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

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**FOREIGN INVESTMENT AND THE
PRIVATIZATION OF COERCION: A CASE
STUDY OF THE FORZA SECURITY
COMPANY IN PERU**

*Charis Kamphuis**

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INTRODUCTION

This Article documents the exercise of coercive power¹ by public police services and private security companies in response to the needs of foreign-owned mining companies in an environment of social protest and opposition. It describes how a particular transnational private

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1. The term “coercive power” refers to two key sets of practices: (1) the armed protection of private and state property, and (2) practices of surveillance, harassment, and intimidation.

security company has been confronted with a broad international social movement of human rights and environmental activists who are simultaneously invoking multiple regimes of domestic and international law in an effort to hold the company to account for its actions. Peru offers an important case study with regard to these issues because it is a relatively poor developing country dominated by foreign-owned mining activity. Between 1990 and 2000, former president Alberto Fujimori initiated the neo-liberalization of the Peruvian economy² through a series of political and economic legislative reforms that sought to integrate the country into the global economy and reduce the presence of the state in all areas of economic and social policy.³ In terms of the resource extraction sector,⁴ this included the complete privatization of mineral production⁵ and the restructuring of the country's legal regimes to create favorable conditions for foreign investors. As a result, in 2001 the International Monetary Fund evaluated Peru as one of the national economies most open to foreign investment in the world.⁶ Following the fall of Fujimori in 2000, subsequent governments⁷ advanced policies that continued the neo-liberalization of Peru's economic and legal order.⁸ By 2006, Peru was

2. See Kurt Gerhard Weyland, *Neoliberalism and Democracy in Latin America: A Mixed Record*, 46 *LATIN AM. POL. & SOC'Y*, Spring 2004, at 135–41.

3. Jeffery Bury, *Neoliberalismo, Minería y Cambios Rurales en Cajamarca* [*Neoliberalism, Mining and Rural Change in Cajamarca*], in ANTHONY BEBBINGTON, *MINERÍA, MOVIMIENTOS SOCIALES Y RESPUESTAS CAMPESINAS* [*MINING, RURAL SOCIAL MOVEMENTS AND ANSWERS*] 49, 50–56 (2007).

4. The term “resource extraction sector” refers to the economic actors and activities that extract resources such as minerals, oil, natural gas, or lumber from the natural environment.

5. 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 Compania Minera Antamina's Operations in Peru*, 39 *J. BUS. ETHICS* 247, 258 (2002).

6. Bury, *supra* note 3, at 58–59.

7. This trend ostensibly changed in 2011 when Ollanta Humala was elected President of Peru on a platform that promised to introduce regulatory measures to promote a more equitable distribution of wealth, especially in the area of resource extraction. Stephanie Boyd, *Business as Usual: Peru's New President Leaps to the Right*, *NEW INTERNATIONALIST MAG.* (Dec. 7, 2011), <http://www.newint.org/features/web-exclusive/2011/12/07/peru-new-president-mine-strikes>. However, by the close of 2011, Humala was already a major disappointment to his supporters on the political left due to his militarized response to social protests and his stance in favor of controversial resource extraction projects. *Id.*

8. For an overview of the reforms introduced by subsequent governments in the area of land law, see Pedro Castillo Castañeda, *El Derecho a la Tierra y los Acuerdos Internacionales: el Caso de Perú* [*Land Rights and International Agreements: The Case of*

one of the top mineral producing countries on the globe, with net project profits in the mostly foreign-owned mining sector totaling over seven billion dollars.⁹

A record level of social and environmental conflict matches these record profits.¹⁰ The majority of resource extraction conflicts relate to mining activities¹¹ and many of Peru's six thousand "Campesino Communities"¹² own or occupy land in areas affected by mining.¹³ These Communities are recognized in a legislative and constitutional framework that

Peru] CEPES (Oct. 2009), http://www.cepes.org.pe/apc-aa/archivos-aa/a01e3bc3e44a89cf3cd03d717396a20e/El_Derecho_a_la_tierra.pdf.

9. Alfredo C. Gurmendi, *The Mineral Industry of Peru*, in 2006 MINERALS YEARBOOK: PERU 15.1 (U.S. Dep't Interior & U.S. Geological Survey eds., 2009), available at <http://minerals.usgs.gov/minerals/pubs/country/2006/myb3-2006-pe.pdf>.

10. Anthony J. Bebbington & Jeffrey T. Bury, *Institutional Challenges for Mining and Sustainability in Peru*, 106 PROC. NAT'L ACAD. SCI. 17296, 17296 (2009) ("In 2007, the Peruvian Ombudsman's office recorded 78 conflicts in the country, 37 of which were socio-environmental in kind, and 33 related to mining; by 2009, it recorded 250 conflicts, of which 125 were socio-environmental in kind, and 89 related to mining."); see, e.g., Franklin Briceno, *Peru Cancels Mine After Police Kill 6 Protesters, Wound 30*, HUFFINGTON POST (Jun. 23, 2011, 11:34 PM), http://www.huffingtonpost.com/2011/06/25/peru-mine-protest-santa-ana-bear-creek_n_884587.html?view=screen; Rory Carroll, *Peru Declares Curfew after Bloody Clashes in Amazon Jungle*, GUARDIAN, June 8, 2009, at 17; Simon Romero, *As China Expands in Latin America, Tensions Fester At Its Mining Ventures in Peru*, N.Y. TIMES, Aug. 14, 2010, at A6; John Vidal, *'We Are Fighting For Our Lives and Our Dignity': Across the Globe, as Mining and Oil Firms Race For Dwindling Resources, Indigenous Peoples Are Battling To Defend Their Lands—Often Paying the Ultimate Price*, GUARDIAN, June 12, 2009, at 26; *Clash Over Peru Irrigation Project Kills One*, N.Y. TIMES, Sept. 17, 2010, at A8; Ruth Collins, *The Spoils of Peru's Mines: Peru is Profiting from Mineral Wealth, But Risks Foreign Investors Riding Roughshod Over the Rights of Indigenous Andean Peoples*, GUARDIAN (Aug. 21, 2010, 11:00 AM), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/aug/31/peru-mining-indigenous-rights>.

11. This is as opposed to hydrocarbon extraction, forestry, or other resource extraction activities. See DEFENSORÍA DEL PUEBLO, INFORME EXTRAORDINARIO: LOS CONFLICTOS SOCIOAMBIENTALES POR ACTIVIDADES EXTRACTIVAS EN EL PERÚ 77 (2007), available at <http://sinia.minam.gob.pe/index.php?accion=verElemento&idElementoInformacion=381&verPor=&idTipoElemento=37&idTipoFuente=477>.

12. 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. Decreto Ley No. 17716, Ley de Reforma Agraria [Agrarian Reform Law] ch. III, DIARIO OFICIAL EL PERUANO [EL PERUANO], 25 June 1969 (Peru), available at http://sisbib.unmsm.edu.pe/bibvirtualdata/libros/2007/legis_per/cap03.pdf.

13. ANTHONY BEBBINGTON ET AL., PERU SUPPORT GRP., MINING AND DEVELOPMENT IN PERU: WITH SPECIAL REFERENCE TO THE RIO BLANCO PROJECT, PIURA, at iv (2007) [hereinafter BEBBINGTON ET AL., MINING & DEV. IN PERU].

establishes communal property rights, autonomous communal self-government, and protected cultural institutions.¹⁴ As such, two common issues underlie many of the conflicts between Campesino communities and mining companies: the question of whether or not the affected communities consented to mining development and the concern that the wealth generated by mining has not sufficiently benefited local communities.¹⁵

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.¹⁶ These

14. Decreto Supremo No. 37-70-AG, Estatuto Especial de Comunidades Campesinas [Special Statute for Campesino Communities] 17 Feb. 1970 (Peru), available at http://sisbib.unmsm.edu.pe/bibvirtual/libros/2007/legis_per/contenido.htm; Ley No. 24656, 13 Apr. 1987, Ley General de Comunidades Campesinas [General Law of Campesino Communities] EL PERUANO, 14 Apr. 1987 (Peru), available at <http://www.cepes.org.pe/legisla/ley24656.htm>; Ley No. 24657, 13 Apr. 1987, Declaran de Necesidad Nacional e Interes Social el Deslinde y la Titulacion del Territorio de las Comunidades Campesinas [Declaration of the National Need and Social Interest of the Territory of the Campesino Communities] EL PERUANO, 14 Apr. 1987 (Peru), available at <http://www.cepes.org.pe/legisla/ley24657.htm>.

15. These issues have been central to each of the high profile mining related conflicts in Peru in the recent years including the Tambogrande conflict in 2002, see Boyd, *supra* note 7; José de Echave, *Canadian Mining Companies Investments in Peru: The Tambogrande Case and the Need to Implement Reforms*, COOPERACION, secs. 1–3 (Frank Berinstein trans., Apr. 2005), available at http://www.miningwatch.ca/sites/miningwatch.ca/files/Peru_case_study_0.pdf, the Quilish conflict in 2004, see THE DEVIL OPERATION (Guarango Cine y Video 2010), the Majaz conflict in 2005 and 2006, see Paola Tejada, [Interview] *A Closer Look into the Minera Majaz Mining Conflict*, INDYMEDIA.BE BLOG (Apr. 3, 2007, 5:54 PM), <http://www.indymedia.be/index.html%3Fq=node%252F8365.html>, the Combayo conflict in 2006, see Milagros Salazar, *Leaching Out the Water with the Gold*, IPS NEWS (Sept. 30, 2006), <http://www.ipsnews.net/news.asp?idnews=34805>, and the Bagua conflict in 2009, see Naomi Mapstone, *Bagua's Indigenous Protest One Year Later*, AM. Q. BLOG (June 7, 2010), <http://www.americasquarterly.org/node/1588>.

16. Mauricio Lazala, *Private Military and Security Companies and their Impacts on Human Rights in Contexts Other Than War*, Conference on Private Military Contractors in Latin America at the Havens Center (Jan. 2008), available at www.havenscenter.org/files/Lazala%20Paper_0.doc; see Chairperson-Rapporteur of the Working Grp. on the Use of Mercenaries as a Means of Violating Human Rights & Impeding the Exercise of the Right of Peoples to Self-Determination, *Rep. on the Mission to Peru*, U.N. Human Rights Council, ¶ 70, U.N. Doc. A/HRC/7/7/Add.2 (Feb. 4, 2008) (by José Luis Gómez del Prado) [hereinafter *Rep. on the Mission to Peru*], available at <http://www.unwg.rapn.ru/en/4/Country%20Visits/G0810419.pdf>; Charis Kamphuis, *Derecho y la Convergencia del Poder Público y el Poder Empresarial: La Desposesión Campesina y La Coerción Privatizada en el Perú*, 15 REVISTA LATINOAMERICANA DE DERECHO SOCIAL (forthcoming 2012) [hereinafter Kamphuis, *Derecho y la Convergencia del Poder Público y el Poder Empresarial*]. See generally Fred Schreier & Marina Capa-

practices, and their interface with international and domestic law, are examined in this Article. The Introduction 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.¹⁷ This section presents the allegations raised against Forza in three on-going cases: *Majaz*,¹⁸ *GRUFIDES*,¹⁹ and *Business Track*.²⁰ These cases depict the deep interpenetration of the economic and political power of foreign-owned mining companies, Forza, and the Peruvian justice system.²¹ By tracing the legal trajectories of each case, this Article reveals a pattern of impunity for foreign investors and their security companies.

Taking the discrete empirical context of the Forza case study as its reference, Part II studies impunity's legal contours by questioning how it is constituted in the midst of multiple systems of international and domestic law. At the domestic level, it discusses the legal mechanisms that have jurisdiction over the transnational actors profiled in the Forza case study. At the international level, it considers three distinct normative systems: public international human rights law, private international foreign investment law, and corporate social responsibility mechanisms. This overview provides insight into how the global gap²² in the domestic regulation of the transnational corporation and the enforcement of domestic

rini, *Privatising Security: Law, Practice, and Governance of Private Military and Security Companies* 39 (Geneva Ctr. Democratic Control of Armed Forces, Occasional Rep. No. 6, Mar. 2005) (listing how private security companies are employed to guard mines in many countries).

17. Forza is one of Peru's oldest and most powerful private security companies, recently purchased by Securitas, a transnational security services corporation. See *infra* notes 74–78 and accompanying text.

18. See Tejada, *supra* note 15.

19. See THE DEVIL OPERATION, *supra* note 15.

20. See Ministerio Público Fiscalía Superior Especializada en Criminalidad Organizada [Prosecutor's Office Organized Crime Specialist], Exp. No. 527–2009, Delitos: Intercepción Telefónica, Violación de Correspondencia y Asociación Ilícita para Delinquir, a Señor Presidente (Jan. 27, 2011) (Peru), available at http://www.justiciaviva.org.pe/webpanel/doc_int/doc17032011-165221.pdf [hereinafter Peru Prosecutor's Office].

21. See, e.g., THE DEVIL OPERATION, *supra* note 15.

22. The regulation of the corporation by states around the globe is uneven, such that in some spaces and places the corporation is subjected to effective regulation and enforcement, and in others regulation is weak, ineffective, or lacking. The effect is to produce “gaps” or zones across the globe where the corporation is regulated to a lesser degree by the state. Another term used to describe the same phenomena is “regime deficit.” See Shedrack Agbakwa, *A Line in the Sand: International (Dis)Order and the Impunity of Non-State Corporate Actors in the Developing World*, in *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW POLITICS AND GLOBALIZATION* (Antony Anghie et al. eds., 2003).

law, together with asymmetry in the enforcement of international law, function together to institutionalize and internationalize impunity in the Forza case study.

In view of the stark—and apparently totalizing—nature of the system of impunity described in Part II, this Article concludes by exploring the potential value of its own methodological approach. With this objective, Part III revisits the Forza case study in terms of a methodology of international lawyering and legal academic work on the issue of corporate impunity. The approach responds to some of the imperatives of certain critical international law scholars²³ and, most importantly, to the practical needs of social movements adversely affected by the privatization of coercive force in favor of foreign investors. This focus ultimately invites advocates to contemplate the possibility that the invocation of voluntary corporate social responsibility mechanisms may risk broader political pitfalls.

I. TRANSNATIONAL RESOURCE EXTRACTION AND THE PRIVATIZATION OF COERCION

A. Domestic Legal Framework and Practice

Academics doing research in diverse contexts have widely observed that the proliferation of private security companies is one consequence that flows from neoliberal law and policy reform and the reduction of public expenditure.²⁴ The findings of a recent report issued by a United Nations Working Group (“UNWG”)²⁵ suggest that this hypothesis is supported by the Peruvian experience.²⁶ Since sweeping neoliberal policy reforms were introduced in Peru in the early 1990s, the State has not in-

23. The specific authors referenced in Part III are Balakrishnan Rajagopal, Bhupinder Chimni, Martti Koskeniemi, and David Kennedy.

24. Bonnie Campbell, *Good Governance, Security and Mining in Africa*, 21 MINS. & ENERGY-RAW MATERIALS REP. 31, 35–37 (2006); Alexis P. Kontos, *'Private' Security Guards: Privatized Force and State Responsibility under International Human Rights Law*, 4 NON-ST. ACTORS & INT'L L. 199, 199–200 (2004) [hereinafter Kontos, *'Private' Security Guards*]; Mark Ungar, *The Privatization of Citizen Security in Latin America: From Elite Guards to Neighborhood Vigilantes*, 34 SOC. JUST. 20, 20 (2007); Robert P. Weiss, *From Cowboy Detectives to Soldiers of Fortune: Private Security Contracting and Its Contradictions on the New Frontiers of Capitalist Expansion*, 34 SOC. JUST. 1, 8, 9 (2007).

25. *Rep. on the Mission to Peru*, *supra* note 16, at 16.

26. See generally Kontos, *'Private' Security Guards*, *supra* note 24, at 199; Ungar, *supra* note 24, at 20.

creased the ranks of the public police force, while conversely the number of private security personnel has expanded tremendously.²⁷

The United Nations (“UN”) study estimated that in 2008 there were 100,000 private security guards in Peru, outnumbering the 92,000 public police officers.²⁸ It also concluded that approximately half of the private security guards in Peru work for companies in the informal sector.²⁹ While the report itself does not define the term “informal,” it can reasonably be assumed that the term refers to companies that have not registered their operations with the appropriate ministry. If this is the case, these companies essentially operate illegally, given that the applicable legislation requires registration.³⁰ The possibility that approximately half of the private security sector in Peru operates informally, and perhaps even illegally, suggests that the State may be either unable or unwilling to exercise effective regulatory control over the sector.³¹

The lack of formal regulatory control over the private security sector is contrasted by the UNWG study’s observation of the close informal 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.³²

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

In this context, the relevant provisions of the corresponding Peruvian legal regime are pertinent. In 1994, Fujimori’s neoliberal reforms included the introduction of Peru’s first law with the stated objective of regulat-

27. See *Rep. on the Mission to Peru*, *supra* note 16, ¶¶ 37, 39, 40, 44.

28. *Id.* ¶¶ 40, 44.

29. *Id.* ¶ 12.

30. All private security companies must register themselves in accordance with an array of administrative specifications. See Ley No. 28879, 17 Aug. 2006, Ley de Servicios de Seguridad Privada [Private Security Services Act] arts. 4, 23, EL PERUANO, 18 Aug. 2006 (Peru) [hereinafter Private Security Services Act (Peru)].

31. *Rep. on the Mission to Peru*, *supra* note 16, ¶¶ 12, 44.

32. *Id.* ¶ 40.

ing the private security services.³³ In 2006 the Private Security Services Act³⁴ ("the Act") replaced the initial 1994 law to form the current legislative context.³⁵

Perhaps not surprisingly, the Act facilitates police and military officers' access to employment in the private security sector.³⁶ The Ministry of the Interior is responsible for the regulation, control, and supervision of all three institutions³⁷ and authorizes the operation of privately owned Private Security Training Centers, which security personnel are required to attend.³⁸ However, police or military officers may bypass this training requirement because Centers are empowered to recognize the equivalency of police or military training.³⁹ The Act explicitly allows retired military or police officers to supervise private security companies⁴⁰ and does not prohibit these companies from employing actively serving police/military officers.⁴¹

While the Act facilitates the integration of the public security labor force into the private sector, it nonetheless imposes a certain division of labor on these officers as they cross between private and publicly paid positions.⁴² Private security companies are prohibited from performing functions within the jurisdiction of the military or the police, such as the investigation of crime and espionage.⁴³ However, despite this prohibition, in exceptional circumstances, private security officers may be required to support, collaborate with, and help the police force.⁴⁴ However, when doing so, the Act stipulates that these private officers do not acquire the legal status of public authorities.⁴⁵

The privatization of the Peruvian police force extends beyond the parameters of the Act. In 2009, a regulation was introduced by the national legislature that allows the National Director of the police force to enter into service provision agreements with private institutions, including

33. See Decreto Supremo No. 005-94-IN, 12 May 1994, Aprueban el Reglamento de Servicios de Seguridad Privada [Approval of the Regulation of Private Security Services], ch. XIII, EL PERUANO, 13 May 1994 (Peru).

34. Private Security Services Act (Peru), *supra* note 30.

35. *Id.*

36. *Id.*

37. *Id.* art. 3.

38. *Id.* art. 23.1(e).

39. *Id.* art. 27.3.

40. *Id.* art. 27.2.

41. See *id.*

42. *Id.*

43. *Id.* arts. 24(c)–(e), 29.

44. *Id.* art. 38.

45. *Id.* arts. 23.1(j), 28, 38.

transnational mining companies.⁴⁶ These agreements provide a framework whereby individual police officers provide services to private companies on their days off.⁴⁷

The Peruvian National Police force's website displays a scanned copy of one such agreement.⁴⁸ It is a 2009 contract signed by the General of the National Police Force and a representative of the Japanese-owned Santa Luisa Mining Company.⁴⁹ However, since this is the only publicly available copy of an agreement of this type, it is difficult to determine how widespread these agreements are in the extractive industry. The information gathered in an ongoing journalistic investigation⁵⁰ suggests that between 2008 and 2010 approximately thirty-three such agreements between the police force and transnational mining companies were in place across Peru.⁵¹ The terms of the agreements collected in this journalistic investigation⁵² are similar to those of the Santa Luisa agreement, described below, and they also coincide with what is publicly known

46. Decreto Supremo No. 004-2009-IN, 11 July 2009, Decreto Supremo que Aprueba el Reglamento de Prestacion de Servicios Extraordinarios Complementarios a la Funcion Policial [Supreme Decree that Approves the Regulation of the Provision of Services that are Exceptional and Complimentary to Police Duties] arts. 1, 4, 5 (Peru), *available at* http://www.mininter.gob.pe/admin/archivos/legales/13122009222005_reglamento_funcion_policial.pdf.

47. *See id.*

48. *See, e.g.*, Convenio De Cooperación para la prestación de Servicios Extraordinarios Complementarios a la Función Policial entre la compañía Minera Santa Luisa S.A. y La Policía Nacional Del Perú [Cooperation Agreement between Mining Company Santa Luisa S.A. and the Peruvian National Police Force for the Provision of Services that are Exceptional and Complimentary to Police Duties], para. 4.1.2 [hereinafter Santa Luisa Agreement], *available at* <http://www.pnp.gob.pe/transparencia/documentos/CONVENIO%20STA%20LUIZA&20SA%20-%20PNP.pdf>.

49. Compañía Minera Santa Luisa S.A. is a wholly owned subsidiary of Mitsui Mining & Smelting Co. Ltd. of Tokyo, Japan. *Cia Minera Santa Luisa S.A.*, DATOSPERU.ORG, <http://www.datosperu.org/peru-cia-minera-santa-luisa-sa.php> (last visited Jan. 30, 2012). It carries out zinc and lead mining activities in the Andean region of Ancash. *Id.*

50. Santa Luisa Agreement, *supra* note 48.

51. Jacqueline Fowks, IDL REPORTERO, <http://idl-reporteros.pe/> (forthcoming). The author has copies of seven such agreements between mining companies and the police force on file. Agreements between Peruvian National Police and Industrias Cachimayo, S.A. (Oct. 23, 2007 & Oct. 24, 2009), Minera Yanacocha, S.R.L. (June 13, 2009), La Empresa Minera Sougang Hierro Peru, S.A.A. (Oct. 21, 2009); Compañía Minera Antamina, S.A. (July 1, 2009), La Empresa Conirsa, S.A (July 10, 2006), and Gold Fields La Cima, S.A. (Jan. 11, 2010) (on file with author).

52. Santa Luisa Agreement, *supra* note 48.

about other arrangements of its kind.⁵³ As such, it would seem that the Santa Luisa agreement is at least somewhat representative of the general nature of the agreements being made between police and mining companies in Peru.

The Santa Luisa agreement, entitled "Cooperation Agreement for the Provision of Services that are Exceptional and Complementary to Police Duties," finds its existence on the constitutional duty of the police force to "maintain order"⁵⁴ and has three named objectives. First, it aims to offer Santa Luisa "exceptional police services, complementary to [ordinary] police duties, utilizing the human resources of the Peruvian National Police."⁵⁵ Second, the police are to "detect and neutralize" any risks that threaten the personnel or property of the mining company,⁵⁶ therefore guaranteeing the normal development of mining activities. Third, the agreement serves to generate the financial and logistical support that the police force requires to fulfill its institutional goals in service of the wider community.⁵⁷ The agreement is drafted like a private contract in that it contains a privative clause specifically stating that controversies are to be resolved directly between the parties.⁵⁸

In this framework, the police force commits to providing the mining company with officers from the Special Operations Division, which is notable for the reason that this division is trained to lead operations against drug trafficking, subversion, and violent conflict.⁵⁹ The commit-

53. The terms of the Santa Luisa agreement coincide with a description of Yanacocha's agreement with the police force. Compare GINO COSTA, COMPREHENSIVE REVIEW OF MINERA YANACOCHA'S POLICIES BASED ON THE VOLUNTARY PRINCIPLES OF SECURITY AND HUMAN RIGHTS 11 (2009) (describing terms of the agreement between the police force and Yanacocha), with Santa Luisa Agreement, *supra* note 48 (actual terms of the agreement between the Santa Luisa Mining Company and the police force).

54. Santa Luisa Agreement, *supra* note 48, paras. 1.2, 2, 3, 3.1, 3.2. 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; and to control the borders. See CONSTITUCIÓN POLÍTICA DEL PERÚ [POLITICAL CONSTITUTION OF PERU] [C.P.], Dec. 29, 1993, art. 166, translated at http://www.congreso.gob.pe/_ingles/CONSTITUTION_29_08_08.pdf.

55. "Exceptional police services, complementary to [ordinary] police duties, utilizing the human resources of the Peruvian National Police" is the author's translation of the Spanish phrase "servicio policial extraordinario complementario a la función policial con los recursos humanos de la Policía Nacional del Perú," appearing in the Santa Luisa Agreement. See Santa Luisa Agreement, *supra* note 48, para. 2.

56. *Id.* para. 3.1.

57. *Id.* para. 3.2.

58. *Id.* para. 8.

59. *Id.* paras. 3.1, 4.1.2.

ment 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 twenty-four hours a day.⁶⁰ In exchange, the mining company agrees to provide the off-duty officers with residence, food, life insurance, health care, and a daily salary.⁶¹ Further, the company provides the police force as an institution with two different types of financial payments.⁶² The first is equivalent to twenty percent of the total salaries paid to individual officers,⁶³ and the second constitutes an unspecified amount designated to assist the police force in the fulfillment of its overall institutional objectives.⁶⁴

To date, the constitutionality of the privatized funding and service arrangements described above remains unscrutinized by academics and activists alike. The Peruvian Constitution states that the funds designated for police force logistics must be used exclusively toward institutional ends under the control of the designated public authority.⁶⁵ It is unclear that the “exceptional” services offered to Santa Luisa fall within the scope of the “institutional ends” contemplated by the Constitution, which include offering protection and help to people and to the community.⁶⁶ According to one Peruvian law professor’s reading of the Constitution, an agreement of this nature violates the rights of all Peruvians to equal police protection and security to the extent that it compromises the constitutional tenet that the exercise of police power must respect the principle of neutrality between institutions and sectors in society.⁶⁷

Taking into account the terms of the Santa Luisa agreement together with the findings of the UNWG study and the applicable legislative framework, some general conclusions can be drawn in regard to security in the Peruvian resource extraction context. First, it is clear that security services are being reorganized in accordance with a number of processes of privatization—in ways that are not yet fully understood. Second, law and practice facilitate the provision of a particular set of coercive resources to transnational mining companies. These resources consist of private security companies that are staffed by former and active police

60. *Id.* para. 4.1.3.

61. *Id.* paras. 4.2.2, 4.2.3, 4.2.5, 4.2.6.

62. *Id.* paras. 4.2.8, 4.2.10.

63. *Id.* para. 4.2.8.

64. *Id.* para. 4.2.10.

65. C.P. art. 170 (Peru).

66. *Id.* arts. 166, 170.

67. Pedro P. Grandez Castro, *El Derecho a la Seguridad Ciudadana y los Procesos de Privatización en el Perú: Un Acercamiento Conceptual*, GCST: NEW VOICES SERIES (forthcoming) (on file with the author).

and military personnel. Further, these resources include fleets of off-duty police officers organized to function like a private security force pursuant to private agreements. Third, public security institutions have adapted their policies and practices to compensate for their apparent lack of public funds. Peruvian law created mechanisms whereby mining companies may fund the police force as an institution and also supplement the income of individual officers.

These observations suggest that the police force, both as an institution and as a labor force, has been partially privatized in the service of mining companies. As described above, 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,⁶⁸ or in the words of the Santa Luisa agreement, “risks.”⁶⁹ In the course of these conflicts, companies—not communities—have the economic resources to generate a market demand for security services. Security services such as those offered in the Santa Luisa agreement are 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.⁷⁰

However, the UNWG recently tied security companies in Peru to a “new development.”⁷¹ Specifically, they have become implicated in the surveillance, coercion, harassment, and intimidation of human rights organizations with a particular focus on defending the economic, social, and environmental rights of mining-affected communities.⁷² Thus the coercive relationship between private security companies and communities has two dimensions, namely the classical function of protecting property, “new” practices of surveillance, and even political persecu-

68. See BEBBINGTON ET AL., *MINING & DEV. IN PERU*, *supra* note 13; José De Echave, *Mining and Communities in Perú: Constructing a Framework for Decision-Making*, in *COMMUNITY RIGHTS AND CORPORATE RESPONSIBILITY: CANADIAN MINING AND OIL COMPANIES IN LATIN AMERICA* 17, 17 (Liisa North, et al. eds., 2006).

69. See, e.g., Santa Luisa Agreement, *supra* note 48, para. 3.1.

70. See Kamphuis, *Derecho y la Convergencia del Poder Público y el Poder Empresarial*, *supra* note 16; Carlos Meléndez Guerrero, *Mobilización sin Movimientos: El Caso de los Conflictos Entre Comunidades y la Empresa Minera Yanacocha en Cajamarca* [*Mobilization without Movement: The Case of Conflicts between Communities and the Mining Company Yanacocha in Cajamarca*], in ROMERO GROMPONE & MARTIN TANAKA, *ENTRE EL CRECIMIENTO ECONÓMICO Y LA INSATISFACCIÓN SOCIAL: LAS PROTESTAS SOCIALES EN EL PERÚ ACTUAL* [BETWEEN ECONOMIC GROWTH AND SOCIAL DISSATISFACTION: SOCIAL PROTESTS IN PERU TODAY] 321 (2009).

71. *Rep. on the Mission to Peru*, *supra* note 16, ¶ 7.

72. *Id.* ¶¶ 7, 48–49, 72.

tion.⁷³ Further, there is a strong indication that these dimensions coexist with a third feature of private security services in the Peruvian extractive industry, namely that these services are linked to a coordinated coalition of foreign governments and transnational corporations who are concerned with monitoring and strategically debilitating mining related social movements. This study of Forza, one of Peru's most important and powerful security companies, allows for a detailed exploration of each of these three dimensions.

B. Case Study: The Forza Security Company

Forza was created in 1991 by retired personnel from the Peruvian Armed Forces who specialized in subversion and espionage work.⁷⁴ Forza's objective is to offer complete corporate security services to diverse companies with a specialization in the industrial, mining, and energy sectors.⁷⁵ In addition to its work for transnational mining companies, Forza's clients span an impressive array of high-profile international organizations, 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.⁷⁶ As Forza became one of Peru's most important and powerful private security companies, its status garnered the interest of Securitas, one of the largest multinational private security corporation in the world.⁷⁷ Due to Forza's "prestige, experience

73. See *id.* ¶¶ 7, 41, 43, 46, 72.

74. *Forza, S.A.: Private Company Snapshot*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=39129768> (last visited Feb. 22, 2012); Edmundo Cruz & César Romero, *Diablo*, CAJAMARCA, <http://www.cajamarca.de/mine/reglaje2.pdf> (last visited Feb. 22, 2012).

75. *Securitas Perú*, SECURITAS, <http://www.securitas.com/pe/es-pe/About-Us/Securitas-Peru> (last visited Feb. 6, 2012).

76. SECURITAS AB, *Securitas in brief*, in SECURITAS ANNUAL REPORT 2010 (2010).

Securitas services a wide range of customers in a variety of industries and customer segments, ranging from governments, airports, infrastructure, office, banks, shopping centers, hotels, manufacturing industries, mining industries, hospitals and residential areas to high-tech and IT companies. The size of the customers varies from the 'shop on the corner' to global multi-billion industries.

Id.

77. Securitas has 12 percent of the global market share and employs over 240,000 individuals to offer services in over 40 countries on every continent. *Acerca de Securitas AB* [About Securitas AB], SECURITAS, <http://www.securitas.com/pe/es-pe/About-Us/Historia> (last visited Feb. 22, 2012); *Company Profile: Securitas*, APRODEX, <http://www.aprodex.com/securitas-931-l.aspx> (last visited Feb. 22, 2012) [hereinafter *Company Profile: Securitas*].

and position in the Peruvian market,” Securitas acquired Forza in 2007 as part of its expansion into Latin America.⁷⁸

Ironically, Forza’s power and status as the security company of choice in Peru for a significant number of international organizations and corporations seem to be proportionate to its growing reputation as a systematic human rights violator. The following section describes three ongoing legal proceedings that allege Forza systematically violated the human rights of activists and human rights defenders working on mining issues in Peru.⁷⁹ The cases are presented in chronological order of the incidents they represent.

1. *Majaz*: Protection of “Private” Property

The Rio Blanco project, located in a “cloud forest” in the Peruvian Andes between 2,200 and 2,800 meters above sea level, is one of the largest undeveloped copper resources in the world.⁸⁰ 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.”⁸¹ In 2003 the British company Monterrico Metals acquired the exploration rights to the Rio Blanco project.⁸² Monterrico began operations in Peru through its wholly owned subsidiary Minera Majaz, whose name has since been changed to Rio Blanco.⁸³ In 2007 the Chinese conglomerate Xiamen Zijin Tongguan Investment Development Company bought the capital share of Monterrico.⁸⁴

Majaz’s exploratory operations at the Rio Blanco site were conducted on the communally owned territory of two Campesino Communities.⁸⁵ These activities occurred without the permission of these Communities

78. *Acerca de Securitas Perú* [About Securitas Peru], SECURITAS, <http://www.securitas.com/pe/es-pe/About-Us/Securitas-Peru> (last visited Feb. 3, 2012) [hereinafter *About Securitas Peru*].

79. See Tejada, *supra* note 15; THE DEVIL OPERATION, *supra* note 15; Peru Prosecutor’s Office, *supra* note 20.

80. BEBBINGTON, ET AL., *supra* note 13, at iv, v, 15; Guerrero v. Monterrico Metals PLC, [2009] EWHC (QB) 2475 [3] (Eng.).

81. Guerrero, [2009] EWHC (QB) at [3] (Eng.); BEBBINGTON ET AL., MINING & DEV. IN PERU, *supra* note 13, at iv.

82. Emily Russell, *Monterrico Acquires 100% Interest in Rio Blanco*, BUS. NEWS AM. (Peru) (Apr. 3, 2003, 3:35 PM), http://www.bnamericas.com/news/mining/Monterrico_acquires_100*_interest_in_Rio_Blanco.

83. BEBBINGTON ET AL., MINING & DEV. IN PERU, *supra* note 13, at 15.

84. Guerrero, [2009] EWHC (QB) at [4] (Eng.).

85. BEBBINGTON ET AL., MINING & DEV. IN PERU, *supra* note 13, at 15.

and in violation of Peruvian and international human rights law.⁸⁶ 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.⁸⁷ In response to the extreme 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.⁸⁸ The delegation concluded that “non-violent protest and the democratic process [had] completely failed local populations.”⁸⁹

In 2004 community members marched on the Rio Blanco mine site, and one Campesino was killed in a confrontation with police.⁹⁰ No police officers have been prosecuted or found responsible for this death.⁹¹ A second march began in late July 2005 with the participation of between two and three thousand Campesino leaders and communal authorities from across the region.⁹² This march was initiated because mining authorities failed to respond to an ultimatum from Communities demanding the cessation of exploration.⁹³ Marchers referred to it as the “sacrifice march”⁹⁴ because they walked for several days through difficult terrain toward the Rio Blanco mine site.⁹⁵ The protesters marched unarmed and waving white flags,⁹⁶ with the expectation of negotiating with a special high-level commission of civil society leaders to be flown in by helicopter.⁹⁷ The Ministry of Mining requested the formation of the commission in order to facilitate negotiations between marchers, Majaz, and state authorities.⁹⁸ However, unexpectedly, the commission’s helicopter was

86. *Id.* at 24–25 (noting that this conclusion was reached in a report issued by the Peruvian Ombudsperson’s Office in April 2006).

87. *Id.* at vi, 51.

88. *Id.* at 20.

89. *Id.* at vi, 51.

90. *Id.* at 17.

91. *Id.*

92. *Id.* at 17, 18.

93. *Id.* at 17.

94. *Guerrero v. Monterrico Metals PLC*, [2009] EWHC (QB) 2475, [15(i)] (Eng.).

95. BEBBINGTON ET AL., MINING & DEV. IN PERU, *supra* note 13, at 18; Jennifer Moore, *Peru: Piura Votes, A Dangerous Precedent*, UPSIDE DOWN WORLD (Sept. 16, 2008 4:29 AM), <http://upside-downworld.org/main/peru-archives-76/1479-peru-piura-votes-a-dangerous-precedent>.

96. *Guerrero*, [2009] EWHC (QB) at [15(v)] (Eng.).

97. BEBBINGTON ET AL., MINING & DEV. IN PERU, *supra* note 13, at iv, 18; *Guerrero*, [2009] EWHC (QB) at [15(ii)]–[15(v)] (Eng.).

98. BEBBINGTON ET AL., MINING & DEV. IN PERU, *supra* note 13, at 21 n.50.

grounded a short distance from the mine site and police prevented its members from proceeding to the site.⁹⁹

With the delegation grounded nearby, the marchers' campsite was allegedly bombed with tear gas from helicopters and raided by Forza and police officers.¹⁰⁰ Approximately twenty-eight Campesino leaders were detained and brought to the mine site.¹⁰¹ The shocking claims of these Campesinos regarding the ensuing events were finally substantiated over three years later when photographs depicting officers engaged in cruel acts of abuse and torture of the Campesino detainees¹⁰² were leaked to a national newspaper in late 2008 by an anonymous source.¹⁰³ Officers bound the Campesinos, placed sacks over their heads, and forced them to walk barefoot.¹⁰⁴ Their clothes were completely or partially removed and they were savagely beaten, tortured, subjected to tear gas, and deprived of food and water.¹⁰⁵ One Campesino did not survive these events.¹⁰⁶ Two female detainees reported being subjected to sexual abuse.¹⁰⁷ After three days of torture in captivity, the Campesino detainees were released and charged with crimes such as terrorism.¹⁰⁸

99. *Id.* at 18–19 & 21 n.49.

100. *Guerrero*, [2009] EWHC (QB) at [15(iv)]–[15(v)] (Eng.); *THE DEVIL OPERATION*, *supra* note 15.

101. *THE DEVIL OPERATION*, *supra* note 15.

102. *Id.*

103. Elizabeth Prado, *En Majaz sí se Torturo el Año 2005 [Yes Torture Occurred at Majaz in 2005]*, LA REPUBLICA (Peru), Jan. 9, 2009, at 16; Fernandoch, *Photographs Confirm Torture of Peasants who Protested against Majaz Mining*, BLOG.DHPERU.ORG (Jan. 9, 2009, 6:27 PM), <http://blog.dhperu.org/?p=1873>; Nat'l Human Rights Coordinator & Ecumenical Found. for Dev. & Peace [FEDEPAZ], *Fotografías demostrarían que seguridad de minera Majaz torturó a pobladores [Photographs Demonstrate that Majaz Mining Security Services Tortured Villagers]*, FEDEPAZ (June 1, 2009), www.fedepaz.org/index.php?option=com_content&task=view&id=101&Itemid=18; *see also* *THE DEVIL OPERATION*, *supra* note 15.

104. *Guerrero*, [2009] EWHC (QB) at [15(x)], [15(xi)] (Eng.); *THE DEVIL OPERATION*, *supra* note 15.

105. *Guerrero*, [2009] EWHC (QB) at [7], [15(x)], [15(xi)], [15(xv)] (Eng.); *THE DEVIL OPERATION*, *supra* note 15.

106. *Guerrero*, [2009] EWHC (QB) at [7] (Eng.). 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.

107. *Id.* at [7] (Eng.); *THE DEVIL OPERATION*, *supra* note 15.

108. *Guerrero*, [2009] EWHC (QB) at [7] (Eng.); Elizabeth Prado, *Instancia Internacional Vería Torturas en Majaz [International Forum will Investigate Majaz Tortures]*, LA REPUBLICA (Peru), Jan. 14, 2009, at 4; Edmundo Cruz, *Defender el Medio Ambiente es Delito de Terrorismo en Minas del Norte de Perú [Defending the Environment is a Crime of Terrorism in the Northern Mines of Peru]*, LA REPUBLICA (Peru), (May 10, 2008), available at <http://www.cajamarca.de/mine/torturas-majaz.pdf>; *see also* *Guerrero*, [2009]

In June 2008 a group of lawyers at the Peruvian NGO FEDEPAZ filed a complaint to the Prosecutions Office requesting an investigation of the Forza security officers, police officers, and mine officials allegedly responsible for the crimes committed against the detained Campesinos.¹⁰⁹ In spite of the supporting photographic evidence, the local prosecutor rejected the complaint and closed the investigation.¹¹⁰ This closure was successfully appealed and in April 2009 the Prosecutions Appeals Office ordered that the investigations be reopened.¹¹¹ At this stage, a prominent national newspaper 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 provide a list of the mine staff—including Forza personnel—on site at the time.¹¹²

One year later, in April 2010, the local prosecutor closed the investigation for a second time.¹¹³ After another appeal, the Appeals Office again

EWHC (QB) at [15(iv)] (Eng.). After more than three years of proceedings, these criminal charges were finally dropped. *Primer Juzgado Mixto De Huancabamba Dispone el Sobreseimiento del Proceso Penal Seguido contra Comuneros y Ronderos de la Comunidad Campesina de Segunda y Cajas* [The First Court of Huancabamba Dismisses Criminal Proceedings Against Members of the Segunda y Cajas Campesina Community], FEDEPAZ, http://www.fedepaz.org/index.php?option=com_content&task=view&id=134&Itemid=18 (last visited Feb. 22, 2012).

109. Guerrero, [2009] EWHC (QB) at [15], [15(xiv)] (Eng.).

110. *Id.* at [15(xvi)]; THE DEVIL OPERATION, *supra* note 15.

111. Guerrero, [2009] EWHC (QB) at [15(xvi)] (Eng.); THE DEVIL OPERATION, *supra* note 15. The Campesinos' lawyers later brought charges against the local prosecutor, Lorenzo Félix Toledo Leiva, for his failure to prosecute the tortures. In November 2011 the national prosecutor authorized a preparatory investigation against Mr. Toledo Leiva for failing to prosecute the tortures even though he was aware of their occurrence. See *Fiscal de la Nación autoriza a que se formalice investigación preparatoria para juicio a ex fiscal provincial de Huancabamba*, FEDEPAZ (Nov. 11, 2011), http://www.fedepaz.org/index.php?option=com_content&task=view&id=169&Itemid=18.

112. THE DEVIL OPERATION, *supra* note 15; Francesca Garcia, *Policía No Brinda los Nombres de los Posibles Responsables* [Police Fail to Provide Names of the Officers Who Might Be Responsible], LA REPUBLICA (Peru), Jan. 12, 2009, at 6; PERU 21, *Aún No Dan los Nombres de Policías que Habrían Torturado a Campesinos de Majaz* [Still No Release of the Names of the Police Who Might Have Tortured Campesinos at Majaz], FEDEPAZ (Jan. 31, 2009), http://fedepaz.org/index2.php?option=com_content&do_pdf=1&id=95.

113. Guerrero, [2009] EWHC (QB) at [15(xvi)] (Eng.); *Fiscalía Ordena Continuar con Investigación por Caso de Torturas a Comuneros en Piura* [Prosecutor's Office Orders the Continuation of the Investigation of the Torture of Community Members], FEDEPAZ (Sept. 1, 2010), http://www.fedepaz.org/index.php?option=com_content&task=view&id=113&Itemid=1 [hereinafter *Research Continues in Torture Cases*].

ordered that the investigation be reopened in August 2010.¹¹⁴ The appeals prosecutor pointed out that the local prosecutor had failed to take into consideration that the police officers detained the victims and subjected them to torture and other crimes while carrying out a police operation that was likely previously planned by high level police Commanders.¹¹⁵ As of the writing of this article, the domestic investigation continues.¹¹⁶

In 2009 the victims brought parallel proceedings against Monterrico and its Peruvian subsidiary before the English High Court.¹¹⁷ Their case alleged that the company's directors, managers, and personnel directly participated in events related to the torture and detainment of the Campesino marchers.¹¹⁸ The victims claimed that Monterrico was liable under the British Private International Law Act¹¹⁹ for failing to fulfill its "responsibility for risk management."¹²⁰ They also claimed that both Monterrico and its subsidiary were liable under the Peruvian Civil Code for culpable or intentional damages on the basis of willful misconduct, failure to take adequate steps to prevent known risks, and actions of their employees (vicariously), including Forza security guards.¹²¹ Finally, the victims made a claim for negligence.¹²²

The nature of Majaz's security arrangement was a major issue of contention in the UK action. It was 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.¹²³ The victims testified that both Forza officers and police officers participated in the acts of torture, detention, and cruelty.¹²⁴ The company alleged that Forza officers refrained from such behavior and

114. *Research Continues in Torture Cases*, *supra* note 113.

115. *Id.*

116. *Casa Matriz de Minera Majaz S.A. Indemniza a 33 Campesinos*, FEDEPAZ (July 20, 2011), http://www.fedepaz.org/index.php?option=com_content&task=view&id=139&Itemid=18.

117. *Guerrero*, [2009] EWHC (QB) at [8], [10], [45] (Eng.).

118. THE DEVIL OPERATION, *supra* note 15; *Guerrero*, [2009] EWHC (QB) at [8], [10], [45] (Eng.); *see also Bristow se niega a responder por supuestas orden que dio para torturar a comuneros* [*Bristow Refuses to Comment on the Alleged Order that he Gave to Torture Community Members*], COORDINADOR NACIONAL DE RADIO (Jan. 14, 2009), <http://www.cnr.org.pe/noticia.php?id=24703>.

119. Private International Law (Miscellaneous Provisions) Act, 1995, c. 42 (U.K.).

120. *Id.* § 12.

121. *Guerrero*, [2009] EWHC (QB) at 2475 [9]–[10] (Eng.).

122. *Id.* at [10].

123. *Id.* at [25].

124. *Id.* at [10], [16].

that any wrongdoing was solely committed by police officers, for which the company was not liable.¹²⁵ Unfortunately, it was difficult to identify the institutional identity of some of the officers on the basis of the photographic evidence because the officers were not always fully uniformed or their uniforms were not always fully visible.¹²⁶

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.¹²⁷ However, at a minimum, the nature of police participation in the events described above suggests a relationship of informal collaboration.¹²⁸ 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.¹²⁹ In a statement to the press, a police general declared that Majaz was not paying the police but that it was providing food and some transportation.¹³⁰ 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.¹³¹

When the UK proceedings began in June 2009, the Court imposed a worldwide freezing injunction to restrain Monterrico from removing any of its assets up to the value of just over £5 million from the jurisdiction.¹³² In the months following, the Court held that the allegations against Monterrico for responsibility and participation in the brutality against the protestors constituted a "good arguable case"¹³³ for the pur-

125. *Id.* at [25].

126. THE DEVIL OPERATION, *supra* note 15.

127. See Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 610–11 (2009).

128. See *Guerrero*, [2009] EWHC (QB) at [16] (Eng.).

129. *Id.* at [8], [15].

130. *Id.* at [10 g.].

131. *Id.* 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. *Id.* at [10 d.], [16]. There are allegations that some of the implements used to torture the Campesinos were company property. *Id.* at [10 i.], [10 k.].

132. *Id.* at [6], [41]. Monterrico was 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. *Id.* at [6].

133. The claimants in Majaz had to prove that they had a "good arguable case" for the purpose of obtaining an injunction against Monterrico that would prevent the company from dealing with or disposing of any of its assets pending the determination of the case against it. The "good arguable case" test is a low threshold.

poses of upholding the injunction.¹³⁴ However in July of that year, before the October 2011 trial could take place, the claimants accepted an offer from the company of monetary compensation without admitting liability in return for the withdrawal of their claim.¹³⁵

2. GRUFIDES: Political Persecution of Mining Activists

Minera Yanacocha, the largest gold mine in Latin America and one of the most profitable in the world,¹³⁶ began operations in 1992 in the Cajamarca region of the Peruvian Andes, located between 3,500 to 4,000 meters above sea level.¹³⁷ Yanacocha is owned and operated by three shareholders: the Peruvian Compañía de Minas Buenaventura and the International Finance Corporation each hold a minority interest, while the American Newmont Mining Corporation, the largest gold mining company in the world, is the majority shareholder.¹³⁸ Yanacocha has employed Forza since 1993 as its exclusive private security company.¹³⁹ Yanacocha also has a confidential contract with the police force to provide security services similar to those described in the Santa Luisa agreement.¹⁴⁰

Like Majaz, Yanacocha also began its operations on the communally owned territory of a Campesino Community.¹⁴¹ There is strong evidence that Yanacocha acquired the portions of the land it now mines in violation of the Campesino Community's land-rights protected by domestic and international law.¹⁴² In addition to the problematic legal and political

134. *Id.* at [26]–[27].

135. Richard Meeran, *Peruvian Torture Claimants Compensated by UK Mining Company*, LEIGH DAY & CO (July 20, 2011), <http://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-minin>.

136. *Quiénes Somos [About Us]*, YANACOCHA, <http://www.yanacocha.com.pe/la-compania/quienes-somos> (last visited Feb. 22, 2012) [hereinafter Yanacocha, *About Us*]; see Bury, *supra* note 3, at 50–56.

137. Yanacocha, *About Us*, *supra* note 136.

138. *Id.*

139. Grupo de formación e intervención para el desarrollo sostenible (GRUFIDES) [Formation & Intervention Grp. for Sustainable Dev.] v. Peru, Petition Alleging Human Rights Violation, Inter-Am. Ct. H.R. ¶ 32 (May 15, 2009) [hereinafter GRUFIDES Petition] (on file with the author).

140. See COSTA, *supra* note 53, at 9, 11, 14.

141. Yanacocha, *About Us*, *supra* note 136; see Bury, *supra* note 3, at 50.

142. Kamphuis, *Derecho y la Convergencia del Poder Público y el Poder Empresarial*, *supra* note 16, at 17–24, 36–46. 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. See C.P. arts. 7, 70–73, 88, 89 (Peru); International Labour Organisation [ILO], Convention concerning Indigenous and Tribal Peoples in Independent Countries, arts. 13–19, June 7,

underpinnings of Yanacocha's presence in the area,¹⁴³ a recent study of the United Nations ("UN") 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.¹⁴⁴ With these antecedents, it is not surprising that large-scale protests began in 1999 against Yanacocha's expansion.¹⁴⁵ These protests were essentially grassroots uprisings of local Campesino Communities affected by Yanacocha's activities.¹⁴⁶

Two of these high-profile protests are particularly relevant. In 2004, a Campesino-led general strike and road blockade occurred in the city of Cajamarca. Ten thousand urban and rural residents engaged in this sustained protest for a period of two weeks.¹⁴⁷ The size and strength of the protests eventually forced Yanacocha to withdraw its planned expansion to a nearby mountain called Quilish.¹⁴⁸ In 2006, another protest against Yanacocha sparked in the rural area of Combayo.¹⁴⁹ Approximately 100 Campesinos blockaded Yanacocha's use of a local highway while 500 Campesinos protested peacefully in the town square.¹⁵⁰ In response, Yanacocha deployed somewhere between 75 and 200 armed officers, consisting of a mixture of Forza officers and off-duty police officers in the employ of Yanacocha pursuant to a private agreement with the police force.¹⁵¹ In the first few days of what became weeks of protest, a Campesino protestor was shot and killed, allegedly by police officers in the

1989, ILO No. 169, 28 I.L.M. 1384; Organization of American States, American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

143. 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*, N.Y. TIMES, Oct. 25, 2005, at A.

144. BEBBINGTON ET AL., MINING & DEV. IN PERU, *supra* note 13, at 36.

145. Anthony Bebbington et al., *Mining and Social Movements: Struggles over Livelihood and Rural Territorial Development in the Andes* 36 WORLD DEV., no. 12, 2008 at 2895.

146. *See id.*

147. Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 104-05 (2008).

148. *See id.* at 105.

149. *See Rep. on the Mission to Peru*, *supra* note 16.

150. THE DEVIL OPERATION, *supra* note 15.

151. *Yanacocha Anuncia Suspensión Total de sus Actividades* [*Yanacocha Announces the Complete Suspension of its Activities*], LA REPUBLICA (Peru) (Aug. 28, 2006), available at <http://peru.indymedia.org/news/2006/08/33496.php>; Edgard Jara & Herbert Holguín, *Han Tomado una Decisión Apresurada* [*They Made a Rushed Decision*], LA REPUBLICA (Peru) (Aug. 29, 2006, 2:00 AM), <http://www.larepublica.pe/29-08-2006/han-tomado-una-decision-apresurada>.

employ of Yanacocha.¹⁵² In an investigation of Forza's warehouse, located on Yanacocha's property, authorities allegedly found "war ammunition."¹⁵³ The possession of military-like weapons and ammunition by private security companies is illegal under the Act¹⁵⁴ and a violation of the Peruvian Constitution.¹⁵⁵

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,¹⁵⁶ with GRUFIDES earning the 2004 National Prize in Human Rights for its role in contributing to the peaceful resolution of the Quilish conflict.¹⁵⁷ However, the rise in Campesino organizing in Combayo in 2006 heralded the escalation of "*Operación Diablo*"—a systematic program of digital surveillance, intimidation, death threats, and defamation—which primarily targeted GRUFIDES personnel, but also spanned approximately thirty other related local environmentalists and Campesino leaders.¹⁵⁸ Later that same year, hit men murdered one of the Campesino leaders identified in the surveillance program as a "threat to Yanacocha."¹⁵⁹

The Peruvian justice system has refused to prosecute the perpetrators of *Operación Diablo*.¹⁶⁰ In 2009, GRUFIDES' lawyers filed a petition with the Inter-American Commission on Human Rights ("IACHR"), alleging that the Peruvian State violated its obligations under the American

152. Ángel Páez & Wilson Castro, '*Forza*' no ha sido Exculpada [*'Forza' Has Not Been Exonerated*], LA REPUBLICA (Peru) (Dec. 8, 2006, 2:00 AM), <http://www.larepublica.pe/08-12-2006/forza-no-ha-sido-exculpada>; Milagros Salazar, *El último Guardián de las Aguas* [*The Last Guardian of the Water*], LA REPUBLICA (Peru) (Sept. 10, 2006), <http://www.larepublica.pe/10-09-2006/el-ultimo-guardian-de-las-aguas>.

153. Páez & Castro, *supra* note 152. The designation war ammunition is given to ammunition according to its size and type. *Id.*

154. Private Security Services Act (Peru), *supra* note 30, art. 36.1.

155. C.P. art. 175 (Peru).

156. Milagros Salazar, *Yanacocha amenaza con paralizar todas sus operaciones si continúan protestas* [*Yanacocha Threatens to Halt All Operations if Protests Continue*], LA REPUBLICA (Peru) (Aug. 28, 2006, 2:00 AM), <http://www.larepublica.pe/28-08-2006/yanacocha-amenaza-con-paralizar-todas-sus-operaciones-si-continuan-protestas>.

157. See Jennifer Stein, *Peru: Arana Awarded Human Rights Award*, GLOBAL GREENGRANTS FUND (Jan. 23, 2005), <http://www.greengrants.org/2005/01/23/peru-arana-awarded-human-rights-award>.

158. *Rep. on the Mission to Peru*, *supra* note 16.

159. *Id.* at 18–19; Andres A. H. Knight, *A Un Año del Asesinato del Líder Ecologista Esmundo Becerra* [*One Year since the Murder of the Environmental Leader Esmundo Becerra*], "EL MALETERO" "RED VERDE CAJAMARCA" (Oct. 31, 2007), <http://caballeroredverde.blogspot.com/2007/10/un-ao-del-asesinato-del-lider.html>.

160. *Rep. on the Mission to Peru*, *supra* note 16, at 18.

Convention on Human Rights to prevent and sanction these crimes.¹⁶¹ The petition documents overwhelming evidence that Forza implemented *Operación Diablo* pursuant to its security services for Yanacocha.¹⁶² The evidence includes hundreds of photographs and surveillance reports, styled like those typically used by the police, which documented the activities of GRUFIDES personnel and other activists.¹⁶³ 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*.”¹⁶⁴ Finally, there is documentation of payment for service between Forza and personnel from the subcontracted company.¹⁶⁵ The GRUFIDES petition also documents the specific acts of complicity of the Peruvian police force with *Operación Diablo*.¹⁶⁶ The proceeding of the GRUFIDES petition in the Inter-American system has been subjected to significant delay given that to date, three years after its submission, the IACHR has not made a determination regarding its admissibility.¹⁶⁷

3. *Business Track*: Coordinated Surveillance of Social Movements

The theme of surveillance raised in *GRUFIDES* is further expanded in *Business Track*. *Business Track* was a private security company officially registered in 2004 with the stated purpose of offering counterespionage and information security such as debugging telephone lines and information technology systems.¹⁶⁸ A retired military captain who served under the Fujimori regime founded the company, which employed active

161. GRUFIDES Petition, *supra* note 139.

162. *Id.* at 9–20.

163. *Rep. on the Mission to Peru*, *supra* note 16, at 10 n.50 & 16–17.

164. *Id.* at 16 n.37 & 19 n.50; THE DEVIL OPERATION, *supra* note 15. The reports were directed to a pseudonymed individual. THE DEVIL OPERATION, *supra* note 15. This pseudonym corresponds to that of a Forza manager as set out in Forza’s operations manual at the time. *Id.*; Boyd, *supra* note 7; *see also* GRUFIDES Petition, *supra* note 139.

165. *Rep. on the Mission to Peru*, *supra* note 16, at 17 n.37 & 40.

166. *See* GRUFIDES Petition, *supra* note 139. Specifically, police returned all evidence to the known perpetrators. *See* THE DEVIL OPERATION, *supra* note 15. Police were also filmed allegedly facilitating the escape of an accused perpetrator from police custody. *Id.*

167. *See* Inter-Am. Comm’n H.R., Second Report on the Situation of Human Rights Defenders 138, OEA/Ser.L/V/II, doc. 66 (Dec. 31, 2011), *available at* <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>.

168. Ángel Páez, *Rights Peru: Spying on Social Movements*, INTER PRESS SERV. (Mar. 12, 2009, 10:08 PM), <http://ipsnews.net/print.asp?idnews=46090> [hereinafter Páez, *Spying on Social Movements*].

and retired military officers.¹⁶⁹ The clients listed on the Business Track website include oil, mining, and gas companies, as well as a number of private security firms—including Forza—that primarily provide security services to companies in these extractive industries.¹⁷⁰ In early 2009, Peruvian authorities arrested Business Track managers and employees on charges of illegally tapping telephone conversations, bugging offices, and intercepting e-mail on behalf of third parties.¹⁷¹

The illegal operation fell in the wake of an oil-kickback scandal.¹⁷² Business Track allegedly recorded a discussion between a senior state official and a high profile lobbyist regarding payments in return for favoring a Norwegian company's bid in a petroleum exploration auction.¹⁷³ The contract was subsequently awarded to the same Norwegian company.¹⁷⁴ Business Track allegedly sold the recorded conversation to a competitor company, which then leaked the audio file to the press.¹⁷⁵ The scandal affected some of the highest officials in the Peruvian government, and Business Track personnel were prosecuted.¹⁷⁶ The illegal surveillance company apparently made a political miscalculation in its pursuit of intelligence on behalf of transnational corporations.¹⁷⁷

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 personnel.¹⁷⁸ This process revealed that only about 20 percent of Business Track's surveillance information related to possible criminal activity.¹⁷⁹ The vast majority of the illegal surveillance targeted citizens

169. *Id.*; Carla Salazar, *Peru Naval Officers Arrested for Illegal Wiretaps*, ASSOCIATED PRESS, Jan. 9, 2009 [hereinafter Salazar, *Naval Officers Arrested*], available at <http://www.highbeam.com/doc/1A1-D95JUB2O1.html>; see also Notificación Judicial, Exp. No. 527-09, 30 Nov. 2009, TRIGESIMO CUARTO JUZGADO PENAL DE LIMA [Thirty-Fourth Criminal Court of Lima] (Peru) [hereinafter Criminal Court Resolution].

170. Páez, *Spying on Social Movements*, *supra* note 168.

171. Peru Prosecutor's Office, *supra* note 20.

172. *Oil Contract Scandal Shakes Peru*, BBC NEWS (Oct. 7, 2008, 7:20 PM), <http://news.bbc.co.uk/2/hi/7656500.stm> [hereinafter *Scandal Shakes Peru*]; Salazar, *Naval Officers Arrested*, *supra* note 169.

173. *Scandal Shakes Peru*, *supra* note 172.

174. *Id.*

175. Salazar, *Naval Officers Arrested*, *supra* note 169.

176. *Id.*

177. *Id.*

178. Criminal Court Resolution, *supra* note 169.

179. *¿Para quién trabajaba Business Track? [Who did Business Track Work For?]*, LA REPUBLICA (Peru) (Aug. 23, 2009 11:02 PM), <http://www.larepublica.pe/24-08-2009/para-quien-trabajaba-business-track>.

as well as private and public institutions in relation to questions of security or matters of national interest.¹⁸⁰ The evidence made public by the Court to date reveals that a significant number of the victims, from the 1990s onward, were human rights activists, mining activists, and grass-roots community organizations, as well as several lawyers' collectives.¹⁸¹ Among these individuals are the victims and advocates in the *Majaz* and *GRUFIDES* cases who were surveilled during the time period corresponding to the issues in each case.¹⁸² Notably, the confiscated audio files date back to the early 1990s—during the Fujimori era—and continue through the present.¹⁸³ 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.

This helps to explain the observation of the International Working Group on Indigenous Affairs (“IWGIA”) that the scandal caused otherwise opposing political forces to align in order to prevent an investigation into Business Track’s client base.¹⁸⁴ The Fujimori political camp, the Alan García government, and at least some transnational companies operating in the resource extraction industry have a shared political interest in curtailing an investigation into Business Track’s activities.¹⁸⁵ As noted above, while the Business Track scandal first broke in relation to the apparent corruption of the Alan García government in favor of a transnational petroleum company, the confiscated files also included recordings of communications of civil society members made during the Fujimori

180. *Id.*

181. Daniel Yovera, *Nadie se salvó de la red de ‘chuponeo’ de la Business Track SAC* [No One Was Saved from Business Track’s Network of Wiretapping], PERU21.PE (Jan. 18, 2009, 7:05 AM), <http://peru21.pe/noticia/235084/nadie-se-salvo-red-chuponeo-business-track-sac>. This includes, but is not limited to el Equipo de Promoción y Desarrollo de Ica [the Team for the Promotion and Development of Ica], la Asociación Civil Foro Democrático [the Democratic Association Civic Forum], el Instituto para una Alternativa Agraria [the Institute for an Agrarian Alternative], la Asociación Pro Derechos Humanos [the Pro-Human Rights Association], la Fundación Ecuménica para el Desarrollo y la Paz [the Ecumenical Foundation of Development and Peace], el Instituto Peruano para los Derechos Humanos [the Peruvian Institute for Human Rights], y el Estudio para la Defensa de los Derechos de la Mujer [the Group for the Defense of Women’s Rights]. Criminal Court Resolution, *supra* note 169.

182. Criminal Court Resolution, *supra* note 169.

183. *Id.*

184. *Country Report: Peru*, in THE INDIGENOUS WORLD 2009, at 161, 172 (Kathrin Wessendorf, ed., 2009) [hereinafter *Country Report: Peru*], available at http://www.iwgia.org/iwgia_files_publications_files/0212_I_09.pdf.

185. *See id.*

era through to the present.¹⁸⁶ Thus *Business Track* is a stark example of how the political surveillance practices previously employed by a repressive dictator can adapt to meet the needs of the transnational corporate sector when security services are privatized.

The IWGIA's concerns about the investigation in *Business Track* seem to have been proven. 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.¹⁸⁷ The 1,135-page decision is essentially a recitation of the 1,300 pieces of evidence reviewed.¹⁸⁸ A key outcome of the report is the Judge's refusal to authorize the Prosecutions Office to investigate the identity of Business Track's clients—in other words, the individuals and institutions that paid for illegal telephone tapping and email hacking activities.¹⁸⁹ Ironically, the Judge reasoned that such an investigation would be *premature*.¹⁹⁰ 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.¹⁹¹

As indicated in the previous two sections, there are documented links between Business Track's surveillance activities and Forza's alleged role in human rights violations against mining activists in the *Majaz*¹⁹² and *GRUFIDES* cases.¹⁹³ These links suggest that transnational mining and private security companies have formed a highly integrated network of surveillance and information exchange regarding civil society actors who

186. Ángel Páez, *Peru: Prosecutors Investigate Wiretapping Operations*, INTER PRESS SERV. (Oct. 30, 2008, 2:09 PM), <http://ipsnews.net/print.asp?idnews=4451>; Páez, *Spying on Social Movements*, *supra* note 168.

187. *Juez Martínez prohíbe investigar a los financistas de Business Track* [Justice Martínez prohibits the investigation of Business Track's Funders], LA REPUBLICA (Peru) (July 28, 2010, 12:32 AM), <http://www.larepublica.pe/28-07-2010/jueza-martinez-prohibe-investigar-los-financistas-de-business-track> [hereinafter *Justice Martínez prohibits the Business Track investigation*].

188. *Id.*; see Peru Prosecutor's Office, *supra* note 20.

189. *Justice Martínez prohibits the Business Track investigation*, *supra* note 187.

190. *Id.*; see Peru Prosecutor's Office, *supra* note 20.

191. There have also been numerous allegations that evidence was tampered with during the judicial investigation and a Commission was created to investigate these allegations. *Jueza Martínez asegura que USBs no fueron cambiados en dependencias judiciales* [Justice Martínez assures that the USBs were not changed on the court's premises], LA REPUBLICA (Peru) (July 16, 2010), <http://www.larepublica.pe/mapa/noticias-16-07-2010> (follow title hyperlink).

192. See also Alberto Adrianzen, *Paramilitaries Inc.*, LA REPUBLICA (Peru) (Jan. 19, 2009), available at <http://www.peruviantimes.com/19/la-republica-paramilitaries-inc/1395>; Páez, *Spying on Social Movements*, *supra* note 168.

193. See also Adrianzen, *supra* note 192.

criticize their activities. There is also reason to believe that this information may be used to facilitate the political persecution of these actors. For example, as detailed in the previous section, *GRUFIDES* alleges that Forza perpetrated *Operación Diablo* against local activists in the service of Yanacocha Mine.¹⁹⁴ It is undisputed that, at the very least, Business Track tapped *GRUFIDES*' phones during the height of *Operación Diablo*.¹⁹⁵ It is further documented that Forza was a client of Business Track.¹⁹⁶ Thus, taking the above observations of the *GRUFIDES* and the *Business Track* cases into consideration, 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.¹⁹⁷

Documents made public by WikiLeaks in late January 2011¹⁹⁸ suggest that this network of surveillance is deeply integrated with key foreign embassies in Peru.¹⁹⁹ The documents of interest are two U.S. embassy cables dated just after the events of *Majaz* that refer explicitly to the *Majaz* conflict.²⁰⁰ These cables communicated that the embassies of the United States, Canada, Great Britain, Australia, Switzerland and South Africa "stepped up" efforts to improve coordination with major foreign mining investors "with an eye to reducing anti-mining violence."²⁰¹ Indeed, the "violence against British firm *Majaz*" had precipitated a meeting hosted by the US and Canadian Ambassadors for representatives of

194. See *supra* text accompanying notes 158–66.

195. *Rep. on the Mission to Peru*, *supra* note 16, at 16.

196. Angel Páez, *Perú: Una empresa, Business Track, formada por ex oficiales navales expertos en contrainteligencia organiza un sistema de información y control social* [Peru: A company, Business Track, composed of ex-Navy officers who are experts in counterintelligence, organizes a system of information and social control], PROFESIONALESPCM.ORG (Oct. 3, 2009), http://www.profesionalespcm.org/_php/MuestraArticulo2.php?id=11934.

197. Cruz & Romero, *supra* note 74.

198. Tim Webb, *UK Firm's Partner 'Wanted Peru to Curb Priests in Mine Conflict Areas'*, *GUARDIAN* (U.K.), Feb. 1, 2011, at 27.

199. *Id.*

200. Cable from Ambassador J. Curtis Struble, U.S. Embassy in Lima, Peru, *Majaz Anti-Mining Violence on Ecuador Border*, to U.S. Dep't of State (Aug. 17, 2005) [hereinafter Struble Cable], available at <http://www.guardian.co.uk/world/us-embassy-cables-documents/38742>; Cable from U.S. Embassy in Lima, Peru, Unclas Section 01 of 03 Lima 003609, to U.S. Dep't of State (Aug. 19, 2005) [hereinafter Lima Cable 003609], available at <http://www.guardian.co.uk/world/us-embassy-cables-documents/38881>.

201. Struble Cable, *supra* note 200; Lima Cable 003609, *supra* note 200.

international mining companies, including Yanacocha Mine, which was later implicated in the *GRUFIDES* case.²⁰² The objective of this meeting was to review companies' operating difficulties in Peru and coordinate efforts to improve the investment climate.²⁰³ At this meeting, the Ambassadors encouraged the companies to report NGO-funded groups or individuals "that advocate violence" so that the Ambassadors would be able to confront any NGOs from their respective countries.²⁰⁴ The mining executives suggested to the Ambassadors that they should meet with Peruvian and church officials to encourage them to rotate teachers and priests in and out of conflictive mining communities to ensure that any of these professionals with anti-mining sentiments would not stay too long in any given community.²⁰⁵ When the contents of these cables are placed within the context of the Forza case study, they present a small glimpse of a web of high-level coordination between the representatives of foreign governments, the executives of transnational mining companies, and their private security companies.²⁰⁶ The explicit objective of this coordination is to criminalize, repress, surveil, and dismantle local social movements and their international supports that either critique and/or oppose particular mining projects in Peru.²⁰⁷

II. 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 mak[e] reparations to their victims.²⁰⁸

202. Lima Cable 003609, *supra* note 200.

203. *Id.*

204. *Id.*

205. *Id.*

206. See Struble Cable, *supra* note 200; Lima Cable 003609, *supra* note 200.

207. Lima Cable 003609, *supra* note 200.

208. U.N. Comm'n on Human Rights, *Rep. of the Independent Expert to Update the Set of Principles to Combat Impunity*, Econ. & Soc. Council, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (by Diana Orentlicher) [hereinafter Orentlicher, *Principles to Combat Impunity*].

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. This approach is undertaken on the basis of the premise that in order to confront impunity, justice advocates must begin with an empirical study of the legal mechanisms that exist in the midst of the circumstances of impunity. Fully examining the shortcomings of present arrangements of law is a crucial first step toward meaningfully contributing to debates regarding law reform on the subject of transnational corporations and human rights. These debates are alive and well, and this issue has been extremely contentious at the international level. As a result, the UN's pertinent agenda has been reincarnated into a radically different framework since its initial conceptualization in the early nineties.²⁰⁹ The most recent UN proposals have been the subject of a highly public, personal, and antagonistic exchange between UN Special Representative John Ruggie and a Senior Director at Amnesty International.²¹⁰ The regulation of the transnational corporation is most certainly an unresolved complex issue and the details of this law reform debate are undoubtedly far beyond the reach of this Article. However, the existence of this debate is briefly referenced here in order to make the basic argument that

209. See, e.g., Annex: Draft Code of Conduct on Transnational Corporations, Letter dated May 31, 1990 from the Chairman of the special session of the Comm'n on Transnational Corporations to the President of the Econ. & Soc. Council, U.N. Doc. E/1990/94 (May 31, 1990); Press Release, Kofi Annan, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to the World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999), available at <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>; U.N. Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003); U.N. Comm'n on Human Rights Res. 2005/69, Human Rights and Transnational Corporations and Other Business Enterprises, 61st Sess., Apr. 22, 2005, Econ. & Soc. Council, 61st Sess., U.N. Doc. E/CN.4/2005/L.10/Add.17 (Apr. 22, 2005) (creating the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations in 2005; renewed in 2008); Human Rights Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 63d Sess., U.N. Doc. A/63/53 (June 18, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf.

210. Widney Brown, Letter to the Editor, *Stronger UN draft on human rights abuses needed*, FIN. TIMES, Jan. 20, 2011, at 10; John Ruggie, Letter to the Editor, *Bizarre Response by Human Rights Groups to UN Framework Plan*, FIN. TIMES, Jan. 19, 2011, at 10; Hugh Williamson, *Amnesty Criticises UN Framework for Multinationals*, FT.COM (Jan. 17, 2011), <http://www.ft.com/intl/cms/s/0/36f72370-2226-11e0-b91a-00144feab49a.html#axzz1bB2qL4Rx>.

empirical work, such as that undertaken in this Article, which analyzes the impunity of the transnational corporation in light of applicable systems of law, continues to have the potential to offer important insights to these broader international law and policy debates. This methodological point is revisited again in the Conclusion.

A. 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 very little 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, and occurred over three years after the incidents.²¹¹ The prosecutor subsequently closed the investigation twice in spite of a preponderance of evidence. While the investigation was reopened each time after appeals were made by local lawyers—five years after the incidents of torture and abuse—the perpetrators have yet to be charged or prosecuted.²¹² In *GRUFIDES*, the criminal investigation of Forza and Yanacocha followed a similar pattern, although the appeals made by local lawyers against the prosecutor's decision to close the investigation were ultimately unsuccessful.²¹³ Finally, in *Business Track*, the institutions, such as Forza, that allegedly paid for the surveillance of mining activists, including activists involved in both *Majaz* and *GRUFIDES*, have yet to be officially named.²¹⁴ Indeed, the Court has specifically decided not to investigate these institutions.

In light of the apparent failure of the Peruvian justice system, and given that Forza's operations in the cases at issue implicate corporate actors from a variety of jurisdictions, one must examine the capacity of other domestic systems to address the impunity alleged in the Forza case study. In the *Majaz* case, the rights to the Rio Blanco mine site have passed from a British company to a Chinese consortium.²¹⁵ In *GRUFIDES*, an American company, a Peruvian company, and the International Finance Corporation ("IFC") jointly own Yanacocha Mine.²¹⁶ All of these com-

211. See *supra* Part I.B.1.

212. See *infra* notes 109–12 and accompanying text.

213. *Rep. on the Mission to Peru*, *supra* note 16, at 18.

214. See *supra* notes 188–92 and accompanying text.

215. BEBBINGTON ET AL., MINING & DEV. IN PERU, *supra* note 13, at 2, 20 n.32.

216. See *Lerner Ghitis Calls for Further Dialogue to Resolve Protests*, PERUVIAN TIMES (Dec. 3, 2011), <http://www.peruviantimes.com/03/lerner-ghitis-calls-for-further-dialogue-to-resolve-protests/14340>.

panies employ Forza, owned by the Swedish corporation Securitas.²¹⁷ Finally, Forza allegedly employed Business Track, a Peruvian company.²¹⁸ Thus, Forza's alleged human rights violations are linked to the interests of corporations based in at least five jurisdictions: Peru, the United Kingdom, the United States, China, and Sweden, as well as one truly international corporation, the IFC. A legal action against a multinational corporation in its home state is usually brought by way of a tort action, governed by either the common law or domestic legislation. However, notwithstanding the intersection of multiple domestic jurisdictions in the Forza study, there are significant obstacles to addressing the issue of corporate impunity in the "home state" of these foreign investors. What follows is a brief consideration of the possibilities of home state litigation in two important jurisdictions: the United States and the United Kingdom.

GRUFIDES could theoretically be brought to an American court under the Alien Tort Claims Act ("ATCA"),²¹⁹ although the litigants have yet to explore this option. It is well known that home state courts in Canada²²⁰ and the United States²²¹ tend to refuse to take jurisdiction over the harm investors have allegedly caused abroad, often due to a narrow application of the international private law doctrine of *forum non-conveniens*.²²² In the United States, as of 2004 there were approximately

217. *About Securitas Peru*, *supra* note 78; *Company Profile: Securitas*, *supra* note 77.

218. Cruz & Romero, *supra* note 74.

219. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

220. Craig Forcese, *Deterring 'Militarized Commerce': The Prospect of Liability for 'Privatized' Human Rights Abuses*, 31 OTTAWA L. REV. 171, 201 (1999–2000). For example, Canadian courts have adopted such a narrow approach to the doctrine of *forum non-conveniens* that most litigants have been unable to convince the courts to take jurisdiction over the harm allegedly caused by a Canadian corporation abroad. *Id.*; *Recherches Internationales Quebec v. Cambior Inc.*, [1998] Q.J. No. 2554 (Can. Que. Sup. Ct. J.); *Piedra v. Copper Mesa Mining Corp.*, [2011] O.A.C. 191 (Can. Ont.). One exception is the decision of the Quebec Superior Court, see *Association canadienne contre l'impunité (ACCI) c. Anvil Mining Ltd.*, 2011 QCCS 1966 (Can. Que.), which was overturned in January 2012 by the Quebec Court of Appeal, see *Anvil Mining Limited c. Association Canadienne Contre l'impunité*, 2012 QCCA 117 (Can.).

221. In 2010 the jurisdictional hurdle disappeared in the states of Connecticut, New York, and Vermont in favor of an absolute bar to multinational liability when the U.S. Court of Appeals for the Second Circuit held as a matter of law that multinational corporations cannot be held liable under the ACTA. See *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111 (2d Cir. 2010). The same Court affirmed this decision in 2011, see *Kiobel v. Royal Dutch Petrol. Co.*, 642 F.3d 268 (2d Cir. 2011) *denied reh'g* 621 F.3d 111 (2d Cir. 2010).

222. Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 227, 229, 240–51 (Philip Alston, ed., 2005); Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263 (2004).

twelve active cases against corporate defendants under the ATCA, a handful of which survived a motion to dismiss on the basis of jurisdiction.²²³ 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 U.S. corporation.²²⁴ 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.²²⁵ Not surprisingly then, there have only been a handful of successful settlements in cases brought under the ATCA for corporate human rights violations.²²⁶ 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.²²⁷

The application of tort law in the European Union (“EU”) is somewhat more favorable to the victims of human rights violations than in Canada and the United States, particularly regarding the doctrine of *forum non conveniens*.²²⁸ A decision of the European Court of Justice in 2005 declared that the national courts of the EU may not halt proceedings on the grounds of *forum non conveniens* in cases brought against EU domiciled defendants, where the alternative venue is outside the EU.²²⁹ In this context, the British High Court was required to take jurisdiction over the action in *Majaz*.²³⁰ However, the company nonetheless challenged the existence of a legal basis for liability in UK law.²³¹ While the Court found that the claimants had an “arguable case” (a low threshold), it fur-

223. Koh, *supra* note 222, at 298.

224. *Id.* at 269–70.

225. *Id.*

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

227. Mara Theophila, Note, *Moral Monsters under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute after Kiobel v. Royal Dutch Petroleum Co.*, 79 *FORDHAM L. REV.* 2859, 2876 (2011).

228. Schutter, *supra* note 222, at 266–72.

229. Case C-281/02, *Owusu v. N.B. Jackson*, 2005 E.C.R. I-1383, ¶¶ 40–46, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0281:EN:HTML>; Richard Meeran, *Tort Litigation against Multinationals (“MNCs”) for Violation of Human Rights: An Overview of the Position outside the US*, *BUS. & HUM. RTS. RESOURCE CTR.* 12–13, <http://www.business-humanrights.org/media/documents/richard-meeran-tort-litigation-against-mncs-7-mar-2011.pdf> (last visited Feb. 24, 2012) [hereinafter Meeran, *Tort Litigation against Multinationals*].

230. Meeran, *Tort Litigation against Multinationals*, *supra* note 229, at 19.

231. *See id.* at 11–13.

ther commented that the case undoubtedly had potential legal and factual weaknesses.²³² While EU tort litigation against multinational companies occurs in a relatively favorable legal context, due to the commercial reality of this litigation to date, no cases have been resolved on the merits or have resulted in a finding of liability against the corporation.²³³ Rather, among the few cases that have not been dismissed, most were resolved through private settlements.²³⁴ *Majaz* ultimately held true to this pattern when the claimants accepted a settlement offer in July 2011, two years after initiating proceedings.²³⁵

This settlement pattern warrants further consideration of the dynamics and implications of private settlements. If an NGO is litigating the claim, settlement is often the only option.²³⁶ While NGOs generally do not stand to financially gain from settlement, they may lack the resources to pursue a trial, especially when litigation may promise to draw out over a period of decades.²³⁷ However, claimants are usually represented by law firms working for a substantial contingency fee.²³⁸ In these cases, settlement is likely the best business option for the firm.²³⁹

Conveniently, Yanacocha offers an example of how such a settlement might play out.²⁴⁰ In 2009 Yanacocha paid \$3,000,000 to settle an action brought to a U.S. District Court by the Municipality of Cajamarca in reference to a spill of 151 kilograms of mercury in the area that occurred in 2000.²⁴¹ The Municipality's American lawyers took \$1,200,000 of the

232. Guerrero v. Monterrico Metals PLC, [2009] EWHC (QB) 2475, [26] (Eng.).

233. See Meeran, *Tort Litigation against Multinationals*, supra note 229, at 13–15.

234. See, e.g., *id.* at 26–36.

235. Oxfam America Calls on Peru's President Elect to Take a Firm Position on Human Rights Protections, STATES NEWS SERV. (July 28, 2011), available at <http://www.highbeam.com/doc/1G1-262731750.html>.

236. See Meeran, *Tort Litigation against Multinationals*, supra note 229, at 13–15.

237. *Current Cases: Wiwa et al v. Royal Dutch Petroleum et al*, CTR. FOR CONST. RIGHTS, <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (last visited Feb. 22, 2012). 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. *Id.*

238. See William R. Towns, *U.S. Contingency Fees: A Level Playing Field?*, WORLD INTELL. PROP. ORG. [WIPO] (Feb. 2010), http://www.wipo.int/wipo_magazine/en/2010/01/article_0002.html.

239. *Id.*

240. See *Cajamarca Approves US \$3mn Indemnity For Mercury Spill*, BUS. NEWS AM. (May 27, 2009, 4:20 PM), http://www.bnamericas.com/news/waterandwaste/Cajamarca_approves_US*3mn_indemnity_for_mercury_spill.

241. *Id.*

settlement pursuant to a contingency fee and a further \$115,000 in additional general costs.²⁴² The Municipality was left with about \$1,685,000. This settlement—marked by significant controversy involving allegations of fraud, misrepresentation, and incompetence against the Municipality's American lawyers and their Peruvian counterparts²⁴³—illustrates the serious ethical questions that can arise when elite (Northern) lawyers purport to represent marginalized communities in developing countries where there are few effective mechanisms of lawyer-client accountability.²⁴⁴

It is clear that, in addition to inherent financial challenges and doctrinal hurdles, an endemic feature of civil law home state litigation against corporate defendants 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 certain drawbacks. Settlements do not “bring the perpetrators to account in legal proceedings” as the definition of impunity presented above requires.²⁴⁵ Rather, settlements allow the alleged perpetrators to purchase their immunity from civil suits according to the terms of secret private agreements. Further, due to the confidential nature of settlements and the location of the proceedings in the

242. See *Cajamarca Approves \$3 M Indemnity for Mercury Spill: Peru*, CHEM. BUS. NEWSBASE (May 27, 2009), http://infotrac.galegroup.com/itw/infomark/0/1/1/purl=rc1_BIM_0_A201533525?sw_aep=nysl_me_brooklaw. In 2009, the mayor of Cajamarca stated that “40% of the payment will be used for legal fees and the balance for projects at the affected communities.” *Id.* The 40% attorney contingency fee totaled \$1.2 million of the \$3 million settlement. Settlement Agreement, Minera Yanacocha and Government of Cajamarca 7–8 (Feb. 5, 2009) (on file with author) [hereinafter Settlement Agreement, Minera Yanacocha].

243. Letter from Mayor of Choropampa to Marco La Torre, Mayor of Cajamarca (Mar. 5, 2009) (on file with author); E-mail from GRUFIDES to “ADEFOR ADEFOR” (May 28, 2009) (on file with author); Letter from Gabriel Larrieu Bellido, Attorney, to Marco Aurelio La Torre, Mayor of Cajamarca (May 13, 2009) (on file with author); Representation Agreement, Law Firm of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A. (Apr. 9, 2001) (on file with author); Settlement Agreement, Minera Yanacocha, *supra* note 242.

244. See David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645, 2660–62 (1991).

245. See Comm. on Human Rts, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Rep.: Question of the Impunity of Perpetrators of Human Rights Violations (civil and political)*, Econ. & Soc. Council, 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex II (Oct. 2, 1999) (by Louis Joinet) [hereinafter *Impunity & Human Rights Violations*], available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.sub.2.1997.20.Rev.1.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.sub.2.1997.20.Rev.1.En); see also Theresa Harris, *Settling a Corporate Accountability Lawsuit without Sacrificing Human Rights: Wang Xiaoning v. Yahoo!*, 15 HUM. RTS. BRIEF, no. 2, 2008 at 10, 13.

investor's home country, the resolution of a case by way of a settlement undoubtedly militates against national or international public policy reform.²⁴⁶ Moreover, settlements deprive social movements of a court sanctioned public record of events that might bolster their moral and political claims for reform.²⁴⁷ For these reasons, private settlements can be seen as a means of privatizing the problem of impunity by converting the accountability of the perpetrators into a private matter and by limiting the impact of the proceedings on public policy and public action.²⁴⁸

These observations raise serious questions about the capacity of home state litigation, at least in its present form, 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.²⁴⁹ Further, the presence of Chinese investors in *Majaz* signals a new challenge created by the emerging shift in the character of the "home country."²⁵⁰ Foreign investment increasingly originates in countries where there is very little history of home state litigation and where new, and as yet unexplored, legal challenges undoubtedly reside to transnational corporate accountability.²⁵¹ For example, China has become the second largest foreign investor in Peru, and Peru is the number one destination in Latin America for Chinese investment.²⁵²

246. See *Impunity & Human Rights Violations*, *supra* note 245.

247. See *id.* at 15; see also Orentlicher, *Principles to Combat Impunity*, *supra* note 208, para. 15 ("States must respect and protect the right of non-State organizations and individuals to collect, preserve and make available relevant documents concerning such violations.").

248. See *Impunity & Human Rights Violations*, *supra* note 245, at 16, 23 (explaining that inherent in combating impunity is the right of the public to know exactly what the violations are, securing truth and restoring dignity to individuals formerly denied both, and the obligation of the state to ensure non-recurrence of violations).

249. *CAFOD Calls on Monterrico to Change its Ways As UK Multinational Settles Torture Case Out of Court*, CATHOLIC AGENCY FOR OVERSEAS DEV. [CAFOD] (July 20, 2011), <http://www.cafod.org.uk/news/international-news/monterrico-metals-2011-07-20>.

250. Milagros Salazar, *Social Responsibility Missing in Growing Trade Ties*, INTER PRESS SERV. (Feb. 3 2010), <http://ipsnews.net/news.asp?idnews=50206>.

251. See generally Jose De Echave, *Does Everything Have a Price?*, MINES & COMMUNITIES (Aug. 28, 2007), <http://www.minesandcommunities.org/article.php?a=2274>; see also Memorandum from CAFOD, and Peru Support Group on Human Rights, to the Human Rights Jt. Comm., U.K. Parliament (May 2009) (U.K.), available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5we38.htm>.

252. *Perú es el principal destino de la inversión china en América Latina al superar los US\$ 1.400 millones [Peru becomes the Main Destination for Chinese Investment in Latin America upon surpassing U.S. \$ 1.4 Million]*, EL COMERCIO.PE (Apr. 21, 2010), <http://elcomercio.pe/economia/465191/noticia-peru-principal-destino-inversion-china-america-latina-al-superar-us-1400-millones>.

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. In the Forza case study, the Southern domestic jurisdiction (Peru) has failed to date to exercise its criminal jurisdiction over Forza, while the Northern jurisdictions pose formidable challenges to successful litigation against the corporations involved.²⁵³ Taken together, these deficiencies create a global gap in the domestic regulation of the transnational corporation. As a result, even in the midst of domestic systems of law ostensibly available to address the alleged violations, the circumstances of impunity are maintained. The Forza case study suggests that the potential for impunity is 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 the global gap created by the deficiencies in domestic legal systems reviewed above.

B. 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 social responsibility mechanisms.²⁵⁴ Each of these will be considered in turn.

The two international public law human rights treaty administration systems of relevance to the study are the Organization of American States ("OAS") system²⁵⁵ and the UN Human Rights Committee.²⁵⁶ Each

253. *Rep. on the Mission to Peru*, *supra* note 16, para. 72.

254. Public international law is defined as "[t]he law of nations, being that law which regulates the political intercourse of nations with each other or concerns questions of rights between nations." BALLENTINE'S LAW DICTIONARY (3d ed. 2010) (search term "Public International Law"). Private international investment law concerns itself with the "ownership or control, directly or indirectly, by commitment or otherwise, by foreign persons of any interest in property" and the law that governs the interactions between the investors. 22 U.S.C § 3102(9) (2006). Private corporate social responsibility "goes beyond philanthropy and compliance and addresses how companies manage their economic, social, and environmental impacts, as well as their relationships in all key spheres of influence: the workplace, the marketplace, the supply chain, the community, and the public policy realm." CORPORATE SOCIAL RESPONSIBILITY INITIATIVE, http://www.hks.harvard.edu/m-rcbg/CSRI/init_define.html (last visited Feb. 22, 2012).

255. Of particular relevance is: American Convention on Human Rights, *supra* note 142.

system has articulated norms relevant to the Forza case study. As a bed-rock principle, both systems recognize that member states have a fundamental duty to appropriately prevent, investigate, and sanction all private and public actors that violate human rights within its territory.²⁵⁷ Further, both systems have declared that human rights violations occurring within a member state's territory become the state's responsibility under international law when the state fails to carry out its duty to prevent, investigate, and sanction human rights violators.²⁵⁸ 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.²⁵⁹

There has been very little international public law jurisprudence that addresses human rights violations committed collectively by the state, private security actors, and transnational corporations.²⁶⁰ Nonetheless, in principle, the norms referenced above appear to confront the problem of impunity depicted in the Forza study. These norms require that the Peruvian State carry out the criminal investigation and prosecution of those responsible in the *GRUFIDES* and the *Majaz* cases. Further, these norms 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.

In practice, however, both the OAS and the UN human rights treaty oversight systems lack enforcement capacity with regard to their state signatories.²⁶¹ If either of these were to be able to take jurisdiction and find a human rights treaty violation in relation to any of the allegations raised in the Forza case study, the recommended remedy would nonetheless

256. Of particular relevance are the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

257. Velásquez Rodríguez v. Honduras Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 172, 174 (July 29, 1988); Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

258. See *supra* note 257.

259. Alex P. Kontos, Privatization of State Security Services 28 (Oct. 2005) (unpublished manuscript) (manuscript presented to the Canadian Council on International Law 34th Annual Conference Fragmentation: Diversification and Expansion of International Law).

260. August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 222, at 37–38.

261. *Id.* at 46–53.

require voluntary implementation by the Peruvian State.²⁶² This process is 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.²⁶³ Even without taking into account the influence of powerful foreign investors and the dynamics of privatization, the obstacles to implementation have been identified by experts and scholars in the field as a lack of political will and the powerful position of the armed forces and the police in Latin American countries.²⁶⁴

The current enforcement deficit inherent in public international human rights law is contrasted by the enforcement capacity of “international” foreign investment law.²⁶⁵ 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,²⁶⁶ the Swedish company Securitas in Forza,²⁶⁷ and formerly, the British company Monterrico in Rio Blanco.²⁶⁸ Yanacocha’s investors further benefit from a private investment contract.²⁶⁹ 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

262. *Id.*

263. Even while the decisions of international tribunals may not often be directly implemented by state signatories, they still may have indirect and derivate positive effects on policy issues. James Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 235 (2004–2005).

264. James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 788 (2008).

265. For a critique of the colonial and Western origins of the foreign investment contract, see M. Somarajah, *Economic Neo-Liberalism and the International Law on Foreign Investment*, in THE THIRD WORLD AND INTERNATIONAL ORDER, *supra* note 22, at 173.

266. Gus Van Harten, Policy Impacts of Investment Agreements for Andean Community States (Sept. 2008) (unpublished manuscript) [hereinafter Van Harten, Impacts of Investment Agreements for Andean], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461097.

267. *Id.*

268. *Id.*

269. CHRISTIAN AID, UNDERMINING THE POOR: MINERAL TAXATION REFORMS IN LATIN AMERICA 9, 16 (Sept. 2009), available at <http://www.christianaid.org.uk/Images/undermining-the-poor.pdf>.

the offending state.²⁷⁰ A study of the political consequences of the BITs applicable to four Andean countries, including Peru, highlighted the enforcement power of these treaties²⁷¹ and concluded that they present major fiscal risks to governmental decision-making in the extractive sector. This occurs because these treaties dramatically shift political bargaining power in favor of transnational firms and against other social interests that stand to benefit from efforts to regulate extractive industry investors.²⁷² Since these BITs do not create any corresponding human rights responsibilities, they are unable to alleviate the problem of impunity in the Forza study. Rather, it is possible that the BITs may aid investors in resisting regulations aimed at addressing the conditions of impunity. In this light, BITs may well represent the privatization of the public power that could theoretically act to address impunity.

Finally, Forza is indirectly governed by an emerging patchwork of privatized human rights norms.²⁷³ Forza's multinational owner, Securitas, signed the UN Global Compact,²⁷⁴ 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, labor, environment and anti-corruption.²⁷⁵ Pursuant to the Global Compact, Securitas 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.²⁷⁶ However, according to the UN Global Com-

270. Van Harten, *Impacts of Investment Agreements for Andean*, *supra* note 266, at 33; see Ibironke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PENN ST. INT'L L. REV. 251, 276–80 (2007–2008); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 58–80 (2007) [hereinafter VAN HARTEN, *INVESTMENT TREATY ARBITRATION*].

271. Van Harten, *Impacts of Investment Agreements for Andean*, *supra* note 266, at 33; see, e.g., Odumosu, *supra* note 270; VAN HARTEN, *INVESTMENT TREATY ARBITRATION*, *supra* note 270.

272. Van Harten, *Impacts of Investment Agreements for Andean*, *supra* note 266, at 33. Odumosu, *supra* note 270; VAN HARTEN, *INVESTMENT TREATY ARBITRATION*, *supra* note 270.

273. Privatized human rights norms are self-regulated voluntary codes of conduct. Reinisch, *supra* note 261, at 42–43. They are not state regulated and are not mandatory. *Id.*

274. *Responsibilidad Social* [Social Responsibility], SECURITAS, <http://www.securitas.com/pe/es-pe/About-Us/Responsabilidad-Social/> (last visited Feb. 12, 2012).

275. *About Us*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Feb. 22, 2012).

276. See *Global Compact Principal One*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html> (last updated Jan. 10, 2010); *Global Compact Principal Two*, U.N. GLOBAL COMPACT,

compact's website, the compact is "voluntary and network based" and its "light and non-bureaucratic" governance framework is focused on promoting corporations' capacity to *prospectively* conform to the Global Compact.²⁷⁷ As such, this initiative offers no mechanism for addressing the criminal behavior of Forza officers alleged in the three cases reviewed.²⁷⁸

Yanacocha, the mining company that employed Forza in relation to *GRUFIDES*, is governed by the most celebrated private human right mechanisms. Yanacocha's majority shareholder, Newmont, has directly signed onto the UN Global Compact, the Global Reporting Initiative, the Voluntary Principles for Security and Human Rights in the Extractive Industry ("Voluntary Principles"), and the Position Statement on Mining and Indigenous Peoples of the International Council on Mining and Metals ("ICMM").²⁷⁹ Yanacocha is also governed by the corporate responsibility regime of the Organization for Economic Cooperation and Development ("OECD"), the Guidelines for Multinational Enterprises, because its majority shareholder, Newmont, is an American company.²⁸⁰ Finally, the human rights policies pertaining to the IFC are applicable because of the IFC's share in Yanacocha.²⁸¹ Of these mechanisms, the OECD,²⁸² the ICMM,²⁸³ the Voluntary Principles,²⁸⁴ and the IFC²⁸⁵ permit the submis-

<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html> (last updated Jan. 10, 2011).

277. *Frequently Asked Questions*, U.N. GLOBAL COMPACT (Jan. 18, 2012), <http://www.unglobalcompact.org/AboutTheGC/faq.html>.

278. *See id.*

279. *UN Global Compact Features PTNNT as Best Practice*, NEWMONT (Nov. 30, 2010), <http://www.newmont.com/features/our-communities-features/UN-Global-Compact-Features-PTNNT-as-Bes-%20Practice>.

280. *Members and Partners*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], http://www.oecd.org/document/25/0,3746,en_36734052_36761800_36999961_1_1_1_1,00.html (last visited Feb. 22, 2012) [hereinafter OECD, *Members & Partners*].

281. *See Yanacocha, About Us, supra* note 136.

282. In 2010 OECD Watch issued a report reviewing the effectiveness of the OECD Guidelines for Multinational Enterprises. *See* JORIS OLDENZIEL, JOSEPH WILDE-RAMSING & PATRICIA FEENEY, OECD WATCH, 10 YEARS ON (2010). The report concluded that "to date the OECD Guidelines have had a poor track record in dealing with the social, environmental and economic problems that matter most to communities and workers whose rights have been harmed by the actions of MNEs," and that "the main impediments to the Guidelines being an effective instrument concern the confusion about their voluntary nature, their restrictive scope as well as failings with the implementation procedures and the lack of authority" of oversight bodies (NPCs). *Id.* at 7–8.

283. INT'L COUNCIL ON MINING & METALS [ICMM], GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING 4, 95–105 (2010), *available at* <http://www.icmm.com/library/indigenouspeoplesguide> (follow "Download PDF" link); ICMM, *ICMM Complaint(s) Hearing Procedure* (Oct. 10, 2007), at 2; ICMM, ICMM

sion of complaints. The outcomes of complaints made against Yanacocha under the Voluntary Principles and IFC mechanisms will be reviewed here.

Since 2000, three complaints against Yanacocha have been filed with the IFC Office of Compliance/Advisor Ombudsmen (“CAO”).²⁸⁶ 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 failed to fulfil its commitments to help the victims of a mercury spill²⁸⁷ and that the mine adversely affected local communities in a myriad of other ways.²⁸⁸ However, each of the three CAO complaints brought against Yanacocha failed to proceed from an initial investigation to a conflict mediation phase²⁸⁹ and none of them entered the subsequent compliance or follow up phases of the CAO process.²⁹⁰ There is no indication from the information presented on the CAO website that the substance of the complaints were ever successfully addressed.²⁹¹ By

ANNUAL REVIEW 2010, available at <http://www.icmm.com/annual-review2010> (follow “Download PDF” link). The only consequence of a successful complaint to the ICMM could be the corporation’s loss of membership in the ICMM. See ICMM, *Human Rights in the Mining & Metals Industry: Overview, Management Approach and Issues* (May 2009), available at <http://www.icmm.com/document/716>; ICMM, *Human Rights in the Mining & Metals Industry: Handling and Resolving Local Level Concerns & Grievances* (Oct. 2009), available at <http://www.icmm.com/page/225/business-and-human-rights> (follow “related guidance” link under “What ICMM Is Doing” heading). However, there is no record of this complaint mechanism actually being used by civil society actors. In 2009 Newmont received full marks from the ICMM for its reporting on its performance under the ICMM’s Sustainable Development Framework. ICMM, MEMBER PERFORMANCE TABLE (2009), available at <http://www.icmm.com/our-work/sustainable-development-framework/member-performance-assessment> (follow “Download PDF” link).

284. See *The Principles: Introduction*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS, <http://www.voluntaryprinciples.org/principles/introduction> (last visited Feb. 22, 2012).

285. See INT’L FIN. CORP. [IRC], GOOD PRACTICE NOTE: ADDRESSING GRIEVANCES FROM PROJECT-AFFECTED COMMUNITIES II (2009).

286. *Latin America & the Caribbean*, COMPLIANCE ADVISOR OMBUDSMEN [CAO], http://www.cao-ombudsman.org/cases/default.aspx?region_id=3 (last visited Feb. 29, 2012).

287. *Yanacoch-01/Cajamarca*, CAO, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=110 (last visited Feb. 22, 2012); *Yanaacocha-02/Cajamarca*, CAO, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=111 (last visited Feb. 22, 2012); *Yanacocha-03/Cajamarca*, CAO, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=112 (last visited Feb. 22, 2012).

288. See *supra* note 287.

289. See *supra* note 287.

290. See *supra* note 287.

291. See *supra* note 287.

August 2006, all three of the complaints had been closed without comment or explanation.²⁹²

In 2001, the CAO attempted to address two of the three complaints²⁹³ through the creation of a “Dialogue Roundtable.”²⁹⁴ At the time, this initiative was a celebrated innovation for the CAO.²⁹⁵ Yet a 2005 independent evaluation of the Roundtable questioned its capacity to serve as a dispute resolution mechanism and observed that the Roundtable had failed to respond to a number of key conflicts in its midst.²⁹⁶ Due in part to this inaction, the evaluation concluded that 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.²⁹⁷ The conclusions of the 2005 evaluation 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 so that the perpetrators of the alleged violations would be “brought to account.”²⁹⁸ One glaring 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 conflict escalated such that the events documented by *GRUFIDES* ensued. In 2004, and again in 2006, mass protests took place against Yanacocha, resulting in the death of a protestor, the murder of a Campesino leader, and the subsequent persecution of GRUFIDES personnel.²⁹⁹

292. *See supra* note 287.

293. One complaint pertained to the Choropampa mercury spill, claiming that Yanacocha has not made good on its commitments to help the victims. The other complaint alleged that Yanacocha’s mining activities caused environmental contamination and increased social inequity in the region, among other adverse effects. *See supra* note 287.

294. CAO & Multilateral Investment Guarantee Agency [MIGA], *Report of the CAO Expert Mission to Cajamarca: Preliminary Public Workshops 4* (Sept. 2001), available at <http://www.cao-ombudsman.org/cases/document-links/documents/CAOSept2001Meetingsenglish.pdf>.

295. *Id.*

296. Manuel Rodríguez et al., Rep. of the Indep. Evaluation of the Mesa de Dialogo y Consenso CAO-Cajamarca, CAO & MIGA, 1, 9 (May 2005), available at http://www.cao-ombudsman.org/cases/document-links/documents/MESA_Evaluation_Report_Final_English.pdf.

297. *Id.* at 1, 26–29.

298. *Id.* at 20–22.

299. *See* Amnesty Int’l, *Peru: Fear for Safety*, AMR 46/029/2006 (2006), available at <http://www.amnesty.org/en/library/info/AMR46/029/2006/en>; *Peru’s Yanacocha Mine Suspends Operations Due to Protest*, PACE E BENE (Aug. 30, 2006), <http://paceebene.org/nvns/nonviolence-news-service-archive/perus-yanacocha-mine->

The conduct of Yanacocha's security forces during these events resulted in yet another voluntary human rights proceeding, initiated in 2007 by Oxfam America against Newmont under the Voluntary Principles for Security and Human Rights.³⁰⁰ This complaint was the first of its kind under the Voluntary Principles, and in response Newmont agreed to an independent review of Yanacocha's security and human rights policies and procedures.³⁰¹ The 2009 report of the independent reviewer³⁰² recommended that Yanacocha create a Risk Assessment and Conflict Resolution Office to "drastically investigate and sanction" violations of the Voluntary Principles and urge the justice system authorities to do the same.³⁰³ 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.³⁰⁴ Finally, the review recommended the termination of Yanacocha's contract of service with Forza.³⁰⁵

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.³⁰⁶ First, the review failed to even mention the outstanding criminal allegations against Forza raised by *GRUFIDES* and pertaining to *Operación Diablo*.³⁰⁷ Second, by failing to question Yanacocha's economic support for the police force, the review did not adequately critique the model of privatized force.³⁰⁸ Rather, it further conflated the roles of Yanacocha and the justice system by suggesting that Yanacocha should take a role in the training of its police employees, and that Yanacocha should create an internal adjudication process for addressing criminal allegations against

suspends-operations-due-protest; Milagros Salazar, *PERU: Leaching Out the Water with the Gold*, INTER PRESS SERV. (Sept. 20, 2006), <http://ipsnews.net/news.asp?idnews=34805>.

300. See Press Release, Oxfam America, Oxfam Calls on Mining Company to Respect Human Rights (July 1, 2009), available at <http://www.oxfamamerica.org/press/pressreleases/oxfam-calls-on-mining-company-to-respect-human-rights>.

301. See Voluntary Principles on Security and Human Rights, London, U.K., Mar. 18–19, 2010, *2010 Plenary Meeting Rep. 2*, available at http://voluntaryprinciples.org/files/VP_Plenary_2010_Report.pdf.

302. Only a five page executive summary of the review is publicly available. See COSTA, *supra* note 53, at 11.

303. *Id.* at 12–14.

304. *Id.* at 14–15.

305. *Id.* at 16.

306. See *id.* at 12.

307. See *id.*

308. See *id.*

its employees.³⁰⁹ Third, to the extent that the review made proposals that could partially address the issue of impunity or privatized force, these do not appear to have been implemented. In the time since the review was issued, there is no evidence that Yanacocha has prohibited its contracted police officers from carrying weapons, nor is there any indication that Yanacocha has terminated its contract with Forza. On the contrary, community members regularly observe that Yanacocha-paid police officers are armed, and that Forza officers continue in the employ of Yanacocha. Finally, there is no indication that the company has taken action to urge the authorities to investigate the criminal allegations raised in *GRUFIDES*, nor has it clarified its alleged role in *Operación Diablo*, either publicly or to the alleged victims of this operation.

Turning to *Majaz*, the British company Monterrico was not governed by any of the corporate social responsibility mechanisms that Newmont has purported to adopt.³¹⁰ As a junior mining company, Monterrico likely lacked the capacity to cultivate long-term relationships with local communities.³¹¹ Junior mining companies generally have a short life span devoted to obtaining and selling mineral exploration rights.³¹² This is exactly the process that was followed in *Majaz*, Monterrico ultimately sold its interest in the *Majaz* project to a Chinese consortium.³¹³ This consortium has likewise not signed onto any of the aforementioned international corporate social responsibility regimes.³¹⁴

The above discussion of the international law mechanisms applicable to the Forza case study highlights the asymmetry in the enforcement of

309. *Id.* at 14.

310. While Monterrico was not a signatory to any voluntary agreements, it would have been automatically covered by the OECD Guidelines since the United Kingdom is a member country. See OECD, *Members & Partners*, *supra* note 280.

311. BEBBINGTON ET AL., *MINING & DEV. IN PERU*, *supra* note 13, at 20–21 & 21 n.33.

312. *Id.* at 14.

313. BEBBINGTON ET AL., *MINING & DEV. IN PERU*, *supra* note 13, at vii, 2, 14 & 20 nn.32–33; Russell Hotten & Richard Spencer, *China's Year of the Rat Race Beijing's Power Play in the Battle for Rio Tinto is Part of a Long-Term Strategy to Build a Whole Range of National Champions*, SUNDAY TELEGRAPH (U.K.), Feb. 10, 2008, at 8.

314. See discussion *supra* p. 496–97; *Participants and Stakeholders*, UN GLOBAL COMPACT, <http://www.unglobalcompact.org/participants/search> (follow “Participant Search” hyperlink; then search “Name” for “Zijn” and “Country” for “China”; then follow “Search” hyperlink) (last visited Feb. 22, 2012); *GRI Organizations Search*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/Pages/GRIOrganizationsSearchPage.aspx> (last visited Feb. 29, 2012); *Participants*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS, <http://www.voluntaryprinciples.org/participants/> (last visited Feb. 22, 2012); *Member Companies*, ICMM, <http://www.icmm.com/members/member-companies> (last visited Feb. 22, 2012); OECD, *Members & Partners*, *supra* note 280.

international law in favour of transnational corporate economic interests. The legal regimes, such as the BITS, 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. In the Forza case study, the enforcement of these conventions continues to depend on the political will of the Peruvian State.

The corporate social responsibility mechanisms that ostensibly govern the facts at issue in this case study have also been described above. Of these mechanisms, four would permit individuals or organizations to file a complaint in relation to Yanacocha³¹⁵ and two have already been invoked to this end, namely, the Voluntary Principles and the IFC CAO. It is also noteworthy that these two mechanisms are arguably among the most robust of the applicable corporate social responsibility regimes. However, as discussed above, the appeals made to the Voluntary Principles and the IFC CAO regarding allegations against Yanacocha have produced very little in the way of concrete outcomes for the affected community members. In these specific circumstances, these two corporate social responsibility mechanisms have been unable to satisfy two key aspects of the definition of impunity, namely, they have not brought the perpetrators to account, nor have they been able to make reparations to the victims.³¹⁶ 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

From the perspective of Campesino and Indigenous communities in Peru, there are a range of potential human rights issues that arise in domestic and international law as a result of transnational corporate resource extraction. These include communities' right to land, free prior and informed consultation—and perhaps even consent to extractive activity—and an equitable share in the benefits of resource extraction.³¹⁷

315. See *supra* notes 282–85 and accompanying text.

316. Orentlicher, *Principles to Combat Impunity*, *supra* note 208.

317. See Case of the Sawhoyamaya Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); Case of the Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 79 (Feb. 1, 2001); Mary & Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1, rev. 1 (2002); Maya Indigenous

However, the Peruvian State, under the pressure of capital exporting countries and international financial institutions,³¹⁸ has institutionalized the primacy of foreign investors' rights in the form of increased property rights and the protection of investment rights. In this context, the Inter-American Commission on Human Rights concluded that the basic land, social, and economic rights of Campesino and Indigenous Communities in Peru are being systematically violated by laws and practices that promote resource extraction and free trade.³¹⁹ A broad and powerful social movement has been consolidated in response.³²⁰ This movement finds its expression in the interconnected work of certain NGOs; community organizations; and formal and informal transnational networks of concerned citizens, activists, and academics; as well as in protest marches and road blockades.³²¹ In response to this social movement and its demands, the Peruvian State and mining companies have frequently resorted to the use of coercive force.

In this context, this case study of the Forza security company has undertaken a particular methodological approach. First, it explored the legal arrangements that structure the exercise of coercive power in Peru and the formal and informal practices that characterize the security sector. In summary, these are (1) the increase in private security companies and officers relative to police officers, (2) the presence of private security companies, in some cases foreign owned, that specialize in providing services to mining companies and other companies in the resource extraction sector, (3) the high levels of participation of police and military officers in private security companies, and (4) the formation of private security contracts between the police force and transnational mining companies. After analyzing the foregoing, this Article argued that public and private security services are being reorganized in accordance with a number of processes of privatization and that these services are increasingly at the disposal of transnational mining companies.

Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5, rev. 1 (2004).

318. 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*, 10 INT'L COMM. L. REV. 431, 436–41 (2008).

319. Inter-Am. Comm'n H.R., *Second Rep. on the Situation of Human Rights in Peru*, ch. X, paras. C, D, E, H, OEA/Ser.L/V/II.106, Doc. 59, rev (June 2, 2000), available at <http://www.cidh.org/countryrep/Peru2000en/TOC.htm>; *Country Report: Peru*, supra note 184, at 166–71.

320. BEBBINGTON ET AL., MINING & DEV. IN PERU, supra note 13, at 17.

321. *Id.* at 17–20.

Next, this Article investigated how these coercive resources are mobilized in response to social movements working on human rights issues in the area of resource extraction. As such, the allegations in *Majaz*, *GRUFIDES*, and *Business Track* 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 by private security companies.³²² 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 purport to 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.³²³ At the international level these consist of the human rights treaty system, the foreign investment regime, and voluntary corporate social responsibility mechanisms.³²⁴ Each of these mechanisms or systems of law was examined in terms of its applicability to the Forza case study and its potential efficacy in addressing the issue of impunity.

This process helped to illuminate the operation, in the context of a particular case study, of the global gap in domestic law and the asymmetry of international law. It showed how the global gap results from a global pattern of deficiencies in the domestic regulation of transnational corporations. The claimants in the three cases reviewed argued that the Peruvian justice system failed to properly investigate and sanction Forza. On the other hand, in many jurisdictions in the global North, the courts are likely to refuse to take jurisdiction over a lawsuit against Forza or one of its transnational corporate employers, as the case may be. Where a Northern court does take jurisdiction and proceed to trial, the experience to date is that the case will be settled out of court. Notwithstanding the positive dimensions of these settlements, this Article has argued that they also carry significant drawbacks; in particular it is argued that, as a systematic practice, they may amount to the privatization of the problem of impunity. At the same time, international law's enforcement capacity is asymmetrical in that the legal regimes that protect the rights of the investors that employ Forza are enforceable, while the regimes that purport to protect the human rights of those who seek to bring claims against Forza

322. See *supra* Part I.B.

323. See *supra* Part II.A.

324. See *supra* Part II.B.

lack enforcement capacity. In this regard, this Article argued that the use of corporate social responsibility mechanisms by human rights claimants may ultimately produce outcomes that serve to perpetuate the privatization of coercive power and to entrench the problem of impunity.

In sum, this Article used a discrete case study to explore how the conditions of impunity are maintained in the face of multiple systems of domestic, transnational, and international legal regimes. It has posited that these regimes have failed in this regard because they are unable to confront impunity's political and economic underpinnings, namely, the privatization of coercive force exercised in the service of transnational corporate power. In this respect, the Forza case study articulates with the fundamental concern of Third World Approaches to International Law ("TWAAIL") scholars that the international legal system works to disempower Third World³²⁵ peoples and intensify global inequality.³²⁶ TWAAIL scholars have argued that Third World social movements represent the "cutting edge of Third World resistance to antidemocratic and destructive development."³²⁷ They have declared that international lawyers must "assist the ongoing global movement for global justice" in whatever ways possible.³²⁸ To this end, TWAAIL scholars have called for the development of "a theory of resistance" that would enable lawyers to respond appropriately.³²⁹ In response, this Article has worked toward developing a methodological approach to the study of 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

325. TWAAIL 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. *Introduction* to BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW* 1, 3 (Cambridge Univ. Press, 2003).

326. *THE THIRD WORLD AND INTERNATIONAL ORDER*, *supra* note 22, at vii–viii.

327. Balakrishnan Rajagopal, *International Law and Third World Resistance: A Theoretical Inquiry*, in *THE THIRD WORLD AND INTERNATIONAL ORDER*, *supra* note 22, at 173, 142, 162.

328. B.S. Chimni, *A Just World under Law: A View from the South*, 22 *AM. U. INT'L L. REV.* 199, 220 (2006–2007).

329. Rajagopal, *supra* note 327, at 162. In Rajagopal's view, a theory of resistance must, among other things, compel a fundamental rethinking of state-centered international law and the ideology of development. *Id.* at 162–71. It must shift the unitary conception of international law, as a political space consisting solely of states and individuals, toward an approach based on social movements and the dialectic between institutions and extra-institutional mass action. *Id.*

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 tools that movements can avail themselves of under current legal arrangements. It engages critically with national and international systems of law in search of a reform agenda that places the issue of effective enforcement at the center of discussions on mechanisms for protecting rights. In this sense, the adoption of the lens of impunity is consistent with the call from critical international law scholars to focus on the outcomes of legal regimes before committing to their vocabularies and institutions.³³⁰ According to these scholars, the vocabularies and institutions of international law—particularly international human rights law—must themselves be sites of critique and contestation. They caution that if institutional outcomes do not change, then a change in vocabulary in favour of human rights will only subvert the capacity for transformation.³³¹

In this framework, this study's methodology has been alert to the potential strategic pitfalls of engaging with particular systems of law. The fact that well-intentioned engagements with certain mechanisms may have inadvertent consequences underscores the need for careful reflection on the broader legal and political consequences of these mechanisms. Particularly, advocates must carefully consider the potential risks associated with the activation of privatized human rights mechanisms, such as voluntary corporate responsibility or private tort law regimes. The Forza case study suggests that it may be difficult to engage voluntary mechanisms without perpetuating or reinforcing the legal and practical arrangements of the privatized coercion that forms the structural underpinnings of the human rights issues that advocates seek to address. In the same vein, this study questions the costs and benefits of the privatized outcomes generated by home state tort law settlements.

Of the many issues facing Third World social movements, the issue of systemic impunity for the criminal behavior perpetrated to benefit 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 protect the very existence of grassroots resistance to inequitable economic relations. Just as this is

330. See Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 22 EUR. J. INT'L L. 7, 12–13 (2009); see also David Kennedy, Professor of Law, Brown Univ., Address at the Ohio Northern Univ. Pettit Coll. of Law Kormendy Lecture: The Mystery of Global Governance (Jan. 25, 2008), available at [http://www.law.harvard.edu/faculty/dkennedy/speeches/GlobalGovernance\(2\).htm](http://www.law.harvard.edu/faculty/dkennedy/speeches/GlobalGovernance(2).htm).

331. Koskenniemi, *supra* note 330, at 13.

of deep concern, the persistence and tenacity of these movements against all odds suggests that these circumstances likewise represent a rare opportunity for change.