The Responsibility to Prevent Future Harm

Anti-Mining Struggles, the State, and Constitutional Lawsuits in Ecuador

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Abstract: Through the example of legal resistance to mining in Ecuador, this article explores the shift towards suing states rather than corporations. Key to ongoing resistance struggles is the allocation of preventive responsibility to 'the state' through the filing of constitutional lawsuits. I show how both the shift from the 'politics of space' to a 'politics of time' and a shift in the imaginary of the state contribute to claims of responsibility being increasingly directed at states. The article inquires into the effects of the temporal reversal from assessing past harm (and ruling retrospectively) to assessing the likelihood of future scenarios in order to prevent future harm. Finally, I address the limits of such allocation of responsibility, showing that while constitutional lawsuits are political attempts to challenge the government's economic programme and disrupt the logic of global capitalism, many powerful policy-shaping actors remain beyond the law's reach.

Keywords: constitutional lawsuits, Ecuador, mining, politics of time, preventive and protective responsibility, state

In their introduction to this Special Issue, Julia Eckert and Laura Knöpfel call for scholars to address the 'conundrums [that] ensue from shifts in claims of responsibility away from states towards corporations'. The other articles in this Special Issue show that this shift certainly occurs. But so does its reverse, as ongoing legal struggles against industrial mining in Ecuador indicate. There, 'anti-mining activists' – a term I discuss in more detail below – have started to increasingly sue the state rather than corporations (or the people who work for them). Since 2013, at least seven constitutional lawsuits, so-called *acciones de protección* (writs of protection), have been filed against Ecuadorian state

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institutions, particularly against the Ministry of Environment (which is responsible for granting the necessary environmental licences for carrying out mining activities) and the Agencia de Regulación y Control Minero (ARCOM)[1] (which is in charge of granting mining concessions and regulating mining activities).[2] The principal aim of these constitutional lawsuits is to prevent mines from starting to operate in the first place rather than seeking remedies for and reparation of past harms. This is done by attributing a preventive and protective responsibility to 'the state' – a responsibility the state is seen to hold towards not only its people but also nature itself.

Drawing on Stuart Kirsch's analysis in *Mining Capitalism* (2014), I show in this article how the shift towards directing claims of responsibility at the state is linked to a shift in anti-mining resistance strategies from a 'politics of space' to a 'politics of time'. Kirsch describes how, in the 1990s, environmental movements and resistance to mining focused on political and legal mobilisation across space. Efforts were made to establish transnational networks that linked actors with varying access to resources, power, and political leverage in order to exert pressure on multinational corporations and to sue them in their home state jurisdictions (2014: 188). In contrast, more recently, prevention has moved to the forefront of political strategies, and social movements have focused mainly on 'the period before mining begins' (2014: 190). Kirsch explains this shift via what he identifies as a 'crucial shortcoming' of the politics of space, namely 'the length of time required to diagnose a problem, enrol a network of supporters, and stage an effective intervention' (2014: 122, 189). Drawing on his engagement with 'the campaign against the OK Tedi mine, which was ultimately too late to save the river', he claims that 'new approaches based on the politics of time represent a more hopeful political turn' (2014: 191). From their own and others' experiences with extractive projects, social movements have learned that once the necessary infrastructure has been built and the companies have begun to operate, challenging and stopping these projects becomes nearly impossible and that 'political pressure may be most effective' so long as mining projects are still in the planning phase (2014: 190). This is reflected in the words of an activist from the Ecuadorian Íntag Valley. After telling me what she had experienced when visiting mines and the communities affected by them in Peru and Chile, she said to me:

> But we don't have to wait for damage to happen here. . . . Because if we can see that there is a possibility that an activity will cause [environmental] damage, then we have to do something. We do not have to wait and see

> whether the activity will contaminate. And with mining the case is clear; it will always lead to contamination.

She went on to propose a potential solution: 'Ever since the company arrived here [to do exploration work] and since the rights of nature were introduced [into the constitution] in 2008, I have said that we should prepare a lawsuit with the rights of nature.'[3] This is precisely what the writs of protection against mining are doing.

In this article, I explore the increasing allocation of responsibility to the state via constitutional lawsuits by analysing the various contributing factors. I inquire into what brings prevention to the forefront and what, for the activists, makes the state a self-evident, practical, and potentially promising addressee of their legal claims. In doing so, I show how in addition to the shift from a 'politics of space' to a 'politics of time', a shift in the imaginary of the state also means that claims of responsibility are increasingly directed at states. I analyse the temporal imaginaries that underlie and accompany these shifts, asking what effects the temporal reversal from remediating past harms to preventing future harms has on court proceedings and the role of judges. Finally, I explore the limits of this shift towards suing states by asking what harms can be legally addressed in this way and what harms remain 'beyond law's conceptual grasp' (Eckert and Knöpfel, this issue). I discuss these questions in dialogue with Suzana Sawyer's analysis of the Chevron-Texaco case in her article 'Fictions of Sovereignty: Of Prosthetic Petro-Capitalism, Neoliberal States, and Phantom-Like Citizens in Ecuador' (2001).

From a politics of space to a politics of time: The Chevron-Texaco case and current struggles against mining

The Chevron-Texaco case is a legal struggle that has been going on for twenty-seven years, moving through various jurisdictions in the United States, Ecuador, Brazil, Argentina, and Canada. It nicely exemplifies what Stuart Kirsch (2014) has called the 'politics of space' and also the above-mentioned problems associated with it. The legal struggle started in 1993 when a group of people from the affected area filed a class-action lawsuit in a New York district court against the United States-based oil company Texaco, which later merged with Chevron Corporation in 2001. The plaintiffs accused the company of having polluted the rivers and groundwater, causing severe damage to the rainforest and people's health through the 'use of substandard technology' including

the dumping of toxic waste into open pits during its operations in the Ecuadorian Amazon between 1964 and 1992 (Sawyer 2016: 226; see also Ofrias 2017: 438–439; Sawyer 2006). The case was eventually dismissed by the US Federal Court on the grounds of *forum non conveniens*, leading to a new class-action lawsuit being brought against the company in 2003 in Ecuador. In 2013, Chevron was ordered by the Ecuadorian Supreme Court to pay 9.5 billion US dollars as compensation and remedy for the environmental damage caused by Texaco (and its fourth-tier subsidiary TexPet) to the plaintiffs. However, to this day, the company has still not paid. Instead, in an attempt to 'prevent the enforcement of the Ecuadorian judgement in foreign jurisdictions' (León Moreta and Liu 2018: 283), Chevron successfully presented a case against the Republic of Ecuador at the Permanent Court of Arbitration in The Hague under UNCITRAL (UN Commission on International Trade Law) Arbitration Rules (2018: 283; see also Sawyer 2015). On the grounds of the US-Ecuador Bilateral Investment Agreement, Ecuador is now obliged to pay compensation to the company for the reputational damage the latter claims to have suffered as a consequence of the Ecuadorian court orders (Eckert forthcoming). Furthermore, Ecuador was ordered to quash the court order issued by its Supreme Court against Chevron and to prevent the plaintiffs from filing lawsuits against Chevron's subsidiaries in other countries in an attempt to enforce the Ecuadorian court order and gain access to Chevron's assets.

The above-mentioned article by Suzana Sawyer about this case was published at a time when the decision by the US Federal Court was still pending and thus brings to light the plaintiffs' hopes and struggles at that particular time. Sawyer construes her arguments with the help of two metaphors: prosthesis and the phantom citizen. She uses the term 'phantom citizen' to describe the 'condition experienced by subaltern groups when their rights of citizenship and national belonging have been disavowed' (2001: 158–159). Prosthesis describes, in the first instance, the relationship between parent companies and their subsidiaries. A subsidiary, 'like a prosthesis', she writes, satisfies 'the desires of the parent company until it . . . [is] no longer needed' (2001: 159). It is 'tractable, detachable, and ultimately discardable at the behest of central command' (2001: 158). This often makes it difficult for claimants to successfully hold parent companies legally responsible for harms caused by their operations abroad. At the same time, she uses the terms 'legal prosthesis' and 'moral prosthesis' to describe how, in the Texaco case, the plaintiffs 'strapped on' US law, environmentalism, and human rights to transform their 'disavowed bodies into disruptive political

subjects' and to gain a political voice – both nationally and internationally (2001: 168). Furthermore, she shows how by submitting to a court in New York and attributing responsibility to the parent company for its decision to use substandard technology, the plaintiffs attempted to disrupt 'the logic of global capitalism that drove oil operations in Ecuador' (2001: 158).

Although the legal struggle Sawyer describes differs from the one discussed in this article – the Chevron-Texaco case was about claiming remedy for past harm, while the writs of protection are about preventing future harm – many parallels nonetheless exist. The anti-mining activists I have been working with while undertaking fieldwork also seek to gain a political voice through their legal actions, albeit different from the way described by Sawyer. They too challenge capitalism, but more its specific ideas of economic development than its global entanglements. Finally, certain sets of rights – like *buen vivir* or the rights of nature – are also 'strapped on' in order to make specific political demands. I do not, however, wish to reduce all forms of legal mobilisation to 'mere prostheses'. At least for some of the actors I worked with – especially those who were already involved in advocating for the rights of nature and *buen vivir* in the constituent assembly – I found that the mobilisation of those rights in the writs of protection against mining projects was not just a 'means to an end', that mining be declared unconstitutional, but to some extent also an 'end in itself' in that the activists sought to give those rights a specific meaning through the setting of legal precedents (see Lemaitre 2008: 331). Yet the concept of 'prosthesis' is nonetheless helpful in that it allows us to address how, through the mobilisation of specific discourses, legal instruments, and rights, certain claims can be given additional power. Moreover, it points to the limits of such mobilisations. A hearing aid will not help us do much more than hear better. And so, too, specific sets of rights and legal instruments have their limits.

(Studying) resistance to mining in Ecuador

Unlike oil exploitation, which has been carried out since the 1960s, industrial mining is a fairly new phenomenon in Ecuador. Although there were earlier attempts by governments in the 1990s and early 2000s to develop industrial mining as part of the neoliberal reforms propelled by the World Bank, it is only in the last ten years that the goal of turning Ecuador into a *país megaminero* (mega-mining country)

has been aggressively pursued (see Sacher 2017). Mining was declared a strategic economic sector by the Correa administration in 2009 and is being promoted by the government as the solution to the country's financial problems and the problems associated with oil extraction, namely falling prices and a dependency on oil revenues (see Báez and Sacher 2014: 234; Riofrancos 2017: 281; van Teijlingen et al. 2017: 336). Consequently, in numerous mining concessions across the country, exploration work is currently being carried out, and, in 2019 and 2020, the first two mines – the Cóndor Mirador and the Fruta del Norte mines in Zamora Chinchipe – began to operate.

In my fieldwork, carried out between July 2018 and June 2019, I worked mainly with actors involved in resistance to mining in the Íntag Valley in the northern province of Imbabura. Vast areas in this valley have been granted as mining concessions to the Ecuadorian state mining company Empresa Nacional Minera (ENAMI EP), the Chilean company Corporación Nacional del Cobre de Chile (CODELCO), the Canadian company Cornerstone Capital Resources, and the Anglo-American multinational BHP. The most advanced mining project is the Llurimagua copper mine, which is already well into its advanced exploration phase. Its concessions intersect with the rural mestizo villages (*comunindades*) of Junín and Chalguayacu Alto, where I have been conducting fieldwork amongst local residents active in the resistance movement. Since my research focus lies mainly on legal resistance to mining, I have primarily engaged with the actors involved in coordinating and paying for various legal actions, planning and writing them, going to court and in the social mobilisation surrounding the court proceedings. My main interaction partners are thus private lawyers hired by the Íntag-based environmental organisation DECOIN (Defensa y Conservación Ecológica de Íntag), members of DECOIN and three other key organisations in the resistance to mining – OMASNE (Observatorio Minero Ambiental y Social del Norte del Ecuador), CEDHU (Comisión Ecuménica de Derechos Humanos), and CEDENMA (Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y el Medio Ambiente) – and representatives of the Defensoría del Pueblo (Ombudsman office) both in Quito and the regional division in Ibarra. CEDHU, a human rights organisation, and CEDENMA, an umbrella environmental organisation, are both based in Quito. Their representatives, or at least those I have been working with, are fairly young and university educated. The same is also true for the grassroots organisation OMASNE, which is based in the province of Imbabura. OMASNE activists engage in gathering information about mining in

the region, making it accessible, and distributing it amongst local populations. This is also an important part of the work DECOIN does on a more local level in the Íntag Valley. This environmental defence organisation, whose members are all local residents, has been active in the resistance against mining since its founding in 1995. Whenever I would visit their little office in Apuela on a Sunday – the only day it is open, since DECOIN's members all have other jobs or their own farms to tend to – DECOIN's members would be handing out pamphlets and other information material to visitors, often locals seeking advice or support, but occasionally also volunteers, journalists, and tourists from other countries. Most of these organisations consist of a handful of highly engaged individuals who know each other well and have close contacts with other national and international organisations and anti-mining activists. In the following, when quoting my interaction partners, I will not state which organisations they belong to for reasons of anonymity. I only distinguish between 'lawyers', regardless of whether they are part of one of the NGOs or not, and 'activists', which I use to refer to all the other non-lawyer actors I have been working with.

The writ of protection that I draw on as the main example in this article is the Los Cedros case. It concerns the mining concessions Río Magdalena I and Río Magdalena II, which intersect with the protected forest and wildlife reserve Los Cedros in the Íntag region. The lawsuit was filed with the cantonal court in Cotacachi in 2018 by the municipal government itself upon the initiative of local activists, and most of my interaction partners became involved in it as *amici curiae*.[4] While the cantonal court in Cotacachi ruled against the plaintiffs in 2018, the case was successfully appealed before the provincial court of Imbabura. In May 2020, the Ecuadorian Constitutional Court selected the Los Cedros case for review because of the potentially grave threats posed to biodiversity and in order to develop further constitutional jurisprudence on the rights of nature.[5] The hearing took place on 19 October 2020 via Zoom and was streamed on Facebook, allowing me to follow it from a distance. As of this writing, the court's decision is still pending. Apart from this last online hearing, the material I draw on in my analysis consists of observations of the court hearings at the provincial court in Ibarra in 2019, observations of preparatory meetings between several of my interaction partners figuring as *amici curiae*, and the written case file that I was allowed to photocopy.

Shaping politics in court

In pursuit of political change – with the aim of challenging the government's economic policy and its extractive model – the activists I have been working with make use of various political strategies. Examples include organising marches and public workshops, sharing information through social and mainstream media, political lobbying, launching public referenda (so-called *consultas populares*), and filing constitutional lawsuits. Legal actions thus constitute only 'one of several weapons' in the resistance arsenal available to such movements (Brinks et al. 2015: 296; see also Kirsch 2014). Yet they appear to be gaining in importance. This accords with a trend in Latin America that Rachel Sieder, Line Schjolden, and Alan Angell (2005) refer to as the 'judicialization of politics'. These authors show how, as a result of the constitutional reforms that have taken place in nearly all Latin American countries since the mid-1980s, 'courts and judges . . . [have] come to make or increasingly dominate the making of public policies that had previously been made by other government agencies, especially legislatives and executives' (2005: 3). This in turn makes resorting to the courts to advance one's political interests a more promising avenue for social movements. Furthermore, other scholars have also described an increased tendency in other parts of the world as well to resort to the courts and the language of law as a means of shaping public policy and achieving political change (see Brinks et al. 2015; Eckert et al. 2012; Kirsch 2012). In Ecuador, the writ of protection has become an important legal means for doing this.[6] In the opinion of activists I spoke to, writs of protection are now often a more promising way of gaining a political voice and challenging government policy than, for instance, lobbying members of parliament. Yet, taken alone, writs of protection would also not have the political effect that activist are seeking, I was often told. To exert the desired political pressure, public attention also had to be drawn to cases via social and conventional media and through social mobilisation across national and international networks.

In writs of protection that oppose mining projects, the overarching aim is always the same: to get the courts to declare industrial mining per se as unconstitutional and, by setting such a legal precedent, to force the government to change its economic policy. In more practical terms, and as a kind of secondary objective, claimants aim to get the courts to revoke mining concessions that have already been granted by ARCOM and the environmental licences issued by the Ministry of Environment by challenging the constitutionality of those specific actions.

In doing so, they attempt to prevent ongoing exploration endeavours from developing into functioning mines.

Recent cases dealt with by the Constitutional Court have made very clear just how high the political stakes are: the Los Cedros case and a case in which it was debated whether it was legal for local governments to hold public referenda (*consultas populares*) asking local people whether they agreed to mining on their territory or not. In both cases, not only did numerous environmental and human rights organisations become involved as *amici curiae*, but so did many multinational mining companies that are currently operating in Ecuador. Furthermore, in connection with the latter case, Ecuador's president, Lenín Moreno – in indirect reference to the Chevron-Texaco case and several other cases that Ecuador has recently lost against multinational corporations before international arbitration courts – made a 'polite request', as he called it, to the constitutional judges: 'if authorising any mechanism that would ultimately lead to a breach of contract and would oblige . . . [Ecuador] to pay an award [,] . . . to also invite the people to decide where the money to pay those awards should come from' (García 2019, my translation). While Ecuador withdrew from the International Centre for Settlement of Investment Disputes (ICSID) Convention in 2009, the new government under Lenín Moreno in 2018 introduced the *Ley de Fomento Productivo* (Law for the promotion of economic development) in an attempt to attract more foreign investment. The law 'provides that disputes arising out of investment agreements are to be resolved through arbitration [under UNCITRAL or any other relevant institutional rules], and arbitral awards arising therefrom are immediately enforceable in Ecuador, without the need for any further recognition by the courts' (Sanderson and Partido 2018).

In contrast to the Chevron-Texaco case, where the plaintiffs at first purposefully appeared before courts abroad in order to be heard and because they did not believe they would have the chance of a fair trial in Ecuador (see Sawyer 2001), the anti-mining activists' legal actions today largely concentrate on the national arena in an attempt to change government politics. Several factors contribute to this. On the one hand, constitutional reforms have led to a change in legal culture and have created new possibilities for taking legal action (see Huneeus et al. 2010; Sieder et al. 2005). On the other hand, the allocation of responsibility to the state through constitutional lawsuits is linked to how prevention is conceptualised and has to do with it formally being states alone that have the capacity to determine their economic policy and to decide whether and which multinational corporations may operate in their ter-

ritories. This is the case even if, in practice, these states (particularly in the Global South) are under a lot of pressure from international financial institutions – and the countries that provide the bulk of the funding to these institutions – to allow foreign investment and to adopt national legislation and economic policies accordingly (see Eckert forthcoming; Gomez and Sawyer 2012; Kaleck and Saage-Maaß 2008: 9, 12). Hence, in formal terms, preventive action in the sense of disallowing mining activities can only be presented against host states, either by submitting to national courts through the filing of constitutional lawsuits or to international human rights courts such as the Inter-American Court of Human Rights, once national legal systems have been exhausted (see Kaleck and Saage-Maaß 2008: 28). '[O]n a transnational level, it is not possible to take preventive juridical action', as Miriam Saage-Maaß argues, since if the companies' home state courts, for example, 'by court order were to prohibit corporations from operating abroad, that would violate the host state's sovereignty' (2014, my translation). This does not mean that prevention cannot be conceived of – and legally prescribed – differently. It could also be – and in many ways is – attributed to actors other than the host states of multinational corporations: the corporations themselves, their subsidiaries, their home states, and also consumers. The due diligence principle, as invoked by the UN Guiding Principles on Business and Human Rights, the French *loi de vigilance*, and the Responsible Business Initiative in Switzerland does precisely that. It attributes a preventive responsibility to multinational corporations and thus indirectly, also to their subsidiaries, who are required to report to their parent companies as well as – potentially – to 'their' home states, who must in turn impose this regulation on the companies or, alternatively incorporate the principle of due diligence into national legislation. Furthermore, multinational corporations operating in Ecuador are obliged to follow constitutional law, which means that the duty to protect the environment also applies to them. If they breach the rights of nature, they can be held responsible retrospectively. Yet, this is not the kind of prevention that mining opponents are seeking, since it does not in itself prevent mining operations from taking place. Since mining activities inevitably cause environmental damage, this is regarded as the only effective form of prevention and protection from future harm.

Imagining the future: Negotiating the state's duty to protect

When driving through the Íntag Valley, it is not unusual to come across handwritten or printed signs stating things such as 'BHP get out of Íntag', 'No entry for miners', or 'Íntag free of mining'. Such political claims are translated into legal arguments in different ways in the writs of protection. One common strategy has been to argue with the right to free, prior, and informed consent in the case of indigenous and Afro communities, which are entitled to collective rights, or with prior consultation in the form of the so-called *consulta ambiental* as determined by Article 398 of the Ecuadorian constitution in the case of mestizo communities. Another important argument that is regarded as a useful means for the long-term prevention of mining is the precautionary principle, which, according to Stuart Kirsch, is exemplary of the politics of time since it only allows actions to take place if it has been positively demonstrated that they are safe (2014: 260). The hope for effective change linked to this legal argumentation is illustrated by this statement made by a lawyer: 'When you argue with the violation of the right to prior consultation, that is something the Ministry of Environment can then carry out and then the mining project will continue. But if you can get the courts to apply the precautionary principle, that is something that will never go away'.[7]

In the Los Cedros case, the claimants argued with this precautionary principle by drawing on a body of international law that included the Rio Declaration on Environment and Development, the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, and the Stockholm Declaration, as well as on Articles 73 and 396 of the Ecuadorian constitution. Article 73, which is part of the constitution's chapter on the rights of nature, states that '[t]he state shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles' (Art. 73 EC).[8] Article 396, which is part of the chapter on 'Biodiversity and Natural Resources' in the section of the constitution on 'The Good Way of Living System' (*Régimen del Buen Vivir*),[9] specifies that '[t]he state shall adopt timely policies and measures to avoid adverse environmental impacts where there is certainty about the damage. In the case of doubt about the environmental impact stemming from a deed or omission, although there is no scientific evidence of the damage, the State shall adopt effective and timely measures of protection' (Art. 396 EC).[10] Both these constitutional

articles thus clearly attribute a preventive and protective responsibility to the state.

Natural scientists partaking in the court proceedings as *amici curiae* have come to play a crucial role in corroborating this legal argumentation. In the hearing of the *amici curiae* by the Constitutional Court, for example, which lasted for nearly seven hours, numerous biologists and other natural scientists from universities and research institutions in Ecuador, Latin America, the United States, and Europe gave presentations on species they had been researching in the Los Cedros reserve, such as monkeys, mushrooms, bats, or orchids – many of them endemic to the region and in danger of extinction – and on what would be likely to happen to them if mining were allowed to proceed. In doing so, they repeatedly stressed both the inevitability and the irreversibility of damage caused by mining. The defendants countered these arguments, albeit with less scientific support by arguing that the state, through the Ministry of the Environment, was complying with its preventive duty by carrying out the mandatory Environmental Impact Assessments. Furthermore, they claimed that with modern technology it was possible to avoid causing environmental damage or at least to fully restore the ecosystem after conclusion of mining activities. This is a common strategy used by mining corporations to try and neutralise criticism (Kirsch 2014: 3). Finally, the defendants argued that at this stage of the mining project, it was not pertinent to think so far into the future, since it was highly uncertain whether the project would ever reach the stage of resource exploitation. The task thus falling to the judges, as the constitutional judge acting as rapporteur himself said during the hearing, is to 'undertake a rigorous examination of the scientific soundness of what is presented to them' and to assess the various future scenarios.[11] For the activists preparing the case, it meant building their claims on scientific evidence in order to convince the judge, making it necessary for them to invoke the precautionary principle and order the government to revoke the mining concessions.

That scientific experts come to play an important role in court proceedings is, of course, not unusual and happens in other types of court proceedings, too (see, for instance, Caudill and LaRue 2006; Holden 2011; Phillips 2017; Roberts 2014). In the Chevron-Texaco case, for example, Suzana Sawyer (2015) writes that 'the bulk of the seven-year trial consisted of five years of on-site judicial inspections of former Texaco oil-production sites during which the judge, opposing legal teams, associated scientific crews, local residents, and the press trekked through scrub forest to examine alleged contamination and its

purported effects on human health'. The temporal imaginaries expected from judges and scientific experts, however, are reversed: in the writs of protection against mining that argue on the basis of the rights of nature and the precautionary principle, the judges are not required to look into the past to assess damage that has already occurred and what might have caused it in order to rule retrospectively, but must rather assess the possibility and probability of future harm.

Imaginaries of the state: Negotiating the duty of care

Writing about the Andes, Christopher Krupa and David Nugent claim that 'it is certainly striking that so many people attribute to the states of the Andes the ability to right historical wrongs, realize long-cherished hopes and dreams, protect against dangerous and destructive foes, and anticipate the unforeseen problems of an uncertain future' (2015: 2). This hope that the state, governments, and presidents can bring about political change and provide for the well-being of the people, despite the fact that the latter have been 'let down by . . . [the former] time after time after time' (2015: 3) is an observation I share with the authors. The underlying idea (or ideal) of the state seems to be that of a strong, coherent, integrated, and autonomous entity (see Migdal 2001: 16; Nuijten 2003: 15). Hence, despite a common perception being that governments seldom fulfil their promises and not much can be expected from them, they nevertheless remain a focus for people's hopes of change and magnets for political action. I therefore interpret the writs of protection as attempts to try to shape governments to fit specific ideas of what the state is or should be. One reason for this seems to be that the image of the coherent state that provides for and ensures its inhabitants' – and nature's – well-being is inherent in the 2008 constitution and was explicitly propagated during Rafael Correa's presidency from 2007 to 2017. According to Flora Lu, Gabriela Valdivia, and Néstor L. Sivla, Correa's political programme, the *revolución cuidadana*, pivoted

> around three principal ideas for state-sponsored well-being: (1) the centrality of *buen vivir* as the driver of modernization which includes ideas of national sovereignty, US anti-imperialism, and the improvement of public services; (2) the promotion of economic and social policies that foster social equity (e.g., making social services and infrastructure more accessible and redistributing wealth) without altering the model of capitalist accumulation; and (3) investment in development in order to promote citizens' belief in the coherence of the state, in its capability to act in their best interest, and in its willingness to do so. (2017: 13)

Ever since it was introduced into the Ecuadorian constitution in 2008, into whose fabric it is now thoroughly woven, appearing in the preamble as well as in ninety-nine of its articles (see Altmann 2014: 89), two opposing interpretations of *buen vivir* have dominated public discourse. Jorge Guardiola and Fernando García-Quero (2014) call these the 'conservationist view' and the 'extractivist view'. The conservationist idea, according to the authors, can be found mostly amongst environmental, human rights and indigenous organisations, anti-extractivism activists and academics and 'promotes the respect of nature and the search of alternative strategies to maintain *Buen Vivir*' (2014: 101). In this view, *buen vivir* is conceptualised as 'value-based spiritual, ecological, collective-social, and normative individual principles that should ensure a sustainable, biocentric, and harmonious way of life beyond material accumulation, extraction of natural resources, and exploitation of humans or nature' (Waldmüller 2018: 121). It is understood not merely as an alternative form of development but rather as an alternative to (capitalist) development (see Altmann 2014: 89; Báez and Sacher 2014: 244; Sieder and Barrera Vivero 2017: 14). The extractivist view, in turn, regards extractive projects as a necessity for achieving *buen vivir* through the generation of economic growth and the elimination of poverty (Guardiola and García-Quero 2014: 102). These opposing views on *buen vivir* were also at the core of the legal dispute in the Los Cedros case. While the defendants put the state's responsibility to provide for its citizens in a material sense above all other responsibilities, the claimants conceptualised the state's moral responsibilities and duty of care in a more extensive way. The state is seen to have moral responsibilities not only towards its citizens – those living now as well as future generations – but also towards the environment and 'the planet' as a whole. In contrast to the view of the proponents of mining, these responsibilities, in the activists' understanding, cannot be hierarchised: the state must assume them all to fulfil its role.

For mining proponents, the state has a primary moral obligation to generate income and provide for its citizens in a material sense. This duty stands above the state's other duties and is often portrayed as a precondition for the state's ability to fulfil those duties: to provide for people in a non-material way, for example, and to protect the environment. This is illustrated by the following statement made by former president Rafael Correa on television: 'We know there are fundamental, aesthetic and moral principles for respecting nature [*naturaleza*] . . . who could favour open-pit mining by itself? But, if that mining happens to represent a value of hundreds of thousands of dollars, it would be

immoral not to exploit it, losing a great opportunity for the country' (Correa cited in Valladares and Boelens 2019: 71). Extractive projects are considered necessary for achieving *buen vivir* through the generation of economic growth and the elimination of poverty and unemployment. Furthermore, as Carolina Valladares and Rutgerd Boelens have shown, the government has used the rights of nature to defend its new mining policy 'which supposedly . . . [brings] in revenues needed for nature conservation' (2017: 1029). The duty to generate income thus comes first. The defendants in the Los Cedros proceedings pursued this line, stressing the state's duty to provide jobs and generate income, invoking the local population's right to work and to lead a dignified life. Local inhabitants speaking out on behalf of the mining project argued that their communities had so far been abandoned by the state authorities and that was why they needed the mining companies; not only because of the job opportunities they provided, but also for the infrastructure they built and the productive and educational programmes they set up as part of their CSR activities. Yet, as research has shown, 'mining companies rarely fulfill such expectations and often fail to keep the promises they . . . make' (Kirsch 2014: 7).

The claimants challenged this argument from economic prosperity, citing among other things the country's experience with oil exploitation. During the Constitutional Court hearing, one scientist giving a short presentation observed the following: 'I ask myself: Since the [19]70s, with the oil companies we have been promised development. Have we left the "third world"? Not that I am aware of.' His argument continued:

> Our planet is but a few centimetres away from reaching a point of no return in a climate and environmental crisis that will put our whole existence at risk. It is that simple. . . . If strong measures aren't taken by states to try and reverse environmental degradation, our children will bear witness to a true apocalypse. Ecosystem services in Ecuador yield 15,000 dollars per hectare a year, that is 39 billion dollars a year. We accept this as free. But the day we lose these ecosystem services, how are we going to pay for them? How many millions of dollars does it cost countries that have lost natural pollination and now have to do it manually, like the US or Turkey, for example? . . . We were born in a megadiverse country, both culturally and naturally, and it is our moral duty – and by us, I mean we, the state – to protect it from everything that could cause harm, including mining.[12]

His statement is exemplary of the main arguments presented by the activists. On the one hand, in line with a classic environmentalist argument, the claimants stressed the state's responsibility towards future generations. On the other hand, they invoked the state's moral

duty towards 'the planet' or a kind of global community and ecological order. This was echoed by the statement one *amicus* made at the provincial court hearing: 'The whole planet is suffering from climate change caused by extractive industries. Ecuador could develop a lot of productive alternatives [to mining], and those forests are an important source for scientific investigation, ecotourism and sustainable agriculture. Yet the state does not help to realise these activities, but rather supports mining'.[13] Furthermore, like the scientist cited above, several *amici* speaking on behalf of the plaintiffs pointed to the Los Cedros forest's 'ecological value' stemming from its capacity for natural pollination, for example, and also to absorb carbon dioxide.

Through the 'strapping on' of different constitutional rights and discourses, both the proponents and opponents of mining thus attempted to turn what they perceived to be the state's moral duties into legal ones.

Limits of state responsibility

In this article, I have explored the combination of several factors making the state an obvious and potentially promising addressee of legal claims: its moral duty of care, which extends beyond humans and current generations, its accessibility through the introduction of new constitutional rights and mechanisms, and the shift towards a politics of time and prevention. In accordance with the tendency observed by many socio-legal scholars, the writs of protection against mining are political struggles carried out through the mobilisation of law. Activists are recurring to the law in an attempt to change public policy. This kind of legal mobilisation that takes the form of filing constitutional lawsuits is one of several political strategies. However, particularly in contexts where opportunities for political participation are otherwise limited, such strategies have come to play an important role in resistance movements. Through the 'strapping on' of certain rights and discourses, activists attempt to influence processes of policy-making. Yet, these 'prostheses' – in the form of existing rights and legal mechanisms – have their limits. Policies are shaped through the interactions of a range of actors on a global level, and certain actors, particularly international financial institutions and the countries that provide the bulk of funding for these institutions, exert more power and influence than others in shaping these policies. However, the law has limited use as a tool to contest such complex entanglements across transnational

space, as it is restrained by the political form of the nation state. States, at least in formal terms, remain sovereign entities that determine their own policies. Hence, they become (or remain) the obvious addressee of legal claims. By addressing and suing states, global entanglements are necessarily fragmented, and extractivism is rendered a national problem. The logic of global capitalism is thus, at best, partially disrupted.

Drawing on Thomas Blom Hansen and Finn Stepputat (2001), Monique Nuijten writes that '[i]t could be argued that while the state apparatus is being dismantled the notion of the state is becoming central in fantasies of rule, governance and order' (2003: 1). The writs of protection filed against extractive projects seem to be an expression of this. They (implicitly) call for more state sovereignty, in the sense that policies should be determined by the state's own agencies and, particularly, by the people living there. Yet, at the same time, the idea of state sovereignty is challenged by activists, who argue against individual states' capacity to do what they want within and in their territories where this potentially has a global impact on the environment and ecosystems and demand that the state submit to international human rights and environmental law. Here there is a global responsibility at stake, which falls to all individual actors, including states. In terms of the legal attribution of preventive responsibility, however, the problem persists that many powerful policy-shaping actors remain 'beyond law's conceptual grasp' (Eckert and Knöpfel, this issue). In a recent self-critical essay, César Rodríguez-Garavito (2019) claims that the human rights movement has for a long time mainly been concerned with 'going beyond the barriers of space' and that it must 'recover' time in order to 'have a future'. Yet, legal struggles against industrial mining in Ecuador suggest that it is also time to think about how to make a politics of time work across space. This could involve thinking about mechanisms for the legal attribution of preventive responsibility that would work transnationally.

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Notes

1. ARCOM has recently become ARCERNNR (Agencia de Regulación y Control de Energía y Recursos Naturales no Renovables).

2. Writs of protection were filed against the Cóndor Mirador mine in 2013, the Río Blanco, Río Magdalena, and Cóndor Mirador mining projects in 2018, mining on the territory of the A'i Cofán de Sinangoe also in 2018, mining in the canton of Pangua in 2019, and against the Llurimagua mining project in 2020.

3. Activist, interview transcript, November 2018, my translation.

4. An *amicus curiae* is a 'person or organisation who/which is not a party to the proceedings . . . [but] set[s] out legal arguments and recommendations in a given case' mostly in the form of a written brief (ECCHR, 'Amicus curiae brief', https://www.ecchr.eu/en/glossary/amicus-curiae-brief/ [accessed 3 November 2020]).

5. See Corte Constitucional del Ecuador, 'Caso no. 1149-19-JP', https://therevelator.org/wp-content/uploads/2020/08/Auto-caso-1149-19-JP.pdf (accessed 31 October 2020).

6. For a detailed discussion of the *acción de protección*, also in comparison with similar forms of constitutional lawsuits in other Latin American countries such as the *recurso de amparo* or the *recurso de tutela* and with its predecessor in Ecuadorian constitutional law, the *acción de amparo*, see Ramiro Ávila Santamaría (2011), José Luis Castro-Montero et al. (2016), Claudia Storini and Marco Navas Alvear (2013), and Alex Valle (2012).

7. Lawyer, interview transcript, December 2018, my translation.

8. Political Database of the Americas (2011), 'Republic of Ecuador: Constitution of 2008', https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

9. Translation provided by Georgetown University's Political Database of the Americas. Political Database of the Americas (2011), 'Republic of Ecuador: Constitution of 2008', https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

10. See endnote 8.

11. Judge, Constitutional Court hearing, October 2020, my translation. See Corte Constitucional del Ecuador (2020), 'Audiencia Pública Caso Nro. 1149-19-JP', 19 October, https://www.facebook.com/CorteConstitucionalDelEcuador/videos/374961090354065, approximate time 1:45:15.

12. *Amicus curiae*, Constitutional Court hearing, October 2020, my translation. See Corte Constitucional del Ecuador (2020), 'Audiencia Pública Caso Nro. 1149-19-JP', 19 October, https://www.facebook.com/watch/live/?v=645221926364006&ref=watch_permalink, approximate time 1:14:00 (accessed 4 November 2020).

13. Transcript of the second provincial court hearing, February 2019, case file, my translation.

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