacocha should take a role in the training of its police employees, and second, that Yanacocha should create an internal adjudication process for addressing criminal allegations against its employees. Third, to the extent that the review made proposals that could partially address the issue of impunity or privatized force, these have not been implemented. In the year since the review was issued, Yanacocha has not prohibited its contracted police officers from carrying weapons, it has not terminated its contract with Forza, it has not urged the authorities to investigate the criminal allegations raised in the *GRUFIDES Case*, and it has not disclosed or clarified its role in *Operación Diablo*.

Turning to the *Majaz Case*, the British company Monterrico was not governed by any of the corporate social responsibility mechanisms that Newmont has purported to adopt.¹³² This is likely

¹³¹ Only a five page executive summary of the review is publicly available: Costa, *supra* note 25.

¹³² While Monterrico was not a signatory to any voluntary agreement, it would have been

because it was a junior mining company, which are known for their lack of capacity to cultivate a long-term relationship with local communities.¹³³ These companies generally have a short life span devoted to obtaining and selling mineral exploration rights.¹³⁴ This is exactly what has occurred in the *Majaz Case*, a Chinese consortium now owns Monterrico. This consortium has likewise not signed onto any of the aforementioned international corporate social responsibility regimes.

This application of the available international law mechanisms to the Forza case study highlights the widely observed asymmetry in the enforcement of international law in favour of transnational corporate economic interests. The legal regimes in place to protect foreign investment interests are strong while the institutions that administer international human rights conventions continue to lack enforcement capacity, particularly with regard to the activities of transnational corporations. Enforcement of these conventions continues to depend on the political will of the Peruvian State.

At the same time, there are a number of corporate social responsibility mechanisms that are engaged by the Forza case study. Of these, four could be activated in relation to Yanacocha and two have already been activated. However, the outcomes of these activations suggest that these voluntary mechanisms do not have the capacity to address the issue of corporate impunity. Corporate social responsibility mechanisms do not seem to be oriented toward two key aspects of the definition of impunity, they do not promise to “bring the perpetrators to account” nor

have they been able to make reparations to the victims. Perhaps most alarmingly, there is cause to wonder, particularly on the basis of the Voluntary Principles example, whether or not the use of these mechanisms may actually perpetuate the conceptual and practical conflation of private and public coercive power.

CONCLUSION: A METHODOLOGICAL REFLECTION

There are a range of human rights issues that arise in domestic and international law as a result of transnational corporate resource extraction in Peru. These include communities’ right to land, their right to free prior and informed consultation and perhaps even consent to extractive activity, and their right to an equitable share in the benefits of resource extraction.¹³⁵ However, the Peruvian State, under the pressure of capital exporting countries and international financial institutions,¹³⁶ has institutionalized the primacy of foreign investors’ rights to the detriment of its most marginalized citizens. The basic land, social and economic rights of Campesino and Indigenous Communities

automatically covered by the OECD Guidelines since the United Kingdom is a member country.

¹³³ Bebbington, *et. al.*, *supra* note 5, at 20, fn 33.

¹³⁴ *Ibid.* at 14.

¹³⁵ *Case of the Indigenous Community of Sanhoyamaxa (Paraguay)* (2006) Inter-Am. Ct. H.R. (Ser. C) N° 146; *Case of the Indigenous Community of Yakye Axa (Paraguay)* (2005) Inter-Am. Ct. H.R. (Ser. C) N° 125; *Case of the Community of Mayagna (Sumo) Awas Tingni (Nicaragua)* (2001) Inter-Am. Ct. H.R. (Ser. C) N° 79; *Mary and Carrie Dann (United States)* (2002), Inter-Am. Comm. H.R. Report N° 75, Case 11.140; *Maya Indigenous Communities of the Toledo District (Belize)* (2004), Inter-Am. Comm. H.R. Report N° 40, Case 12.053.

¹³⁶ For an overview of some of the interventions of the IMF and World Bank in the Peruvian mining sector, see: Gerardo J. Munarriz, “Rhetoric and Reality: The World Bank Development Policies, Mining Corporations, and Indigenous Communities in Latin America” (2008) 10 *International Community Law Review* 431 at 436-41.

are being systematically violated in favour of laws and practices that promote resource extraction and free trade.¹³⁷ A broad and powerful social movement has been consolidated in response. This movement finds its expression in the interconnected work of certain NGOs, community organizations, and networks as well as in protest marches and road blockades.

In this context, this case study has undertaken a particular methodological approach. First, it identified the legal arrangements and practices that have contributed to the reorganization and privatization of coercive power in Peru. In summary, these are: (1) the increase in private security officers relative to the police officers, (2) the high levels of participation of police and military officers in private security companies, and (3) the formation of private security contracts between the police force and transnational mining companies.

Next, this article investigated how these legal and practical security arrangements are mobilized in reference to social movements working on human rights issues in the area of resource extraction. As such, the allegations in the *Majaz Case*, the *GRUFIDES Case*, and the *Business Track Case* were summarized. Each of these cases points to the participation of Forza's private security officers (as well as police officers in the *Majaz Case*) in the systematic persecution of social movement leaders on behalf of transnational mining companies seeking to protect their investment interests. Further, attention was paid to the procedural dimensions of each case. This information is important because it indicates that, at least to date, none of the

legal efforts associated with each case have succeeded in bringing the perpetrators of the alleged violations to account for their actions.

Finally, this study identified the systems of national and international law that govern the transnational companies associated with Forza and the human rights violations alleged. At the domestic level, these consist of the Peruvian domestic legal system and the investor's home state legal system. At the international level these consist of the human rights treaty system, the foreign investment regime, and voluntary corporate social responsibility mechanisms. Each of these mechanisms or systems of law was examined in terms of its applicability to the Forza case study and its potential efficacy for addressing the issue of impunity. This process helped to illuminate the practical consequences, in the context of a particular case study, of the global gap in domestic law and the asymmetrical enforcement capacity of international law. Unfortunately, it appears that the conditions of impunity are maintained in the face of these systems of law because they are unable to confront impunity's political and economic underpinnings.

In this respect, the Forza case study articulates with the fundamental concern of Third World Approaches to International Law (TWAIL) scholars that the international legal system works to disempower Third World¹³⁸ peoples and intensify global inequality.¹³⁹ TWAIL scholars have argued that Third World

¹³⁷ OAS, Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OR OEA/Ser.L/V/II.106, Doc. 59 rev (2000); IWGIA, *supra* note 76.

¹³⁸ TWAIL scholars have resurrected the term "Third World" on the basis that Asia, Africa and Latin America share a common history of colonialism and a common present-day experience of underdevelopment and marginalization.

¹³⁹ Antony Anghie, *et al.*, eds., *The Third World and International Order: Law Politics and Globalization* (Leiden: Brill Academic Publishers, Martinus Nijhoff, 2003) [Anghie, *et al.*]

social movements represent the “cutting edge of Third World resistance to antidemocratic and destructive development”.¹⁴⁰ They have declared that international lawyers must “assist the ongoing global movement for global justice” in whatever ways possible.¹⁴¹ To this end, they have called for the development of “a theory of resistance” that would enable lawyers to respond appropriately.¹⁴²

This study works toward developing a methodological approach to studying the issue of impunity with the potential to inform theories of resistance. It endeavours to map the coercive arrangements of power that threaten to curtail or even destroy Third World social movements. This mapping begins from the experience of particular movements in particular political moments and documents the real life violations that threaten the political spaces that make these movements possible.

This methodology is oriented toward identifying the meaningful and strategic legal options that movements can avail themselves of under current legal arrangements. It engages critically with national and international systems of human rights law in search of a reform agenda that places the issue of effective enforcement at the centre of international law discussions on mechanisms for protecting rights. In this vein, this methodology also reveals the potential strategic pitfalls of engaging with particular systems of law or regimes. The fact that well-intentioned engagement with certain mechanisms may have inadvertent consequences suggests that

international legal scholars and lawyers who are interested in supporting mining related social movements must reflect on the appropriate legal and political approaches to addressing institutionalized and internationalized impunity.

Particularly, advocates must carefully consider the potential risks associated with the activation of privatized human rights mechanisms such as voluntary corporate social responsibility regimes. Experience suggests that it may be difficult to engage with these mechanisms without perpetuating or reinforcing the legal and practical arrangements of privatized coercion that form the structural underpinnings of the human rights issues in question. The orientation of the study around the concept of impunity is an example of an approach that organizes legal work and scholarship according to the question of “what legal infrastructure would best respond to the needs of social movements reacting to the human rights violations generated by the current system of foreign investment?” rather than, “how can we efficiently regulate the investor to respect human rights?”. By focusing on the needs of communities rather than the activities of the investor, legal activism and law reform may be more likely to shift power toward communities.

Of the many issues facing Third World social movements, the issue of systemic impunity for the criminal behaviour perpetrated to the benefit of foreign investors deserves serious attention from progressive international lawyers. These circumstances constitute a moment where national and international systems of law fail to respond to grassroots resistance to inequitable economic relations. Just as this is of deep concern, if international lawyers unite forces with these movements, these circumstances also represent a moment of intense opportunity for change.

¹⁴⁰ Balakrishnan Rajagopal, “International Law and Third World Resistance: A Theoretical Inquiry” in *ibid.* at 162 [Rajagopal].

¹⁴¹ Bhupinder Chimni, “A Just World Under Law: A View from the South” (2006-2007) 22 *International Law Review* 199 at 220.

¹⁴² Rajagopal, *supra* note 140 at 162.

