# HABITAT AS HUMAN RIGHTS: INDIGENOUS HUAORANI IN THE AMAZON RAINFOREST, OIL, AND OME YASUNI[1]

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## INTRODUCTION

I want to thank Vermont Law School, *Vermont Law Review*, and the organizers of this Symposium, "Habitat for Human Rights," for bringing us together to discuss this important topic. It is commonly assumed that

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1. This Article is based on the Author's presentation at the *Vermont Law Review* September 2015 Symposium, Habitat for Human Rights. Parts of this Article have been previously published in the Colorado Journal of International Law and Policy and the New York University Journal of International Law and Politics. For more information see Judith Kimerling, *Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni*, 24 COLO. J. INT'L L. & POL'Y 43 (2013) [hereinafter *Oil, Contact, and Conservation*]; Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POLS. 413 (2006) [hereinafter *Oil Frontier*]. In addition to the sources cited *infra,* this Article draws on the Author's observations during regular visits since 1989 to oil field facilities and affected communities in Ecuador's Amazon region; participation in local, national, and international fora; and interviews and ongoing dialogue with local residents, oil company workers and executives, and governmental officials.

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environmental protection and human rights go hand in hand. And on the ground, they normally do. But environmental law and human rights law do not always work together, or further their stated aims. In the Amazon Rainforest in Ecuador, the effectiveness of environmental law and human rights law is undermined by the failure to recognize and address historical legal structures and policies that seek to dominate Indigenous peoples and continue to shape the law. I'd like to begin by highlighting three general scenarios where environmental and human rights laws intersect, and then talk about the indigenous Huaorani communities I work with, who have organized themselves to defend their habitat as human rights in the area now known as Yasuni National Park and Biosphere Reserve, in the Amazon Rainforest in Ecuador.

## I. HUMAN RIGHTS AND THE ENVIRONMENT

A first scenario where human rights and the environment intersect is when the human rights of environmental defenders are violated. This can include rights violations that take place outside of the law, such as arbitrary detention and excessive use of force against protesters. It can also include use of the law to violate human rights, such as when governments criminalize dissent and repress freedom of expression by using criminal defamation or overly-broad counterterrorism laws to prosecute protestors and influential critics.[2]

A second scenario where environmental and human rights law intersect is when environmental degradation is a source of human rights violations. The question of what types, and extent, of environmental degradation rise to the level of human rights violations is complicated when approached from an environmental law perspective. This is because international law is based on agreement among States, while environmental law is dynamic—it can change and evolve. In addition, not only do the details of many environmental norms differ from place to place, but also, at a more general level, some States maintain that so-called developing nations should not require the same level of environmental protection as wealthier nations.[3]

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2. *See generally* GLOB. WITNESS, HOW MANY MORE? (2015) https://www.globalwitness.org/en/campaigns/environmental-activists/how-many-more/ (report on risks faced by environmental and land defenders in 2014, finding 116 cases of killings in 17 countries as well as threats of physical violence, criminalization, and restrictions on their freedoms); HUMAN RIGHTS WATCH, WORLD REPORT: EVENTS OF 2015, at 218–24 (2016) https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf (reporting on human rights abuses and concerns in Ecuador).

3. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 11, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992) ("States shall enact effective environmental legislation. Environmental standards, management objectives and priorities

For example, we hear a lot of talk about international standards for oil extraction operations. But there is no clear body of international environmental rules. At the national level, standards vary. And here, in the United States, even national standards are limited and important environmental norms can differ from state to state.[4]

As a result, it is difficult to define precise environmental standards that have international consensus, and that is one reason why customary international environmental law is so limited. But human rights law could help address this challenge in some circumstances by providing a shared performance-based standard: basically, that environmental degradation is not acceptable when it violates human rights. And as we heard in this morning's Keynote Address, human rights law has been able to maintain universality despite some differences.[5]

In 1997, the Inter-American Commission on Human Rights (IACHR, or the Commission) published a report with a groundbreaking analysis linking environmental contamination and human rights.[6] The report examined human rights in Ecuador, and included a chapter on the situation of people affected by oil extraction in the Amazon region that focused on the ability of local residents "to realize their rights to life and physical security in an environment that has been subjected to severe environmental pollution."[7]

The Commission began its analysis of relevant Inter-American human rights law by recognizing that "[t]he realization of the right to life, and to physical security and integrity [as protected by the American Declaration on

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should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.") This principle reflects the belief that costly environmental requirements could undermine development, and that developing countries may choose to prioritize the generation of jobs and revenues over environmental concerns. Industrial nations, the argument goes, became wealthy at great environmental expense and should not expect poor countries to forego those trade offs.

4. For a fuller discussion, see Judith Kimerling, *Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 COLUM. J. ENVTL. L. 523, 574–83 (2002) [hereinafter *Rio + 10*]; *see generally* Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: the Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289 (2001) [hereinafter *International Standards*].

5. Marcos Orellana, Keynote Address, *15th Annual Vermont Law Review Symposium: Habitat for Human Rights*, 40 VT. L. REV. 417, 417 (2016).

6. INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR (1997), http://www.cidh.oas.org/countryrep/ecuador-eng/index%20-%20ecuador.htm [hereinafter IACHR ECUADOR REPORT]. The IACHR is an organ of the Organization of American States (OAS). Its function is "to promote the observance and protection of human rights and to serve as a consultative organ" of the OAS on human rights issues. *What is the IACHR?*, INTER-AM. COMM'N ON HUMAN RIGHTS, http://www.oas.org/en/iachr/mandate/what.asp (last visited May 14, 2016). The IACHR was created in 1959; in 1969, it was expressly authorized to examine complaints regarding specific cases of human rights violations. In addition to the individual petition system, the IACHR monitors the human rights situation in OAS Member States as well as "priority thematic areas." *Id.*

7. IACHR ECUADOR REPORT, *supra* note 6, at 78.

the Rights and Duties of Men and the American Convention on Human Rights] is necessarily related to and in some ways dependent upon one's physical environment."[8] "Accordingly," the Commission reasoned, "where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."[9]

The Commission further noted that Inter-American human rights law recognizes "the interrelationship between the rights to life and health;" that "[t]he right to have one's life respected is not limited to protection against arbitrary killing;"[10] and that "[r]espect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being."[11] It concluded that "[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being."[12]

The Commission also found that, in this context,

> protection of the right to life and physical integrity may be best advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.[13]

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8. *Id.* at 88; *see* ORG. OF AM. STATES, AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MEN, (1948), https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm; American Convention on Human Rights art. 4, 5, Nov. 22, 1969, 1144 U.N.T.S. 123, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf. The Commission also found that domestic law in Ecuador recognized "the relationship between the rights to life, physical security and integrity and the physical environment in which the individual lives" in a number of provisions in the constitution in effect at the time, and cited additional international instruments that "Ecuador is Party to or has supported . . . which recognize the critical connection between the sustenance of human life and the environment." IACHR ECUADOR REPORT, *supra* note 6, at 87.

9. IACHR ECUADOR REPORT, *supra* note 6, at 88.

10. *Id.* The Commission also noted that the right to life is "fundamental in the sense that it is nonderogable and constitutes the basis for the realization of all other rights," and that "States Parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury." *Id.*

11. *Id.* at 92.

12. *Id.*

13. *Id.* at 93. In the report's recommendations, the Commission referred to the obligation of the State to prevent and remedy contamination, and to implement measures to ensure that all persons have the right to participate in decisionmaking that directly concerns their environment and the right to effective judicial recourse—both of which require access to information and transparency. *Id.* at 94–95.

The Commission did not define "severe" pollution or "serious" illness, or explain how much increased risk of disease and suffering is too much. But the Commission did find that, in the case of Ecuador's Amazon region, "'[d]econtamination is needed to correct mistakes'" that should not have happened,[14] that both the State and the oil companies are responsible for correcting those mistakes, and that the State has a duty to ensure that they are corrected.[15]

The Commission also recognized—in a separate chapter examining "human rights issues of special relevance" to Indigenous peoples—that additional human rights violations occur when Indigenous peoples maintain special ties with their traditional territories and are displaced, or when those lands are degraded.[16] This is because "the control and use of territory are essential" to the physical and cultural survival of Indigenous peoples, and to their "individual and collective well-being."[17]

So when we think about the nexus between human rights and environment, and what that means for Indigenous peoples, the environment is not only a source of life-sustaining services, such as food, water, air, and so on, which are essential for life and the full enjoyment of human rights—or, as the organizers of this Symposium aptly put it, a "habitat for human rights."[18] I love this title (of the Symposium) because it reinserts human beings and their communities into the landscape, and reminds us that human rights are linked to environmental quality, and that we need to think not only about violations of human rights and litigation after those violations occur, but also about preventing violations and safeguarding human rights.

I would like to take this concept further by passing on something I have learned about human rights from the Huaorani. For Indigenous peoples who live on the land, habitat *is* human rights. It provides the resources that sustain life—and much more. It is also a space, a territory and living environment through which, and in which, Indigenous peoples can realize their cultural, social, economic, and political rights. In other words, it is a space where Indigenous peoples can exercise genuine self-determination or, as the Huaorani say, "live as Huaorani, in freedom." And without it, they cannot survive.

A third scenario where environmental and human rights laws intersect is when environmental initiatives affect Indigenous peoples and their

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14. *Id.* at 94 (quoting a press release by the Commission at the conclusion of its on-site observation in Ecuador, which included a visit to the Amazon region).

15. *Id.*

16. *Id.* at 97–116.

17. *Id.* at 114–15.

18. *Symposia: Habitat for Human Rights*, VT. L. REV., http://lawreview.vermontlaw.edu/symposia (last visited May 14, 2016).

traditional lands, territories, and resources. We hear a lot about how environmentally harmful "development" violates the rights of Indigenous peoples. And for good reason: it is a serious and widespread problem.

But a growing number of Indigenous communities are also concerned about environmental initiatives that empower outsiders to make decisions about their territories, lands, and resources, and fail to respect their rights. For example, in some places, people have been displaced from traditional lands for the cause of wildlife conservation.[19] In other areas, conservation bureaucracies and nongovernmental organizations (NGOs) impoverish Indigenous communities and violate or threaten their cultural, subsistence, and other rights when they seek to manage protected areas that were superimposed on Indigenous lands without consent.[20] They are seen as just another colonizer.

So there is a need to include respect for human rights in environmental initiatives. This means more than adding a traditional knowledge annex to a conservation project plan, or using Indigenous plaintiffs in a lawsuit. It means truly understanding, and respecting, the priorities of the affected communities and how they want to work with outsiders. And it means avoiding the pitfalls of taking an overly dominant role and excluding local community members from decisionmaking. This can be especially difficult when litigation is involved, or when the interests of local communities are perceived as being in conflict with conservation interests. But it is necessary.

## II. THE HUAORANI, CHEVRON, AND YASUNI

### *A. "When the Civilization and First Oil Company Arrived"*

The Huaorani (also spelled "Waorani" and "Waodani") are hunters and gatherers who have lived in the Amazon Rainforest since before written history. Their ancestral lands span some 20,000 square kilometers, and include the area now known as Yasuni National Park and Biosphere Reserve.[21] Yasuni is world-renowned for extraordinary biological diversity,

19. *See, e.g.*, Mark Dowie, *Conservation Refugees*, ORION MAGAZINE, https://orionmagazine.org/article/conservation-refugees/ (last visited May 14, 2016) (explaining that "conservation refugees exist on every continent but Antarctica," and that people have been "banished from lands they thrived on for hundreds, even thousands of years").

20. For a fuller discussion see Part III.A below. *See also* Kimerling, *Oil, Contact, and Conservation*, *supra* note 1, at 101–15.

21. Indeed, some scientists say that Yasuni may well be the most biologically diverse forest on Earth. For example, a typical hectare of rainforest in Yasuni contains more tree species that all of the United States and Canada together. Margot S. Bass et al., *Global Conservation Significance of Ecuador's Yasuni National Park*, PLOS ONE, Jan. 2010, at 2, 7, 12. One hectare is 100 meters by 100 meters, or 2.47 acres. Yasuni is also believed to have a high probability of maintaining relatively stable climate conditions in the coming decades, and may potentially serve as a refuge for Amazonian species responding to climate

and is an important refuge for freshwater dolphins, giant otters, Amazonian manatees, harpy eagles, jaguars, short-eared dogs, and other threatened species and regional endemics. It is also home to the last known groups of Indigenous peoples living in voluntary isolation in Ecuador. But Yasuni is threatened by encroaching oil extraction, settlers, and loggers.

The Huaorani are also known as "*Aucas*," a term that means "savages" and is considered deeply insulting by the Huaorani. Their name for themselves, Huaorani, means *humanos* (human beings, or people); they refer to outsiders as *cowode*, which means *desconocidos* (strangers).

The Huaorani are legendary, even among other Amazonian peoples in Ecuador, for their knowledge about the rainforest and its plant and animal life. They are also renowned for their warriors and long hardwood spears, made from peach palms planted by their ancestors. When the first oil company to find and develop commercial reserves,[22] Texaco (now part of Chevron), arrived around 1970, the Huaorani family groups who lived in the areas where the company wanted to operate had no "contact" with the outside world. They lived in voluntary isolation in the forest.

Texaco collaborated with Ecuador's government and missionaries from the United States-based Summer Institute of Linguistics and Wycliffe Bible Translators (SIL/WBT) to pacify the Huaorani and end their way of life. Using aircraft supplied by Texaco, missionaries cruised the skies searching for Huaorani homes, dropping "gifts" and calling out to people through radio transmitters hidden in baskets lowered from the air.

The missionaries removed more than 200 Huaorani from the path of Texaco's oil crews, and took them to live in a distant Christian settlement.[23]

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change. *Id.* at 13. The most significant consequence of climate change in the Amazon may be increased drought conditions during dry seasons, and "climate models indicate a much higher probability of dry season intensification in the eastern than in the western Amazon" (where Yasuni is located). *Id.* at 13 (citing Yadvinder Malhi et al., *Climate Change, Deforestation, and the Fate of the Amazon*, 319 SCIENCE 169, 169–72 (2008).

22. Shell Oil explored for oil in Ecuador's Amazon region in 1937–1950, but did not find any commercially-valuable oil fields. Huaorani warriors defended Yasuni (and other areas of Huaorani territory) from the oil invaders with hardwood spears, and there was considerable bloodshed on both sides. In 1964, Texaco renewed the search for oil in the Ecuadorian Amazon. In 1967, the consortium operated by Texaco—comprised of wholly-owned subsidiaries of Texaco and Gulf, both now part of Chevron—discovered a rich field of crude near Huaorani territory. Texaco's commercially-valuable find sparked an oil rush, and the company soon expanded its operations into Huaorani territory. The Huaorani regard Texaco as "the first oil company" to "arrive" because it was the first company to remain, and extract oil in their territory, and many more companies have come in its wake.

23. Kimerling, *Oil, Contact, and Conservation*, *supra* note 1, at 51; s*ee generally* Judith Kimerling, *Dislocation, Evangelization & Contamination: Amazon Crude and the Huaorani People*, *in* ETHNIC CONFLICT AND GOVERNANCE IN COMPARATIVE PERSPECTIVE 70–99 (Woodrow Wilson Int'l Ctr. for Scholars, Working Paper No. 215, 1995). For centuries, Huaorani warriors defended their territory from intrusions by outsiders who sought to exploit the Amazon and conquer its inhabitants. They were the only known tribe in Ecuador to survive the rubber extraction boom—which ended around 1920—as a "free people" with vast territory. In 1956, the Huaorani became world famous for spearing to death five

Other Huaorani, including many in the area now known as Yasuni, refused to be "tamed,"[24] but were displaced from large areas of their traditional territory. At least three Huaorani family groups have continued to resist contact with outsiders, and still live in voluntary isolation in Yasuni. Rosemary Kingsland, a journalist who wrote about the evangelization of the Huaorani with the missionaries' cooperation, described the mood of the time:

> The northern [oil] strike was enormous. . . . Nothing would stop them from going in [to Huaorani territory] now and there was talk of using guns, bombs, flame-throwers. Most of the talk was wild, but the result would be the same: a war between the oil men and the Aucas; a handful of naked savages standing squarely in the middle of fields of black gold, blocking the progress of the

North American Evangelical Protestant missionaries from SIL/WBT who were trying to establish "contact" with them. *See, e.g.*,*'Go Ye and Preach the Gospel': Five Do and Die,* LIFE, Jan. 30, 1956, at 10–19; ELISABETH ELLIOT, THROUGH GATES OF SPLENDOR (1957) (account of SIL/WBT's "Operation Auca" written by the widow of one of the slain missionaries); STEVE SAINT, END OF THE SPEAR (2005) (account by the son of one of the slain missionaries, who returned to Ecuador in 1995 to work with the Huaorani family group who had speared his father). The first peaceful, sustained contacts between Huaorani and *cowode* were in 1958, when SIL/WBT missionaries convinced Dayuma, a Huaorani who was living as a slave on a hacienda near Huaorani territory, to return to the forest where she had lived as a child and help the missionary-linguists relocate her relatives into a permanent settlement (near the southwestern corner of Huaorani territory, distant from Yasuni), teach them to live as Christians, and translate the Bible into their native tongue. When the oil rush began in Ecuador's northern Amazon region, Texaco and Ecuador asked SIL/WBT to intensify its operation to contact and evangelize the Huaorani, and extend it to family groups who lived in areas where the oil company wanted to work. For accounts of SIL/WBT's operations to contact and convert the Huaorani from the missionaries' perspective, see SAINT, *supra*; ELISABETH ELLIOT, THE SAVAGE MY KINSMAN (1996) (originally published in 1961, revised in 1981); ETHEL EMILY WALLIS, THE DAYUMA STORY: LIFE UNDER AUCA SPEARS (Wycliffe Bible Trans., Inc., 1st ed. 1960) [hereinafter DAYUMA STORY]; ETHEL EMILY WALLIS, AUCAS DOWNRIVER: DAYUMA'S STORY TODAY (Wycliffe Bible Trans., Inc., 1st ed. 1973) [hereinafter AUCAS DOWNRIVER]; ROSEMARY KINGSLAND, A SAINT AMONG SAVAGES (1980). For an analysis of the relationship between Summer Institute of Linguistics and Wycliffe Bible Translators, which includes a critique of their work with the Huaorani, see DAVID STOLL, FISHERS OF MEN OR FOUNDERS OF EMPIRE? THE WYCLIFFE BIBLE TRANSLATORS IN LATIN AMERICA (1982). For a report on collaboration by missionaries and the international oil industry to pacify indigenous peoples in Ecuador, see J.F. SANDOVAL MOREANO, CORPORACIÓN ESTATAL PETROLERA ECUATORIANA, PUEBLOS INDÍGENAS Y PETRÓLEO EN LA AMAZONÍA ECUATORIANA [INDIGENOUS PEOPLES AND PETROLEUM IN THE ECUADORIAN AMAZON] (1988).

24. The term "tamed" is borrowed from WALLIS, AUCAS DOWNRIVER, *supra* note 23, at 121. Wallis wrote "the 'inside' Auca story" for SIL/WBT, and described the (Yasuni) Huaorani who had not relocated to live with the missionaries as "untamed and untaught." *Id.* at ix, 121. Some of those households were subsequently "contacted" by Catholic missionaries, with support from the national oil company, CEPE, in the late 1970s. *See generally* ALEJANDRO LABACA, CRONICA HUAORANI [HUAORANI CHRONICLE] (1988) (account by Roman Catholic missionary of first "contact" with a Huaorani family group in Yasuni).

> machine age. If it was to be a question of no oil or no Aucas, there was only one answer.[25]

Kingsland did not elaborate on the "talk of using guns, bombs, [and] flamethrowers" that was *not* "wild," but former Texaco workers have reported that—in addition to working with the missionaries to try to remove the Huaorani from Texaco's oil concession—the company's contractors dropped (lighted) dynamite from aircraft to frighten the Huaorani away from areas where oil exploration operations were planned.[26] Oil exploration begins with seismic surveys, and Texaco's standard practice was to grid the forest with trails and heliports, and then detonate explosives underground at regular intervals along the trails. By monitoring the movement of resulting sound waves through the ground, company geologists were able to detect the potential presence of oil reserves far beneath the earth's surface.[27] In Huaorani territory, Texaco reportedly sent aircraft in advance of the seismic crews, to look for Huaorani homes and drop dynamite to try to scare the Huaorani into moving out of the path of the oil crews.[28]

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25. KINGSLAND, *supra* note 23, at 125–26.

26. Interview with Luis Carrera, President of the Envtl. Advisory Comm'n to the President of the Republic, in Quito (Jan. 26, 1994); Interview with Giovanni Rosanía Schiavone, Geologist for CEPE, and the CEPE-Texaco Consortium, 1974–84, in Quito (Jan. 14, 2016) [hereinafter Rosanía Interview]. Rosanía also worked for a Texaco subcontractor before working for CEPE and Texaco, and subsequently for Petroecuador and the government of Ecuador (as Director of Hydrocarbons, Ministry of Energy and Mines, 1984–86, and Deputy Secretary for Environment, Ministry of Energy and Mines, 1994–96). Rosanía helped negotiate the cleanup accord between Texaco and Ecuador that is discussed below in Part II.E, and signed the remedial action plan for the cleanup on behalf of Ecuador's government.

27. JUDITH KIMERLING, AMAZON CRUDE 55 (1991) [hereinafter AMAZON CRUDE]. Oil companies use data from seismic surveys to decide where to drill exploratory wells, which is the next step in oil exploration operations. For a fuller discussion, see *id.* at 55–61.

28. Rosania Interview, *supra* note 26. Rosanía explained that he learned about what he calls the "*bombardeos"* (bombing) of Huaorani homes from pilots who flew the aircraft. *Id.* During my visit to Huaorani territory in January 2016, I confirmed three incidents of *bombardeos* with four Huaorani eyewitnesses. Each explosion occurred at a different location and was directed at a distinct Huaorani home and family group. According to Rosanía, both Texaco and Ecuador's government were aware of the "normal practice" of looking for Huaorani homes and dropping dynamite to try to drive the Huaorani away from areas that were stated for seismic surveys. *Id.* Steve Saint has written about earlier violence—when Shell Oil was exploring for oil—based on a letter he received from the wife of a pilot for Shell Oil. The letter enclosed an article written by the pilot, Captain Johns. Saint does not provide a citation for the article, but he quotes it at length. According to Saint, Johns' article "detailed deadly encounters" between Shell Oil and the Huaorani. SAINT, *supra* note 23, at 50. Johns wrote:

> "In this remote section of the world, murder by the Aucas was just another everyday occurrence. It has been going on for years. Twenty-one of our people, not to mention the many colonists and their workers, were brutally killed by these vicious aborigines who roamed the jungle like wild animals, strip-stark naked with the exception of a skimpy G-string. . . .
> Though vigilant armed guards were posted, the workers lived in daily fear [of the "savages"]."

The Huaorani who went to live with the missionaries were told that Huaorani culture is sinful and savage, and pressured to change, become "civilized," and adopt the Christian way of life. Among other hardships, there were epidemics of new diseases (including a polio epidemic); important rainforest products were depleted; and the Huaorani, whose culture values personal autonomy, sharing, and egalitarianism, had to rely on imported foods and medicines obtained by the missionaries. The new foods, medicines, and gifts of consumer items that the Huaorani could not themselves produce or obtain from their "giving"[29] rainforest territory created relationships of dependency, inequalities, and new needs for trading relationships with *cowode*.

Many elders recall the time "when the civilization arrived" as a period of great suffering, when new diseases sickened and killed many people, and when large areas of the rainforest that had been their home were first occupied and damaged by outsiders. When some families returned to the land of their ancestors years later, it was not the same as before. The forest that was their home and source of life had been invaded and degraded by *cowode* while they were away. In addition to wells, waste ponds, pipelines, and production stations, Texaco built a 100-kilometer road into Huaorani

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*Id.* Saint noted that "Johns also recorded that the violence was not one sided," and quoted another passage written by Johns:

> "The mounting loss of human life, taken by Auca raids, caused much controversy in Quito among government officials. Several dignitaries, including President Velasco Ibarra and the Ministerio del Interior, visited Shell Mera, our base camp. It was my assignment to fly them on this special mission over Auca territory for them to evaluate as they put it, future strategic defenses against our formidable foe."

*Id.* at 51. Saint continued:

> Captain Johns wrote that the official Ecuadorian government position was not to retaliate against the "Aucas" except in self-defense. I have seen documents, however, that suggest that there was another less formal government policy that included trying to wipe the Waodani [Huaorani] out or drive them deeper into the Amazon rain forests, away from their ancestral lands. . . .

*Id.* According to Saint, Johns "was an eyewitness to the fact that oil company employees, perhaps with the blessing of the government, committed atrocities against 'the Aucas.'" *Id.* at 52. The excerpts published by Saint include a report by Johns about a "retaliatory raid against the 'Aucas,'" in which "some oil company people" bombed a large Huaorani home (near Arajuna, in Pastaza Province). *Id.* Johns described the home (which he flew over after the bombing) as "'blown to smithereens, its remnants burned and charred.'" *Id.*

29. The term "giving" is borrowed from Laura Rival, *The Growth of Family Trees: Understanding Huaorani Perceptions of the Forest,* 28 MAN 635 (1993). (describing the relationship of the Huaorani with their "giving environment") and Huaorani who live in the forest in Yasuni, and say that their rainforest territory *Ome* "gives us everything" and "gives us life and our way of life."

territory—which it named *Via Auca* (Auca Road)—and settlers used the new road to colonize Huaorani lands and clear the rainforest.[30]

As a result of Texaco's operations, Huaorani territories, lands, and resources were significantly reduced. Many remaining lands and resources have been degraded, and pollution is a continuing problem and growing threat for a number of communities. These changes, in turn, have produced a host of new problems and challenges for the Huaorani, including the erosion of food security and self-reliance in meeting basic needs. Moreover, because Huaorani culture co-evolved with the Huaorani's rainforest ecosystem, there is an inextricable relationship between Huaorani culture and the Huaorani's rainforest territory. As a result, the environmental injuries and displacement from ancestral lands have not only harmed the means of subsistence of the Huaorani, but also undermined their ability to conduct certain cultural practices and transmit their culture to future generations. As a group, the Huaorani have been thrust into a process of rapid change, external pressures, and loss of territory and access to natural resources that endangers their survival as a people. Texaco no longer operates in Ecuador, but its deep footprint remains, and other oil companies and settlers continue to push further into Huaorani ancestral lands.

The missionaries who worked with Texaco had their own converging interests. SIL/WBT described the "Aucas" as "murderers at heart" and its operation to convert them as "one of the most extraordinary missionary endeavors" of the 20th century, "living proof of miracles brought to pass through God's word."[31] Nonetheless, the forced contact and relocation of the Huaorani was a systemic, ethnocidal public policy and campaign, promoted and aided by Ecuador and Texaco in order to open Huaorani lands to oil extraction by displacing the Huaorani from their ancestral territory in areas where the company wanted to operate, and severing their relationship with those territories.[32] In addition to ignoring the basic human rights of the

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30. In addition to *campesino* settlers from Ecuador's highland and coastal regions, the Huaorani also lost lands to Shuar and Kiwcha (Quichua), who are indigenous to the Amazon but moved into Huaorani territory during this period.

31. WALLIS, AUCAS DOWNRIVER, *supra* note 23 at front inside cover, ix, 68; *see also* WALLIS, DAYUMA STORY, supra note 23, at front inside cover (describing the "Aucas" as "the world's most murderous tribe"); SAINT, *supra* note 23, at back cover (describing the Huaorani as "the most savage culture ever known"). Stoll describes SIL/WBT's activities with the Huaorani as its "most famous mission." STOLL, *supra* note 23, at vii.

32. Anthropologist Norman Whitten, Jr. wrote in 1976 about ethnocidal policies generally in Ecuador's Amazon region. Whitten explained: "The concept of ethnocide is taken from genocide, and refers to the process of exterminating the total lifeway of a people or nation, but in the ethnocidal process many of the peoples themselves are allowed to continue living." Norman E. Whitten, Jr., *Ecuadorian Ethnocide and Indigenous Ethogenesis: Amazonian Resurgence Amidst Andean Colonialism, in* 23 IWGIA DOCUMENT SERIES 24 (Inese Anderson & Helge Kleivan eds., 1976). Whitten was conducting field research with another Amazonian people, the Canelos Quichua, when the oil rush began. He

Huaorani, it was a form of discrimination that denied cultural, political, and property rights to the Huaorani based on the prejudice of cultural superiority.[33] SIL/WBT was evidently aware of the converging interests; in "the 'inside' Auca story"[34] written by Ethel Emily Wallis, another missionary describes one of many helicopter operations supported by "the oil people" and comments on the expense:

> This thing costs $200-300 an hour to run; and it was a three-hour operation—besides the four high-priced employees! The oil people, in turn, are more than willing to do what they can for our operation, since we have almost cleared their whole concession of Aucas. They assure us that they aren't just being generous![35]

### *B. Petroleum Policy in Ecuador*[36]

Texaco's discovery of commercial quantities of oil in Ecuador's Amazon region—in 1967, near the northern edge of Huaorani territory—was heralded as the salvation of Ecuador's economy, the product that would pull the nation out of poverty and "underdevelopment" at last. At the time, the national economy was centered on the production and export of bananas.[37]

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described the "attempts of ethnocide aimed at indigenous people" generally in Ecuador's Amazon region as "systemic, large scale, and planned, as well as random, local and unintended." *Id*. "Illustrations" of ethnocidal policies cited by Whitten included "monolingual education in Spanish, prosetylization by Catholics and Protestants, courses in social organization aimed at altering family, kinship, and other bases of social cooperation and competition launched by government, church, and Peace Corp Volunteers, and the steady encapsulation of natives on eroding territories . . . ." *Id.* In essence, those national policies were "aimed at cultural obliteration and assimilation into a lower class serf-like existence." *Id.* at 3–4. Whitten also wrote about internal colonialism and described "the ordinary colonist" (settler) in the Amazon region as "bluntly racist," reporting that it was "common to hear 'the Indian is more backward than the animals' and 'the Indian is lower than the animals,' and 'the Indian is not a person because he is lower than the animals.'" *Id.* at 26. Today, those kinds of comments are no longer common in ordinary conversation; however, racism against both Indigenous peoples generally, and the Huaorani in particular, persists. As described by Steve Saint in 2005: "All indigenous people groups have long been discriminated against in Ecuadorian society. But the Waodani [Huaorani], though the most famous tribe in the country, have generally been treated like the bottom rung on the social ladder." SAINT, *supra* note 23, at 142.

33. The definition of discrimination is based on the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations General Assembly in 1963, and the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in 1969. G.A. Res. 18/1904, art 1, United Nations Declaration on the Elimination of All Forms of Racial Discrimination (Nov. 20, 1963); G.A. Res. 2106 (XX), art 1, International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965).

34. WALLIS, AUCAS DOWNRIVER, *supra* note 23, at ix.

35. *Id.* at 76 (quoting Catherine Peeke).

36. For citations and a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 417–26. *See also generally* JOHN D. MARTZ, POLITICS AND PETROLEUM IN ECUADOR (1987).

37. The other principal exports were cocoa and coffee. MARTZ, *supra* note 36, at 157 tbl. 5-2.

The "first barrel" of Amazon Crude was paraded through the streets of the capital, Quito, like a hero. People could get drops of crude to commemorate the occasion, a bishop sprinkled holy water, and after the parade the oil drum was placed on an altar-like structure at the Eloy Alfaro Military Academy. But the reality of oil development turned out to be far more complex than its triumphalist launch. For the Huaorani, the arrival of Texaco's work crews meant dislocation and destruction rather than progress.

Texaco's discovery sparked an oil rush, and petroleum quickly came to dominate Ecuador's economy. The company named the first commercial field Lago Agrio, after an early Texaco gusher in Sour Lake, Texas; erected a one-thousand barrel per day (bpd) refinery that had been prefabricated in the United States; and expanded exploration and production deeper into the rainforest. Production rose to more than two hundred thousand barrels per day by the end of 1973, and that same year, government income quadrupled.[38]

Initially, the oil boom stimulated nationalist sentiments in petroleum policymakers. The government claimed state ownership of oil resources, raised taxes, demanded investments in infrastructure, created a State oil company (*Corporación Estatal Petrolera Ecuatoriana* (CEPE), now Petroecuador), and acquired ownership interests in the consortium that developed the fields.[39]

Before long, however, government officials learned that they have less power than commonly believed. Although relations between Ecuador and Texaco and other oil companies have not been static, at the core of those relationships lies an enduring political reality. Since the oil rush began, successive governments have linked national development and economic policy with petroleum, and the health of the oil industry has become a central concern for the State. At the same time, because oil is a nonrenewable resource, levels of production—and revenues—cannot be sustained without ongoing operations to find and develop new reserves, activities that are capital-intensive and technology-driven. Oil development has accentuated Ecuador's dependence on export markets and foreign investment,

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38. The initial bonanza and easy money from Texaco's early finds, however, were relatively short-lived and in 1977, only a "flood of foreign borrowing" by the government sustained Ecuador's economic growth. *Id.* at 207–08. Because of its oil reserves, Ecuador has been able to secure large loans for its size and has accumulated massive foreign debts.

39. Oil exports began in 1972. In 1974, Ecuador's newly-created national oil company (CEPE, now Petroecuador) acquired a 12.5% participating interest in the Texaco-Gulf Consortium from Texaco and a 12.5% interest from Gulf, giving it a 25% share of the stock in the consortium. REPUBLIC OF ECUADOR, MINISTRY OF ENERGY AND MINES, CONTRATO PARA LA EJECUCIÓN DE TRABAJOS DE REPARACIÓN MEDIOAMBIENTAL Y LIBERACIÓN DE OBLIGACIONES, RESPONSIBILIDADES Y DEMANDAS [CONTRACT FOR IMPLEMENTATION OF ENVIRONMENTAL REMEDIAL WORK AND RELEASE FROM OBLIGATIONS, LIABILITY AND CLAIMS] 2 (May 4, 1995) [hereinafter REMEDIATION CONTRACT]. Petroecuador acquired Gulf's remaining shares in 1977. *Id.*; MARTZ, *supra* note 36, at 111, 168, 186.

technology, and expertise, instead of providing the answer to Ecuador's development aspirations.

When confronted with the realities of governance and oil politics, governments in Ecuador have vacillated over the extent to which petroleum policy should accommodate the interests of foreign oil companies, or be nationalistic in outlook. Alarm over forecasts of the depletion of productive reserves has become a recurring theme in petroleum politics, as have the twin policy goals of expanded reserves and renewed exploration, and the corollary need to reform laws and policies to make the nation more attractive to foreign investors. The focus on economic development has eclipsed environmental and human rights concerns. Even the more nationalistic and populist policymakers have prioritized the need to promote oil extraction, and generally endeavored to maximize the State's share of oil revenues and production, while disregarding environmental protection and human rights. Despite that focus, the benefits of oil development have not been well-distributed, and income inequality and the percentage of Ecuadorians living in poverty have remained stubbornly high.

### *C. Amazon Policy in Ecuador*[40]

When the oil rush began, Ecuador's institutions had very little influence or presence in the Amazon, and the Huaorani who lived in the areas where Texaco wanted to operate were free and sovereign, living in voluntary isolation in the forest. The discovery of black gold made the conquest of Amazonia and pacification of the Huaorani a national imperative. It also provided infrastructure to penetrate remote, previously inaccessible areas and monies to support the military and bureaucracy. Ecuador launched a national integration policy to incorporate the Amazon region into the nation's economy and assimilate its native inhabitants into the dominant national culture. Successive governments have viewed the Amazon as a frontier to be conquered, a source of wealth for the State, and an escape valve for land distribution pressures in Ecuador's highland and coastal regions.

The government aggressively promoted internal colonization and offered land titles and easy credit to settlers who migrated to the Amazon, cleared the forest, and planted crops or pasture, even though most soils in the region are not well-suited to livestock or mono-crop production.[41]

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40. For a fuller discussion of Amazon policy and the rights of Indigenous peoples in Ecuador, see Kimerling, *Oil Frontier*, *supra* note 1, at 426–33.

41. Ley Especial Para Adjudicación de Tierras Baldias en la Amazonia [Special Law for Adjudication of Titles to Uncultivated Wastelands in the Amazon], Supreme Decree No. 196, R.O. No. 2 (Feb. 17, 1972); Ley de Colonización de la Región Amazonica [Law for Colonization of the Amazon Region], Decree No. 2091, R.O. No. 504 (Jan. 12, 1978).

Government officials pledged to civilize the Huaorani and other Amazonian peoples.

On a visit to the Amazon in 1972, Ecuador's President, General Rodriguez Lara, rebuffed an appeal from a neighboring tribe for formal recognition of Indigenous peoples in the government's new development policies and protection of Indigenous lands from settlers. The President-General said that "all Ecuadorians [are] part Indian," with "blood of the Inca Atahualpa."[42] "[H]e insisted that he, too, was part Indian," although he did not know where he had acquired his "Indian" blood.[43] "There is no more Indian problem," he proclaimed, "we all become white when we accept the goals of the national culture."[44] Within ten days, the President's declaration of national ethnic homogeneity was codified by executive decree in the National Law of Culture.[45] Despite that ideal of national culture, established by administrative decree, Ecuadorian society has continued to be multiethnic and multicultural.

Ecuador's law incorporated the doctrine of *terra nullius*, a racist doctrine that was used by European colonial powers in the Age of Discovery to provide a legal justification for ignoring the inherent rights of Indigenous peoples in lands they claimed around the world—and asserting legal and political sovereignty over Indigenous peoples and annexing their territories. The doctrine of *terra nullius* has been aptly described by Peter Russell as both "confused and confusing,"[46] but it has nonetheless had an enduring effect on the way that Ecuador (and Chevron) have defined their relationship with the Huaorani. Essentially, it is a legal fiction that treats lands that were claimed by discovering European states as uninhabited—and thus belonging to no one—despite the presence of Indigenous peoples. The doctrine denies property and political rights to Indigenous peoples based on the racist presumption that even though they lived on the land at the time of colonization, they were "savages" who were incapable of exercising political sovereignty or owning their lands, and their political economies were so "underdeveloped" that their very existence as self-governing societies, in possession of their lands, could be denied.[47]

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42. Whitten, *supra* note 32, at 12.

43. *Id.*

44. *Id.*

45. *Id.* at 13.

46. PETER H. RUSSELL, RECOGNIZING ABORIGINAL TITLE: THE *MABO* CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM 38 (2005).

47. For a fuller discussion, see *id.* at 30–42; Tonya Gonnella Frichner (Special Rapporteur of the U.N. Permanent Forum on Indigenous Issues) *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, U.N. Doc. E/C.19/2010/13 (Feb. 4, 2010); STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND (2008).

In conjunction with the Doctrine of Discovery—a related international legal construct that can be traced back more than 500 years to papal documents authorizing "discovery" of non-Christian lands, and which states that a Christian monarch who locates, or discovers, non-Christian "heathen" lands has the right to claim dominion over them[48]—the doctrine of *terra nullius* has served as a legal justification for violating the rights of the Huaorani. In a preliminary study of the Doctrine of Discovery for the United Nations Permanent Forum on Indigenous Issues, then-forum member Tonya Gonnella Frichner identified two key elements of the Doctrine: dehumanization and dominance.[49] Frichner found that the institutionalization of the Doctrine in law and policy at national and international levels "lies at the root of the violations of indigenous peoples' human rights . . . [and] has resulted in State claims to and the mass appropriation of the lands, territories and resources of indigenous peoples."[50]

Although Frichner primarily examined the operation of the Doctrine of Discovery and related "Framework of Dominance"[51] in United States federal Indian law, her findings are consistent with the experience of the Huaorani in Ecuador. There, a European colonial power and successor nation state have similarly used the Doctrine of Discovery, dominance framework, and legal fiction of *terra nullius* to assert both a supreme, overriding title to Huaorani lands, territory, and resources and a paramount right to subjugate and govern the Huaorani, and appropriated Huaorani lands for oil extraction without consent or compensation. That, in turn, has resulted in dispossession and new problems and challenges for the Huaorani.

This remarkable claim—that the Amazon region was "*tierras baldías*," vacant, uncultivated wastelands which belonged to the State because they had no other owner, despite the presence of the Huaorani and other Indigenous populations—was the law in Ecuador when the oil rush began.[52] It was not until 1997 that Ecuador affirmed, in a submission to the Inter-American Commission on Human Rights for the report discussed above, that "the processes of 'directed colonization'" and the "consideration of large

48. NEWCOMB, *supra* note 47, at 89–90; Frichner, *supra* note 47, at paras. 5–17.

49. *See generally* Frichner, *supra* note 47.

50. *Id.* at 1 (abstract).

51. *Id.* at paras. 23–33.

52. *See, e.g.*, Ley de Tierras Baldías y Colonización [Uncultivated Wastelands and Colonization Law], Supreme Decree No. 2172, R.O. No. 342 (Nov. 28, 1964); Ley de Tierras Baldías y Colonización [Uncultivated Wastelands and Colonization Law], Supreme Decree No. 2753, R.O. No. 663 (Jan. 6, 1966); Ley Especial Para Adjudicación de Tierras Baldias en la Amazonia [Special Law for Adjudication of Titles to Uncultivated Wastelands in the Amazon], Supreme Decree No. 196, R.O. No. 2 (Feb. 17, 1972); Ley de Colonización de la Región Amazonica [Law for Colonization of the Amazon Region], Decree No. 2091, R.O. No. 504 (Jan. 12, 1978); JORGE O. VELA & JUAN LARREA HOLGUN, A STATEMENT OF THE LAWS OF ECUADOR IN MATTERS AFFECTING BUSINESS (Org. of Am. States, 3d ed. 1975).

tracts of the Amazon basin as '*tierras baldias*' may be considered superseded."[53] By then, oil companies and settlers had displaced the Huaorani from many areas.[54] And despite that policy change, the right of the Huaorani to own and control their remaining lands, territories, and resources has continued to be limited by other laws and policies that control the characterization and granting of title, and by laws and policies associated with development and conservation activities.

In 1998, Ecuador formally recognized the multicultural nature of the country and some collective rights of Indigenous peoples when it ratified International Labour Organisation (ILO) Convention 169 and included Indigenous peoples' rights in a new constitution. The constitutional rights echoed provisions in the ILO convention and included some recognition of collective land rights.[55] However, under Ecuadorian law, no land titles are truly secure because all subsurface minerals are claimed as property of the State, and oil extraction is permitted in lands that are titled to Indigenous peoples without their consent. Current law also claims State ownership of

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53. IACHR ECUADOR REPORT, *supra* note 6, at 100.

54. In 1969, Ecuador established a "Protectorate" for the Huaorani in the southwestern region of their ancestral territory, which included the new Christian settlement but only some 3.3% of Huaorani ancestral lands (66,578 hectares, or 665.78 square kilometers). In 1983, the area was titled to the Huaorani. Municipal Property Registry of the Canton Pastaza, *Certificada* (July 27, 2012) (certifying title to 66,578 hectares adjudicated on April 12, 1983). In 1990, a much larger area—6,125.6 square kilometers (subsequently increased to 6,137.5 square kilometers)—was titled to the Huaorani, but with the provision that legal title could be revoked if the Huaorani "impede or obstruct" oil or mining activities. Ecuadorian Institute for Agrarian Reform and Colonization (IERAC), Providencia No. 900001772 (Apr. 3, 1990) (adjudicating 612,560 hectares); National Institute for Agrarian Reform (INDA), *Resuelve* (Apr. 7, 1998) (clarifying and rectifying boundaries of title to 613,750 hectares); Municipal Property Registry of the Canton Pastaza, *Certificada* (July 27, 2012) (certifying title to 613,750 hectares adjudicated on April 3, 1990 and rectified on April 7, 1998). In 2001, another 234.89 square kilometers was titled to the Organization of the Huaorani Nationality of the Ecuadorian Amazon (ONHAE, now the Waorani Nationality of Ecuador (NAWE)). Municipal Property Registry of the Canton Pastaza, *Certificada* (July 27, 2012) (certifying title to 23,489 hectares adjudicated on September 24, 2001). The decision to award that land title to ONHAE instead of the Huaorani people is curious, and was evidently made without the knowledge or consent of the grassroots Huaorani communities. Together, the titled lands are referred to (by *cowode*) as the Waorani Ethnic Reserve and include some 7,038 square kilometers, roughly one-third of traditional Huaorani territory. Other Huaorani lands have been titled to settlers and an even larger area—some 10,123 square kilometers—is located in Yasuni National Park and claimed as State land. *See* ECUADOR MINISTRY OF THE ENVIRONMENT, PLAN DE MANEJO DEL PARQUE NACIONAL YASUNI [YASUNI NATIONAL PARK MANAGEMENT PLAN] 1 (2011). The Huaorani refer to the reserve, the park, and some adjacent lands as Huaorani territory, *Ome*.

55. Convention 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989, 72 ser. A INT'L LAB. ORG. OFFICIAL BULL. 59 (1989) (entered into force Sept. 5, 1991); *International Labour Conventions: Ratifications, Denunciations, Declaration and Notifications of Application*, 81 ser. A INT'L LAB. ORG. OFFICIAL BULL. 58 (1998); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [POLITICAL CONSTITUTION OF THE REPUBLIC OF ECUADOR] Aug. 10, 1998, art. 83–85. The 1998 constitution also included expanded environmental rights, with provisions that echo rights and duties in international instruments to promote sustainable development.

"biodiversity" and of most protected natural areas, including Yasuni National Park.[56]

Those and other restrictions on the rights of the Huaorani over their lands, territories, and resources continue to be a major problem for the Yasuni (and other) Huaorani, despite the proliferation of laws and policies at the national and international levels that recognize and guarantee rights of Indigenous peoples. At the national level, those developments include a new Constitution (adopted in 2008) that arguably strengthens the land and self-determination rights of Indigenous peoples in Ecuador, and a new government led by President Rafael Correa (since 2007) that acknowledges that previous governments have disregarded the rights of Indigenous peoples and claims to be implementing transcendent changes. At the international level, a growing body of international norms and jurisprudence recognize that Indigenous peoples' rights over their lands, territories, and resources are necessary for their physical and cultural survival.[57]

As a general matter, the implementation of Indigenous peoples' rights in the Amazon has lagged. The enormous gap between what some Huaorani call the "pretty words" in the law and the reality on the ground reflects the chasm between legal ideals and political realities, and the enduring legacy of the Doctrine of Discovery, dominance framework, and legal fiction of *terra nullius*.

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56. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [2008 CONSTITUTION OF THE REPUBLIC OF ECUADOR] Oct. 20, 2008, art. 1, 400, 404–05; Ley Forestal y de Conservación de Áreas Naturales y Vida Silvestre [Forestry and Conservation of Natural Areas and Wildlife Law], R.O. No. 418, art. 67 (Sept. 10, 2004).

57. The international law developments include: the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007; a General Recommendation by the United Nations Committee on the Elimination of Racial Discrimination (CERD) calling on States to recognize and protect the rights of Indigenous peoples, including rights over lands, territories and resources, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination; decisions and concluding observations by CERD in response to individual complaints and country reports, respectively; and decisions and reports by the Inter-American Court and Inter-American Commission on Human Rights, respectively, interpreting and applying the right to property enshrined in the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man to protect the special relationship between Indigenous peoples and their territory, and recognizing rights of property over traditional lands, territories, and resources based on that relationship and customary (Indigenous) norms. For citations and a fuller discussion, see Kimerling, *Oil, Contact, and Conservation*, *supra* note 1, at 54–57.

### *D. Environmental Law and Impacts of Texaco's Operations in Ecuador*[58]

Oil exploration and production is an industrial activity. Among other impacts, it generates large quantities of wastes with toxic constituents and presents ongoing risks of spills. Ecuador's Hydrocarbons Law has included boilerplate environmental directives since at least 1971. Early provisions required oil field operators to "adopt necessary measures to protect the flora, fauna and other natural resources" and prevent contamination of water, air, and soil.[59] Similarly, Texaco's production contract with Ecuador, signed in 1973, required Texaco "to adopt suitable measures to protect flora, fauna, and other natural resources and to prevent contamination of water, air and soil under the control of pertinent organs of the state."[60] In theory, these and other comparable requirements in generally applicable laws, such as the 1972 Water Law, offer mechanisms for regulation of significant sources of oil field pollution. In practice, however, Texaco and other oil companies have disregarded the laws, and successive governments have failed to implement or enforce them.

When Texaco began its operations, there was little public awareness or political interest in environmental issues. Environmental protection in the oil patch is expensive and requires a lot of work. It also depends on the use of technology, and Ecuador relied on Texaco, as the operator of the first commercially developed fields in the Amazon, to transfer oil extraction technology. Ecuadorian officials saw Texaco as a prestigious international company with vast experience and access to "world-class" technology and capital. They relied on Texaco to design, procure, install, and operate the infrastructure that turned Ecuador into an oil exporter. In its contract with the State, Texaco agreed to use "modern and efficient" equipment, train Ecuadorian students, and turn over the field operations to Petroecuador "in good condition" when the contract ended in 1992.[61]

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58. For citations and a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 433–74; KIMERLING, AMAZON CRUDE, *supra* note 27; JUDITH KIMERLING, CRUDO AMAZONICO (1993) (Spanish-language adaptation of AMAZON CRUDE).

59. Ley de Hidrocarburos [Law of Hydrocarbons], Decreto Supremo No. 2967, art. 31(s), 31(t), R.O. 711 (Nov. 15, 1978), amended by DL 101, R.O. 306 (Aug. 13, 1982) (Ecuador).

60. Decreto Supremo No. 925, ch. IX, cl. 46.1, from General Guillermo Rodriguez Lara, President of Ecuador (Aug. 16, 1973).

61. *Id.* at ch. IX, cl. 40.1, 38.1, 51. Texaco Inc. operated in Ecuador through a wholly-owned subsidiary, Texaco Petroleum Company (TexPet). In 1974, two years after commercial production began, Petroecuador (then CEPE) acquired a 25% participating interest in the Texaco-Gulf consortium. In 1977, Petroecuador purchased Gulf's remaining interests and became the majority shareholder in the new CEPE-Texaco consortium. Texaco retained ownership of 37.5% of the stock, and continued to be the operator of the consortium's exploration and production assets until 1990, when a subsidiary of Petroecuador became the operator.

In the environmental regulatory vacuum, Texaco set its own environmental standards and policed itself.[62] As Petroecuador's "professor," Texaco also set standards for that company's operations. Texaco's standards and practices, however, did not include environmental protection. The company did not instruct its Ecuadorian personnel about environmental matters, and skilled oil field workers who were trained by Texaco were so unaware of the hazards of crude oil during the 1970s and 1980s that they applied it to their heads to prevent balding. They sat in the sun or covered their hair with plastic caps overnight. To remove the crude, they washed their hair with diesel. Similarly, many workers took jars of crude oil to parents suffering from arthritis. The rumors attributing medicinal qualities to Amazon crude are not entirely surprising, considering its status as the harbinger of a great future for the nation and Texaco's neglect of environmental and human health concerns.

In 1990, when government officials were confronted with a study by an environmental lawyer from the United States (the Author) that documented shocking pollution and other impacts from operations by Texaco and other companies (subsequently published as *Amazon Crude*), they professed ignorance. Texaco was their "professor," they explained; the company taught them how to produce oil, but did not teach environmental protection.[63]

That basic view—that public officials did not realize that oil extraction was taking a serious toll on the environment until international environmentalists put a spotlight on Ecuador's Amazon region—has been echoed by others. According to General Rene Vargas Pazzos, a key policymaker in the military government that ruled Ecuador when the oil rush

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62. Irrespective of government regulation, Texaco had a duty of care under Ecuador's Civil Code. Ecuador first adopted the Civil Code in 1857, copying nearly verbatim the Chilean Civil Code, and subsequently amended it on numerous occasions. Many of the general rights and obligations established by the Civil Code, for example to indemnify and repair injuries to persons and property, are comparable to common law tort principles that are particularized and applied by courts in the United States. For citations and a fuller discussion, see JUDITH KIMERLING, EL DERECHO DEL TAMBOR: DERECHOS HUMANOS Y AMBIENTALES EN LOS CAMPOS PETROLEROS DE LA AMAZONÍA ECUATORIANA [THE LAW OF THE DRUMMER: HUMAN AND ENVIRONMENTAL RIGHTS IN THE ECUADORIAN AMAZON OIL FIELDS] 36, 56–75 (1996); Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J.L. & TRADE AM. 293, 336-40 (1995) [hereinafter *Rights, Responsibilities, and Realities*].

63. KIMERLING, AMAZON CRUDE, *supra* note 27, at ix, xxvi. The Author's study in Ecuador was the first to document widespread pollution and other environmental and social impacts from oil extraction in tropical forests. It was based on extensive field observations and interviews during repeated visits to the Amazon region in 1989–1990, in collaboration with the indigenous organizations FCUNAE (Federation of Comunas Union of Natives of the Ecuadorian Amazon, now Inter-Provincial Federation of Kichwa Comunas and Communities of the Ecuadorian Amazon, FICCKAE) and CONFENIAE (Confederation of Indigenous Nationalities of the Ecuadorian Amazon), and other research. The disclosures first appeared in a draft report in 1989. Subsequently, the Author expanded the report; in 1991, it was published, with color photographs, as *Amazon Crude* by the environmental organization Natural Resources Defense Council (NRDC). In 1993, a Spanish-language adaptation was published with FCUNAE (in Ecuador) by Abya Yala Publications. KIMERLING, CRUDO AMAZONICO, *supra* note 58.

began, government officials did not question Texaco about environmental practices because they did not question the company's technical expertise or know that the operations could damage the environment:

> We thought oil would generate a lot of money, and that development would benefit the country. But we did not have technical know-how, and no one told us that oil was bad for the environment . . . . We were fooled by Texaco. We were betrayed. We trusted the company . . . . Texaco was responsible for all of the operations. . . . We were not experts . . . . The Hydrocarbons Directorate approved the work, but the technology came from Texaco. It is like contracting a doctor. You go in, and can see that the room is fine. But with the operation, it is beyond your control and know-how . . . .
>
> We were happy about the petroleum. We said, "Do it, and tell us what it will cost." . . . But we did not know about environmental issues . . . . We thought Texaco used the best methods . . . . Texaco was the operator. We did not interfere in technical decisions because that was Texaco's responsibility. That is what we paid them for . . . . We controlled only the production rates, the payment of taxes [and things like that] . . . .[64]

According to Vargas, all of the work plans and technical specifications for the operations were elaborated by Texaco in the United States and sent to Quito from the company's Latin America/West Africa Division, based in Coral Gables, Florida. According to Margarita Yepez, who worked for Texaco's wholly-owned subsidiary in Ecuador (Texaco Petroleum) from 1973–1989, the operations were closely supervised from the Coral Gables office: every department head in Quito had a direct telephone line to a supervisor in Coral Gables; important contracts for field operations were approved and signed in the United States; expenditures were closely supervised from the United States; and the Quito office had a full-time employee to microfilm all reports and other written materials to send to Coral Gables in a daily mail pouch.

Texaco's international prestige and day-to-day control, as the operator, of field activities gave the company enormous power in the oil patch. That power can hardly be overestimated and was compounded by systemic deficiencies in the rule of law and good governance in Ecuador. Texaco's power and the culture of impunity in the oil fields—the belief that companies can do whatever they want and suffer no adverse consequences as long as

64. Interview with General Rene Vargas Pazzos (Ret.), former General Manager of Petroecuador, 1973–1975, and former Minister of Natural Resources, 1976–1977, in Quito, Ecuador (July 4, 2001).

they get the oil—is illustrated in a remark by a worker in 1993, the year after Texaco's contract expired. The man worked for a subcontractor, driving a truck that dumped untreated oil on roads for dust control and maintenance purposes. When asked what he thought about the practice, he replied:

> Three years ago, I went to a training course . . . and a *gringo* from Texaco told us that oil nourishes the brain and retards aging. He said that in the United States they do this on all of the roads, and people there are very intelligent.[65]

When asked if he believed what the trainer from Texaco had said, he answered: "It doesn't matter what I think; here, Texaco, and now Petroecuador *manda* [gives the orders]. Everyone works for them."[66]

The consortium led by Texaco extracted nearly 1.5 billion barrels of Amazon crude over a period of 28 years (1964–1992).[67] During its tenure as operator, Texaco drilled 339 wells in an area that now spans more than one million acres.[68] It built a 498-kilometer Trans-Ecuadorian pipeline system to transport oil from the remote Amazon region across the Andes Mountains to the Pacific coast, in addition to some 1,000 kilometers of secondary pipelines and flow lines in the rainforest and more than 600 kilometers of unpaved roads.[69] Among other sources of pollution, Texaco regularly sprayed roads with crude oil for maintenance and dust control, and deliberately dumped tons of toxic drilling and maintenance wastes,[70] in addition to an estimated 19.3 billion gallons of oil field brine (also known as produced water)[71] into

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65. The exchange (with the Author) took place on Sept. 26, 1993.

66. *Id.*

67. KIMERLING, AMAZON CRUDE, *supra* note 27, at 31. The dates include exploration and production; commercial production began in 1972. In 1990, Texaco transferred operational responsibility for exploration and production to a subsidiary of Petroecuador and retained a minority ownership interest in the consortium until its contract with Ecuador expired in 1992. *Id.* at 44.

68. *Id.* at 43–44; Kimerling, *Oil Frontier*, *supra* note 1, at 449–50.

69. Kimerling*, Oil Frontier*, *supra* note 1, at 450.

70. *Id.*; KIMERLING, AMAZON CRUDE, *supra* note 27, at 59, 69. Drilling and maintenance wastes were either abandoned in open, unlined waste pits (large holes dug in the ground) at well sites and production stations or discharged to waters or soils. *Id.*

71. Calculations by the author based on REPUBLIC OF ECUADOR, MINISTRY OF ENERGY AND MINES, PRODUCCIONES DE PETRÓLEO, AGUA DE FORMACIÓN Y GAS NATURAL DIC./89 [PRODUCTION OF PETROLEUM, FORMATION WATER AND NATURAL GAS, DEC./89] (1989) (unpublished document). Oil field brine, also known as produced water, is extracted with crude oil and separated in the field. Natural gas is also present in oil-bearing formations and is extracted with the oil and brine. Typically, the (oil-gas-brine) mixture is transported through small-diameter pipelines, known as flow lines, from the wells to a central production station. There, crude oil is separated from the mixture and transported by pipeline for sale. Virtually all of the produced water wastes generated by Texaco were discharged into the environment. Some of the gas was processed for use in the operations; however, most was flared or burned as a waste, without temperature or emissions controls, depleting a nonrenewable resource and polluting the air with greenhouse gases, precursors of acid rain, carbon particulate (soot), and other contaminants.

the environment—contaminating countless rivers and streams that had served as rich fisheries and freshwater resources for local communities.

The operations expanded incrementally, and by the time Texaco handed over operational responsibility for the wells and other production facilities to Petroecuador in June 1990, they were producing some 213,840 barrels of oil daily.[72] At the same time, according to government figures from December 1989, the facilities generated more than 3.2 million gallons of produced water wastes every day, virtually all of which was dumped into the environment via open, unlined waste pits without treatment or monitoring, and more than 49 million cubic feet of associated natural gas every day, most of which was burned as a waste, also without environmental controls or monitoring.[73]

In addition to routine, willful discharges and emissions, accidental spills were common. During the time that Texaco operated the Trans-Ecuadorian pipeline, that line alone spilled nearly twice as much oil as the Exxon Valdez, mostly in the Amazon Basin.[74] Spills from secondary pipelines, flow lines, tanks, production stations, and other facilities were also frequent and continue to this day.

In contrast to the oil industry's typically energetic response to spills in the United States, Texaco's response in Ecuador was limited to shutting off the flow of petroleum into the damaged portion of the pipeline, and allowing the oil already in the line to spill into the environment before making the necessary repairs. No cleanup activities were undertaken, and no assistance or compensation was provided to affected communities.[75] In addition,

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Because the facilities do not achieve complete separation, produced water wastes typically contain high levels of hydrocarbons in addition to toxic levels of salts, heavy metals, and chemicals that have been injected down a well or used in the separation process, and it is not unusual to see black smoke released from flares. At some locations, produced water wastes can also contain naturally occurring radioactive material (NORM).

72. *Id.* at 2.

73. *Id.*; KIMERLING, AMAZON CRUDE, *supra* note 27, at 63–70. As part of the produced water waste stream, Texaco's operations discharged an estimated 1,600 to 16,000 gallons of oil into the environment every day. Kimerling, *Oil Frontier*, *supra* note 1, at 456.

74. According to figures recorded by Ecuador's government, Texaco spilled an estimated 16.8 million gallons of oil from the Trans-Ecuadorian pipeline in 30 major spills. KIMERLING, AMAZON CRUDE, *supra* note 27, at 69. When adjusted using figures from the World Bank for one of the spills, the total increases to 19.23 million gallons. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ECUADOR EMERGENCY PETROLEUM RECONSTRUCTION PROJECT 13 (Apr. 27, 1987) (Technical Annex to President's Report and Recommendation on Proposed Loan to Ecuador for Emergency Petroleum Reconstruction Project); *see also* Kimerling, *Oil Frontier*, *supra* note 1, at 457–58. By comparison, the Exxon Valdez spilled an estimated 10.8 million gallons of oil into the Prince William Sound. KIMERLING, AMAZON CRUDE, *supra* note 27, at 69. Texaco operated the Trans-Ecuadorian pipeline until 1990, when a subsidiary of Petroecuador became the operator.

75. Texaco's pipeline system crosses myriad rivers and streams. As a result, depending on the location and size of the release, in addition to devastating local impacts, spills can cause oil slicks on waterways and foul water supplies and fisheries for scores or even hundreds of kilometers. Moreover, because spills are not properly cleaned up, they can become sources of ongoing chronic pollution in

Texaco instructed its personnel in Ecuador not to keep any records of spills, and not to report spills unless they were "major events"—defined as a spill "which attracts the attention of the press and/or regulatory authorities or in [the] judgment [of the general manager of the Ecuador operations] merits reporting."[76]

I have written at length in other publications about the environmental impacts of Texaco's operations, so here I will simply add that pollution and other impacts have made large areas of ancestral Huaorani lands uninhabitable to the Huaorani who live on the land. The damages are so serious and widespread that other oil companies have gone to great lengths to try to distinguish their operations: "We are not like Texaco, we use cutting edge technology, best practice and international standards to protect the environment" has become a common refrain.

As oil extraction facilities age, they generate less oil and more produced water. They also require more costly maintenance to maximize production and prevent spills and other accidental releases. Basic oil field economics, then, do not favor environmental protection because the cost of protection typically increases as the income stream from facilities decreases. Petroecuador and other companies have continued to expand operations in the fields developed by Texaco, in addition to expanding exploration and production activities in new areas.

In the wake of *Amazon Crude*, environmental protection has become an important policy issue in Ecuador. Since the early 1990s, both government officials and oil companies must at least appear to be "green." However, the implementation of environmentally significant changes in the oil fields has lagged, despite both public pledges by a growing number of companies to voluntarily raise environmental standards and a trend on paper toward increasingly detailed, albeit incomplete, environmental legal rights and requirements—including constitutional recognition since 1984 of the right of individuals to live in an environment free from contamination, expanded constitutional environmental rights for groups since 1998, and constitutional recognition of "rights of nature" since 2008.[77] In addition to the legacy of Texaco, the implementation of environmental law in the oil fields has been hampered by the absence of political will, inadequate financing, lack of

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affected watersheds for months or years. For photographs and a fuller discussion, see KIMERLING, AMAZON CRUDE, *supra* note 27. For a discussion of a contemporaneous account by Texaco of the company's response to a spill from the Trans-Ecuadorian pipeline, see Kimerling, *Oil Frontier*, *supra* note 1, at 617–18.

76. Directive from R.C. Shields, Chairman of the Board, Texaco Petroleum Co. to M.E. Crawford, Acting Manager (July 17, 1972) (on file with author). The directive further instructed that "all previous [spill] reports are to be removed from Field and Division offices and destroyed." *Id.*

77. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [2008 CONSTITUTION OF THE REPUBLIC OF ECUADOR] Oct. 20, 2008, art. 71–74.

technical capacity, oil industry influence and resistance to regulation, corporate control of environmental decisionmaking, and the failure of the rule of law and good governance generally.[78]

### *E. Litigation in Texaco's Homeland*[79]

Texaco's contract expired in 1992 and the following year a class action lawsuit was filed in federal court in New York on behalf of all Indigenous and settler residents who have been harmed by pollution from the company's Ecuador operations. The case, *Aguinda v. Texaco, Inc.*,[80] was filed by United States-based attorneys after an Ecuadorian-born lawyer, Cristobal Bonifaz, read *Amazon Crude*.[81]

Class action law permits a group of named plaintiffs to sue as representatives of a plaintiff class, on behalf of a large group of similarly

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78. For a study of a corporate initiative claiming to apply best practice and international standards in Ecuador, which includes a fuller discussion of environmental law, see Kimerling, *International Standards*, *supra* note 4 (environmental standards and practices); Judith Kimerling, *Uncommon Ground: Occidental's Land Access and Community Relations Standards and Practices in Quichua Communities in the Ecuadorian Amazon*, 11 L. & ANTHROPOLOGY 179 (2001) (community relations standards and practices); Kimerling, *Rio + 10*, *supra* note 4 (environmental and community relations standards and practices). The study concludes that some things have changed in Ecuador's oil frontier, but the oil companies are still firmly in control of oil field operations, including environmental and community relations standards and practices. Voluntary initiatives have led some companies to share some financial benefits of development with local communities, but a vast gap remains between the promises of environmentally-friendly operations, sustainable development, and respect for the rights of Indigenous peoples and the reality of development in the oil fields. Some companies may be raising levels of environmental protection in some areas, at least in the short term; however, those protections are very limited, at best, and they are not certain and need independent verification and long-term monitoring. Two key questions are whether groundwater resources are protected from contamination by waste injection activities and buried wastes and pipelines, and whether aging pipelines, well casings, and other equipment are properly inspected and maintained. Another major concern is the impact of road construction. As a general matter, although voluntary initiatives by oil companies are clearly needed to raise levels of environmental protection, they are not without peril. The promise to apply "international standards," "cutting edge technology," "best practice," and/or "corporate responsibility" has become a tool that oil companies can use to dominate and control environmental information, decisionmaking, and implementation; deflect and discourage meaningful oversight; rebuff and belittle grievances by affected populations; and paint a veneer of environmental excellence and social responsibility to camouflage business as usual. In addition, they can operate to undermine the development of national environmental law and capacity in developing nations like Ecuador, by arbitrarily legitimizing norms that have been defined by special interests and reassuring government officials and other stakeholders that standards and practices are improving. Although the voluntary initiatives cannot be divorced from the social, economic, and political context in which they operate, a major source of abuse can be linked to the widespread confusion, outside of industry circles, about the source and substance of applicable norms.

79. For citations and a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 474–664.

80. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 536–37 (S.D.N.Y. 2001), *aff'd,* 303 F.3d 470 (2d Cir. 2002).

81. Letter from Cristobal Bonifaz to Author (Oct. 20, 1992), *quoted in* Kimerling, *Oil Frontier*, *supra* note 1, at 475; *see also* Letter from Cristobal Bonifaz to Author (Nov. 16, 1992) (on file with author). Bonifaz was a co-lead counsel for the plaintiffs until March 2006.

situated individuals. The complaint named some 74 plaintiffs, none of them Huaorani, and asserted claims based on common law negligence, nuisance, trespass, civil conspiracy, and medical monitoring.[82] It also included an international law claim based on the Alien Tort Claims Act, and a claim for equitable relief to remedy the contamination.[83] Until its merger with Chevron in 2001, Texaco's corporate headquarters was in White Plains, New York, and the complaint alleged that decisions directing the harmful operations were made there.[84] The putative class was defined geographically and estimated to include at least 30,000 persons.[85]

The complaint did not identify all of the affected Indigenous groups or distinguish their claims and injuries from those of the settlers, who are also adversely affected by the pollution and included among the named plaintiffs and putative class. Similarly, it did not include claims based on human rights norms or the specific rights of Indigenous peoples. However, in press releases and other public relations and advocacy activities related to the case, the plaintiffs' lawyers and NGOs that support the litigation often give the impression that all of the plaintiffs are Indigenous Amazonian peoples. As a result, confusion about the plaintiffs and intended beneficiaries of the litigation—as well as the origins of the case—have characterized much of the extensive media reporting about the case, and it has commonly been described as a lawsuit brought by "Indians" or "indigenous people from the rainforest."[86]

For example, the attorneys' press release announcing the lawsuit had four headlines:

> RAINFOREST INDIANS LAUNCH BILLION-DOLLAR LAWSUIT AGAINST TEXACO
>
> Claim Oil Company Ruined Their Rivers and Land in Amazon Basin in Ecuador
>
> Tribal Leaders to Arrive in New York Today to File Class Action Papers at US Courthouse

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82. Complaint at 2–3, 5, *Aguinda*, 142 F. Supp. 2d 534 (No. 93-cv-7527).

83. *Id.* at 6.

84. *Id.* at 18.

85. *Id.* at 19.

86. Kimerling, *Oil Frontier*, *supra* note 1, at 478–84. In addition to the Huaorani, the Indigenous groups affected by Texaco's operations include the Cofan, Siona, and Secoya peoples, and a large number of Kichwa communities. The named plaintiffs were selected by the lawyers and did not include any Huaorani, Cofan, or Siona. The Secoya are now also known as the Sikopei; Cofan is also spelled "Kofan"; and Kichwa is also spelled "Quichua."

> "Catastrophe Worse than the Exxon Valdez," Lawyers Say[87]

The opening paragraph stated:

> Leaders of several Indian tribes in the Amazon region of Ecuador filed a groundbreaking lawsuit today charging Texaco with ruining their rivers and land, causing widespread devastation to the rainforest environment, and creating a dramatically increased risk of cancer for tens of thousands of people. The attorneys estimate the damages could exceed a billion dollars.[88]

In response to the lawsuit, Texaco denied any wrongdoing and vigorously fought the legal action. In submissions to the court and in the media, Texaco alleged that the operations had complied with Ecuadorian law and then-prevailing industry practices. Moreover, the company argued, its

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87. Press Release, Plaintiffs' Attorneys, Rainforest Indians Launch Billion-Dollar Lawsuit Against Texaco: Claim Oil Company Ruined Their Rivers and Land in Amazon Basin of Ecuador: Tribal Leaders to Arrive in New York Today to File Class Action Papers at US Courhouse: 'Catastrophe Worse than the Exxon Valdez,' Lawyers Say, (Nov. 3, 1993) (on file with author).

88. *Id.* The press release did not mention that settlers were included in the action, and gave the misleading impression that the lawsuit had been coordinated with—or initiated by—Indigenous tribal leaders. One Indigenous organization, FCUNAE (comprised of Kichwa communities), refused to help Bonifaz find plaintiffs when he visited the region after reading *Amazon Crude* because he told them—falsely—that he was working with the Author. FCUNAE was suspicious of Bonifaz's claim because he had not been introduced by the Author and contacted the Author to find out if he was telling the truth. (He was not.) Because of that incident, and others that soon followed, FCUNAE (and the Author) came to distrust Bonifaz and his team early on. For more recent examples of confusion about the origins of the litigation and the plaintiffs and intended beneficiaries of *Aguinda v. Texaco* and the related case filed in Ecuador in 2003 by a group of the same plaintiffs, see, e.g., Chad Bray, *Filmmaker Must Turn Over Chevron-Ecuador Footage*, WALL STREET J. (July 15, 2010), http://www.wsj.com/articles/SB10001424052748704682604575369662908874500 (repeatedly referring to a lawsuit by "indigenous groups" and to lawyers representing the "indigenous people"); James North, *Ecuador's Battle for Environmental Justice Against Chevron*, NATION (June 2, 2015), http://www.thenation.com/article/ecuadors-battle-environmental-justice-against-chevron/ (feature article with the headline, "For more than two decades, impoverished indigenous people have been seeking restitution from the oil giant for polluting their region"; reporting (erroneously) that "popular movements in the rain forest . . . . brought their own lawsuit against Texaco in a New York federal court in 1993" and that "the Amazon Defense Coalition [NGO Amazon Defense Front] represents the 30,000 rain-forest *afectados* [local residents who are affected by Texaco]"; repeatedly referring to "the rain-forest plaintiffs" and "rain-forest inhabitants," and quoting attorney Steven Donizger's statement that "'Chevron is trying to kill off the idea that impoverished indigenous groups and lawyers can pool their talents and resources like we have to take on Big Oil and be successful," without mentioning the settlers); Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (ruling by United States District Judge Lewis Kaplan following a bench trial in fraud case by Chevron against the plaintiffs in the Ecuador litigation and members of the plaintiffs' legal team, describing the Ecuador case as a lawsuit "on behalf of thousands of indigenous peoples"); Chevron Corp. v. Yaiguaje, [2015] 3 S.C.R. 69 (Can.) (ruling by Supreme Court of Canada in action to enforce the judgment in the Ecuador case, holding that Ontario courts have jurisdiction and describing the Ecuadorian plaintiffs as "represent[ing] approximately 30,000 indigenous villagers"). The subsequent, related litigation and NGO Amazon Defense Front are discussed below in Part II.F.

subsidiary (Texaco Petroleum) had not operated in Ecuador since 1990, and any legal claims should be pursued there instead of the United States. It touted the ability of Ecuadorian courts to provide a fair and alternative forum to administer justice.[89]

In submissions to the court, Texaco also denied parent company control over the operations. This effort to distance the parent company from the Ecuador operations and assert that it had no role in environmental management there contradicted both the image that Texaco Petroleum had cultivated in Ecuador, of a leading international company based in the United States, and the image commonly promoted by Texaco, Inc. in public relations materials and responses to concerned consumers and NGOs before it was sued, of an industry leader engaged in worldwide operations that is committed to environmentally responsible practices wherever it operates.[90] Texaco's legal submissions further contended that Petroecuador and Ecuador had heavily regulated Texaco Petroleum's environmental practices.

Outside court, Texaco and Ecuador moved quickly to negotiate issues raised by the lawsuit, in what *ABC News Nightline* later called an "exit agreement."[91] They signed a series of agreements in 1994–1995. The

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89. For citations and a fuller discussion, see Kimerling, *Oil Frontier*, supra note 1, at 484–87.

90. *See, e.g.*, Letter from J. Donald Annett, President, Texaco Environment, Health, Safety Division to Jeffrey Hunter (Mar. 29, 1992) (response to letter to Texaco's CEO expressing concern about "Texaco's" operations in Ecuador). The Texaco letter does not mention Texaco Petroleum or any subsidiary and states:

> One of Texaco's official corporate goals is to "actively seek ways of protecting the environment in which we live and operate." You can rest assured that our operations in Ecuador . . . were conducted in compliance with the laws of Ecuador, with industry standards of good practice, and in conformity with our own Guiding Principles and Objectives . . . . Texaco is committed to environmentally sound practices in the conduct of all its operations, wherever in the world they may be . . . . I appreciate and share your concern about damage to the rainforest . . . . I have enclosed a copy of Texaco's *Environment, Health and Safety Review* to help give you some idea of the investment in time, capital and thought Texaco is putting into environmental matters.

*Id.*; *see also, e.g.*, TEXACO INC., ENVIRONMENT, HEALTH & SAFETY REVIEW (1990); Letter from J. Donald Annett, President, Texaco Environment, Health, Safety Division to S. Jacob Scherr, Director, International Program, Natural Resources Defense Council (Jan. 2, 1991) (responding to a letter and press conference based on *Amazon Crude,* not mentioning Texaco Petroleum and stating, "Texaco has been careful to comply with the laws of Ecuador, oil industry standards of 'good practice,' and Texaco's own Guiding Principles and Objectives"); TEXACO INC. PUB. RELATIONS, TEXACO AND ECUADOR: SETTING THE RECORD STRAIGHT (1992) (report prepared in Harrison, NY and sent by Texaco Europe to Norwegian NGO, defending practices in Ecuador and using "Texaco" and "Texpet" interchangeably; also stating that because developing nations "do not always have the technological and financial resources . . . [to improve their economy and standard of living, they] welcome foreign investment . . . [and] based on Texaco's policies, practices, expertise, technology and resources, we feel that Texaco is most qualified and capable to assist governments in developing their natural resources while protecting the environment").

91. *Nightline: Texaco in the Amazon* (ABC television broadcast Oct. 21, 1988). The correspondent, Dave Marash, also described the affected area, which he visited after the remediation, as

agreements did not mention the *Aguinda* lawsuit, but purported to decide how Texaco Petroleum would remedy its share of the contamination at issue in the litigation.[92] Publicly, Texaco and Ecuador vowed that the company would clean up damaged areas and compensate affected communities.

Under the accord, Texaco agreed to implement limited environmental remediation work, make payments to Ecuador for socio-economic compensation projects, and negotiate contributions to public works with municipal governments of four boom towns that grew around the company's operations and, in the wake of *Aguinda v. Texaco*, sued Texaco Petroleum in Ecuador.[93] In exchange, the Ecuadorian government and Petroecuador agreed to release Texaco—and its subsidiaries and successors—from all claims, obligations, and liability to the Ecuadorian State and national oil company related to contamination from the operations.[94] The agreements did

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follows: "This Amazon paradise is as pocked and chipped and scratched as dinnerware at a greasy spoon." *Id.*

92. The agreements are: REPUBLIC OF ECUADOR, MINISTRY OF ENERGY AND MINES, MEMORANDO DE ENTENDIMIENTO ENTRE EL ESTADO ECUATORIANO, PETROECUADOR Y TEXACO PETROLEUM COMPANY (TEXPET) [MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF ECUADOR, PETROECUADOR AND TEXACO PETROLEUM COMPANY] (DEC. 14, 1994); REPUBLIC OF ECUADOR, MINISTRY OF ENERGY AND MINES, ALCANCE DEL TRABAJO DE REPARACIÓN AMBIENTAL [SCOPE OF THE ENVIRONMENTAL REMEDIAL WORK] (MAR. 23, 1995); REMEDIATION CONTRACT, *supra* note 39.

93. The (four) lawsuits were filed in local courts in 1994 by the municipal governments of Lago Agrio, Francisco de Orellana (Coca), Joya de las Sachas, and Shushufindi, and sought compensation and cleanup. For citations and a fuller discussion of the lawsuits and subsequent settlements, see Kimerling, *Oil Frontier*, *supra* note 1, at 511–14, 537. The settlements were negotiated with local politicians behind closed doors and, like the negotiations with Ecuador's central government, excluded the *Aguinda* plaintiffs and the affected communities, and caused considerable controversy and concern in the oil patch.

94. Upon signing the Remediation Contract and "in consideration for [Texaco Petroleum's] agreement to perform" the work outlined in the accord, Ecuador and Petroecuador committed to "release, acquit and forever discharge" Texaco Petroleum and Texaco Inc. from all claims to Ecuador and Petroecuador for "Environmental Impact arising from the Operations of the Consortium except for those related to the obligations contracted," thereby limiting Texaco's liabilities to the State and its former partner to the relatively narrow scope of work set forth in the agreement. REMEDIATION CONTRACT, *supra* note 39, at art. V. "Environmental Impact" is defined as the presence or release of any solid, liquid, or gaseous substance into the environment "which causes, or has potential to cause harm to human health or the environment." *Id*. at art. I, para. 3. In 1998, Ecuador quietly signed off on the Texaco "remediation." In a document called the Final Act, the government certified that Texaco Petroleum had fully performed its obligations under the remedial contract and "released, absolved and discharged forever" Texaco and its affiliates and principals from any claim or complaint by Ecuador and Petroecuador "for reasons related to the obligations acquired" by Texaco Petroleum in that contract. ACTA FINAL [FINAL ACT] art. IV (Sept. 30, 1998). Although the Remediation Contract clearly states that the Release of Claims provisions apply to claims by the government and Petroecuador, and the accord does not include a hold harmless provision, Chevron now argues that the Remediation Contract and Final Act granted the company a complete release from any and all liability for environmental remediation, including claims by third parties; that Ecuador and Petroecuador retained responsibility for any remaining or future environmental impacts; and that any such claims should be made against the government instead of Chevron. Ecuador's (current) government maintains that the accord operated only to release Chevron from claims by Ecuador and Petroecuador, and that Ecuador expressly rejected a proposal by Texaco during the settlement negotiations to extend the

not include a price tag, but Texaco subsequently reported that it spent 40 million dollars on the remediation program.

The remedial work undertaken by Texaco was limited in scope and largely cosmetic. It did not contain or reverse the tragic environmental legacy of the operations or benefit the affected rural populations. Indeed, the accord—which was negotiated behind closed doors, without meaningful participation by affected communities, transparency, or other democratic safeguards—seemed more like an agreement between polluters to limit cleanup requirements, and lower and divide their costs, than a remediation program based on a credible assessment of environmental conditions and the measures that are needed to remedy them. The decisionmaking processes and final release of Texaco and its corporate family after the work was completed (in 1998, in a document called the Final Act) reflected the enduring political and economic power of Texaco and the selective application of the law in the oil frontier. Inasmuch as it liberated the company from environmental obligations to the State, it also raised serious questions of law and legitimacy. Many people in Ecuador saw the accord as an effort to derail the *Aguinda* lawsuit and help Texaco evade responsibility for its environmental legacy, and it remains controversial to this day.[95]

In court, after nine years of litigation, Texaco's efforts to dismiss the lawsuit were successful, and the *Aguinda* plaintiffs were essentially told to go home and sue in Ecuador.[96] The court dismissed the case on the ground of forum non conveniens, a doctrine that allows a court to dismiss a lawsuit that could be tried in a different court, in the interest of justice or for the convenience of the parties.[97] Dismissal was conditioned on Texaco's agreement to submit to the jurisdiction of Ecuador's courts.[98]

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release to claims by residents of the Amazon; that the accord does not contain any hold harmless or indemnification obligation in favor of Chevron; and that it does not require Ecuador to intervene in private litigation by third parties. Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, at 12–23 (Feb. 27, 2012) [hereinafter BIT Third Interim Award], http://www.italaw.com/sites/default/files/case-documents/ita0175.pdf.

95. For a fuller discussion of the agreements and remedial work, see Kimerling, *Oil Frontier*, *supra* note 1, at 493–514, 523.

96. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 536–37 (S.D.N.Y. 2001), *aff'd,* 303 F.3d 470 (2d Cir. 2002).

97. *Id.* at 537.

98. *Aguinda*, 142 F. Supp. 2d, at 538. The district court first dismissed the *Aguinda* lawsuit in 1996 on the grounds of forum non conveniens, international comity, and the failure to join indispensible parties (Petroecuador and Ecuador). Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996), *rev'd sub nom.* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). At the time, Ecuador's government vigorously opposed litigating the plaintiffs' claims in the United States, and the district court agreed with Texaco and Ecuador that the "Ecuadorian-centered" case did not belong in United States courts. In a brief opinion, United States District Judge Jed Rakoff also directed the plaintiffs to "face the reality" that the power of United States courts "does not include a general writ to right the world's wrongs." *Id.* at 627–28. In response to the dismissal, Ecuador's government—which had a new President—reversed its

I have written elsewhere at length about the *Aguinda* litigation in New York and the decision to dismiss the case in favor of litigation in Ecuador.[99] So, I will cut to the chase: The application of the forum non conveniens doctrine to dismiss *Aguinda v. Texaco* was colored by a series of detailed, but questionable, factual assumptions.

When a federal court applies the forum non conveniens doctrine, it first determines whether there is an alternative forum, and then balances private and public interest factors to determine whether they overcome the ordinarily strong presumption in favor of the plaintiffs' chosen forum.[100] However, the standard to establish that an alternative forum exists is not exacting. And the public and private interest factors are malleable, so it is not unreasonable to expect that, more often than not, no two judges would apply them the same way. In *Aguinda,* the district court ruled that Ecuador's courts provide an alternative forum, and that the balance of private and public interest factors "tips . . . overwhelmingly in favor of dismissal . . . ."[101] Despite the fact that Texaco's headquarters was just a few miles from the courthouse where the case was filed, the judge, Jed Rakoff, concluded that the case has "everything to do with Ecuador and nothing to do with the United States."[102]

Some of the facts the district court used to support its legal analysis were uncontested. For example, there were no allegations of injury in the United States; Texaco's wholly-owned subsidiary, Texaco Petroleum, built and

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opposition, and Ecuador and Petroecuador moved to intervene as parties aligned with the plaintiffs. The district court denied the motion to intervene and the plaintiffs' then-pending motion for reconsideration. On appeal, the Second Circuit held that the district court erred by dismissing the complaint on the grounds of forum non conveniens and international comity without first securing a "commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts," and remanded for further proceedings. *Jota*, 157 F.3d at 159–63. On remand, Texaco "unambiguously agreed in writing to be[] sued . . . in Ecuador, to accept service of process in Ecuador, and to waive . . . any statute of limitations-based defenses that may have matured since the filing of the [complaint]." *Aguinda*, 142 F. Supp. 2d at 539. *See also Aguinda v. Texaco,* Nos. 93 Civ. 7527, 94 Civ. 9266 (S.D.N.Y. June 27, 2001) (stipulation and order). In addition, Texaco offered to "'satisfy judgments that might be entered in plaintiffs' favor [by the Ecuadorian courts], subject to [its] rights under New York's Recognition of Foreign Country Money Judgments Act.'" Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 396 (2d Cir. 2011) (brackets in original) (quoting Texaco's Mem. of Law in Supp. of Its Renewed Mot. to Dismiss Based on Forum Non Conveniens and International Comity 16–17). For a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 487–90 (early opposition to the *Aguinda* lawsuit by Ecuador's government); *id.* at 514–27 (the first dismissal and political instability in Ecuador); *id.* at 650–52 (subsequent political turmoil and changing positions in submissions by Ecuador to the *Aguinda* court).

99. *See generally* Kimerling, *Oil Frontier*, *supra* note 1. For further observations on the application of the forum non conveniens doctrine by the Aguinda court, see Judith Kimerling, *Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors' Perspective*, 1 STAN. J. COMPLEX LITIG. 241, 259–61 (2013) [hereinafter *Intervenors' Perspective*].

100. Piper Aircraft Co. v. Reyno*,* 454 U.S. 235, 254 n.22, 255 (1981); *Aguinda*, 142 F. Supp. 2d at 538.

101. *Aguinda*, 142 F. Supp. 2d at 548.

102. *Id.* at 537.

operated the facilities; and after operations began, Ecuador acquired majority ownership of the assets and continued to operate them when Texaco Petroleum's contract expired. Other facts, however, were in dispute. One area that was especially germane relates to control of the operations. While not determinative, by itself, of the legal questions, the factual issue of where decisions were made about the technology and practices that caused the pollution, and who made them, was a material element of the analysis of both private and public interest factors, and clearly colored the decision to dismiss.

The proposition—advocated by Texaco and accepted by the court without live testimony[103]—that Ecuadorians controlled the relevant decisions, that no one from Texaco or anyone else operating out of the United States made any material decisions or was involved in designing, directing, guiding, or assisting the activities that caused the pollution, and that environmental practices were heavily regulated by Ecuador, was a recurring theme. The court also distinguished Texaco from Texaco Petroleum, the subsidiary that operated in Ecuador. That distinction, and the portrait of Texaco Petroleum as essentially an Ecuadorian company whose operations were far removed from the parent, was dramatically different from the image of "Texaco" in Ecuador and the impression there that the government had contracted with *the* United States company, Texaco. It was also at odds with the portrait cultivated by Texaco before it was sued, of a multinational industry leader that transferred world class technology to Ecuador. Altogether, the *Aguinda* court's depiction of Texaco's role in the operations was clearly incongruous with the reality of oil development in Ecuador, including the environmental law vacuum and culture of impunity in the oil frontier, the experience of Amazonian peoples and other Ecuadorians with the company, and the portrait that Texaco cultivated during its tenure in Ecuador.[104] And it sends a troubling message: that laws and institutions in

103. For example, the court cited a total of 11 pages of (self-serving) deposition testimony by four Texaco managers for the proposition that the record "clearly establishes that all of the Consortium's key activities, including the decisions and practices here at issue, were managed, directed, and conducted by Consortium employees in Ecuador." *Id.* at 548.

104. *See, e.g.*, *Texaco, 25 Años Preparando Manos Ecuatorianos para Manejar Nuestro Patrimonio [Texaco, 25 Years Preparing Ecuadorian Hands to Manage Our Patrimony]*, COMERCIO, June 15, 1990 (paid advertisement by "Texaco" in major Ecuadorian newspaper stating that "Texaco, a company known around the world" had "share[d] its technology with Ecuador" and "trained more than 700 Ecuadorians in technical and administrative areas of the petroleum industry"); *Se Va la Texaco* [*Texaco Leaves*], HOY, June 6, 1992 (reporting Texaco's departure from Ecuador when its production contract expired; referring to the reversion to the State of "all of the infrastructure installed by the *foreign* company" during its 28 years in Ecuador (emphasis added); and quoting the General Manager of a Petroecuador subsidiary, that "through the work of the company [Texaco] in the 1960s and 1970s Ecuador entered the modern world"); Texaco, *Articulo de Fondo* [*Leading Article*], NOTICIAS, 1989 (company magazine distributed to Texaco Petroleum workers in Ecuador, describing "Texaco" as "a serious and efficient" company, with operations worldwide; noting that "when we sign a contract it is to fulfill it; because of this our image is beloved and respected in 74 countries of the world, where TEXACO maintains

the United States create and protect transnational corporations, but decline to act when companies harm people abroad.

The *Aguinda* court's determination that an adequate alternative forum exists was also colored by questionable factual assumptions, including erroneous and unsupported findings of fact about the history of litigation in Ecuador's courts. For example, the court found that some plaintiffs had already "obtained tort judgments" against Texaco Petroleum and Petroecuador in Ecuadorian courts "on some of the very claims here alleged" by the *Aguinda* plaintiffs,[105] a finding that was clearly erroneous.[106]

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it operations"; and stating, "we have demonstrated our sincere desire to transfer technology to the national employees, training them for the complex tasks of the petroleum industry and gradually reducing expatriate personnel"). The sources cited above in this footnote were not included in submissions to the *Aguinda* court. But, they offer a contemporaneous look at Texaco that clearly contradicts the portrait of the company in the decision to dismiss and the finding by the court that the plaintiffs' claims have "nothing to do with the United States." For a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 613–20. For a fuller discussion of the evidence in the record and analysis of private and public interest factors by the district court, which further concludes that (i) despite considerable gaps in the litigation record, many evidentiary roads lead to the United States, including significant (albeit incomplete) evidence that the Ecuador operations were part of an international corporate enterprise that relied on the parent company's technical expertise, financial and human resources, and image as a United States-based multinational corporation, and (ii) the balancing of private and public interest factors by the court was "lopsided" and although the court properly considered a number of factors that favored litigation in Texaco's preferred forum, it did not take into account a number of factors that favored the plaintiffs' choice of a United States forum, *see id.* at 528–32, 571–625.

105. *Aguinda*, 142 F.Supp. 2d at 539-40 (rejecting plaintiffs' argument that Ecuador's courts do not provide an adequate alternative forum because they are unreceptive to tort claims).

106. The *Aguinda* court cited affidavits and exhibits submitted by Texaco in support of the finding. However, a review of the record shows that none of the lawsuits relied on by the court resulted in a final judgment for the plaintiffs. The only case in which a plaintiff won a tort judgment—an action by the municipal government of Joya de las Sachas against Petroecuador and its insurer for damages caused by an oil spill from a former Texaco facility in 1992—was overturned on appeal. Ecuador's Supreme Court ruled that the local civil court, where the action had been filed, should not have allowed the case to proceed under provisions of the Code of Civil Procedure that provide for summary oral proceedings. The Supreme Court vacated the entire proceeding and assessed costs for the defendants' attorneys, to be paid by the lower court judge who adjudicated the case and the judges of the intermediate appellate court who signed the majority opinion upholding the lower court's judgment. Although a translation of the Supreme Court's decision was included in exhibits submitted by Texaco to the *Aguinda* court, the affidavit that accompanied the judgment and described the case (by Texaco Petroleum attorney Adolfo Callejas Ribadeneira) did not mention the assessment against the judges and stated, inaccurately, that the Supreme Court "ordered that [the case] be refiled in the appropriate legal form." No information was included about subsequent litigation; however, exhibits submitted to the *Aguinda* court by the plaintiffs included an affidavit by the attorney who represented Joya de los Sachas in the lawsuit. That affidavit stated that municipal officials decided not to pursue the case after the judgment was overturned because they concluded that "it is impossible to win an action of that sort"—even if they won again in the local court, the judgment would not survive appeal by Petroecuador because of the company's political influence in Quito. As a result, the legal claim was apparently abandoned. The other lawsuits cited in the submissions relied on by the *Aguinda* court were based on the "very occurrences" at issue in *Aguinda* and fall into two groups. Four cases, involving six colonists, were filed after the *Aguinda* litigation was underway (in 1997 and 1999). The plaintiffs were apparently members of the putative *Aguinda* class; however, no judgments had been issued yet in any of those cases, even by a court with original jurisdiction.

Another major finding, that the description of systemic shortcomings in Ecuador's legal and judicial system by the United States Department of State in its Country Reports on human rights was largely limited to cases involving confrontations between political protestors and the police, was also erroneous and suggests a lack of candor by the court. Remarkably, the court misquoted the State Department report. Judge Rakoff evidently reviewed reports describing human rights practices during 1998 and 1999. Both reports stated that "[t]he most fundamental human rights abuse [in Ecuador] stems from shortcomings in the politicized, inefficient, and corrupt legal and judicial system."[107] However, the latter report was quoted by the court as "describ[ing] Ecuador's legal and judicial systems as 'politicized, inefficient and *sometimes* corrupt' so far as certain 'human rights' practices are concerned."[108] The misquotation is especially troubling because the same statement was quoted correctly by Judge Rakoff on two prior occasions, and the litigation record suggests that the court allotted appreciable attention to considering its proper meaning.[109]

Another finding, that Ecuador had recently taken steps to further the independence of its judiciary, was technically accurate. However, the effectiveness of those steps had not been demonstrated and events soon

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The second group of cases are the four lawsuits filed by municipal governments against Texaco Petroleum, discussed *supra.* Those cases were settled and withdrawn prior to adjudication, in connection with the remedial accord negotiated by Texaco and Ecuador. In Ecuador, the settlements and subsequent payments to local officials were generally regarded as the result of political processes, not judicial proceedings, and many people saw them as part of a strategic effort by Texaco to undermine *Aguinda* and curry favor among political elites for the company's limited remedial program. Thus, notwithstanding the voluminous materials submitted by Texaco to the *Aguinda* court, not a single (standing) tort judgment in a plaintiff's favor appears in the record, either for the claims alleged by the *Aguinda* plaintiffs or for similar ones. Moreover, the record shows that every such tort lawsuit that is explicitly identified therein either (i) had been settled by Texaco (and withdrawn by the plaintiff) prior to adjudication; (ii) had not yet been adjudicated by the court with original jurisdiction; or (iii) had been overturned on appeal. For citations and a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 534-45.

107. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ECUADOR 1999 1–2 (2000); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ECUADOR 1998 1 (1999). For a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 552–62.

108. *Aguinda*, 142 F. Supp. 2d at 545 (emphasis added).

109. For a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 525–26, 546, 552–69. *See also* Patricia Darrow, U.S. & Foreign Commercial Service & U.S. Dep't of State, Country Commercial Guide, Ecuador FY 2000, at 1 (Oct. 13, 1999), *in* Letter from Paolo Di Rosa, Attorney Advisor, Office of the Legal Advisor, U.S. Dep't of State, Western Hemisphere Affairs, to Edward Scarvalone, Esq., Assistant U.S. Attorney, submitted by Edward Scarvalone for Mary Jo White, United States Attorney to the Honorable Jed S. Rakoff as the Dep't of State Submission to the *Aguinda* court at Tab C, *Aguinda*, 142 F. Supp. 2d 534 (No. 93-cv-7527) (annual guide prepared by the United States Embassy with assistance from several United States government agencies to provide guidance on the "commercial environment" in the host country, describing Ecuador's judicial system as "dysfunctional" and included in Department of State submission to the *Aguinda* court in response to a query from Judge Rakoff following his decision to reopen the record to receive additional submissions related to the administration of justice in Ecuador).

proved that the *Aguinda* court's optimistic view was premature. This is not surprising because the court's expectations turned a blind eye to the historical and political context of the reform efforts, including both the repeated failure of previous reforms to establish an impartial judiciary and combat corruption generally, and Ecuador's volatile political history. A related finding, that there would be little chance of corruption or undue influence in lawsuits by the *Aguinda* plaintiffs because they would be subject to public and political scrutiny, was speculative and sanguine. In addition, this finding was contradicted by both the historical record and references in the litigation record to prior judicial proceedings related to high profile corruption scandals that had prompted considerable public outrage, but were nonetheless reportedly tainted by external influences.[110]

The *Aguinda* plaintiffs appealed to the Second Circuit Court of Appeals. However, because forum non conveniens involves the exercise of discretion by the trial court, appellate courts have limited powers of review. In *Aguinda*, the Second Circuit found no abuse of discretion.[111]

In its review of the district court judgment, the Second Circuit did not repeat all of Judge Rakoff's detailed factual determinations, but it quoted his general finding that *Aguinda* "[has] everything to do with Ecuador and nothing to do with the United States" and apparently relied on at least some of the more specific findings to reject the plaintiffs' appeal.[112] The Second Circuit also found it "significant" that Ecuador and Petroecuador could be joined in a lawsuit in Ecuador but not in a United States forum, because they enjoy sovereign immunity here.[113] That factor was also cited by the district court and is related to Texaco's contention that Ecuador and Petroecuador had primary control of the challenged operations[114] and, as a result, that it would be unfair for a lawsuit to proceed on the plaintiffs' claims without Petroecuador.

However, reliance on that factor now appears misplaced. Despite representations to the *Aguinda* court by Texaco that "Petroecuador can and will be brought into" the lawsuit if it is filed in Ecuador, "[y]ou can't try . . . [this case] without having Petroecuador present," and "[i]t just is almost a

110. For a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 417–21, 517–18, 523–26, 532–71.

111. Aguinda v. Texaco, Inc., 303 F.3d 470, 475–76, 478 (2d Cir. 2002). As noted above, dismissal was conditioned on Texaco's agreement to submit to the jurisdiction of Ecuador's courts. A second condition required Texaco to agree to waive defenses based on statutes of limitations for limitation periods expiring between the date the lawsuit was filed and 60 days after the final judgment of dismissal. On appeal, the Second Circuit directed the district court to extend that time period to one year after dismissal. *Id.* at 478.

112. *Id.* at 476 (quoting *Aguinda,* 142 F. Supp. 2d at 537).

113. *Aguinda*, 303 F.3d at 479.

114. *Aguinda*, 142 F. Supp. 2d at 550–51.

matter of fundamental fairness,"[115] Chevron[116] did not seek to implead Petroecuador in the lawsuit filed in Ecuador by a group of the *Aguinda* plaintiffs after the New York case was dismissed.[117]

### *F. The Lago Agrio Lawsuit and Related Litigation*

In 2001, Chevron acquired Texaco and in 2003, the *Aguinda* plaintiffs' lawyers filed a new lawsuit against ChevronTexaco (now Chevron) in Lago Agrio, Ecuador, the boom town that grew up around Texaco's first commercial oil field. The complaint names 48 plaintiffs (the Lago Agrio plaintiffs, or LAPs) from two settler and two Indigenous communities, and asserts claims on behalf of the Huaorani and all other *Afectados*, local residents who have been harmed by the company's operations.[118] The *Afectados* include four Indigenous peoples (the Huaorani, Cofan, Secoya, and Siona), members of the Kiwcha people, and settlers (known locally as *colonos* (colonists)). However, the Huaorani were not consulted about the litigation or included among the plaintiffs, and no relief was requested directly for the affected communities or community members (or even for

115. Transcript of Argument on Renewed Motion to Dismiss Before the Honorable Jed S. Rakoff, United States District Judge at 23–24, *Aguinda*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (no. 93-cv-7527); *see also, e.g.*, Texaco Inc.'s Memorandum of Law in Support of its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity at 31–32, *Aguinda*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (no. 93-cv-7527) (arguing that "[a] defendant's inability to implead non-parties weighs heavily in favor of dismissal"; that Ecuador and Petroecuador "are subject to suit and have been sued in Ecuador for similar claims"; and alleging that "it is doubtful that a trial here could provide Texaco with due process given Ecuador and Petroecuador's preeminence in the activities at issue . . .").

116. In 2001, Chevron acquired Texaco for $39 billion and adopted the name ChevronTexaco. In 2005, ChevronTexaco changed its name to Chevron, "to reduce the confusion caused by the combined name." Associated Press, *Company News; ChevronTexaco Drops Half its Corporate Name*, N.Y. TIMES (May 10, 2005), http://www.nytimes.com/2005/05/10/business/company-news-chevrontexaco-drops-half-its-corporate-name.html?_r=0.

117. Instead, ChevronTexaco and Texaco Petroleum filed an arbitration claim against Petroecuador with the American Arbitration Association (AAA) in New York, seeking damages and indemnification of all fees, costs, and expenses relating to the litigation in Ecuador, including any adverse judgment that might be rendered in favor of the *Aguinda* plaintiffs there. ChevronTexaco Corp. v. Empresa Estatal Petroleos del Ecuador, Am. Arb. Ass'n, Demand for Arbitration and Statement of Claim, (filed June 11, 2004) [hereinafter AAA Arbitration Statement of Claim]. The arbitration in New York not only raises questions about Texaco's candor with the *Aguinda* court, but also makes a mockery of the company's argument that litigation in New York is inconvenient. As a general matter, Chevron now claims that it is not bound by Texaco's representations to the *Aguinda* court. It has used that contention to challenge the lawsuit in Ecuador, arguing that Chevron did not agree to submit to the jurisdiction of Ecuador's courts. Answer, Aguinda v. ChevronTexaco Corp., at paras. I.1–.4, I.8, IV.1, IV.3–.4, IV.5–.9 (Corte Superior de Justicia de Nueva Loja [Superior Court of Justice of Nueva Loja], Oct. 21, 2003) (Ecuador); Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 389–90 (2d Cir. 2011). The Ecuador lawsuit and arbitration are discussed briefly below in Part II.F.

118. Complaint, Aguinda v. ChevronTexaco Corp. (Corte Superior de Justicia de Nueva Loja [Superior Court of Justice of Nueva Loja], May 7, 2003) (Ecuador).

the plaintiffs).[119] Instead, the complaint asks the court to award monies to remedy Chevron's contamination to an Ecuadorian NGO, Amazon Defense Front (*Frente de Defensa de la Amazonia)*.[120] The complaint also claims a 10% share of the remedial monies for the plaintiffs, but requests that those funds be paid to Amazon Defense Front as well.[121]

Amazon Defense Front was founded in 1994 by a group of colonists in Lago Agrio who heard about the *Aguinda* lawsuit in New York on the radio, and decided to establish a local institution to administer monies that they expected to be forthcoming from the case. The group has developed close ties with the plaintiffs' lawyers and some external NGOs, but it is controlled by colonists and is not regarded by the affected Indigenous peoples as their legitimate representative.[122] Moreover, its efforts to claim a monopoly of representation of all people affected by Texaco (without authorization) and manage local politics in an undemocratic fashion have alienated many people in the affected communities. In addition to issues related to representation, another recurring concern involves possible remedies. Efforts by groups of *Afectados*, at various junctures over the years, to demand "clarity and transparency in the process," obtain information from Amazon Defense Front and its lawyers, and engage them in a dialogue about remedial plans—in the event of a victory in court or out-of-court settlement—have been rebuffed.[123] The decision to designate Amazon Defense Front, which is not a plaintiff, as the organization in charge of administering any judgment was evidently made by the plaintiffs' lawyers and Amazon Defense Front, without consulting or informing the affected communities.

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119. *Id.* at pt. VI. As with the Huaorani, the plaintiffs do not include any Cofan or Siona.

120. *Id.*

121. *Id.*

122. Although Amazon Defense Front has developed alliances with a handful of Cofan, Secoya, Siona, and, more recently, Kichwa, community involvement in those alliances appears to be limited, at most, and the organization is dominated by colonists.

123. The litigation against Texaco and Chevron has had a life of its own in the oil patch, outside of the media spotlight. Certain events, at various junctures along the way, have periodically spurred groups of *Afectados* to take action to try to participate in decisionmaking related to their claims and make the litigation responsive to their needs. Amazon Defense Front and the plaintiffs' lawyers have responded to many of those local initiatives in ways that made it seem that they view those grassroots aspirations as threats to their control of the litigation, instead of embracing them and engaging with community members to strengthen the advocacy that purports to champion their rights. This troubling pattern began soon after news of the lawsuit in Texaco's homeland reached the oil patch, and continues to this day. For example, when a group of local leaders who had decided to support the *Aguinda v. Texaco* lawsuit asked the plaintiffs' lawyers to tell them the names of the plaintiffs (soon after the case was filed), they were told that the plaintiffs' names could not be disclosed because it would endanger their lives—despite the fact that all of the named plaintiffs were listed in the complaint and the list was publicly available in the United States. For a fuller discussion and some additional examples, see Kimerling, *Oil Frontier*, *supra* note 1, at 632–42, 647–50; Judith Kimerling, *The Story From the Oil Patch: The Under-Represented in* Aguinda v. Texaco, 2 HUM. RTS. DIALOGUE 6, 6–7 (2000). For discussion of a recent initiative by a group of Huaorani (working with the Author), see Kimerling, *Intervenors' Perspective*, *supra* note 99, at 286–94.

In February 2011, the trial court in Lago Agrio ruled that Chevron is responsible for widespread pollution that has harmed, and continues to threaten, the environment, public health, and Indigenous cultures.[124] In a 188-page opinion, the court ordered Chevron to pay $8,646,160,000 for remedial measures, and another $8,646,160,000 in punitive damages if the company did not apologize to the affected communities within 15 days.[125] The court also awarded an additional 10% of the "amount sentenced" (now worth more than $864 million) to Amazon Defense Front.[126] The Lago Agrio judgment further directed the parties to set up a trust fund to administer the remedial monies, and provided that the sole beneficiary of the trust, and its board of directors, shall be Amazon Defense Front or the person or persons it designates.[127]

The purpose of the remedial measures is "to return things to their natural state" and restore natural resources and environmental conditions to the way they were before Chevron caused the damage that gave rise to the litigation.[128] The Court recognized, however, that it will be impossible to achieve that objective in many cases and, for that reason, included three types of remedies in the judgment: (1) "principal" measures to remedy contamination; (2) "complementary" measures to compensate for the inability to fully restore natural resources; and (3) "mitigation" measures to address the impacts on human health and Indigenous cultures that cannot be reversed or fully repaired.[129] The damage awards for "principal" remedial measures include nearly $5.4 billion to clean up contaminated soils and $600 million to remediate ground waters.[130] The awards for "complementary" remedies include $150 million to deliver potable water supplies, and $200 million to restore native flora and fauna and help remedy impacts on the affected Indigenous peoples' food supplies.[131] The awards for mitigation measures include $800 million to develop and implement a health plan that includes treatment for people with cancer, $1.4 billion for a permanent healthcare system to serve the affected populations, and $100 million to

124. Aguinda v. ChevronTexaco Corp., No. 2003-0002, at 177, 183–84 (Corte Provincial de Justicia Sucumbios [Provincial Court of Justice of Sucumbios], Feb. 14, 2011) (Ecuador) [hereinafter Lago Agrio Trial Court Judgment]; *see also* Aguinda v. Chevron Texaco, No. 2003-0002 (Corte Provincial de Justicia Sucumbios [Provincial Court of Justice of Sucumbios], Mar. 4, 2011) (Ecuador) (trial court decision on motions for amplification and clarification of the Lago Agrio Trial Court Judgment).

125. Lago Agrio Trial Court Judgment, *supra* note 124, at 176–86.

126. *Id.* at 187.

127. *Id.* at 186.

128. *Id.* at 177.

129. *Id.*

130. *Id.* at 179, 181.

131. *Id.* at 182–83.

mitigate unique harms to the affected Indigenous communities, including displacement from their ancestral territories and other cultural impacts.[132]

Chevron appealed the judgment to the appellate division of the Lago Agrio court, which affirmed it in all material respects.[133] In October 2013, Ecuador's National Court of Justice overturned the punitive damages award but upheld the rest of the judgment, which is now valued at more than $9.5 billion. Chevron is currently challenging the decision in Ecuador's Constitutional Court.[134]

Chevron has vowed not to pay the Lago Agrio judgment, arguing that it was procured by fraud. The company has limited assets in Ecuador, so the plaintiffs' lawyers are trying to collect the judgment in other countries where Chevron subsidiaries operate. To date, they have sued in Canada, Brazil, and Argentina. Those cases are pending.

At the same time, Chevron is challenging the legitimacy of the Lago Agrio judgment in other fora, including an investor arbitration proceeding against Ecuador in the Hague (the BIT Arbitration), and a lawsuit against the Lago Agrio plaintiffs and their lead counsel, Steven Donziger, in—ironically—federal court in New York (Chevron SDNY Action or *Chevron v. Donziger*).[135] Chevron's legal actions are based on allegations of fraud and other misconduct by the Lago Agrio plaintiffs' legal team, improper collusion with the government of Ecuador, and systemic failures in the administration of justice in Ecuador.[136] Chevron has also sued or settled with a number of additional parties that have been associated with the plaintiffs' legal team. These include investors,[137] the Patton Boggs law firm (now

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132. *Id.* at 183.

133. The appellate division also ordered Chevron to pay an additional 0.1% of the value of the judgment as legal fees. Aguinda v. ChevronTexaco, No. 2011-0106 at 15-16 (Corte Provincial de Justicia Sucumbios [Provincial Court of Justice of Sucumbios], Jan. 3, 2012) (Ecuador); Aguinda v. Chevron Texaco, No. 2011-0106, (Corte Provincial de Justicia Sucumbios [Provincial Court of Justice of Sucumbios], Jan. 13, 2012) (Ecuador) (decision on motions for amplification and clarification of the Jan. 3, 2012 appellate chamber decision).

134. *Chevron presenta recurso final ante Corte Constitucional de Ecuador* [*Chevron Files Final Appeal Before Ecuador's Constitutional Court*], UNIVERSO (July 16, 2015), http://www.eluniverso.com/noticias/2015/07/16/nota/5022064/chevron-presenta-recurso-final-ante-corte-constitucional-ecuador.

135. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014); Chevron Corp. v. Republic of Ecuador, PCA Case Repository 2009-23, Claimants' Notice of Arbitration (Sep. 23, 2009) [hereinafter BIT Notice of Arbitration].

136. *See generally* Amended Complaint, Chevron v. Donziger, 886 F. Supp. 2d 235 (S.D.N.Y. 2012) (No. 11-cv-0691-LAK) [hereinafter Chevron RICO Complaint]; BIT Notice of Arbitration, *supra* note 135. For a fuller discussion of the claims and pre-trial proceedings in *Chevron v. Donziger* and early proceedings in the BIT Arbitration, see Kimerling, *Oil, Contact, and Conservation*, *supra* note 1, at 77–93; Kimerling, *Intervenors' Perspective*, *supra* note 99, at 255–59, 277–81.

137. Investors that have reached agreement with Chevron include Burford Capital Limited (and Treca Financial Solutions, a Cayman Islands subsidiary created for the investment); James Russell DeLeon (who invested both directly and through Torvia Limited); and Woodsford Litigation Funding

Limited. Burford, a Guernsey corporation that "focuses on litigation finance" and is publicly traded in London, gave the Lago Agrio plaintiffs' legal team $4 million in 2010, as the first tranche of a planned $15 million investment in exchange for a 5.545% share of any net recovery. Declaration of Christopher Bogart at 1, 13–14, Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (No. 11-cv-00691-LAK-JCF) (docket number 1039-02) [hereinafter Bogart Declaration]. The funding agreement defined net recovery as "the difference between the proceeds of the judgment or settlement amount (if the settlement is $1 billion or more) and certain costs and expenses," and as $1 billion if the case settles for less than $1 billion. *Id.* at 14. Burford received a 1.5% share of the net recovery when it made the initial payment, and sold that interest to an undisclosed investor. Roger Parloff, *Investment Fund: We Were Defrauded in Suit Against Chevron*, FORTUNE.COM (Jan. 10, 2013, 2:05 PM), http://fortune.com/2013/01/10/investment-fund-we-were-defrauded-in-suit-against-chevron/. In 2011, Burford terminated its funding agreement with the LAPs' representatives, "in light of evidence that emerged in [the Chevron SDNY Action] and other proceedings." Bogart Declaration, *supra*, at 3. In a letter to the LAPs' representatives, Burford accused them of breaching the agreement by "concealing material information and misrepresenting critical facts" and engaging in conduct "that amounts to fraud." Letter from Burford Group to Purrington Moody Weil, Pablo Fajardo, El Frente de Defensa de la Amazonia [Amazon Defense Front], Steven Donziger, and Luis Yanza (Sept. 29, 2011). In April 2013, Burford and Chevron issued a joint public statement, announcing that "Burford and Chevron have now reached an agreement the substance of which is that Burford will renounce any interest in the [Lago Agrio] Litigation and Burford and Chevron will exchange complete releases." Press Release, Chevron, Another Key Funder of Fraudulent Ecuador Litigation Against Chevron Withdraws Support (May 4, 2015), https://www.chevron.com/stories/another-key-funder-of-fraudulent-ecuador-litigation-against-chevron-withdraws-support. The same day, Chevron submitted the Bogart Declaration to the *Chevron v. Donziger* court. Russell DeLeon, a Gibraltar businessman and longtime friend of Donziger, invested approximately $23 million in the Lago Agrio litigation between March 2007 and October 2013, in exchange for approximately 7% of the proceeds. Defence and Counterclaim of the First and Second Defendants at 7, Chevron Corp. v. DeLeon, No. 2012-C-232 (Gibraltar July 30, 2014). Chevron sued DeLeon (and Torvia) in March 2014 in Gibraltar; in February 2015, the case was settled. DeLeon agreed to cease funding or aiding the LAPs and their representatives; transfer to Chevron all proceeds he may receive from the Lago Agrio litigation; and provide discovery and some ongoing information to Chevron. Settlement Agreement Between the DeLeon Parties and Chevron Corp. at 2–5 (Feb. 13, 2015) [hereinafter DeLeon Settlement] (on file with author). DeLeon also agreed to issue the following statement:

> Commencing in March 2007, I provided funding to support the litigation in Ecuador against Chevron Corporation, in the good faith belief that I was supporting a worthy cause.
>
> However, I have since reviewed the March 4 opinion by Judge Kaplan of the United States District Court for the Southern District of New York setting out the Court's findings [and ruling in favor of Chevron in *Chevron v. Donziger*] and I have also considered the evidence presented during the trial. I have concluded that representatives of the Lago Agrio Plaintiffs, including Steven Donziger, misled me about important facts. If I had known these facts, I would not have funded the litigation.
>
> I no longer seek or wish to receive any financial benefit from this matter and I have therefore decided to relinquish my entire interest in the litigation to Chevron.

*Id.* at 11. In September 2015, Chevron entered into a settlement agreement with H5, a California-based litigation services company that provided "electronic discovery and advisory services" to the LAPs' legal team from 2009 to 2013, in exchange for a 1.25% share of any proceeds from the case. Settlement Agreement Between Chevron Corp. and H5 at 1 (Sept. 2, 2015) (on file with author). H5 agreed to "refrain from providing future services or . . . assistance" to the LAPs and their representatives; assign its interest in the Lago Agrio judgment to Chevron; and issue a public statement announcing that it had reviewed the judge's "extensive findings" in the ruling in favor of Chevron in *Chevron v. Donziger*, and "[i]n view of those findings, among other reasons, H5 has decided it does not want to profit from the Ecuadorian Judgment and is therefore relinquishing any interest in the judgment." *Id.* at 2–3, 7. Chevron's settlement with Woodsford is discussed briefly below.

Squire Patton Boggs),[138] and a company that the lawyers and Amazon Defense Front secretly set up in Gibraltar (Amazonia Recovery Limited) to receive the judgment proceeds and distribute them to investors, lawyers, and

138. Patton Boggs first appeared as counsel for the LAPs in 2010, in one of Chevron's discovery actions in the United States. (Chevron's discovery is discussed briefly below.) Among other activities, the powerful law and lobbying firm authored a strategy memorandum known as "the Invictus memo." *Chevron Corp.*, 974 F. Supp. 2d at 474–77. Written in 2010, the Invictus memo outlined an "action plan" to "create the optimal environment for settlement." Plaintiff's Ex. 2382 at cover, 4, *Chevron Corp.*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (No. 11-cv-00691-LAK-JCF) (Invictus: Path Forward: Securing and Enforcing Judgment and Reaching Settlement). In addition to planning for "anticipated" enforcement litigation "across the globe," the strategy included "offensive discovery actions targeted at exposing Chevron's misconduct [in the Ecuador litigation]," and public relations and lobbying activities. *Id.* at 4, 24, 28–29. The Invictus memo stated that "[o]btaining recognition of an Ecuadorian judgment in the United States is undoubtedly the most desirable outcome." *Id.* at 12. But it recognized that "non-U.S. jurisdictions may, for a variety of reasons, offer the prospect of a more expedient resolution." *Id.* at 17. The memo noted that "Patton Boggs' current and former representation of numerous, geographically diverse foreign governments means that barriers to judgment recognition may not necessarily preclude enforcement there," and further stated that "Patton Boggs will use its political connections and strategic alliances to ascertain which nations' governments are not beholden to Chevron, so as to minimize the prospect of adverse government interference in the enforcement process." *Id.* at 19. The litigation between Patton Boggs (on behalf of itself) and Chevron began in November 2010, when Patton Boggs sued Chevron in federal court in the District of Columbia, seeking a declaratory judgment that the representation of Chevron by a lobbying group subsequently acquired by Patton Boggs (the Breaux Lott Group) should not disqualify Patton Boggs from representing the LAPs. That case was dismissed. Patton Boggs, LLP v. Chevron Corp., 791 F. Supp. 2d 13 (D.D.C. 2011). A second lawsuit, against Chevron and its attorneys in *Chevron v. Donziger* (Gibson, Dunn & Crutcher), included a claim for tortious interference and was also dismissed. Patton Boggs, LLP v. Chevron Corp., 683 F.3d 397 (D.C. Cir. 2012). A third lawsuit against Chevron, filed in federal court in New Jersey, sought, among other relief, to recover on a bond related to a preliminary injunction issued by the district court in *Chevron v. Donziger.* (The injunction was overturned by the Second Circuit and is briefly discussed below.) Stipulation and [Proposed] Order of Dismissal with Prejudice, ex. A, at 3, Patton Boggs LLP v. Chevron Corp., No. 12-cv-09176 (LAK) (S.D.N.Y. May 7, 2014). The New Jersey case was transferred to the Southern District of New York, where *Chevron v. Donziger* was being litigated. In March 2014—after ruling in favor of Chevron in *Chevron v. Donziger*—Judge Lewis Kaplan granted Chevron leave to file counterclaims against Patton Boggs, and in April 2014, he dismissed Patton Boggs' claims against Chevron. *Id.* at 4. Eight days later, Patton Boggs and Chevron settled their disputes. Patton Boggs agreed to "decline to assist in any way any party, including the LAPs, in any effort to enforce the Lago Agrio judgment." *Id.* at 4–5. It further agreed to pay $15 million to Chevron, provide discovery to Chevron, and assign to Chevron all rights to future payments for work related to the Lago Agrio case. *Id.* at 5–8. Patton Boggs also agreed to issue an approved public statement of regret:

> Today's resolution of our firm's disputes with Chevron ends our involvement in the Lago Agrio matter. The recent opinion of the United States District Court for the Southern District of New York in the *Chevron v. Donziger* case includes a number of factual findings about matters which would have materially affected our firm's decision to become involved and stay involved as counsel here. Based on the Court's findings, Patton Boggs regrets its involvement in this matter.

*Id.* at 12. In June 2014, Patton Boggs was acquired by Squire Sanders. Catherine Ho, *A Year After Rocky Merger, Patton Boggs Aims to Reestablish Dominance*, WASH. POST (July 12, 2015), https://www.washingtonpost.com/politics/a-year-after-rocky-merger-patton-boggs-aims-to-reestablish-dominance/2015/07/12/3a65037e-273f-11e5-aae2-6c4f59b050aa_story.html.

others before sending any remaining monies to the Ecuadorian trust charged with funding the remedies ordered by the Lago Agrio court.[139]

In an effort to reconcile its current allegations about Ecuador's courts with Texaco's spirited defense of Ecuador's legal and judicial system in *Aguinda v. Texaco*, Chevron contends that the rule of law has deteriorated in Ecuador since the United States lawsuit was dismissed, and that in view of more recent judicial reforms and the public support expressed by President Correa for the Lago Agrio plaintiffs, the "judiciary [now] lacks the necessary independence and institutional stability to adequately adjudicate highly politicized cases."[140] That argument, however, is problematic. Although the political landscape in Ecuador has indisputably changed in some pertinent respects since the Lago Agrio lawsuit was filed, institutional instability, political interference, corruption, and other systemic shortcomings in the rule of law and administration of justice in Ecuador are longstanding problems that were also apparent (but evidently overlooked) when the *Aguinda v. Texaco* court applied the forum non conveniens doctrine to dismiss the New York action.[141]

Chevron's BIT Arbitration proceeding against Ecuador is the second arbitration claim pursued by the company to try to dodge liability to the *Aguinda* plaintiffs. The first one was filed against Petroecuador in New York

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139. Chevron sued Amazonia Recovery, its individual directors (Pablo Fajardo, Luis Yanza, Ermel Chavez, and Julian Jarvis), and the United Kingdom-based funder Woodsford Litigation Funding in 2014 in the courts of Gibraltar. Chevron settled with Jarvis in February 2015, as part of the settlement agreement with the investor Russell DeLeon. DeLeon Settlement, *supra* note 137. In May 2015, Chevron settled with Woodsford (and Temeraire, which is owned by Woodsford and holds Woodsford's interest in the Lago Agrio judgment). The Woodsford parties agreed to cease funding or aiding the LAPs and their representatives; to transfer to Chevron any proceeds they may receive from the Lago Agrio litigation; to inform Chevron about certain information related to Amazonia Recovery; and to issue a public statement saying that Woodsford "had acted in good faith . . . in providing funding to support the Lago Agrio plaintiffs" and that

> [i]n light of the 4 March 2014 opinion by Judge Kaplan of the United States District Court for the Southern District of New York [in *Chevron v. Donziger*], and having become deeply concerned about the ethical standards of attorney Steven Donziger, Woodsford has decided to forego any financial benefit from this matter and to relinquish its entire interest in the proceeds of the litigation to Chevron.

Settlement Agreement Between the Woodsford Parties and Chevron Corp., at 3–4, 11 (May 1, 2015) (on file with author). According to a statement by Chevron, Woodsford provided $2.5 million to the LAPs' representatives beginning in March 2013. Chevron, Another Key Funder of Fraudulent Ecuador Litigation Against Chevron Withdraws Support, *supra* note 137. In December 2015, Chevron won a default judgment against Amazonia Recovery for costs of litigation in the United States ($28,035,219.37). Chevron Corp. v. Amazonia Recovery Ltd., No. 2014-C-110, slip op. at 1, 4–5 (Gibraltar Dec. 9, 2015), The Gibraltar court also enjoined Amazonia Recovery "from assisting the Lago Agrio Plaintiffs in the enforcement of the [Lago Agrio] judgment." *Id.* at 4–5. The lawsuit in Gibraltar against Amazonia Recovery's Ecuadorian directors is still pending.

140. BIT Notice of Arbitration, *supra* note 135, at para. 42.

141. For a fuller discussion of the administration of justice in Ecuador, see Kimerling, *Oil Frontier*, *supra* note 1; Kimerling, *Rights, Responsibilities and Realities*, *supra* note 62.

in 2004, soon after Chevron was sued in Lago Agrio.[142] It sought an order from an American Arbitration Association (AAA) panel requiring Petroecuador to indemnify Chevron for all costs and liability related to the Lago Agrio litigation.[143] Ecuador and Petroecuador challenged the proceeding in a lawsuit in federal court in New York, and in 2007 United States District Judge Leonard Sand stayed the AAA arbitration on ground that Petroecuador was not contractually bound to arbitrate disputes with Chevron.[144]

In response, Chevron filed the BIT Arbitration claim against Ecuador in the Hague. That proceeding, which is currently underway, alleges that Ecuador violated a bilateral investment treaty with the United States by "permitting" the Lago Agrio lawsuit to proceed despite an earlier settlement agreement with Texaco,[145] and by improperly colluding with the Lago Agrio plaintiffs and denying due process rights to Chevron in the Lago Agrio litigation. Chevron seeks a declaration that Ecuador or Petroecuador is exclusively liable for any judgment rendered in the Lago Agrio lawsuit, and an order requiring Ecuador to so inform that court; a declaration that any judgment against Chevron is not enforceable, and an order directing Ecuador to enjoin enforcement of any judgment and represent to any court where the plaintiffs seek enforcement that the judgment is not final, enforceable, or conclusive; an order requiring Ecuador to protect and defend Chevron in connection with the Lago Agrio litigation; and indemnification from Ecuador for any liability, costs, and moral damages.[146]

In response to Chevron's allegations in the BIT Arbitration, Ecuador has emphasized that the lawsuit in Lago Agrio is a private litigation between private parties, and characterized the arbitration as an attempt to "transform what is fundamentally a private environmental dispute into an 'investment dispute' against a sovereign."[147] Moreover, the relief sought by Chevron—to "close" the case in Lago Agrio—would amount to an unconstitutional violation of the independence of "the legal system."[148] In response to the company's allegations that the Lago Agrio litigation is tainted by fraud, Ecuador has denied interfering in the judicial process and accused Chevron

142. *See supra* note 117. *Aguinda v. Texaco* was dismissed in 2002, and the Lago Agrio lawsuit was filed in 2003.

143. AAA Arbitration Statement of Claim, *supra* note 117, at 18–19.

144. Republic of Ecuador v. ChevronTexaco Corp., 499 F. Supp. 2d 452 (S.D.N.Y. 2007), *aff'd*, 296 F. App'x 124 (2d Cir. 2008)*, cert. denied*, 557 U.S. 936 (2009).

145. The settlement accord is discussed *supra* at Part II.E; *see also* Kimerling, *Intervenors' Perspective*, *supra* note 99, at 255–57 (discussing the settlement accord and release of liability).

146. BIT Notice of Arbitration, *supra* note 135, at 17–18.

147. BIT Third Interim Award, *supra* note 94, pt. III, at 41, 73–75.

148. *Id.*

of attacking the Ecuadorian State because the government "refused to interfere [at Chevron's behest] . . . to disqualify" the case.[149]

In early proceedings, the arbitration panel issued an interim award ordering Ecuador, "whether by its judicial, legislative, or executive branches, to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgment" by the Lago Agrio court, pending a final resolution of the arbitration on the merits.[150] A full discussion of the BIT Arbitration is beyond the scope of this Article. However, it raises a number of problematic issues because Chevron is seeking to resolve legal issues of great consequence without transparency or participation by the people who are most directly affected by the legal action; because the arbitration panel maintains that it can order national courts to act under international law irrespective of "constraints" under domestic law, and effectively override a domestic legal action, even to the detriment of parties who are not party to the arbitration; and because it presents a potential conflict between international investor arbitration norms and international (and national) human rights norms that protect the rights of groups and individuals who have been harmed by Chevron's operations.

Chevron's SDNY Action, *Chevron v. Donziger,* was filed in 2011 and names 55 defendants.[151] They include the New York lawyer who currently manages the case for the plaintiffs, Steven Donziger; Amazon Defense Front and its lawyer, Pablo Fajardo (who is also counsel of record for the Lago Agrio plaintiffs); Amazon Defense Front's founder, Luis Yanza; an environmental consulting firm that worked closely with Donziger (Stratus Consulting) and two of its managers; and the Lago Agrio plaintiffs.[152] The complaint also alleges culpable conduct by a number of non-parties, including Cristobal Bonifaz; Kohn, Swift and Graf, the United States law firm that initially financed the Lago Agrio lawsuit and was co-lead counsel (with Bonifaz) for the plaintiffs in *Aguinda v. Texaco*[153]; and the California-

149. *Id.*

150. Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, Second Interim Award on Interim Measures, para. 3(i) (Feb. 16, 2012).

151. Chevron RICO Complaint, *supra* note 136, at 1.

152. *Id.*

153. Donziger worked for Bonifaz when the *Aguinda v. Texaco* litigation began; however, Bonifaz was discharged by Amazon Defense Front in 2006 and Donziger subsequently opened his own law office in his New York City home. The Kohn, Swift and Graf firm was discharged in 2010. *See* Letter from Joseph C. Kohn, Partner, Kohn, Swift & Graf, P.C., to Pablo Fajardo, Luis Yanza, Humberto Piaguaje, Ermel Chavez, Hugo Payaguaje and Emergildo Criollo (Aug. 9, 2010) (on file with author) (responding to the recipients' discharge of Kohn, Swift and Graf; expressing shock about "recent disclosures concerning potentially improper and unethical, if not illegal, contacts with the court-appointed expert, Mr. Cabrera"; stating that the firm was "intentionally misled" and "deceived [at least by Donziger], in part apparently driven by Donziger's conceit and naivete, a dangerous combination which is leading the case rapidly towards disaster"; and recommending, among other measures, that "the plaintiffs'

based NGO Amazon Watch, which works closely with Amazon Defense Front and Donziger.[154] The complaint asserts claims for fraud against all of the defendants, and claims under the Racketeer Influences and Corrupt Organizations Act (RICO) against all of the defendants except the Lago Agrio plaintiffs, based on allegations that the Lago Agrio lawsuit is part of an alleged criminal enterprise to obtain a settlement or judgment from Chevron through fraud and extortion.[155]

*Chevron v. Donziger* followed extensive discovery proceedings in the United States,[156] which gained force after the release of a documentary film about the Lago Agrio case in 2009. The film, *Crude*, was solicited by Donziger. The film crew shadowed the plaintiffs' lawyers for three years, shooting some 600 hours of footage. An early version of the film showed an expert who contributed to what was supposed to be an independent, comprehensive assessment of the alleged damages for the Lago Agrio court meeting with plaintiffs' counsel. The images of the expert were subsequently edited out, but not before Chevron saw them.[157]

Chevron used that scene, and others, to get a discovery order compelling the filmmaker, Joseph Berlinger, to produce all of the outtakes (raw footage that does not appear in the film).[158] The company argued that the outtakes

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representatives . . . replace all legal counsel and client leaders who have participated in the tainting of the case . . . ").

154. Amazon Watch promotes itself as an organization that "work[s] directly with indigenous communities" in the Amazon to support Indigenous peoples and advance their rights, in addition to protecting the rainforest, but works closely with Amazon Defense Front and Donziger in the name of the affected communities and often appears to act as a megaphone for the plaintiffs' lawyers. *See* AMAZON WATCH, 2009 ANNUAL REPORT 6 (2009), https://amazonwatch.org/assets/files/aw_annual_report_2009.pdf; *Id.* at 5, 7, 16-22 (summarizing Amazon Watch's work in Ecuador in 2009); CHEVRONTOXICO, www.chevrontoxico.com (last visited May 20, 2016) (website maintained by Amazon Watch and Amazon Defense Front to support the Lago Agrio lawsuit); Kimerling, *Oil Frontier*, *supra* note 1, at 647–50.

155. *See generally* Chevron RICO Complaint, *supra* note 136.

156. Section 1782 of the Judicial Code allows a party to a foreign or international litigation to compel a person in the United States to give testimony or produce documents or other evidence in the federal judicial district where that person resides or is found, for use in the foreign or international proceeding. 28 U.S.C. § 1782(a) (2006).

157. *In re* Chevron Corp., 709 F. Supp. 2d 283, 296 (S.D.N.Y. 2010), *aff'd sub nom.*, Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011).

158. *Chevron Corp.*, 629 F.3d at 304–11. Chevron highlighted two additional scenes in support of its subpoena application. In one scene, Donziger pressures a judge to block the judicial inspection of a laboratory allegedly being used by the Lago Agrio plaintiffs to test samples for contamination. Donziger describes his use of "pressure tactics" and explains, "[t]his is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it's dirty." In another scene, a representative of the plaintiffs informs Donziger that "he left the office of President Correa 'after coordinating everything.'" *Id.* Donziger then declares that "[w]e've achieved something very important in this case. . . . Now we are friends with the President." *Id.* The film then shows President Correa and plaintiffs' (Ecuadorian) counsel together on a helicopter; later on, President Correa embraces Donziger and says, "Wonderful, keep it up!" *Id.* at 304. Berlinger argued that the outtakes were protected from disclosure by

were "more than likely relevant" to Chevron's claims and defenses in the Lago Agrio lawsuit and the BIT Arbitration, and that they would likely depict the Lago Agrio plaintiffs' counsel's "interaction with at least one supposedly neutral expert," the "plaintiffs' improper influence on the Ecuadorian judicial system," and the "plaintiffs' attempts to 'curry favor' with [the government of Ecuador]."[159] Chevron also subpoenaed environmental consultants, and even lawyers, who were involved in the Lago Agrio case to give deposition testimony and turn over documents. The discovery proceedings resulted in at least 50 orders and opinions from federal courts across the country, and have been described by the Third and Second Circuits as "unique in the annals of American judicial history."[160]

As a result of discovery, Chevron gained access to an extraordinary amount of material, including Donziger's litigation files and hard drive.[161] Chevron argued successfully that the material it sought was not protected by attorney-client privilege because it had not attached or had been waived.[162]

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the "Journalist's Privilege," a qualified evidentiary privilege for information gathered in a journalistic investigation. *Id.* at 306. However, the Second Circuit held that Berlinger could not invoke the privilege because he failed to show that his research and reporting were done with independence from the subject of the film, the Lago Agrio plaintiffs. The court noted that Donziger had solicited Berlinger to make the documentary from the perspective of his clients, and that Berlinger removed at least one scene from the final version of the film at the direction of the Lago Agrio plaintiffs. *Id.* at 308.

159. *In re Chevron*, 709 F. Supp. 2d at 296. Two Chevron attorneys, Ricardo Reis Veiga and Rodrigo Pérez Pallares, also sought to subpoena the outtakes. At the time, Veiga and Pérez Pallares were defendants in criminal proceedings in Ecuador, along with former government officials and employees of Petroecuador, based on allegations that they falsified documents in connection with the remediation agreement and releases discussed above. The proceedings were irregular, and Chevron alleges that they were "the direct result of improper influence from the highest levels of the State" as part of the alleged effort to "support the Lago Agrio plaintiffs" and "nullify" the 1998 Final Act (release). BIT Notice of Arbitration, *supra* note 135, at para. 55. Veiga and Pérez Pallares argued that they needed the outtakes to defend themselves in the criminal proceedings. *In re Chevron,* 709 F. Supp. 2d at 297. The criminal charges were dropped in 2011. Lawrence Hurley, *Dropped Charges in Ecuador Could Affect Chevron Racketeering Case*, N.Y. TIMES, (June 3, 2011), http://www.nytimes.com/gwire/2011/06/03/03greenwire-dropped-charges-in-ecuador-could-affect-chevro-90134.html?pagewanted=print.

160. Chevron Corp. v. Naranjo, 667 F.3d 232, 236 (2d Cir. 2012) (quoting *In re* Chevron Corp., 650 F.3d 276, 282 n.7 (3d Cir. 2011)), *cert. denied*, 133 S.Ct. 423 (2012).

161. *Chevron*, 667 F.3d at 236–37. Donziger was also required to submit to a deposition.

162. *Chevron*, 667 F.3d at 236; *In re* Chevron Corp., 650 F.3d 276, 289 (3d Cir. 2011); *In re* Chevron Corp., 633 F.3d 153, 156 (3d Cir. 2011). Chevron attorneys Veiga and Pérez Pallares also sought the discovery for use in the criminal proceedings. Donziger moved to quash his subpoenas on a number of grounds, including attorney-client privilege and work product doctrine. In rejecting the motion to quash, Judge Lewis Kaplan of the Southern District of New York acknowledged the "possibilities for mischief and abuse" when a party to litigation is allowed to take discovery of lawyers on the other side. *In re* Application of Chevron Corp., 749 F. Supp. 2d 141, 144 (S.D.N.Y. 2010), *adhered to on reconsideration,* 749 F. Supp. 2d 170 (S.D.N.Y. 2010), *aff'd sub nom*. Lago Agrio Plaintiffs v. Chevron Corp., No. 10-4341-cv, 2010 WL 5151325 (2d Cir. Dec. 15, 2010). Nevertheless, he described Donziger as "the field general of the Lago Agrio plaintiffs' efforts in Ecuador," and concluded that many of Donziger's activities "had little to do with the performance of legal services and a great deal to do with political activity, intimidation of the Ecuadorian courts, attempts to procure criminal prosecutions [of two of Chevron's

Among other disclosures, the company found compelling evidence that the legal team for the plaintiffs ghostwrote most or all of the comprehensive damages assessment that had been presented to the Lago Agrio court as the work of the "independent" court-appointed expert (Richard Cabrera). Chevron also found outtakes from *Crude* showing Donziger stating that all Ecuadorian judges are "corrupt" and explaining:

> You can solve anything with politics as long as the judges are intelligent enough to understand the politics. [T]hey don't have to be intelligent enough to understand the law, just as long as they understand the politics.[163]

The company also found evidence that Donziger and Amazon Defense Front had "coerced" the Lago Agrio judge to appoint Cabrera as a "supposedly

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lawyers in Ecuador] for the purpose of extracting a settlement [from Chevron], and presenting a message to the world media." *Id.* at 144, 157–58. Judge Kaplan also cited the "extremely great" need for discovery, "in view of the extraordinary evidence already before [the Court]." *Id.* at 168. He described a number of scenes from the *Crude* outtakes and concluded:

> To turn a blind eye to evidence suggesting improper influence on and intimidation of the Ecuadorian courts by both Donziger and the [government of Ecuador], improper manipulation of the criminal process in that country [in the cases of Veiga and Pérez Pallares], knowing submission by the Lago Agrio plaintiffs of at least one fraudulent report [to the Lago Agrio court], and improper collusion with Cabrera, the supposedly neutral court-appointed expert, could defeat the purpose of Section 1782, deprive [Veiga and Pérez Pallares] of evidence needed for their defense in a criminal case, and frustrate the BIT arbitration.

*Id.*; *see also In re Chevron Corp.*, 749 F. Supp. 2d 135 (S.D.N.Y. 2010) (summary memorandum and order prior to fuller opinion), *opinion issued*, 749 F. Supp. 2d 141 (S.D.N.Y. 2010). Initially, Donziger sought to quash the subpoenas without filing a privilege log, as required by local court rules and the Federal Rules of Civil Procedure. The district court held that Donziger had thus waived his privilege claims, but held open the possibility of exercising the court's discretion to relieve him of the waiver and adjudicate the merits of privilege claims with respect to specific documents. *In re Chevron*, 749 F. Supp. 2d at 173. Donziger subsequently claimed privilege as to 8,652 documents, but the court found that "not even one document . . . was written by or addressed to any of the Lago Agrio plaintiffs" and some 2,500 or more documents had been sent or disclosed to a public relations person, Amazon Defense Front's Luis Yanza, Amazon Watch, the Wall Street Journal, Bloomberg News, Conde Nast, The New York Times and the Los Angeles Times, and thus adhered to its prior ruling. *Id.* at 170, 173.

163. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 393 (S.D.N.Y. 2014). The outtake can be viewed at Chevron's The Amazon Post, *Donziger on Judges in Ecuador—Crude Film Outtake (CRS129-00-02A)*, YOUTUBE (Jan. 20, 2011), https://www.youtube.com/watch?v=DRS2_rxVNtg. In another outtake, Donziger explained his views and strategy more fully:

> [I]t's a problem of institutional weakness in the judiciary, generally, and of this court, in particular. We have concluded that we need to do more, politically, to control the court, to pressure the court. We believe they make decisions based on who they fear the most, not based on what the laws should dictate. . . . [I]t's a critically important moment, because we want to send a message to the court that, "don't fuck with us anymore—not now, and not—not later, and never."

*Chevron Corp.*, 974 F. Supp. 2d at 393.

impartial" expert[164]; used a "'secret' bank account . . . to surreptitiously"[165] pay Cabrera "outside the court process"[166]; and secretly sold interests in the Lago Agrio judgment to third-party investors.[167]

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164. *Chevron Corp.*, 974 F. Supp 2d at 384. In the Chevron v. Donziger judgment discussed below, Judge Kaplan made extensive findings relating to Cabrera. *Id.* at 420–48, 558–59, 682–87. Judge Kaplan further found that "Donziger knew at every step that what he and the LAP team did with Cabrera was wrong, deceptive, and illegal." *Id.* at 460. Among other evidence, Judge Kaplan quoted an email to Donziger from one the LAPs' Ecuadorian lawyers (Julio Prieto), which was written in March 2010, after a federal court in Colorado granted Chevron's application for a subpoena in a discovery action against the consultants who ghostwrote Cabrera's report (Stratus Consulting). The email, which Judge Kaplan described as "one of those blinding rays of candor that can occur even in clouds of lies," states:

> Today Pablo [Fajardo] and Luis [Yanza] were kind enough to tell us what was going on in Denver, and that fact that certainly ALL will be made public, including correspondence. . . . Apparently that is normal in the U.S. and there is no risk there, but the problem, my friend, is that the effects are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail), and we are not willing to minimize our concerns and to sit to wait for whatever happens. For us it is NOT acceptable for the correspondence, the emails . . . to be divulged.

*Id.* at 460–61 (emphasis in original).

165. *Id.* at 428.

166. *Id.* at 434. Judge Kaplan also found that the Lago Agrio plaintiffs' legal team referred to Cabrera by the code name "Wuao" or "wao." *Id.* at 428. For Judge Kaplan's findings about the "secret" bank account and additional "support" provided to Cabrera by the LAPs' legal team, see *id.* at 428, 431–37. The Lago Agrio judgment states that the Court did not rely on Cabrera's report; however, Judge Kaplan rejected that "disclaimer" and found that "the Cabrera Report in fact was relied upon by the author or authors of the Judgment and that it played an important role in holding Chevron liable to the extent of more than $8 billion." *Id.* at 559.

167. *See, e.g.*, TORVIA LIMITED AND CLAIMANTS, FUNDING AGREEMENT (2011) (funding agreement); TRECA FINANCIAL SOLUTIONS AND CLAIMANTS, FUNDING AGREEMENT (2010) (funding agreement); Roger Parloff, *Have You Got a Piece of this Lawsuit?*, FORTUNE (June 28, 2011), http://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/. In the Chevron v. Donziger litigation, Judge Kaplan found that the Lago Agrio plaintiffs' (representatives) "had raised at least $15.99 million and perhaps $21 million or more" by selling interests in the Lago Agrio judgment to investors. Chevron Corp. v. Donziger, 37 F. Supp. 3d 653, 660–61 (S.D.N.Y. 2014). Those numbers, however, appear to be low, in light of disclosures in subsequent litigation by Chevron against some of the investors. *See supra* notes 137, 139. Disclosures in *Chevron v. Donziger* also revealed that Donziger and Amazon Defense Front had secretly set up the Amazonia Recovery company in Gibraltar (in 2012) to receive and distribute any proceeds from the Lago Agrio judgment and additionally, that the LAPs who appeared in the litigation (at least) had "ceded all rights to the proceeds from the Lago Agrio judgment to Amazon Defense Front." Declaration of Craig Smyser in Support of Opposition to Motion for Partial Summary Judgment at ex. 15 at 29, Chevron Corp., 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (No. 11-cv-00691-LAK-JCF) (docket number 918-15; Defendant Hugo Gerardo Camancho Naranjo's Supplemental Objections and Responses to Chevron's First Set of Interrogatories); Declaration of Craig Smyser in Support of Opposition to Motion for Partial Summary Judgment at ex. 16 at 29, Chevron Corp., 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (No. 11-cv-00691-LAK-JCF) (docket number 918-16; Defendant Javier Piaguaje Payaguaje Naranjo's Supplemental Objections and Responses to Chevron's First Set of Interrogatories); *Chevron Corp.*, 974 F. Supp. 2d at 637, 528 n.1110; *see also* TRECA FINANCIAL SOLUTIONS AND CLAIMANTS, FUNDING AGREEMENT, supra, at 25 (funding agreement executed before the Lago Agrio trial court judgment was issued, stating that "[t]he FDA [Frente de Defensa de la Amazonia (Amazon Defense Front)], the sole beneficiary of the Claim as a result of the designation by the Claimants [LAPs], is executing this Agreement to bind the Claimants hereto"). However, at least some of the LAPS might not

On March 4, 2014, following a bench trial,[168] United States District Judge Lewis Kaplan issued a 497-page opinion finding Donziger liable for RICO violations and fraud which, among other things, had "corrupted the Lago Agrio case."[169] The opinion included 1,842 footnotes, and extensive

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be aware that they (purportedly) ceded their rights to Amazon Defense Front; the Author observed the cross-examination of one of the LAPs during the Chevron v. Donziger trial, Javier Piaguaje Payaguaje, and when questioned about the interrogatory cited above, it was the Author's impression that Mr. Piaguaje did not understand the question and might not be aware that his rights had been ceded to Amazon Defense Front. *Cf. Chevron At War With Canadian Supreme Court; Company Also Faces Accusations of Terrorism and Tax Evasion*, CHEVRON PIT (Feb. 2, 2016), http://thechevronpit.blogspot.com/2016/02/chevron-at-war-with-canada-supreme.html (blog "by the team working to hold oil giant Chevron accountable for its human rights and environmental abuses in Ecuador" describing their work as "the historic battle by indigenous communities to hold the company accountable for its 'Amazon Chernobyl'" and referring to the (Indigenous) villagers' judgment); Press Release, Amazon Watch & UDAPT, Chevron General Counsel Hew Pate Misleads Financial Markets Over Default Judgment in Ecuador Pollution Case (Dec. 18, 2015), http://chevrontoxico.com/news-and-multimedia/2015/1218-chevron-general-counsel-hew-pate-misleads-financial-markets (press release by Amazon Watch and Amazon Defense Front's UDAPT describing the Lago Agrio judgment as "won" by "indigenous communities" and "indigenous villagers" and referring to it as "their judgment"; also describing Amazon Defense Front's Luis Yanza, an urban settler who now lives in Quito, as one of the "villagers" and a "community leader," and implying that Pablo Fajardo, a setter, is also indigenous; and quoting Donziger to accuse Chevron of racism against Indigenous persons in "its strategy to target the lawyers for the villagers to distract attention from the company's liability"); Press Release, Amazon Watch & UDAPT, Villagers Threaten New Lawsuit Against Chevron In U.S. Courts; Order Company to Cease Destruction of Documents (Oct. 5, 2015), http://chevrontoxico.com/news-and-multimedia/2015/1005-villagers-threaten-new-lawsuit-against-chevron-in-us.courts (describing "the villagers" who won the Lago Agrio judgment as "Indigenous villagers," without mentioning settlers, and quoting Donziger to refer to it as "their [the villagers'] judgment"). A forensic analysis of an October 31, 2010 "Intercreditor Agreement" and other documents—prepared by an accounting firm retained by Chevron's attorneys—found that the proportional distribution of any proceeds from the Lago Agrio lawsuit would depend on the amount of funds recovered, and that the share paid to investors would be greater if a smaller sum is collected. Direct Testimony of Troy A. Dahlberg at 1, 6–7, *Chevron Corp.*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (Case 11-cv-00691-LAK-JFC) (docket number 1597-1; direct testimony of expert witness for Chevron in *Chevron v. Donziger* trial). For example, if the Lago Agrio plaintiffs recover $1 billion, the monies would be divided (approximately) as follows: $123 million would be paid to investors; $217 million would be paid to attorneys and advisors (with $63 million of that going to Steven Donziger and $20 million going to Pablo Fajardo); $8 million would be used for administrative fees and expenses; no monies would be paid to the Lago Agrio plaintiffs; and $652 million would remain to fund the remedies ordered by the Lago Agrio judgment. If the LAPs recover $100 million, the monies would be divided (approximately) as follows: $69 million would be paid to investors; $22 million would be paid to attorneys and advisors (with $6.3 million of that going to Donziger and $2.5 million going to Fajardo); $8 million would be used for administrative fees and expenses; no monies would be paid to the Lago Agrio plaintiffs; and only $1.5 million would remain to fund the remedies ordered by the judgment. *Id.* at 7, Attach. O, P. Because of the dates of Chevron's discovery, the documents available to Dahlberg did not include all of the (more recent) investor and attorney agreements; as a result, the investors' and attorneys' share might be underestimated.

168. Initially, Chevron sought damages and injunctive relief. At the last minute, Chevron dropped its demand for money damages, thus avoiding a jury trial.

169. *Chevron Corp.*, 974 F. Supp. 2d at 384 (Judge Kaplan's opinion runs from page 362 in the federal reporter to page 644, with an additional 61 pages and 192 footnotes dedicated to appendices). Appendix I describes and adopts findings by experts for Chevron who examined the trial court judgment and record in the Lago Agrio case, and internal LAP documents obtained from discovery in the United

findings of fact and law. Among other misconduct, Judge Kaplan ruled that Donziger and his team had bribed Ecuadorian judges, fabricated evidence, obstructed justice, committed wire fraud and money laundering—and ultimately ghostwrote the judgment issued by the Lago Agrio trial court in exchange for a promise to pay $500,000 to the judge who signed it (Nicolas Zambrano).[170] Judge Kaplan also found the two Lago Agrio plaintiffs who

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States, and found that the judgment contains materials taken from the LAPs' representatives' internal work product that were not part of the record. *Id.* at 646–50. Appendix II excerpts portions of that "unfiled work product" and "overlap[ing]" passages from the judgment, side by side. *Id.* at 651–81. Appendix III elaborates on Judge Kaplan's finding that the report by Richard Cabrera was material to the Lago Agrio judgment. *Id.* at 682–87. The remaining appendices deal primarily with evidentiary issues and the *Chevron v. Donizger* trial record. *Id.* at 689–705.

170. *Id.* at 555–603. Judge Zambrano testified at trial that he was the author of the judgment, but Judge Kaplan found that his testimony was "not credible." *Id.* at 482. Among other reasons cited by the Court,

> Zambrano was unable to answer basic questions about the Judgment that he ostensibly wrote and that he came to New York to defend.
>
> The Judgment states that "benzene . . . is the most powerful carcinogenic agent considered in this decision." But when Zambrano was asked [on cross-examination at trial] "what substance the judgment says is, quote, the most powerful carcinogenic agent considered," he could not recall. Instead, he said that "[t]he hexavalente is one of the chemicals that if it is exceeded in its limits, it becomes cancer causing, carcinogenic."
>
> Zambrano was asked also which report the Judgment stated is "statistical data of the highest importance to delivering this ruling." He responded "[t]he report by the expert Barros." But the Judgment stated that the "Relative Risk established in" the study entitled *Cáncer en la Amazonía Ecuadoriana* "is statistical data of highest importance to delivering this ruling. . . ."
>
> Zambrano was unable also to recall the theory of causation on which the Judgment relied. And, although the English word "workover" appears twice in the Judgment, Zambrano testified that he does not speak English, did not know what "workover means," and could not explain why the word was in the Judgment.
>
> TPH—which stands for total petroleum hydrocarbons—appears over 35 times in the Judgment. Indeed, the Judgment awards plaintiffs over $5 billion for TPH cleanup. But when Zambrano was asked at his deposition what TPH stands for, he testified that "it pertains to hydrocarbons, but I don't recall exactly."

*Id.* at 483–84 (footnotes omitted). Judge Kaplan also found that portions of eight internal LAP work product documents (produced in discovery in the United States) appear verbatim "or in substance" in the Lago Agrio (trial court) judgment, even though those documents are not in the Lago Agrio court record, and concluded that "[t]he LAP's '[f]ingerprints' [a]re [a]ll [o]ver the Judgment." *Id.* at 492. Judge Kaplan also credited testimony by another former judge in the Lago Agrio case, Alberto Guerra, despite the fact that Guerra admitted taking bribes as a judge, paying bribes as a lawyer, participating in corrupt schemes related to the Lago Agrio litigation, and initially lying to Chevron about those schemes in an effort to exaggerate his importance. Guerra—who moved with his family to the United States with generous support from Chevron—testified that he ghostwrote orders for Judge Zambrano, including in the Lago Agrio case; that he was paid approximately $1,000 per month by the LAPs' representatives for that work; that he was involved in negotiating (with Steven Donziger, Pablo Fajardo, and Luis Yanza) the bribe that was allegedly promised to Zambrano in exchange for allowing the LAPs' representatives to draft the Lago Agrio trial court judgment; and that he made minor editorial changes to the judgment before Zambrano signed it. *Id.* at 502–35; Witness Statement of Alberto Guerra Bastidas, *Chevron Corp.*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (Case 11-cv-00691-LAK-JCF) (docket number 1596-1). Donziger and the LAPs

had appeared in the New York lawsuit liable for fraud, because of the misconduct committed by Donziger and their other agents.[171] The court further found that Ecuador's judicial system "does not provide impartial tribunals or procedures compatible with due process of law in cases of this nature."[172]

Judge Kaplan concluded the opinion by stating:

> The saga of the Lago Agrio case is sad . . . . It is troubling that . . . what happened here probably means that "we'll never know whether or not there was a case to be made against Chevron."
>
> [But the issue here] is whether a court decision was procured by corrupt means, regardless of whether the cause was just.
>
> The decision in the Lago Agrio case was obtained by corrupt means. The defendants here may not be allowed to benefit from that in any way.[173]

The court issued a judgment enjoining Donziger and the appearing Lago Agrio Plaintiffs from filing or pursuing any legal action to recognize or enforce the Lago Agrio judgment (or any new judgment based on the Lago Agrio judgment) in any court in the United States.[174] It further enjoined them

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have also accused Chevron of misconduct in the Lago Agrio litigation, and pleaded unclean hands as an affirmative defense in *Chevron v. Donziger*. However, Judge Kaplan ruled that they had "abandoned" their unclean hands defense because they "barely even mentioned it in their post-trial submissions." *Id.* at 633–34. Judge Kaplan further found that "there was no credible evidence to support any such defense even if it had been pressed" and additionally, that "it is well established that unclean hands is not a defense to fraud on the court." *Id.* at 634. For a statement of Donziger's allegations, see generally Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC's Memorandum in Support of Their Motion for Leave to File (1) Amended Answer and (2) Counterclaims, *Chevron Corp.*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (11-cv-00691-LAK-JCF) (docket number 566).

171. *Id*. at 644. The other Ecuadorian defendants did not appear. *Id.* at 544. Stratus and its managers settled with Chevron before the trial. Stipulation of Voluntary Dismissal Pursuant to Court Order of April 8, 2013, Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. Mar. 4, 2014) (No. 11-cv-0691-LAK-JCF) (declaring that "the Dismissal Order satisfies the condition precedent to the Settlement Agreement and makes the Agreement effective such that Chevron's claims against each of the Stratus Defendants and the counterclaims of Stratus Consulting, Inc. against Chevron are dismissed with prejudice").

172. *Chevron Corp.*, 974 F. Supp. 2d at 636.

173. *Id.* at 644 (quoting attorney Jeffrey Shinder, who was retained by Donziger in 2010 to represent the LAPs but withdrew after meeting with Stratus Consulting and learning the truth about Stratus's role in ghostwriting the report by Cabrera and subsequent related submissions to the Lago Agrio court).

174. Chevron Corp. v. Donziger, No. 1:11-cv-00691-LAK-JCF, slip op. at 2–3 (S.D.N.Y. Mar. 4, 2014) (docket number 1875) (Judgment issued in conjunction with Opinion). Judge Kaplan distinguished the injunction against enforcement in the United States from a preliminary injunction he had granted early in the litigation. *Chevron Corp.*, 974 F. Supp. 2d at 641–44. The preliminary injunction had enjoined the

from "undertaking any acts to monetize or profit from the Judgment . . . including without limitation by selling, assigning, pledging, transferring or encumbering any interest therein."[175] The court also imposed a constructive trust for the benefit of Chevron over all property that Donziger and the appearing Lago Agrio Plaintiffs had received, or would receive in the future, that is "traceable" to the Lago Agrio judgment or its enforcement anywhere in the world, and ordered them to assign all such property to Chevron.[176] Additionally, the court ordered Donziger to transfer his shares of Amazonia Recovery (the Gibraltar company set up by Donziger and Amazon Defense Front to receive and distribute monies from the judgment) to Chevron.[177]

Both Donziger and the Lago Agrio Plaintiffs appealed to the Second Circuit.[178] Those appeals are pending. A full discussion of the racketeering and fraud litigation is beyond the scope of this Article. The bottom line, however, is that after more than 22 years of litigation, there is a judgment in favor of the plaintiffs but the viability of that judgment is in question.

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Chevron v. Donziger defendants from taking any action to enforce the Lago Agrio judgment outside of Ecuador, pending a final determination of the New York case, but was promptly vacated by the Second Circuit. Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *vacated sub nom.* Chevron Corp. v. Naranjo, 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd and remanded* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 423 (2012). The Second Circuit did not reach the merits of Chevron's fraud allegations; instead, it held that the procedural device underlying the preliminary injunction was unavailable because New York's Uniform Foreign Country Money-Judgments Recognition Act does not grant a cause of action to putative judgment-debtors to challenge foreign judgments before enforcement is sought. The judgment recognition statute allows a party to challenge the validity of a foreign judgment, as a defense, when a judgment creditor seeks to enforce the judgment in New York. But it cannot be used preemptively to declare foreign judgments void and enjoin their enforcement. *Chevron Corp.*, 667 F.3d at 240–41, 247. The Second Circuit based its holding on statutory interpretation, but seemed troubled by the global reach of the preliminary injunction and found that considerations of international comity provided "additional reasons" to conclude that the statute cannot support the injunctive remedy granted by the district court. *Id.* at 242. In enacting the judgment recognition statute, the Second Circuit reasoned, New York meant to "act as a responsible participant in an international system of justice—not to set up its courts as a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs." *Id.*

175. Chevron Corp. v. Donziger, No. 1:11-cv-00691-LAK-JCF, slip op. at 3 (S.D.N.Y. Mar. 4, 2014) (docket number 1875) (Judgment issued in conjunction with Opinion).

176. *Id.* slip op. at 1–2.

177. *Id.* slip op. at 2. Donziger and the appearing LAPs moved to stay the imposition of the constructive trust and transfer of Donziger's shares in Amazonia Recovery, pending appeal. Judge Kaplan denied the motion in "almost all respects," but ordered that the corporate shares be "held pending appeal by the Clerk of the Court for the benefit of Chevron and Donziger, as their interests ultimately may appear, and be voted, after ten days prior notice and absent a contrary order by this Court, as Donziger may direct." Chevron Corp., 37 F. Supp. 3d at 656–57.

178. The Second Circuit heard oral argument on April 20, 2015, but has not yet decided the appeal. For accounts of the oral argument, see Michael D. Goldhaber, *The Global Lawyer: Will Chevron Lose in the Second Circuit?*, LITIGATION DAILY (April 23, 2015); Ted Folkman, Lago Agrio: Oral Argument At The Second Circuit (And A Special Letters Blogatory Backgrounder), Letters Blogatory (April 21, 2015), https://lettersblogatory.com/2015/04/21/lago-agrio-oral-argument-at-the-second-circuit-and-a-special-letters-blogatory-backgrounder/ (blog about the Lago Agrio case).

Litigation is now underway in seven countries on three continents, with no end in sight. There is considerable uncertainty about how decisions by these different legal regimes will intersect, and there is no single, controlling supra-national authority to adjudicate those potential disputes.

What is more, even if the plaintiffs' lawyers succeed in collecting the Ecuador judgment (or portions of it)—or if the parties decide to settle instead of litigating in courtrooms around the world—the impact of *Aguinda* on the Huaorani and other *Afectados* will still be uncertain. The decision to allow Amazon Defense Front to control the monies awarded by the Lago Agrio court reflects and reinforces the failure of the *Aguinda* litigation elites to allow meaningful participation by the affected Indigenous communities in decisionmaking processes, and their apparent determination to, in the words of Huaorani critics, "speak for all but work only with a few." It remains to be seen whether any judgment proceeds that might be collected will obtain meaningful remedies for the Huaorani and other *Afectados,* or simply empower and enrich a new layer of elites, and perpetuate the injustices and injuries. The Huaorani and other Indigenous peoples who have suffered most from Chevron's operations could become symbols of justice without getting justice or meaningful remedies.

For now, sadly, this chapter in the litigation appears to be shifting the focus of the legal and political contest from allegations about Texaco's misconduct to allegations of misconduct by the lawyers and activists who manage the Lago Agrio case, and from concern about the rights of the affected communities to the rights of Chevron.[179] Chevron is using the misconduct by the plaintiffs' lawyers and their allies not only to prolong the litigation, but also to try to taint the credibility of the *Afectados*' claims and jeopardize their rights to remedies. These developments beg the question: What are the true victims left with, by way of legal remedies, now that the Lago Agrio judgment is in question through no fault of their own?

At the same time, the national and international spotlight on the legal drama is eclipsing the situation on the ground—where environmental conditions continue to deteriorate, people's rights are still being violated, the oil frontier continues to expand, and no one is accepting responsibility.

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179. *See, e.g.*, Chevron Corp. v. Camp, No. 1:10-mc-0027, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010).

> While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill.

*Id.*; *Donziger*, 974 F. Supp. 2d at 644 (quoting attorney Jeffrey Shinder to conclude that "we'll never know whether or not there was a case to be made against Chevron," and repeating that "[t]he issue in this case is not what happened in the Oriente [Ecuador's Amazon region] more than twenty years ago and who, if anyone, now is responsible for any wrongs then done").

Together, the legal developments and the experience of the Huaorani show the wisdom of the decision by the Ome Yasuni Huaorani to oppose new oil operations in their territory, and defend their right to continue to live in freedom, as Huaorani, in their ancestral lands.

## III. OME YASUNI

### *A. The Ome Yasuni Huaorani*

The representatives of the Lago Agrio plaintiffs often say, in their narrative about the case, that the affected Indigenous peoples were "decimated" by Texaco.[180] However, the Huaorani want people to know that they are still there. They have suffered serious injuries, and in the language of tort law and human rights law, they are victims. But they are also survivors.

In accounts of the litigation, the people whose rights are being defended often appear as backdrops to a distant drama, in which the key protagonists are outsiders. So it might surprise a lot of people who have been following the litigation to hear that many Huaorani are taking a proactive approach to the need to remedy problems and threats that began with Texaco and continue to this day.

Since the arrival of Texaco and "the civilization," much has changed for the Huaorani. Today the Huaorani live in two worlds. Some people live in cities outside of Huaorani territory or on roads built by oil companies in their ancestral lands, and increasingly depend on money to survive. But others—both "uncontacted" and "recently-contacted" Huaorani family groups—still live deep in the forest in Yasuni, in harmony with their rainforest environment. The see the rainforest as a "giving" environment, that gives them life and a *casa* (home) where they can live as Huaorani and pass on their culture to their children.

The uncontacted family groups (Tagaeri, Taromenani, and Dugakaeri) and the most traditional of the contacted Huaorani live in (and around) an

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180. *See, e.g.*, AMAZON DEFENSE COALITION [AMAZON DEFENSE FRONT], *Ecuadorians Hit Chevron with $18 Billion Enforcement Action in Canada*, CHEVRONTOXICO (May 30, 2012), http://chevrontoxico.com/news-and-multimedia/2012/0530a-ecuadorians-hit-chevron-with-18-billion-enforcement-action-in-canada; AMAZON DEFENSE COALITION, *For Second Time, Ecuador Appellate Panel Rejects Chevron Attempt to Block $18 Billion Judgment for Dumping Toxic Waste*, CHEVRONTOXICO (Mar. 2, 2012), http://chevrontoxico.com/news-and-multimedia/2012/0302-for-second-time-ecuador-appellate-panel-rejects-chevron-attempt-to-block-judgment; AMAZON DEFENSE COALITION, *Ecuador Court Rejects Latest Chevron Attempt to Block Enforcement of $18 Billion Judgment*, CHEVRONTOXICO (Feb. 20, 2012), http://chevrontoxico.com/news-and-multimedia/2012/0220-ecuador-court-rejects-latest-chevron-attempt-to-block-enforcement-of-18-billion-judgment.

area of Yasuni known as "the Intangible Zone." The Intangible Zone spans more than 7,580 square kilometers and has been designated as a conservation area since 1999.[181] It is off-limits to oil extraction, mining, and logging—at least for now—because those operations would violate the right of the uncontacted groups to live in voluntary isolation, further reduce the territory they need to survive, and give rise to violent encounters that could lead to their extermination. Although the Intangible Zone does not include all of the territory of the uncontacted groups and reportedly overlaps with parts of five oil concessions, the designation as "intangible" is nonetheless important because Ecuador permits oil development in other areas of Yasuni National Park and in lands titled to Indigenous peoples without their consent. The entire northern half of Yasuni National Park overlaps with oil concessions, and at least nine oil concessions include some titled Huaorani lands.

Since 2008, Ecuador's Constitution has afforded additional legal protection (in theory) for the uncontacted groups, by providing that their territories are "irreducible," "intangible," and off-limits to "extractive activities" and directing the State to adopt measures to safeguard their lives, self-determination, and will to remain in isolation.[182] The Constitution further provides that "[t]he violation of these rights shall constitute the crime of ethnocide, which shall be established by law."[183] However, a loophole—found in another section of the Constitution, in a provision prohibiting extractive activities in protected natural areas and "zones declared as intangible"—allows oil and other extractive operations in those areas "as an exception" when the President obtains a "declaration of public interest" from Ecuador's National Assembly.[184]

The recently-contacted Huaorani who live in the Intangible Zone understand that they need to preserve and defend the forest in order to survive "as Huaorani." They see the area, and some adjacent lands that have not yet been occupied by oil companies or colonists, as their last refuge. For the Huaorani who live in the forest in Yasuni, conservation is about much more than environmental protection and physical survival; it is also intimately related to the survival of the Huaorani people and their culture and identity.

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181. *See* Decreto Ejecutivo No. 552, art. 1 [Executive Decree No. 552], R.O. No. 121 (Feb. 2, 1999) (declaring an "intangible zone" of approximately 700,000 hectares in Huaorani titled lands and Yasuni National Park, to be delimited within 120 days); Decreto Ejecutivo No. 2187 [Executive Decree No. 2187], R.O. No. 01 (Jan. 16, 2007) (defining boundaries, spanning 758,051 hectares, of the intangible zone decreed in 1999 to protect the Tagaeri, Taromenane, and other uncontacted groups of Huaorani). The 2007 decree also designates a buffer zone.

182. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [2008 CONSTITUTION OF THE REPUBLIC OF ECUADOR] Oct. 20, 2008, art. 57, 407.

183. *Id.*

184. *Id.* at art. 407. The National Assembly may also convene a "*consulta popular*," or referendum, on the issue. *Id.* The National Assembly is the legislative branch of Ecuador's government, and is currently controlled by President Correa's political party.

The importance of the area to them was described by Kemperi, a Huaorani elder and shaman, in a "message to the people who live where the oil companies come from":

> My message is that we are living here. We are living in a good way. No more oil companies should come because already there are enough. They [the people who live where the oil companies come from] need to know that we have problems. I want them to understand what we are living. Many companies want to enter, everywhere. But they do not help; they have come to damage the forest. Instead of going hunting, they cut down trees to make paths. Instead of caring for [the forest], they destroy. Where the company lives, it smells nasty, the animals hide, and when the river rises the manioc and plantain have problems. We respect the environment where we live. We like the tourists because they come, and go away. When the company comes, it does not want to leave. Now the company is in the habit of offering many things, it says that it comes to do business, but then it makes itself the owner. Where the company has left its environment, we cannot return. It stays bad. Something must remain for us. Without territory, we cannot live. If the oil companies destroy everything, where will we live? We do not want more companies to enter, or more roads. We want to live as Huaorani, we want others to respect our culture.[185]

Kemperi's community, Bameno, is located in the heart of the Intangible Zone. Since 2007, Bameno has been leading efforts to organize the contacted communities in the Intangible Zone to work together to defend what remains of their territory and sovereignty, including the right of community members to live in peace and freedom, as Huaorani, in their ancestral lands, and the right of their uncontacted neighbors to be left alone. The communities first came together to remove illegal loggers from the Intangible Zone.[186] They

185. Message from Kemperi Baihua, Huaorani Community Bameno, Preface, *printed in* JUDITH KIMERLING, ¿MODELO O MITO? TECNOLOGIA DE PUNTA Y NORMAS INTERNACIONALES EN LOS CAMPOS PETROLEROS DE LA OCCIDENTAL [MODEL OR MYTH? CUTTING EDGE TECHNOLOGY AND INTERNATIONAL STANDARDS IN OCCIDENTAL'S OIL FIELDS] 7–8 (2006) (translated from Huaorani to Spanish by Penti Baihua, related to the author, on August 8, 2005).

186. The loggers used the road built by Texaco to reach the rivers that flow into the Intangible Zone. As they penetrated more deeply into the area, they had a number of violent encounters with the Tagaeri and/or Taromenani, who were defending the forest in the traditional Huaorani way: with hardwood spears. The wood trade also reportedly contributed to intra-tribal conflict; in May 2003, 26 uncontacted Huaorani were massacred when their longhouse was attacked by a group of nine contacted Huaorani. The attackers came from communities that are located outside of the Intangible Zone (on roads), and were reportedly supplied and incited, at least in part, by outsiders who controlled the wood trade and wanted to exterminate the isolated bands. The attack was condemned by many contacted Huaorani, including the Huaorani who live in The Intangible Zone—who were further stirred to concern themselves about the fate of their isolated neighbors and subsequently came together, as Ome Yasuni, to remove the

also oppose new oil operations and roads in the forest, and see community managed and operated tourism as a better economic alternative that does not harm the forest or disrespect their culture and way of life. They call themselves *Ome Gompote Kiwigimoni Huaorani* (We Defend Our Huaorani Territory); for short, they say "Ome Yasuni." *Ome* is the Huaorani word for "territory" and "rainforest."

Before contact, the Huaorani defended *Ome* with hardwood spears. Now, the Ome Yasuni Huaorani are working to develop new ways to defend the forest that is their home and source of life. Those new ways include using written documents, the outsiders' language, and even human rights law.[187] At the same time, they are trying to resolve the growing conflict within the Huaorani tribe, which is related, at least in part, to the expansion of the oil frontier in Yasuni and other external pressures.

In the process of organizing themselves and seeking to engage in a dialogue with the *cowode,* the Ome Yasuni Huaorani are learning about new threats to their territory and self-determination. Much has been written about violations of Indigenous peoples' rights by environmentally harmful "development" in Amazonia (and elsewhere), and the Huaorani still face that threat. But the Huaorani who live in and around the Intangible Zone and Yasuni National Park also face a new threat: conservation and human rights NGOs and bureaucracies.

Although Yasuni National Park and Yasuni Biosphere Reserve have existed on paper since 1979 and 1989, respectively, for years, the government and international conservationists paid relatively little attention to the area. Most Huaorani did not know that a park and reserve had been superimposed on their lands. More recently, however, as international financial support for conservation has surged, there has been growing interest in the biologically-diverse, carbon-rich forests of Yasuni and the Huaorani family groups who live in voluntary isolation.

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loggers from The Intangible Zone and defend their shared territory and the right of the uncontacted Huaorani to remain in voluntary isolation. Around the same time, the government took steps to stop the transportation of wood from the Intangible Zone on the Texaco road, as part of the implementation of precautionary measures to protect the Tagaeri and Taromenani, discussed below (a measure that was generally supported by Ome Yasuni, albeit in different locations).

187. *See, e.g.*, *Comunicado de las Comunidades Waorani (Huaorani) de Yasuni sobre la Iniciativa Yasuni-ITT y Conservacion de Yasuni* [Communication from the Waorani (Huaorani) Communities of Yasuni About the Yasuni-ITT Initiative and Conservation of Yasuni] (Oct. 25, 2010) (written communication) (on file with author); Ome Yasuni, *Message from Huaorani of Yasuni Part 1: Ahua,* YOUTUBE (Oct. 18, 2011), http://www.youtube.com/watch?v=kMSCJTdr_Z0; Ome Yasuni, *Message from Huaorani of Yasuni Part 2: Kemperi;* YOUTUBE (Oct. 18, 2011), http://www.youtube.com/watch?v=nCUXyzk863A; Ome Yasuni, *Message from Huaorani of Yasuni Part 3: Penti,* YOUTUBE (Oct. 19, 2011), https://www.youtube.com/watch?v=MyjsS1Sm65M (series of video messages from Bameno, posted on YouTube by Ome Yasuni after learning that the government was using images of Bameno community members in a video posted on YouTube to promote the Yasuni-ITT Initiative). The Yasuni-ITT Initiative and Bameno's human rights petition are discussed below, in Part III.B.

The Ome Yasuni Huaorani appreciate that a lot of people want to protect the rainforest that is their home. However, they are concerned because so many outsiders from national and international public institutions and NGOs want to direct projects and programs that make decisions about Yasuni without taking them or their rights into account. Despite international recognition of the value to conservation of Indigenous traditional knowledge—and myriad commitments by governments and NGOs to respect the rights of Indigenous peoples in protected area policies and activities around the world—the projects and programs that purport to protect biological and cultural diversity in Yasuni still follow a technocratic, expert-dominated paradigm that empowers outside professionals and excludes local communities from decisionmaking. This approach not only ignores the rights, interests, and knowledge of community members, but also fails to appreciate that the vital link between the continued existence of the Huaorani, their culture, and their rainforest environment represents a tremendous, and irreplaceable, opportunity for sustainable conservation in Yasuni.

At the same time, there are signs of paternalism and belief in robust state intervention in Ecuador's current government. For example, one high-level official explained to me that "the problem in the Amazon is the absence of the State, so the solution lies there; we need to *reconquistar* (reconquer) the Amazon." On the national level, the Correa government has enacted a number of measures designed to expand state power or consolidate power in the executive branch (especially the presidency).

In its discourse related to Indigenous peoples, the Correa government has acknowledged that previous governments have violated the rights of Indigenous peoples, and claims to be implementing transformative changes. However, an enormous gap remains between the promise of a rights-based approach to public policy and the reality on the ground. The government's statist and paternalistic approach to policymaking reflects and reinforces the enduring legacy of the Doctrine of Discovery, framework of dominance, and legal fiction of *terra nullius,* and has resulted in a proliferation of bureaucratic processes in the name of Indigenous peoples that routinely disregard their real voices—or, as in the case of oil extraction in the Amazon, support and promote selected voices that agree or appear to agree with government policies.

It is not surprising, then, that there has been a lot of resistance to efforts by the Ome Yasuni Huaorani to gain access to information, make themselves understood, and engage public officials and conservation project managers in a constructive dialogue. This is true even when those officials and managers claim to consult and work with local communities and decorate posters and brochures with pictures of community members, as in the poster for Yasuni National Park shown below.

*Figure1: Photograph of a Poster for Yasuni National Park*[188]

For example, in March 2011 the (then) Ministry of Environment (MAE) official charged with managing Yasuni National Park, Santiago Bonilla, invited some Huaorani from Yasuni to a meeting in the provincial capital, Coca. A group from Bameno travelled for three days to reach Coca and was joined by people from other Huaorani communities along the way; the meeting sounded important. I accompanied the group. They told me they hoped to listen, first, to learn about what the government is doing in its programs and projects for Yasuni, and then have an opportunity to explain their thinking and concerns and engage in a dialogue about "what is going to happen and how we will live."

But when they arrived, Bonilla told the meeting that he was working with professionals from the United Nations to update the management plan for Yasuni National Park, and divided the participants into groups—two for Huaorani who live on oil company roads and another for Huaorani who live in the forest. Two facilitators from United Nations agencies led each group. When asked for a copy of the current management plan for Yasuni, Bonilla said he did not have a copy, and that it was "not pertinent" and the Huaorani did not need to know what it said in order to participate in the meeting. He instructed the Huaorani to answer questions presented by the group leaders and said their answers would be written on large sheets of paper taped to the

188. Shown in an exhibition by Ecuador's Ministry of Environment at a street fair in Coca, using (unauthorized) images of members of the Huaorani community Bameno, 2010.

wall. This methodology offended the Ome Yasuni Huaorani, who subsequently said they felt "shoved into the groups" without any opportunity to listen and learn, or speak about what was on their minds.

Bonilla described the approach to me (in a private conversation), in order to explain "the methodological reasons" why I would not be allowed to speak during the meeting.[189] He said that the methodology for the group with the Ome Yasuni Huaorani was being managed by "high-level officials" from the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations World Tourism Organization (UNWTO); that they would ask the Huaorani "extremely simple questions" in order to facilitate "comprehension of the problem"; and that "it would be harmful to the Huaorani people" if I spoke "since they [the Huaorani] had never been taken into account" but now would be "taken into account."

After the meeting, the Ome Yasuni Huaorani felt "sad and concerned" because, as they explained in a formal communication to (then) United Nations Special Rapporteur on the rights of Indigenous peoples James Anaya (reporting and protesting violations of their rights by Ecuador and the United Nations agencies):

> [I]t was clear to us that the government and United Nations system want to meddle in Yasuni, but they do not understand our culture, thinking, concerns or priorities, and what is more, *they do not want to understand.* They do not want to engage in a serious dialogue with our communities, instead they seem to think that we are children or animals to manage (and adorn their posters), and they want to impose authorities on us and make us live like children of the government. But we are humans and Yasuni is our home, it is our territory. We have rights and we want to live in freedom, as Huaorani, in our ancestral territory.[190]

The communication—from 23 Huaorani from five communities and Ome Yasuni—also said that the people who managed the meeting "seemed confused about who lives in the park and who lives far away or in the city," and protested that "they did not inform us about what a management plan is

189. Initially, an international environmental consultant told me to leave, because only Huaorani could attend the meeting. I asked his name; in response, he said he was the person who would write the new management plan, and refused to tell me his last name or where he worked. He threatened to call the police if I did not go. The Ome Yasuni Huaorani protested, so Bonilla intervened and said I could stay if I did not speak.

190. Ome Gompote Kiwigimoni Huaorani, *Comunicación Relativa a Violaciones de los Derechos Humanos de Miembros del Pueblo Indígena Huaorani (Waorani) en Ecuador* [Communication of Violations of the Human Rights of Members of the Indigenous Huaorani (Waorani) People in Ecuador] 2 (May 18, 2011) [hereinafter Communication from Ome Gompote Kiwigimoni Huaorani] (on file with author).

and what their process is to write it and make decisions," and "they did not want to let us talk about territory, only about the park and their questions."[191] In addition, "the papers they wrote (on the wall) were badly done because they wrote things that changed our words, they did not write other important things that we said, and they made it look like we all agree with everything the papers say even though that is not true." For example, when Penti, a Bameno community member and president of Ome Yasuni said "we want title to our ancestral territory," the United Nations facilitator said, "they want demarcation of the park," and began to write that on the paper on the wall.[192]

When I tried to clarify, saying "it is not the same thing," Bonilla approached me and said in a private conversation that "everyone knows" that Ecuador's Constitution prohibits land titles in national parks because park lands must be the property of the State. I asked him to explain that to the Huaorani, but he refused—until finally, I told Penti about the discussion and he told the Huaorani. When Bonilla at last addressed the group, "he spoke as if there is nothing to dialogue about, as if we [the Huaorani] have no rights"[193] because the Constitution is the highest law of the land. He did not mention that the same Constitution, and international law, also recognize rights of the Huaorani over their lands, territories, and natural resources. Both Bonilla and his United Nations advisors were silent about the rights of Indigenous peoples, prompting the Huaorani to complain in their communication that they "only informed us about the law that favors their programs," and "it seems that they do not know" that the United Nations Declaration on the Rights of Indigenous Peoples, and other constitutional and international law that "recognize our rights, exist, or they wanted to hide and disregard our rights and misinform us."[194]

The Ome Yasuni communication also protested the lack of information and discussion about future oil development in Yasuni, and underscored their opposition to new operations:

> We have asked the government to inform us about its plans and proposals for oil company activities that could affect us and our territory. But it does not tell us anything. The government needs to understand that something of our territory must remain for us, where we can live in tranquility in the way we want to live. Without territory we cannot live.[195]

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191. The questions were: What benefits do you have from the park? What problems exist? What solutions do you propose? What economic activities do you want to carry out?

192. Communication from Ome Gompote Kiwigimoni Huaorani, *supra* note 190, at 4.

193. *Id.*

194. *Id.*

195. *Id.* at 5.

They concluded by saying that "instead of dialoguing with us with dignity, they [MAE and the United Nations agencies] tried to manipulate and use us so that afterwards they can say that we grassroots Huaorani who live in Yasuni are participating in their process and Yasuni Program, something that is not true."[196]

A brochure that was given to some people at the meeting indicates that the activities were part of a larger project by MAE and six United Nations agencies, called the Program for Conservation and Sustainable Management of the Natural and Cultural Patrimony of the Yasuni Biosphere Reserve (Yasuni Program). The project was funded by Spain, through the United Nations Millennium Development Goals (MDGs) Achievement Fund,[197] ostensibly to advance MDG 7 (to ensure environmental sustainability), by contributing to conservation of one of the most biologically and culturally diverse regions in the world; MDG 1 (to eradicate extreme poverty and hunger), by "promoting community management of biodiversity and natural resources with the objective of generating sustainable means of livelihood"; and additionally, to "contribute to the protection of the fundamental rights of the indigenous peoples who live in isolation" in Yasuni.[198]

The Ome Yasuni Huaorani were not invited to any follow-up meetings or "consultations" (if they occurred), or allowed to review a draft of the new management plan. Not surprisingly, the final management plan did not help

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196. *Id*. On its website, MAE described the process to update the management plan for Yasuni National Park as "part of a new planning and management process for the Yasuni Biosphere Reserve, that takes into account the inter-relation between Yasuni National Park (core zone of the Yasuni Biosphere Reserve) and the surrounding territory," and "involves the participation and efforts of multiple local, national, and international actors." MINISTRY OF ENV'T, REPUBLIC OF ECUADOR, *Actualización del Plan de Manejo del Parque Nacional Yasuni* [*Updating the Yasuni National Park Management Plan*] (2011) (on file with author). The agency further claimed that the new process and plan "will be the result of a process of broad citizen participation that permits the configuration of a new shared vision of the Protected Area, with citizens being the key actors in this process . . . ." *Id.*

197. The MDGs were first agreed to in 2000 in the United Nations Millennium Declaration. They included eight goals, with a target date of 2015. According to the official United Nations website, they were agreed to "by all the world's countries and all the world's leading development institutions" and "galvanized unprecedented efforts to meet the needs of the world's poorest." *Millennium Development Goals and Beyond 2015*, UNITED NATIONS, http://www.un.org/millenniumgoals/bkgd.shtml (last visited Apr. 26, 2016). The United Nations agencies working in the Yasuni Program included the United Nations Development Programme (UNDP), UNESCO, UNWTO, Food and Agriculture Organization of the United Nations (FAO), United Nations Development Fund for Women (UNIFEM), and United Nations Human Settlements Programme (UN-HABITAT). MINISTRY OF ENV'T, REPUBLIC OF ECUADOR, PROGRAMA PARA LA CONSERVACION Y EL MANEJO SOSTENIBLE DEL PATROMONIO NATURAL Y CULTURAL DE LA RESERVA DE BIOSFERA YASUNI [PROGRAM FOR THE CONSERVATION AND SUSTAINABLE MANAGEMENT OF THE NATURAL AND CULTURAL PATRIMONY OF THE YASUNI BIOSPHERE RESERVE] (Yasuni Program project agreement, signed by MAE and 6 United Nations agencies) 7 (2008).

198. Ecuador Ministry of Environment, *Programa para la Conservación y Manejo Sostenible del Patrimonio Natural y Cultural de la Reserve de la Biosfera Yasuni* [*Program for the Conservation and Sustainable Management of the Natural and Cultural Patrimony of the Yasuni Biosphere Reserve*] (Yasuni Program brochure).

community members gain a better understanding of government projects and policies for Yasuni, or take into account—or even acknowledge—their views. In addition, a new map of Indigenous territories upset the Huaorani by excluding the park from Huaorani territory and representing a portion of Huaorani ancestral lands as the territory of a larger neighboring tribe (the Quichua, or Kichwa) whose invasions of Huaorani lands have reduced their territory and caused conflicts in a number of areas, some of which remain unresolved.

In another, more recent example, a MAE official gave Penti a booklet entitled *Operations Manual for Sustainable Tourism in the Protected Areas: Cuyabeno, Limoncocha and Yasuni*. The publication states that it was funded by United States and German government projects to support conservation and sustainable development, respectively, and "created" by MAE "in coordination with" a team of experts from the United States environmental NGO Rainforest Alliance.[199] The "Presentation" by Ecuador's Minister of Environment, Lorena Tapia Nuñez, recognizes that sustainable tourism is a "key economic activity" in "sensitive protected areas" such as Yasuni, which can provide direct economic benefits to local communities and "enormous support" for conservation efforts.[200] However, the Presentation also states:

> [Tourism] can become disorderly and cause negative impacts in the communities and host ecosystems. For that reason, it should be managed under certain sustainability principles and criteria, so that development and conservation interlace, thereby providing a better quality of life for the local communities.[201]

The Presentation then explains that MAE's functions include enforcing environmental norms and strengthening the technical capacity of "the tourism actors" in protected areas.[202] It describes the operations manual as a "technical tool" to promote "forms of tourism behavior, based on the understanding of the relations [between] human beings and nature and on the principles of sustainable tourism, minimizing the negative impacts that it can

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199. REPUBLIC OF Ecuador, MINISTRY OF ENV'T, Manual de Operaciones para Turismo Sostenible en las Áreas Protegidas: Cuyabeno, Limoncocha y Yasuní [Operations Manual for Sustainable Tourism in the Protected Areas: Cuyabeno, Limoncocha and Yasuni] vii, xii (2015) [hereinafter TOURISM MANUAL]. United States government funds were provided by the United States Agency for International Development (USAID), through a project entitled Initiatives for Conservation of the Amazonia Andina; German funds were provided by Deutsche Gesellschaftfür Internationale Zusammenarbeit (GIZ) GmbH and Ministry of Economic Cooperation and Development (BMZ), through a project entitled Yasuni Biosphere Reserve Sustainable Development Program. *Id.* at vii.

200. *Id.* at v.

201. *Id.*

202. *Id.*

produce in the host communities."[203] But it also describes the manual as a "regulatory document that is mandatory for every actor interested in the development of tourism activities" in Yasuni National Park (and Cuyabeno Wildlife Reserve and Limoncocha Biological Reserve).[204] This characterization is confusing because there is no citation to Ecuador's *Registro Oficial* (Official Registry), where laws and regulations must ordinarily be published before taking effect.

Although some of the rules—or tools—could be helpful when external tour agencies operate in Indigenous communities, or when local communities seek to emulate the kind of ecotourism that external agencies offer in lodges that cater to comfort-seeking tourists, many provisions overreach. For example, the manual states that all "personnel," including cooks and kitchen help, must wear company uniforms with their name;[205] tourists who camp must put their boots and footwear in designated places and may not smoke cigarettes in "camping zones;"[206] "tourism activities" are allowed only between 5:00 AM and 9:00 PM, and "cultural activities" are not allowed after 6:00 PM;[207] swimming and fishing (both sport and demonstration fishing) are prohibited;[208] and a detailed itinerary and list of tourists must be submitted to MAE for each tour.[209] In addition, every operator must maintain a blackboard for the tourists, with information about the day's activities,[210] and in the future, operators will be required to comply with "standardization" requirements for "the construction and maintenance of infrastructure" which are currently being developed.[211]

The manual also states that tour operators must get permission from MAE (called a "patent"), and make payments to MAE for the right to operate tours in the protected areas, among other payments.[212] The procedures to obtain permission require operators to register with MAE on the internet, upload documentation on a regular basis, and also appear to require operators to form companies and obtain (and upload) certifications of corporate compliance from two other government agencies.[213] The MAE patents must be renewed every year, and only permit holders (referred to as "beneficiaries") that have complied with their "obligations" and operated

203. *Id.* at vi; *see also id*. at xii.
204. *Id.*
205. *Id.* at 26.
206. *Id.* at 50.
207. *Id.* at 26.
208. *Id.* at 26–28, 36–37.
209. *Id.* at 27, Annexes 2, 3.
210. *Id.* at 27–28. This requirement is listed for Yasuni and Cuyabeno, but not for Limoncocha.
211. *Id.* at 34.
212. *Id.* at 21–23.
213. *Id.* at 22–23.

tours for at least 180 days per year have the right to renew.[214] Patents may be suspended if the tour operator changes the "approved itinerary" or type or frequency of service without authorization,[215] and tour operators must offer food and lodging to MAE and other government agencies when they visit to "corroborate" that the services offered to tourists comply with all applicable regulations and "standards of quality."[216]

In the past, some external tour operators abused and denigrated the Huaorani, and tourism was a controversial activity.[217] However, Bameno and other communities in Yasuni have gained control over tourism in their communities and learned how to operate tours themselves.[218] The Huaorani have extraordinary insights into their rainforest environment and delight in teaching tourists about the forest and Huaorani culture. Currently, tourism is an important (albeit irregular) economic activity for the contacted Huaorani in the Intangible Zone, which supplements the predominantly subsistence economy and is seen by community members as the only means to gain access to cash income and trade goods that does not harm the environment, disturb the uncontacted families, or threaten the autonomy of community members—unlike logging, oil extraction, and dependence on the government.

The operations manual gives lip service to "cultural tourism;" however, the MAE officials and international "expert" consultants who wrote it do not appear to have any understanding of Huaorani culture or the tourism currently offered (successfully) by the Huaorani in Yasuni. There is no space in their rules for authentic community-operated tourism. If interpreted to apply to tours operated by the Huaorani in their rainforest home (and enforced), the tools—or rules—in the manual would run roughshod over the rights of community members and essentially destroy cultural tourism in Yasuni, to the detriment of the communities and tourists who want to visit a Huaorani community, by seeking to control Huaorani tourism and impose a *cowode* model of regimented tourism that is alien to Huaorani culture. In addition to adverse economic impacts, the type of tourism contemplated by the manual has the potential to be very damaging to the Huaorani because it would not allow them to engage in contact with tourists on their own terms, and would foment a paternalistic and demeaning relationship between the

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214. *Id.* at 23.

215. *Id.*

216. *Id.* at 33.

217. For a fuller discussion, see RANDY SMITH, CRISIS UNDER THE CANOPY (Abya-Yala ed., 1993).

218. *See, e.g.*, *Bameno Community Tour*, HUAORANI COMMUNITY TOURS, https://huaoranicommunitytours.wordpress.com/tour-information/bameno-community-tour/ (last visited Apr. 28, 2016); OTOBO'S AMAZON SAFARI, (last visited Apr. 28, 2016); *Minta Huaorani Tours: An Alternative*, HUAORANI COMMUNITY TOURS, http://mintahuaoranitours.com/an-alternative/ (last visited Apr. 28, 2016).

Huaorani who work in tourism and the MAE which, in turn, could generate conflict among the Huaorani and with the State.

This does not mean that there are no tools that external experts could potentially offer to help develop and support sustainable community-operated tourism in Yasuni, but rather that they need to be developed in concert with the Huaorani and offered instead of imposed. Significantly, the summary of the regulatory framework for environmental protection in the manual begins by quoting a provision from Ecuador's Environmental Management Law Regulations, which states that "[e]very action related to environmental management should be planned and executed on the basis of the principles of sustainability, equity, prior informed consent . . . " and respect for traditional practices and culture (among other principles).[219] Those principles sound promising but ring hollow in the other sections of the manual, and are commonly ignored by Ecuador's growing conservation bureaucracy and its myriad NGO partners, technical experts, and international funders. At the same time, as discussed above, the environmental law vacuum in the oil patch persists, and oil companies effectively control environmental standards, practices and oversight of their operations in protected areas (and elsewhere).

In the human rights arena, the burgeoning bureaucracy has been propelled, at least in part, by international litigation at the Inter-American Commission on Human Rights. This legal action was initiated in 2006 by four environmentalists in Quito, on behalf of the Tagaeri and Taromenani, and prompted the Commission to ask Ecuador to implement "precautionary measures" to protect the life and physical integrity of the uncontacted groups.[220]

Precautionary measures are intended to prevent imminent and irreversible human rights violations. A parallel proceeding, based on the

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219. TOURISM MANUAL, *supra* note 199, at 20.

220. *See Petición de Medidas Cautelares a favor de los pueblos indígenas Tagaeri y Taromenani* [*Petition for Precautionary Measures in Favor of the Tagaeri and Taromenani Indigenous Peoples*], CIUDADANOS POR LA DEMOCRACIA (May 1, 2006), http://www.ciudadanosporlademocracia.org/frontEnd/main.php?idSeccion=159 (also asking IACHR to find violations of the rights of the Tagaeri and Taromenani); Medidas Cautelares MC 91-06, *Pueblos Indígenas Tagaeri y Taromenani* [*Tagaeri and Taromenani Indigenous Peoples*], Inter-Am. Comm'n H.R. (May 10, 2006), http://www.cidh.org/medidas/2006.sp.htm. In 2009, the national Indigenous organization CONAIE became a co-petitioner, after being invited by the environmental petitioners to join the case. Despite that development, the litigation appears to be controlled by a small group of external environmentalists who seek to protect Yasuni from oil extraction, but have a limited (at best) understanding of Huaorani culture and the situation on the ground in Yasuni. IACHR litigation is not transparent, and there is no procedure for intervention by parties who have a legal interest in a case. The refusal by the external petitioners to disclose their submissions to IACHR or to engage in a dialogue with Huaorani who are directly affected by the precautionary measures (and potential remedies) has generated considerable concern about both the effectiveness of the litigation to protect the Tagaeri and Taromenani and its potential additional consequences for the Yasuni Huaorani.

same petition, seeks a determination that Ecuador has violated the human rights of the Tagaeri and Taromenani, and corresponding remedies. That proceeding is currently underway.[221]

The Ome Yasuni Huaorani agree with the objectives of the precautionary measures—to respect the right of the Tagaeri and Taromenani to live in voluntary isolation and protect their lives and territories—and welcome external help from the Commission to achieve those goals. Nonetheless, they want the government (and petitioners) to recognize and respect *their* rights, too, including their territorial rights, and reach agreements with them on how to implement the measures instead of making unilateral decisions and imposing them on community members. Some major concerns include the growing presence of the Ecuadorian State, including a military presence; repeated overflights to search for Tagaeri and Taromenani homes and gardens[222]; the lack of clarity and transparency that commonly characterizes government actions and decisionmaking, including finger-pointing between different government entities and confusion about which agency will make, or has made, a particular decision[223]; the (well-founded) belief that government officials do not keep their promises or respect the contacted Huaorani or their rights, that they want to control the Huaorani and

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221. In 2014, the Commission ruled that the petition is admissible, and that the case may proceed on the merits. Report on Admissibility: Tagaeri and Taromenani Indigenous Peoples in Isolation, Petition 422-06, Inter-Am. Comm'n on H.R., Report No. 96/14, OEA/Ser.L/V/II.153, Doc. 12 (2014), http://www.oas.org/en/iachr/decisions/2014/ECAD422-06EN.pdf.

222. The recently-contacted Huaorani recall from their experience with first contact that overflights to look for uncontacted Huaorani and their homes mean that "*cowode* may be coming to kill" them, and see the overflights as a form of forced contact and harassment of their uncontacted neighbors. They are also concerned about government patrols that enter the forest (with military protection) to try to track the uncontacted Huaorani "like animals."

223. For example, the Huaorani often tell me that "we do not understand what the government is doing" or "we do not know what the government is doing." In another recent example, the agency in charge of implementing the precautionary measures, the Ministry of Justice and Human Rights and Cults (Ministry of Justice), signed an agreement in 2015 with the Huaorani organization NAWE (discussed below). The official who directs the precautionary measures program for that agency, Enrique Vela, invited Penti (a Bameno community leader and president of Ome Yasuni) to attend the signing ceremony. In response, Penti requested a copy of the agreement, so that the Ome Yasuni Huaorani could read it before it was signed. Vela promised to send the document to Penti, but did not. Instead, a follow-up invitation, sent by email, stated that "refreshments" would be served at the event, but did not include any information about the agreement. Despite repeated requests, both the Ministry of Justice and NAWE have refused to disclose the signed agreement. A Huaorani who attended the event reported that the Ministry of Justice gave five computers to NAWE, and read the agreement aloud very quickly, in Spanish, without translating it into the Huaorani language or distributing copies, and that the Huaorani who were present did not understand what the agreement says. Soon thereafter, scenes from the event (of the signing and Huaorani chanting) were included in a video presented by the government to the IACHR in a hearing on the merits of the Tagaeri and Taromenani litigation, to support the contention by the government that it is working with the Huaorani communities to implement the precautionary measures. *See* Inter-Am. Comm'n on Human Rights, *Ecuador: Caso Tagaeri y Taromenani*, YOUTUBE (Oct. 19, 2015), https://www.youtube.com/watch?v=LEdxuoxc0Sg.

their territory and treat them like children, and that they do not understand Huaorani culture or "reality"; further, ongoing encroachments by oil companies and settlers in areas that lie outside of the Intangible Zone but within the territory of the Tagaeri and Taromenani (despite "talk of protection"), and the loss of territory and potential for violence caused thereby; external pressures on the Huaorani related to the expansion of the oil frontier and unilateral actions by the government in the name of the Tagaeri and Taromenani, that generate conflict, anger, confusion, uncertainty, and stress; and the failure of the precautionary measures to achieve their stated aims.

It remains to be seen whether, and how, the myriad external projects, programs and processes to protect Yasuni and the Tagaeri and Taromenani will lead to new law in Huaorani territory—and control over the Huaorani and their lands, territories, and resources—and whether any changes will be sustained, because so many important details and decisionmaking processes are murky and because historically, law and politics in Ecuador have been unstable.[224] In addition, the Ome Yasuni Huaorani are learning about the new colonizers and have vowed to defend their territory and inherent right of self-determination.

Nevertheless, there is no question that this surge in outside interest, and funding,[225] is fueling decisionmaking processes that affect the rights and interests of the Huaorani. Those processes, in turn, are creating a climate of insecurity in which community members now worry not only about protecting their territory from oil companies, settlers, and loggers, but also fear for their right to continue to live in freedom as Huaorani in what remains of their ancestral lands. As Daboto, a Huaorani woman and Bameno community member, explained:

> This is our territory. We live here, our parents and grandparents lived here; this has always been our territory. But now *cowode* [strangers] put their name, they call it Yasuni, and say it is not our land. We want to live here, like our ancestors, in this territory; we want our children to live here. We want to live in freedom, we do not want strangers to tell us how to live, where to plant, and what we can and cannot do.

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224. Even constitutional law has been relatively easy to disregard, manipulate, and supplant. Ecuador has had 21 constitutions since becoming a republic in 1870. For a fuller discussion, see Kimerling, *Oil Frontier*, *supra* note 1, at 448 n.97.

225. International funding for conservation is expected to continue to grow as a result of emerging market-based mechanisms to combat climate change, including the Reduced Emissions from Reduced Deforestation and Forest Degradation (REDD) schemes that are being developed by the United Nations and World Bank to maintain carbon storage in forests by reducing deforestation and forest degradation rates.

At the same time, oil companies and settlers continue to destroy and degrade Huaorani ancestral lands, territories, and resources. And once gone, the loss of rainforest territory is irreversible.

In addition to seeking to manage Huaorani territories, lands, and resources, and govern the Huaorani, the conservation and human rights project managers also seem to be trying to decide who should represent the Huaorani, by supporting efforts to create a supreme tribal authority that would ostensibly speak for all Huaorani—and if needed, legally represent the Huaorani and sign agreements with outsiders who seek to manage or extract natural resources. Those efforts began with the oil companies and the United States Agency for International Development (USAID), working with the Huaorani organization NAWE (Waorani Nationality of Ecuador, formerly the Organization of the Huaorani Nationality of the Ecuadorian Amazon, or ONHAE), but now appear to also have support from the government of Ecuador, United Nations agencies, and some NGOs. Increasingly, those outsiders need new intermediaries (other than the missionaries) to legitimize their activities and deal, in their way, with the Huaorani. Under pressure from mounting recognition of Indigenous peoples' rights in national and international law and policy, the effort to impose a chief legal and political representative on the Huaorani thus appears—at least in part—to seek to circumvent Huaorani rights over their lands, territories, and resources, and their right to participate in decisionmaking that affects them, by vesting those rights in a legal body that is controlled by a small circle or even one person.

ONHAE was founded in 1991 by a group of young Huaorani men who had attended secondary school together—and learned some Spanish—in an effort to engage with the outside world on new terms and enable the Huaorani to speak for themselves. In 1993, the president of the organization signed a "friendship agreement" with the oil company Maxus (now part of Repsol-YPF[226]) and opened an office in a city, outside of Huaorani ancestral lands. The officers of ONHAE began to leave their communities to work in the city, and both the organization and its directors became dependent on funding from the oil company and increasingly disconnected from the Huaorani communities. In 2007, the directors changed the name of the organization to NAWE, reportedly because ONHAE had a bad reputation and was widely regarded, by Huaorani and *cowode*, as notoriously corrupt.

NAWE's bylaws have never been approved by the Huaorani communities, but the Ome Yasuni Huaorani regard NAWE as "a social organization that should help the communities" and not as a tribal authority

226. Repsol-YPF operates the oil concession known as Block 16, which includes parts of Yasuni National Park and Huaorani titled lands. For a first-hand account of the founding of ONHAE and its early relations with the former operators of Block 16, Conoco and Maxus, see JOE KANE, SAVAGES (1995). At the time the agreement with Maxus was signed, it was poorly understood by the Huaorani; one woman who attended the signing ceremony subsequently described it to me as an agreement "for t-shirts."

or legal representative of the communities or their members. A fundamental, and deeply held, norm of Huaorani culture is that "no one goes to the home of another to *obligar*" (oblige them, or tell them what to do). In addition, although the Huaorani have a sense of shared identity and territory, there are distinct extended kinship groups, or peoples, within the tribe (and Yasuni) who have ties with clearly defined areas of traditional Huaorani territory, and according to customary law, local communities have the right to manage and control the territory they inhabit and defend.

It is not surprising, then, that the effort to transform NAWE into a tribal government and authority pursuant to *cowode* law is a stealthy—and mysterious—external process that does not have the free, prior, and informed consent of Huaorani community members. As a general matter, the attempt to attribute political and legal "authority" to NAWE in Yasuni is generating considerable concern in the communities, and growing conflict within the tribe between grassroots Huaorani who want to live in peace in the forest, and an emerging urban political elite who want a piece of the action and see Huaorani lands and resources, and conservation and development projects by *cowode,* as a source of income.

### *B. Bameno's Human Rights Petition*

Initially, the Ome Yasuni Huaorani tried to engage in a constructive dialogue with the Ecuadorian government. They sent delegations to Quito and Coca—and even attended a session of the United Nations Permanent Forum on Indigenous Issues in New York. But their efforts were rebuffed, repeatedly. At the same time, the oil frontier has continued to expand more deeply into Huaorani territory, in and around Yasuni. In July 2014, Bameno filed a petition with the Inter-American Commission on Human Rights, seeking to end and remedy violations of their human rights by the Ecuadorian State, including their rights over their lands, territories, and natural resources.[227] More specifically, the petition seeks to prevent oil development in an area of Yasuni that is large enough for the (contacted and uncontacted) Huaorani who do *not* want to live with the oil companies to survive, and a secure legal framework that recognizes and respects their territorial and other human rights. I am co-counsel for Bameno, with the Ecuadorian human rights organization CEDHU (*Comisión Ecuménica de Derechos Humanos*, or Ecumenical Commission on Human Rights).

In some ways, IACHR is not an ideal forum for litigation. Reportedly, there is considerable political pressure on the Inter-American human rights

227. Peticion Contra la Republica del Ecuador [Petition Against the Republic of Ecuador] at 1, Inter-Am. Comm'n H.R. (July 8, 2014) [hereinafter Bameno Petition] (on file with author). The petition seeks both precautionary measures, to prevent further human rights violations, and a declaration that Ecuador has violated the human rights of Bameno community members and corresponding remedies. *Id.*

system from some member States, including Ecuador. Moreover, even with a favorable decision, implementation can be a serious problem. But it is a viable forum, and a potentially powerful tool, for the claims and remedies that the Ome Yasuni Huaorani want to pursue. Inter-American human rights case law (from both the IACHR and its complementary body, the Inter-American Court of Human Rights) interprets the right to property enshrined in the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man as a right that protects the special relationship between Indigenous peoples and their territory, and property rights over traditional lands, territories, and resources, based on that relationship and customary (Indigenous) norms. This includes the right of Indigenous peoples to own and control their territory, without outside interference.[228] We think we can build on that jurisprudence, and want to try

228. *See generally*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); Yakye Axa Indigenous Cmty.v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); Saramaka People v. Suriname, Interpretation of the Judgement on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185 (Aug. 12, 2008); Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010); Pueblo Indígena Kichwa de Sarayaku v. Ecuador [Kichwa Indigenous People of Sarayaku v. Ecuador], Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); Comunidad Garifuna de Punta Piedra v. Honduras [Punta Piedra Garifuna Community v. Honduras], Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 304 (Oct. 8, 2015); Comunidad Garifuna de Triunfo de la Cruz v. Honduras [Triunfo de la Cruz Garifuna Community v. Honduras], Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 305 (Oct. 8, 2015); Kaliña and Lokono Peoples v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015); Annual Report, Case No. 7615 (Yanomami Case), Inter-Am. Comm'n on H.R., Report No. 12/85, OEA/Ser.L/V/II.66 Doc. 10 rev. 1 at Considerando para. 8 (1985), http://www.cidh.org/annualrep/84.85sp/Brasil7615.htm (referring to a 1972 IACHR resolution recognizing that States have a sacred duty to specially protect indigenous peoples); Merits Report, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No.40/04 (2004); IACHR ECUADOR REPORT, *supra* note 6, at 88. The American Declaration of the Rights and Duties of Man was adopted in 1948 and the American Convention on Human Rights entered into force in 1978; both instruments may also apply to hold states liable for human rights violations that originated prior to accession, but continue thereafter. Although it is fair to say that there has been a legal revolution in the human rights norms of the Inter-American system, which began with the 2001 landmark decision in Awas Tingni and continues to evolve, those norms may still be problematic for Indigenous communities whose lands are slated for oil extraction because to date, the rights of Indigenous populations to own and manage natural resources are limited to resources that have been used traditionally by the community. In addition, states may restrict the property rights of Indigenous peoples in certain, exceptional circumstances and permit developments or investments within (or affecting) their territories, although specific safeguards are required. That said, states may not permit operations that endanger the physical or cultural survival of Indigenous peoples, and the free, prior, and informed consent of affected communities must be obtained for some projects. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172.

to use human rights law to protect Yasuni ecosystems in the broadest terms, because for the Huaorani to survive, they need a "habitat for human rights." That means protecting a large living forest, where both the Huaorani and the rainforest plant and animal species with which they co-evolved—and with which they maintain myriad relationships—can survive and thrive.[229]

In addition to a "habitat for human rights," Bameno's petition also seeks to create a space for respectful dialogue with the government, in order to relieve external pressures that are generating conflict, anger, and stress in the Huaorani communities, end the long history of human rights violations, and recast and repair the damaged relationship between the Yasuni Huaorani and the State. It describes the advance of the oil frontier on multiple fronts (Blocks 16, 55, 14-17, 31, 43, and 66)[230] and the deepening, and dangerous,

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For a discussion of those safeguards and the landmark *Saramaka People v. Suriname* case, see FOREST PEOPLES PROGRAMME, INDIGENOUS PEOPLES' RIGHTS AND REDUCED EMISSIONS FROM REDUCED DEFORESTATION AND FOREST DEGRADATION: THE CASE OF THE *SARAMAKA PEOPLE V. SURINAME* (2009).

229. Bameno Petition, *supra* note 227, at paras. 9–11, 38.

230. *Id.* at paras. 22–29. The petition refers to five fronts where new exploration and/or extraction operations are pushing the oil frontier more deeply into the forest in Yasuni (Blocks 16, 55, 66, 31, and 43). *Id.* A subsequent communication to IACHR adds the sixth front (Blocks 14-17). Block 16 is operated by Repsol. Block 66 is operated by Petrobell. Blocks 31, 43, and 55 (also known as Armadillo) are operated by Petroamazonas (the State oil company). Blocks 14 and 17 are operated by Andes Petroleum, a consortium owned by China National Petroleum Corp. and China Petrochemical Corp. (SINOPEC). The best known front is Block 43, also known as ITT (Ishpingo-Tambococha-Tiputini). In 2007, President Correa proposed an innovative idea to combat climate change: Ecuador would "leave the oil in the ground" in the ITT—if the international community would contribute at least half of the profits Ecuador expected to forego by not extracting the oil. Dubbed the "Yasuni-ITT Initiative," the proposal—which sought roughly $3.6 billion over 10 years, through donations and trading in carbon credit markets—was hailed as a new model for global cooperation to prevent dangerous greenhouse gas emissions by avoiding the exploitation of dirty fossil fuels in areas with high environmental and cultural sensitivity. But in 2013, President Correa announced that "the world has failed us" and cancelled the ITT Initiative. Clifford Krauss, *Plan to Ban Oil Drilling in Amazon is Dropped*, N.Y. TIMES (Aug. 16, 2013), http://www.nytimes.com/2013/08/17/business/energy-environment/ecuador-drops-plan-to-ban-drilling-in-jungle.html?_r=0; s*ee also* República del Ecuador, Inctiativa Yasuní - ITT: Una propuesta desde un pequeño país para salvar el planeta [Yasuni - ITT Initiative: A Proposal from a Small Country to Save the Planet] (information sheet distributed by the Government of Ecuador at a side event at the Eighth Session of the United Nations Permanent Forum on Indigenous Issues, held on May 26, 2009). However, some critics have questioned Ecuador's commitment to the initiative, citing pressure from the oil sector and China. David Hill, *Ecuador Pursued China Oil Deal While Pledging to Protect Yasuni, Papers Show*, GUARDIAN (Feb. 10, 2014), http://www.theguardian.com/environment/2014/feb/19/ecuador-oil-china-yasuni. According to press reports, Ecuador has borrowed heavily from China in exchange for access to crude oil from Yasuni. Between 2009 and 2012, China "committed more than $12 billion in financing to Ecuador," according to unofficial estimates. Mercedes Alvaro, *Ecuador Expects $4 Billion in Loans From China in 2015*, WALL STREET J. (March 23, 2015), http://www.wsj.com/articles/ecuador-expects-4-billion-in-loans-from-china-in-2015-1427144435. Most of those loans are tied to oil sales, and some 90% of Ecuador's oil exports are reportedly earmarked for China—although much of the oil is resold by Chinese traders on world markets and ends up in refineries on the West Coast of the United States. *Id.*; Clifford Krauss and Keith Bradsher, *China's Global Ambitions, Cash and Strings Attached*, N.Y. TIMES (July 24, 2015), http://www.nytimes.com/2015/07/26/business/international/chinas-global-ambitions-with-loans-and-strings-attached.html?_r=0; U.S. ENERGY INFORMATION ADMIN., ECUADOR:

conflict between Huaorani who want to live in the forest "with territory" (without oil companies) and Huaorani who want to negotiate deals for new oil operations in Yasuni.[231] That intra-tribal conflict is a response to the expansion of the oil frontier, and is intensifying because of pressures by the State and other external actors. It threatens not only Bameno, which is leading local efforts by the Ome Yasuni Huaorani to protect Yasuni, but also the uncontacted Huaorani, because they are seen by some contacted Huaorani and other supporters of oil extraction as an obstacle to oil development.

A full discussion of the history of violent encounters between Huaorani and *cowode* since "the civilization arrived" and the current intra-tribal conflict is beyond the scope of this Article. It is complicated, and will not be easy for the Huaorani to resolve. But it will be impossible to end the violence and resolve the intra-tribal conflict as long as oil companies continue to further reduce Huaorani territory in Yasuni, and as long as Huaorani who are eager to negotiate more deals with the oil companies are led to believe that new offers will be forthcoming if the uncontacted Huaorani are further displaced or exterminated.[232] Bameno's petition asks the Commission to

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INTERNATIONAL ENERGY DATA AND ANALYSIS (2015), https://www.eia.gov/beta/international/analysis_includes/countries_long/Ecuador/Ecuador.pdf. The decision to cancel the Yasuni-ITT Initiative sparked demonstrations, and the emergence of a new environmental NGO, Yasunidos, which has garnered considerable international support. However, both the Yasuni-ITT Initiative and advocacy by Yasunidos have focused their spotlights on Block 43, and relatively little attention has been paid to the advance of the oil frontier on the other five fronts, including areas where the Tagaeri and/or Taromenani are known to be present (Blocks 55, 16, 66, and 14-17) and where the Dugakaeri are believed to be present (Block 31, in addition to Block 43). Currently, Ecuador's economy is reeling from the decline in oil prices.

231. Bameno Petition, *supra* note 227, at paras. 7, 12–22, 46. Oil companies do not pay any royalties to the Huaorani, and provide few permanent jobs. As a result, Huaorani communities (and NAWE) generally believe that they need to negotiate new agreements for new operations on an ongoing basis, in order to receive payments from the company and create new (temporary) jobs. *Id.* at para. 8.

232. A related issue is the apparent ease with which government administrators can redraw official maps showing the location of the uncontacted Huaorani. As discussed above, Ecuador's Constitution prohibits oil extraction in the territories of Indigenous peoples living in voluntary isolation, and in protected natural areas, unless the National Assembly declares it to be in the national interest. In August 2013 (after cancelling the Yasuni-ITT Initiative), President Correa sought, and obtained, such a declaration for operations in two oil blocks in Yasuni National Park (Blocks 31 and 43). The President's request to the National Assembly included a report by the Ministry of Justice (dated August 21, 2013), with a map purporting to show the location of the Tagaeri and Taromenani. MINISTRY OF JUSTICE, HUMAN RIGHTS AND CULTS, REPUBLIC OF ECUADOR, INFORME SOBRE POSIBLES SEÑALES DE PRESENCIA DE PUEBLOS INDÍGENAS AISLADOS EN LOS BLOQUES 31 Y 43 (ITT) [REPORT ON POSSIBLE SIGNS OF PRESENCE OF ISOLATED INDIGENOUS PEOPLES IN BLOCKS 31 AND 43 (ITT)] 6 (2013) [hereinafter MINISTRY OF JUSTICE AUGUST 2013 REPORT], *in* Petition from President Rafael Correa, President of the Republic of Ecuador, to Gabriela Rivadeneira Burbano, President of the National Assembly, Oficio No. T.4980-SNJ-13-719 (Aug. 23, 2013) [hereinafter Correa Petition]. Previous maps, including the map in a communication from Ecuador to IACHR in April 2013 (for the litigation on behalf of the Tagaeri and Taromenani) recognized the presence of the uncontacted Huaorani in Blocks 31, 43, 16, 55, 14, and 17. MINISTRY OF JUSTICE, HUMAN RIGHTS AND CULTS, INFORME DE ACTIVIDADES REALIZADAS POR EL ESTADO ECUATORIANO EN VIRTUD DE LA MEDIDA CAUTELAR A FAVOR DE LOS PUEBLOS INDÍGENAS EN

direct Ecuador to suspend new oil operations in Yasuni until the government and local (contacted) Huaorani communities reach "agreements for peace and legal security for a Huaorani territory that is free from oil activities," and large enough to allow the members of Bameno and neighboring (contacted and uncontacted) *kiwigimoni* (communities, or more literally, "where we live") "who want to live in their rainforest territory without oil companies, to live and survive."[233]

The petition also describes how "errors" in the State's "unilateral and paternalistic" implementation of the precautionary measures ordered by IACHR to protect the Tagaeri and Taromenani are contributing to the conflict in Yasuni and "generating confusion, insecurity, disquiet, ire and conflict" among the Huaorani and with the State, and stresses the need for precautionary measures that are effective and respectful.[234] It explains that neither the militarization of Yasuni nor the forced assimilation of the Huaorani will resolve the current conflict,[235] and proposes an alternative: dialogue between the (contacted) Huaorani communities and the State to construct "agreements for peace and understanding."[236]

For Bameno, the solution to the conflict in Yasuni lies in protecting *Ome* and making peace, among the Huaorani and with the State.[237] The government's response to the conflict has been to ignore the voices of contacted Huaorani who oppose new oil operations, and deny that the conflict has anything to do with the expansion of the oil frontier—framing it instead as an exclusively intra-tribal conflict while, at the same time, treating it as a

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AISLAMIENTO VOLUNTARIO TAGAERI Y TAROMENANE [REPORT ON ACTIVITIES PERFORMED BY ECUADOR BY VIRTUE OF THE PRECAUTIONARY MEASURE IN FAVOR OF THE INDIGENOUS PEOPLES IN ISOLATION TAGAERI AND TAROMENANE] annex 4, at 8 (April 2013). However, the new (August 2013) map excluded them from five of those oil blocks, where the State is expanding the oil frontier in Yasuni (Blocks 31, 43, 16, 55, and 14), and from most of Block 17, without supporting documentation. Officials used the new map to argue that oil extraction in Blocks 31 and 43 would not affect the Indigenous peoples in isolation or violate Ecuador's Constitution. MINISTRY OF JUSTICE AUGUST 2013 REPORT, *supra*, at 10–11; Correa Petition, *supra*, at 7, 15. Bameno's communications to IACHR cite this precedent to support the community's request for legal security, and clearly-defined boundaries, for the territory they seek to protect.

233. Bameno Petition, *supra* note 227, at para. 69.

234. *Id.* at para. 30; s*ee also id.* at paras. 13–28 (describing actions by the State in response to an attack on a Tagaeri home by a group of Huaorani from Block 16, briefly discussed below, and new oil operations in Block 16).

235. *Id.* at paras. 31, 34, 37.

236. *Id.* at para 31; *see also id.*at para. 39.

237. Bameno's proposal stresses the need for dialogue with, and between, the grassroots Huaorani communities—who live in the forest in Yasuni and in the surrounding oil blocks—in order to determine the boundaries of the territory that will be protected from oil operations, and to enable the communities and the State to better understand each other and construct peace agreements "to coexist with respect, peace, legal security" and human rights for all. *Id.* at paras. 37–40. It rejects NAWE as an intermediary, and describes the effort by the State to try to impose NAWE as the chief authority and legal representative of the Huaorani communities as contrary to Huaorani culture. *Id.* at para. 37.

matter of (*cowode)* criminal law. That approach ignores the ongoing displacement of the (contacted and uncontacted) Huaorani who live in the forest, and their steady encapsulation in a shrinking forest. At the same time, it relegates the conflict to the State's criminal justice system for resolution, and is giving rise to a new policy of judicializing the conflict in Yasuni. However, the judicialization of the conflict is not helping to elucidate or resolve it; instead, it is intensifying and expanding the conflict, obscuring its complexity, and preventing an inter-cultural treatment of the situation in Yasuni.

The most prominent criminal case began in 2013. In March of that year, two Huaorani elders, Ompure and Bugeney, were speared to death near the oil road in Block 16. Despite repeated warnings that relatives of the slain couple were preparing a vengeance party, and calls for (and to) the government to reach out to the family and take precautionary measures to protect the Tagaeri and Taromenani—and a flurry of activities by numerous government agencies—the State failed to act to help to soothe the anger, grief, and fear of the family, or to engage in a meaningful dialogue with them, and a promise to indemnify the surviving spouse[238] and children was not kept.[239] Some three weeks later, relatives of Ompure and Bugeney attacked a Tagaeri home. Seventeen Huaorani men have been charged with homicide—although their trial has been repeatedly postponed for reasons that are not clear.[240]

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238. Ompure had two wives: Bugeney and one of her sisters.

239. As a general matter, the State's response to the deaths of Ompure and Bugeney seemed characterized by confusion, mixed messages, and vague assurances that "what has to be done will be done." *See* Milagros A. Aguirre, *¡Ocultados! La bitácora de unas muertes anunciadas (marzo-septiembre 2013)* [*Hidden! The Blog of Deaths Foretold (March-September 2013)*], *in* UNA TRAGEDIA OCULTADA [A HIDDEN TRAGEDY], 141, 146–47 (2013) (quoting the Deputy Minister of the Interior). For a fuller discussion, see generally A HIDDEN TRAGEDY, *supra.* Bameno's Petition refers to the book and describes it as containing "some important information, especially about the government action and efforts by the Catholic (Capuchin) Mission in Coca and Foundation Alejandro Labaka to defend the Tagaeri and Taromenani," but cautions IACHR about some "misunderstandings" and "mistaken interpretations" of Huaorani culture and histories in the book (and other "*cowode* sources" as well), including "errors in some things attributed by the authors to Penti and Kemperi." Bameno Petition, *supra* note 227, at para. 25 n.15.

240. Reports of the number of dead range from 5 to "at least 30" men, women, and children. *See, e.g.*, El Comercio, *Un guerrero huaorani confesó haber encabezado matanza de taromenane* [*Huaorani Warrior Confessed to Having Led Massacre of Taromenane*] (April 13, 2013), reposted on CONFIRMADO.NET (Apr. 29, 2013), http://www.confirmado.net/el-comercio-un-guerrero-huaorani-confeso-haber-encabezado-matanza-de-taromenane/. Two Tagaeri girls—who I will refer to as *C* and *D*—around six and two years old, respectively, were spared, and taken to Block 16 to live. Eight months later, in November 2013, the government carried out a unilateral, military-style operation to remove *C* from Block 16. The Office of the State Prosecutor (State Prosecutor) had invited the attackers to a meeting in Coca that same day, purportedly to "resolve" the problems related to the conflict between their family and the uncontacted Huaorani. Six of the alleged attackers traveled to Coca, but after taking their statements, the State Prosecutor had them arrested and put in jail, in preventive detention. By then, the killings had received considerable national and international attention. The State Prosecutor initially

Of course, there is a potent logic to the criminal prosecutions in our culture, and even in human rights law. Impunity tends to fuel and perpetuate human rights violations, and human rights law demands that violators be held accountable for their actions. But the criminalization, and judicialization, of the matter obscures its inter-cultural context—and is not helping to resolve the conflict that continues to endanger the human rights of the Tagaeri and Taromenani (and members of Bameno, who have been drawn into the conflict because of actions by the State).

For the Huaorani, the criminal case is a mysterious, coercive process imposed by the State that does not allow any space for the dialogue they need to find solutions and peace. Officials say that only the judge has decisionmaking power, so there is nothing to talk about. But rumors abound regarding external pressures on the court from high-level officials in Quito. Also, different judges may decide the same question in different ways. The adversarial environment of the proceedings encourages secrecy and distrust,

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charged the jailed Huaorani—and 11 other Huaorani men—with genocide, but the charges were subsequently changed to homicide. In September 2014, the Huaorani in preventive detention were released, and in November 2014, the court ruled that there was no crime because there were no bodies, and provisionally dismissed the case. The incarceration (or captivity, which confined the Huaorani warriors and separated them from their families) and criminal prosecutions, and the military action to enter a Huaorani community without permission and "steal" *C*, took the Huaorani by surprise and created a crisis that remains unresolved. The State actions also drew Bameno into the conflict, because after removing *C* from Block 16, government officials (and NAWE) asked Penti to take *C* to Bameno to live. When the attackers learned that *C* was in Bameno, they began to blame Bameno (mistakenly) for "stealing *C*" and working with the government to put them in jail. Despite that response, and threats by some of the attackers and their relatives against Penti, *C* and other Bameno community members, government officials have made it clear that they want *D* to live in Bameno, too, with her sister, and the State Prosecutor has reportedly made that an issue in the criminal case, although the legal basis for inserting the custody issue into a criminal case is unclear. Bameno has asked the government not to bring *D* to Bameno unless an agreement can be reached with the community (Dicaro) and family with whom she is living, so that she comes in peace. But they do not trust the government to respect their wishes or take their safety into account. Another factor that appears to be contributing to the conflict (and misunderstanding) are public claims by government officials that they coordinate and work with the local Huaorani communities, despite the "reality," as described in Bameno's Petition, that "we are not well informed, we do not know what they [the government officials] are doing, and a serious and transparent path for dialogue and understanding does not exist to seek agreements between the government and the Huaorani communities in order to coexist and resolve problems." Bameno Petition, *supra* note 227, at para. 19. Because of the threats and risk that the State will continue to aggravate the conflict, a recent communication from Bameno to IACHR asks the Commission to direct the State to engage in a dialogue with Bameno and Dicaro, to analyze the best interests of *D* and pursue an agreement. That communication, and Bameno's Petition, also ask the Commission to direct the State to dialogue with Bameno in order to effectuate a written agreement for the best interests and protection of *C*. *Id.* at para. 30. Bameno's communications refer to *C* and *D* as Tagaeri (rather than Taromenani) based on conversations with *C* (although it is not a term she uses to describe herself). Taga is the name of a Huaorani man who rejected contact with the *cowode*, and *Tagaeri* means "group, or family, of Taga" in the Huaorani language. For information about the criminal case pursued by the State Prosecutor, *see generally Consulta de Procesos*, CONSEJO JUDICATURA, http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf (last visited May 25, 2016) (under "Número de Proceso," input 22251-2013-0223, and click "Buscar") (website of Ecuador's judiciary providing docket information about orders and opinions by the court).

rather than a clearer, and inter-cultural, understanding of the factual and legal issues, and foments contentious relationships with the State. At the same time, it exacerbates the anger, suffering, fear, and anxieties of the defendants and their communities, because they do not know what will happen or how to affect the outcome. The goal of the criminal case—punishment—does not exist in Huaorani culture. Instead, the Huaorani live in times of war and peace, and they end wars by agreeing to make peace. A restorative justice approach—where the goal is to find solutions that promote peace, healing, reconciliation, and the rebuilding of relationships—would present special challenges because of the imperative to respect the right of the Tagaeri and Taromenani to live in voluntary isolation, but nonetheless could offer a more culturally appropriate, constructive, and effective response, that is consistent with the remedies sought by Bameno in its human rights petition.[241]

Bameno's petition to IACHR also seeks legal recognition of the Yasuni Huaorani's land rights. It asks the Commission to direct Ecuador to dialogue with Bameno and the other (contacted) Yasuni communities who want to continue to live in the forest without oil companies, in order to construct legal agreements that recognize their rights over their lands, territories, and resources, including title to the territory that will be protected from oil extraction operations.[242] The petition also asks the Commission to direct Ecuador to consult with Bameno and obtain the free, prior, and informed

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241. In the wake of the attack on the Tagaeri home, the government also created a special commission to investigate the conflict between "the Huaorani and Taromenane peoples," comprised of two government officials (the Minister of Justice and the National Secretary of Policy Management) and the Executive Director of a NGO with ties to the Catholic Church (FEPP). *Se conforma comisión para la investigación de las disputas existentes entre los pueblos indígenas Huaorani y Taromenane, adscrita a la Sectretaría Nacional de la Gestión de la Política* [*Commission for Investigation of the Disputes Existing Between the Huaorani and Taromenane Indigenous Peoples is Formed, Attached to the National Secretary of Policy Management*], Decreto Ejecutivo No. 17 [Executive Decree No. 17], R.O. 19 (June 20, 2013), http://decretosconsulta.gobiernoelectronico.gob.ec/ (under "Número de Decreto," enter "17" and click "Buscar"). In April 2015, the commission presented its findings and recommendations to President Correa. In his weekly address to the nation, the President embraced the commission's recommendations and promised to make adjustments to public policy "that will create an agenda of peace with the Huaorani culture." *Enlace Ciudadano 420* [Citizen Link 420], COMERCIO (Apr. 18, 2015), http://www.elcomercio.com/actualidad/enlace-puengasi-correa-sabatina-iess.html. However, the government has refused to disclose the commission's report (or recommendations), and to date, the only specific measure that has been revealed is the creation of a new bureau in the Ministry of Justice, the Directorate for Protection of Indigenous Peoples in Voluntary Isolation. *See Dirección de Protección de Pueblos Indígenas en Aislamiento protegerá a los pueblos no contactados* [Directorate for Protection of Indigenous Peoples in Isolation Will Protect the Uncontacted Peoples], CIUDADANO (Apr. 18, 2015, 3:15 PM), http://www.elciudadano.gob.ec/direccion-de-proteccion-de-pueblos-indigenas-en-aislamiento-protegera-a-los-pueblos-no-contactados/. It is difficult to imagine how the State will create "peace with the Huaorani culture" without disclosing its recommendations, and the findings that underlie them, to the (contacted) Huaorani.

242. Bameno Petition, *supra* note 227, at para. 68; s*ee also id.* at paras. 41, 48–52 (asserting rights over traditional lands, territories and resources, and violations of those rights by the State).

consent of community members before allowing any extractive activities in their territory.[243]

## CONCLUSION: "*DEJE VIVIR*" (LET US LIVE)

Texaco's discovery of commercially valuable oil in the Amazon Rainforest in Ecuador was heralded as the salvation of Ecuador's economy, the product that would pull the nation out of chronic poverty and "underdevelopment." The discovery ignited an oil rush that made the conquest of Amazonia and pacification of the Huaorani a national policy imperative, and petroleum quickly came to dominate Ecuador's economy and quest for progress.

But the reality of oil extraction has been far more complex than its triumphalist launch. For the Huaorani who have lived in the Amazon Rainforest since time immemorial, the arrival of Texaco and "the civilization" meant destruction and ethnocide rather than development and progress. Their ancestral homelands were invaded and degraded by outsiders who also sought to force them to live in contact with "strangers" (*cowode*) and end their way of life. The strangers used their legal fiction to assert a supreme, overriding title to Huaorani lands, territory, and resources, and a paramount right to subjugate and govern "the People" (*Huaorani*). With their world changed forever and their territory reduced, the Huaorani have borne the costs of oil extraction without sharing in its benefits and without participating in decisionmaking by outsiders that affects them.

Notwithstanding those changes and challenges, many Huaorani who live in the area now known as Yasuni have maintained their culture and relationship with their "giving" rainforest territory, and want to "leave [their] own history" for their children. In the Intangible Zone, uncontacted and contacted Huaorani family groups are actively defending their way of life and what remains of their territory against further intrusions by *cowode*, each in their own way—but both nonetheless impelled by their shared interest in protecting as much forest as possible for future generations and their right to continue to live as they wish in their ancestral lands. For the Huaorani who still live on the land, territory is much more than a physical place and healthy environment. It is a space in which they can exercise genuine self-determination, maintain their culture and identity, and live as Huaorani, without strangers spoiling the forest or trying to dominate the People and tell them how to live.

Despite significant changes in *cowode* law, at the national and international levels, that recognize rights of the Huaorani over their lands, territory, resources, culture, and development, an enormous gap remains

243. *Id.* at para. 68.

between the promises in the law and the reality on the ground. Moreover, the arrival of new law and politics in the name of conservation and Indigenous peoples' rights in Yasuni is fueling, and funding, the "*reconquista*" of Huaorani territory and the People. This distressing distortion of well-intentioned—and essential—legal ideals reflects and reinforces gross inequities in law and governance and the enduring legacy of the Doctrine of Discovery and legal fiction of *terra nullius.* It also shows the wisdom of the conclusion, and response, by the Huaorani of *Ome* Yasuni, as explained by Penti:

> Before, our territory was big, big. Now we have less but the government wants more oil companies to enter, and many *cowode* want to impose their projects and law and tell us how to live. The *cowode* law has pretty words but does not respect the Huaorani or protect our territory *Ome.* Yasuni is here today because we [the Huaorani] defended this territory.
>
> They all need to understand that something of this rainforest territory must remain for the Huaorani, where we can continue to live freely and in accordance with our culture, without oil companies, settlers, roads, military and security forces, loggers, *ministerios* (bureaucrats), or other outsiders damaging the forest or telling us how to live. Without territory, we cannot live. We want to live in peace, with territory and rights.

For the Huaorani who call Yasuni home—and "*Ome*"—environmental protection and human rights go hand in hand. Their destiny and the fate of the forest are one. Bameno's petition to the IACHR, and to the government of Ecuador, is clear: "We do not want to disappear, we want the State to let us live."[244]

For the rule of law to serve as an instrument of justice, the rules must be fair. When rules and rulemaking processes are inequitable, the rule of law can be an instrument of aggression and destruction, rather than democracy and development. Until Ecuador recognizes *and respects* the rights of the Yasuni Huaorani over their lands, territory, and resources, including the right of local community members to free, prior, and informed consent before development—or conservation—projects may go forward in their territory, the kinds of abusive practices that began with Texaco and are still going on today can be expected to continue, and the rights of the Huaorani will continue to be violated by state and non-governmental parties with impunity.

Ecuador needs to engage in a dialogue with the communities of contacted Huaorani in Yasuni in order to address the problems and threats

244. *Id.* at para. 6.

that imperil the Huaorani and the carbon-rich, biologically diverse forest that is their home; ensure that the right of the uncontacted Huaorani family groups to live in voluntary isolation is respected; and change the relationship between the Huaorani and the colonizing State, to establish a "just relationship"[245] that would allow the Huaorani to engage (or not) with strangers on their own terms in their own territory. As part of Ecuador's responsibility to the Huaorani, the government needs to work with the Huaorani and other *Afectados,* as well as with Chevron and Petroecuador, to develop and implement measures to clean up contaminated areas and redress injuries from those companies' operations that cannot be repaired.

Effective conservation and genuine, sustainable development—and justice and equal protection of the law—cannot be achieved by imposing a supreme and dominant *cowode* law in Yasuni, but rather will require a "habitat for human rights" and political agreements that Huaorani community members and *cowode* "construct together"[246] in freedom and respect.

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245. The quoted term is borrowed from RUSSELL, *supra* note 46, at 381. Russell wrote about the landmark *Mabo* land rights litigation in Australia:

> They [Aborigines and Torres Strait Islanders] are members of historical societies that have never given up their own laws and their continuing and sovereign responsibility for their lives and their lands. In the resort to the white man's courts that Eddie Mabo inspired, they hoped to improve their chances for establishing a just relationship with the much more powerful society that has colonized them. In that case, they did achieve a measure of justice. That is about all Indigenous peoples can expect from these courts. As I have written elsewhere, as a person whose ancestral ties are with the colonizing English-speaking people: "At their best, my people's courts can prod, provoke, and, yes, on their *very* best days, inspire my people and our political leaders to work for a just relationship with the peoples we have colonized. But justice will only come through the political agreements my people and Indigenous peoples in freedom construct together."

*Id.*

246. *Id.*