Chapter 6. Human rights litigation abroad

Introduction[1]

In March 2019, the United States Court of Appeals for the Third Circuit in Philadelphia remanded a lawsuit to the District Court of Delaware and instructed the lower court to reevaluate whether Peru, in light of various corruption scandals, is an "adequate alternative forum" for dealing with corporate abuses.[2] The previous year, the District Court dismissed a civil complaint of Peruvian plaintiffs on the grounds that access to the justice system is provided in their home country.[3] Why would judges in Delaware care about the ability of their colleagues in Peru? And what prompts a U.S. appellate court to order an evaluation of foreign judicial institutions? In the context of the debates on TNCs' responsibility, several judges in the Global North evaluated the capability of courts abroad in recent years. They were asked to hear lawsuits on parent companies' responsibility for human rights violations and environmental damage committed in the context of the subsidiaries' activities abroad.

There are various reasons for bringing such cases before a court in the Global North. Difficulties in suing corporate actors in Peru is, in global comparison, the rule rather than an exception. Thus, the obstacles in accessing the domestic justice system are one reason for human rights litigation abroad. Another reason arises from the conviction of civil society organizations that global business activities should lead to global chains of responsibility, thus the idea that parent companies bear legal responsibility for their subsidiaries' conduct. Behind this is the moral claim that companies should not be able to evade responsibility for activities from which they profit economically. Courtrooms in the Global North are considered an appropriate

1 Parts of the material on which this chapter is based were previously published in an article entitled "Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?", *Journal of Legal Anthropology* 4, 2 (2020).

2 U.S. Court of Appeals for the Third Circuit 2019.

3 U.S. District Court for the District of Delaware 2018a, 2018b.

forum to transform this moral claim into a legal claim of responsibility. Finally, a further reason is the aim of supporting legal mobilization at home by bringing a claim abroad, for instance by obtaining evidence in foreign courts or by exerting pressure on domestic authorities through a judgment in another country. This chapter examines how Peruvian human rights lawyers perceive and evaluate this particular form of legal mobilization and how transnational complaints contribute to their struggles in Peru. The chapter provides insights into the question of (transnational) corporate responsibility, which adds an important dimension to the judicalization of local mining conflicts.

Several of the human rights violations that emerged from the mining conflicts in Cajamarca and Piura became transnational court cases. The claim in the District Court of Delaware mentioned previously was filed by Máxima Acuña and her family, who live in the area of Minera Yanacocha's planned Conga mine. Another example is a lawsuit against the parent company Monterrico Metals in the United Kingdom, which resulted from the torture case in the context of the Río Blanco project in Piura. Third, EarthRights International took legal action abroad in favor of Elmer Campos, the *campesino* from Cajamarca who was shot during the Conga protests. Based on these three transnational court cases, this chapter discusses possible reasons and motivations for transnational human rights litigation. In particular, it provides an analysis of what expectations members of the Peruvian human rights movement placed on the law in such cases.

In all three lawsuits discussed in this chapter, Peruvian human rights lawyers decisively contributed to bringing the cases abroad. However, they were not the only actors involved. As I will show in this chapter, the various actors involved in such human rights litigation have different objectives and legal expectations of what should and could be achieved. Transnational human rights litigation, like other forms of legal mobilization, takes place in specific social contexts and is characterized by power asymmetries and shaped by the actors' different interests and political objectives. In many cases, we can observe discrepancies in the actors' perception of legal processes. I am interested in the implications of these discrepancies. In this sense, transnational lawsuits not only exemplify the legal mechanisms encountered and the judicial obstacles faced when trying to get justice abroad. My aim is to understand the "risks and benefits of [transnational] legal activism" (Kirsch 2018, 17) but also to explore its effects on the legal proceedings and the actors in Peru.

Like the rest of this book, this chapter is primarily based on my field research with the Peruvian human rights movement. In addition, information was gathered during a shorter stay in London, where I conducted interviews with British lawyers and NGO representatives. Unfortunately, a lawyer from the law firm Leigh Day later retracted his statements and prohibited me from using the interview. With regard to the lawsuits in the United States discussed in the chapter, an interview was conducted via Skype with a lawyer from EarthRights International based in Washington.

In Peru, I had several conversations with representatives of this same office. Finally, this chapter also makes use of a wide range of court documents. In the U.S. courts, the prevailing transparency strategy and the payment of a small fee allowed me detailed access to digital court files. In the case of the High Court in London, access was more restrictive and limited to the courts' judgments.

Suing transnational parent companies at home

Suing parent companies in the countries where they are headquartered, thus in their *home states*, for abuses committed by subsidiaries in *host states* involves what Liesbeth Enneking (2014) defines as "foreign direct liability cases" (see also: Zerk 2006, 198). Criminal law has been applied in some of these cases, but more often they are based on civil or tort law (Zerk 2014, 43). Plaintiffs have sued parent companies either directly for human rights violations committed by subsidiaries or for negligence in preventing such abuses (Schrempf-Stirling and Wettstein 2017, 545–6).

Complaints filed under the Alien Tort Claims Act (ATCA) in the United States played a pioneering role in transnational human rights litigation. This statute grants U.S. district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[4] Originally, ATCA was legislated as part of the First Judiciary Act in 1789 and then, for nearly 200 years, fell into oblivion (Skinner *et al.* 2013, 19). In the eighties, the Center for Constitutional Rights in New York "(re-)discovered" the act and applied it before a U.S. court against a Paraguayan police officer for acts of torture and kidnapping during the Stroessner regime (Kaleck 2008, 285, Brett 2018, 54).[5] Since the mid-nineties, U.S. NGOs used ATCA to claim compensation for corporate abuses committed in third countries (Shamir 2004, 638). Thus, the legal activism in the ATCA claims can be historically related to cases of human rights violations committed under authoritarian regimes. Like in Peru, the U.S. human rights movement has thus over time extended its experiences to new areas, from litigation against state actors to lawsuits against corporations.

Legal NGOs based the ATCA claims on the principle of universal jurisdiction and argued that, following this principle, U.S. courts also have jurisdiction over corporations, even if they are headquartered abroad. For several years, the strategy seemed promising: Until 2014, around 150 claims were filed against TNCs on the basis of ATCA, and a considerable number resulted in settlements and thus in financial compensation (Enneking 2014, 44). As the statute was thought to be "truly extraterritorial in its reach" (Shamir 2004, 639), it seemed to be an ideal instrument for redressing

4 28 U.S. Code §1350. Alien's action for tort.

5 Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984).

abuses committed abroad. However, the question about whether the United States was an appropriate site to hear such cases or rather a so-called *forum non conveniens* remained the central issue over the years (Deva 2012, 69). Based on the *forum non conveniens* doctrine, corporate defendants have argued that such actions should be heard in the countries where the aggrieved parties reside and where the alleged offenses were committed. The home states are said to be an unsuitable forum for this, as the courts there have no jurisdiction and therefore no competence, according to the doctrine.

Corporate actors persisted in this jurisdictional question and finally succeeded when, in April 2013, the Supreme Court handed down a landmark decision in *Kiobel v Royal Dutch Petroleum Co* by restricting the possibilities for using ATCA to only when the claims "touch and concern" the United States with "sufficient force."[6] In 2018, the Supreme Court held, in another case, "that foreign corporations may not be defendants in suits brought under" ATCA.[7] As a consequence of this precedent ruling, access to U.S. courts has since been largely restricted (Skinner *et al.* 2013, 5, 19–20, Enneking 2014, 51, Zerk 2014, 95–6).

As mentioned above, the ATCA experience exemplified how lawyers strategically searched for new legal routes to hold TNCs liable at home. At the same time, however, it also revealed the fierce controversy surrounding access to courts in the Global North, which became evident in other countries, too. The question of whether home state courts can and should have jurisdiction over extraterritorial cases was key in many lawsuits. Following a landmark decision by the European Court of Justice in 2005,[8] the *forum non conveniens* doctrine is no longer an obstacle for transnational lawsuits in the European Union, but it is an issue in many other non-EU Anglo-Saxon countries (Kamphuis 2012a, 560, Blackburn 2017, 38–9). In addition, corporations have relied on a wide range of procedural and legal strategies to keep themselves out of court. A central legal issue, for example, is the so-called "corporate veil," an argument by which parent companies contest being liable for the misconduct of subsidiaries, which they seek to describe as "separate" corporate entities (Kaleck and Saage-Maaß 2010, 716, Müller-Hoff 2011, 25). Thereby, the corporations seek to achieve a "fragmentation of responsibility" (Eckert 2016, 246, own translation). In the United Kingdom, this obstacle could be circumvented by claiming a TNC's duty of care, which means that a parent company is not sued for being directly involved in the abuses but for acting with negligence (Zerk 2014, 44, Blackburn 2017, 44).

In addition, depending on the jurisdiction, plaintiffs face formal obstacles, such as the lack of class actions or contingency fee arrangements, which makes claims financially unviable (Taylor *et al.* 2010, 21, Zerk 2014, 80–1). Other obstacles include

6 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

7 Jesner et. al. v. Arab Bank, PLC, 16–499, 584 U.S. ___ (2018).

8 Owusu v Jackson ([2005] ECR 1383).

strict statutes of limitation (Skinner 2014, 228, 231). Such transnational lawsuits require considerable time and human resources to be brought to court and can often not meet the time limits set in procedural law for ordinary domestic claims. Obtaining companies' internal documents as evidence is complex, whereas, on the other hand, the burden of proof is high and a claim is likely to be dismissed if the parent company's direct influence on its subsidiary cannot be proven (Zerk 2014, 44, Blackburn 2017, 54–5).

People who become plaintiffs in such lawsuits often belong to marginalized groups living in remote areas. They often lack litigation experience and are thus what Galanter (1974, 97) titled "one-shotters" (see also: Kirsch 2014, 85). These circumstances demonstrate the importance of willing lawyers in the Global North who have the knowledge and the resources to bring forth such claims. Such attorneys often work for international human rights NGOs or for *pro bono* law firms. These lawyers are rare, especially those who dare to face the proverbial "army of corporate lawyers" and who risk being involved in costly litigation for many years without knowing whether their expenses will ever be recovered (Taylor *et al.* 2010, 17–8).

As a result of the legal barriers and procedural hurdles, litigation against parent companies has repeatedly failed, and claims against TNCs rarely have made it to trial. Procedural issues often remain at the core of lawsuits against TNCs, whereas the question of whether a corporation actually holds responsibility remains untouched. In addition, those cases that are not dismissed for procedural reasons are often settled out of court, meaning that a trial is avoided in these cases, as well (Kamphuis 2011, 87). Thus, despite years of transnational efforts to overcome the global accountability gap and to fight corporate impunity in courtrooms abroad, it has so far hardly been possible to actually attribute legal liability to a parent company. These examples show that in cases involving the responsibility of corporations, even in the Global North there are still considerable hurdles in accessing the justice system.

While in countries like Peru corruption and weak state institutions are blamed for corporate impunity, in countries of the Global North "procedural" or "formal" reasons are advanced to dismiss claims and to avoid dealing with the sensitive issue of corporate responsibility. In reality, however, there are political reasons in both the Global South and North that prevent corporations from being held accountable because they are "too big to jail," as Brandon Garrett (2014) boldly framed it in relation to the United States.

Case studies: an overview

Guerrero & Ors v. Monterrico Metals Plc & Anor

Despite these difficulties, efforts for transnational human rights litigation have continued worldwide in recent years and have also reached Peru. From a Peruvian perspective, the case against Monterrico Metals in the United Kingdom was a pioneer in this regard. It was one of the first cases of human rights violations occurring in the extractive sector that later reached a foreign justice system. As described in Chapter 3, *Fedepaz* has worked for years to obtain justice in Peru for the twenty-eight individuals who suffered acts of torture when protesting against the Río Blanco project in August 2005. Progress in criminal proceedings in Peru has been slow, and the difficulties in including corporate actors in the investigation became evident over time. For this reason, *Fedepaz*' team, along with lawyers from the *Coordinadora*, looked at their transnational networks and their partner organizations for ways to bring the case forward with foreign assistance. In this way, they contacted the U.S. Environmental Defender Law Center (EDLC),[9] which then introduced them to the British law firm Leigh Day. In 2009, Leigh Day filed a civil complaint at the High Court in London against Monterrico Metals and its Peruvian subsidiary Río Blanco.[10]

Leigh Day is a private law firm that, since its founding in 1987, has led several court cases against UK-based TNCs. It has attempted to establish the principle in English law that parent companies owe a direct "duty of care" to those affected by subsidiaries' activities abroad (Brett 2018, 55–6). Leigh Day's lawyers are convinced that the British judicial system offers legal opportunities, which they attempt to exhaust. In the law firm's own words, its lawyers "represent people all over the world fighting for justice and challenging powerful corporate and government interests" (Leigh Day 2018, 2). They "push the boundaries of the law to hold the powerful to account" (*ibid.*), and they "are not afraid to take on daunting challenges" since they "believe passionately that every individual and community, no matter who they are or where they live, is entitled to defend their human rights, including their right to justice" (*ibid*, 4). Working on a *pro bono* basis, the law firm was involved in litigation against corporations such as Thor Chemicals, Rio Tinto, Cape plc, BP, Trafigura, Xstrata, Unilever, Shell, and Vedanta Resources. Some of these lawsuits have been settled, meaning that plaintiffs received compensation and that Leigh Day could cover its litigation costs. However, as a consequence of these settlements, no judgment

9 EDLC is a type of gatekeeper for transnational litigation. The NGO based in the United States supports local communities in suing TNCs by establishing contact with lawyers in the Global North.

10 *Guerrero v Monterrico*, [2009] EWHC 2475 (QB).

was ever made as to whether parent companies actually owe a duty of care for the activities of their subsidiaries.[11]

Compared to other transnational lawsuits, the Monterrico claim made relatively rapid progress. Leigh Day's lawyers argued that "officers of Rio Blanco or of Monterrico ought to have intervened so as to have prevented the abuse of the Claimants' human rights and/or are otherwise responsible for the injuries which they suffered."[12] The lawsuit was based on "the fact that [Monterrico Metals] exercised effective control over the management of [Río Blanco S.A.]."[13] The detention of demonstrators in the mine camp in Piura was described as "a joint operation"[14] between Monterrico Metals, the private security firm Forza, and the Peruvian National Police. The corporation and its subsidiary were alleged to have "authorized the police and their security guards to detain the Claimants on the Defendants' property over the course of three days."[15] The claim mentioned that the corporation had "provided the police with the materials that were used in the torture of the Claimants including ropes, heavy metal objects, black bags and sticks."[16]

The lawsuit was, in this sense, closely tied to the Peruvian criminal case and the legal argumentation brought forth by the Peruvian human rights lawyers. By becoming a transnational claim, the torture case was, however, translated into a tort law case of negligence.[17] According to a British lawyer familiar with the claim, this was "not ideal" because "to characterize […] torture as negligence, breach of a duty of care, that seems to be minimizing the significance of what happened." It was, however, the only access point in English law and the only legal basis for presenting the case in London. This reveals that, as a consequence of the process of judicialization, compromises must be made in order to comply with the categories of the law.

Leigh Day's lawyers traveled to Peru several times to meet with the plaintiffs and the local NGO lawyers. In addition, the law firm employed a Spanish-speaking assistant, who stayed in Peru and who established confidence and helped maintain contact with the plaintiffs in Piura. *Fedepaz*' team, along with lawyers working with the *Coordinadora*, had collected evidence and information that served as a basis for drafting the claim. They introduced the British lawyers to the context in Peru, shared

11 An exception was the case against Cape Plc, where a court ruled that the parent company has a duty of care for its subsidiary's employees (*Chandler v Cape Plc* [2012] EWCA Civ 525). Leigh Day has sought to extend this principle to the people affected by business activities who are not employed.

12 *Guerrero v Monterrico*, [2009] EWHC 2475 (QB), para. 8, (see also: Meeran 2011, 40).

13 *Guerrero v Monterrico*, [2009] EWHC 2475 (QB), para. 8.

14 Cited in: *Guerrero v Monterrico*, [2009] EWHC 2475 (QB), para. 10.

15 *Guerrero v Monterrico*, [2009] EWHC 2475 (QB), para. 10.

16 Cited in: *Guerrero v Monterrico*, [2009] EWHC 2475 (QB), para. 10.

17 This translation from torture to tort is emblematic for transnational human rights litigation and has been discussed by various authors (see, for example: Scott 2001, Augenstein 2018).

their material relating to the criminal investigation with them, introduced them to the Peruvian legal framework,[18] and established contact with the plaintiffs. In retrospect, *Fedepaz*' team recounted that video conferencing and Internet calls were still unusual at that time and communication was challenging, also because of language barriers.

The legal proceedings in London initially looked promising. Shortly after they began, the court ordered a worldwide injunction, freezing over £5 million of Monterrico's assets.[19] The judges declared that the plaintiffs demonstrated "a good arguable case."[20] The corporation thus came under considerable pressure. Later, the High Court scheduled a ten-week trial starting in October 2011 (Meeran 2011, 41, 2013, 385). About eighty witnesses were prepared to participate in the trial on the plaintiffs' side, including some of Monterrico's employees (Leigh Day & Co. 2011). However, the trial ultimately did not take place as an out-of-court settlement was reached in July 2011, three months before the trial date (Skinner *et al.* 2013, 96). Monterrico did not admit any liability but agreed to pay an undisclosed sum as compensation to thirty-three victims (Meeran 2012, 19, Velazco Rondón and Quedena Zambrano 2015, 40, 52).[21] In return, the plaintiffs withdrew the claim by accepting the compensation and waived the need for a judgment on the corporation's responsibility (Kamphuis 2012a, 548). This closed the case.

Campos-Alvarez v. Newmont Mining Corporation et al

This chapter's second case example is a lawsuit in the United States on behalf of Elmer Campos, the *campesino* who was injured during the Conga protests in 2011. As described in Chapter 3, Elmer became complainant in a criminal lawsuit in Cajamarca, in which the presentation of corporate internal documents led to Minera Yanacocha being included in the proceedings as a civilly liable third party. These pieces of evidence were obtained through a legal action that EarthRights International's team in Washington D.C. filed in January 2014 under the so-called Foreign Legal

18 The complaint to the High Court in London was formulated on the basis of both Peruvian and English law. The High Court had to determine whether Peruvian or English law would be applied. Knowing the relevant Peruvian legal norms was thus crucial for bringing the claim.

19 *Guerrero v Monterrico*, [2009] EWHC 2475 (QB), para. 41 (see also: Jahncke 2011, 52, Kamphuis 2012a, 547, Skinner *et al.* 2013, 66, 95).

20 *Guerrero v Monterrico*, [2009] EWHC 2475 (QB), para. 26 (see also: Kamphuis 2011, 77, Leigh Day & Co. 2011).

21 The compensation payments not only included the 28 detainees, but also the relatives of the man who died during the conflict in August 2005 and the relatives of another person who died one year before in another violent clash in the context of protests against the Río Blanco project.

Assistance (FLA) statute in the United States.[22] The U.S. NGO attempted to obtain evidence that substantiated the relationship between Minera Yanacocha and Peru's National Police. To this end, it filed an application with the District Court of Colorado, which sought discovery from Newmont Mining, Minera Yanacocha's major shareholder.

The FLA statute allows parties involved in foreign court cases to request disclosure of documents located in the United States. Initially, TNCs used the statute to obtain documentation about competitors or critics. Chevron Corporation, for example, gained access in this way to raw footage from a company critical documentary produced in the United States, which served as evidence in a well-known lawsuit in Ecuador. EarthRights International recognized the statute's potential and began using it to assist human rights lawyers in the Global South in claims against TNCs, among them the Peruvian human rights movement.

At least two of the U.S. lawyers involved in this legal action had lived and worked for a longer period of time in Peru and knew the local context well. In addition, they received assistance from EarthRights International's team in Lima, who supported them in establishing contact with Elmer and with his Peruvian attorneys. As I mentioned in the previous chapters, EarthRights International's Peruvian team worked for several years with national NGOs such as the *Coordinadora* and with regional grassroots organizations, in Cajamarca in particular, with *Grufides* and the PIC. The FLA application in the United States resulted from this collaboration and was aimed at supporting EarthRights International's Peruvian allies in their struggles within the Conga conflict.

The NGO's lawyers filed the application for discovery to the District Court of Colorado in order to pursue documents – including videos, photos, security reports, and internal company communication – from Newmont Mining Corporation and two of its affiliates (Newmont Peru SRL and Newmont USA LTD). They argued that the Peruvian National Police officers who shot Elmer Campos had acted under a contract with Minera Yanacocha. Furthermore, they claimed that Newmont USA LTD controlled and managed Minera Yanacocha and that there was an "unusually close relationship between and among the Newmont entities."[23] EarthRights International stated that "there is every reason to believe that Newmont, as manager of Minera Yanacocha and its operations, possess […] critical evidence" relevant to the legal proceedings in Peru.[24] *Coordinadora* lawyer Mar, Elmer's Peruvian attorney, submitted declarations to the U.S. court underlining the application's necessity. She explained

22 28 U.S.C. § 1782.

23 As an indicator of this "unusually close relationship," EarthRights International mentioned that several individuals simultaneously worked for the management of Minera Yanacocha and for Newmont Mining (U.S. District Court for the District of Colorado 2014a, 5).

24 U.S. District Court for the District of Colorado 2014a, 5.

that, theoretically, Peru's Public Ministry is responsible for gathering evidence in criminal investigation, but that, in practice, prosecutors are overworked and under pressure to not investigate corporate or state actors.[25] Thus, the difficulties in suing corporate actors in Peru, which I discussed in Chapter 3, served as a justification for Mar bringing the FLA application in the United States.

Newmont Mining opposed the application and submitted various motions to the court. The corporation argued that, from a legal point of view, discovery of documents should be demanded from Minera Yanacocha in Peru and not from Newmont Mining in the United States. The second argument to oppose the application was political. Newmont Mining claimed that the lawsuit was motivated in bad faith and argued that "the background of [the] request is complex and involves a deep and longstanding social and political controversy in the Republic of Peru."[26] According to the corporation, the discovery request was "extremely broad and not at all limited to the incident" in which Elmer was shot.[27] To question the legitimacy of the application, the corporation sought to discredit Elmer's lawyers and portrayed them as political actors and "anti-mining" activists. For instance, Newmont Mining called into question the role of Mar by stating the following:

> Ms. Perez appears to be an NGO advocate actively involved in a national political debate in Peru regarding the role of the National Police in anti-mining protests. No evidence has been submitted showing that […] her testimony in the [declaration to the U.S. court] is unbiased, reliable, or accurate. – *Respondents Newmont Mining Corporation et al., Motion to the U.S. District Court for the District of Colorado*[28]

As Ronen Shamir (2004, 649) wrote, this strategy of discrediting opponents' lawyers is often used by TNCs in lawsuits in the United States. Newmont Mining also attacked EarthRights International and accused the NGO of trying to obtain internal company information not for the purpose of the criminal investigation in Peru but for "some other political or activist purpose."[29] The company stated that both the *Coordinadora* and EarthRights International "appear to be players in the on-going political and social controversy in Peru about the role of the public security forces."[30] The involvement of the two human rights organizations in the case was, according to Newmont Mining, "suspicious."[31] Questioning the credibility of human rights lawyers by accusing them of pursuing "political" intentions is a strategy also pursued

25 U.S. District Court for the District of Colorado 2014b, 3.
26 U.S. District Court for the District of Colorado 2014c, 1.
27 U.S. District Court for the District of Colorado 2014d, 2.
28 U.S. District Court for the District of Colorado 2014c, 4.
29 U.S. District Court for the District of Colorado 2014e, 4.
30 U.S. District Court for the District of Colorado 2014e, 5.
31 U.S. District Court for the District of Colorado 2014d, 10.

in Peru by corporate and state actors. Behind this is the accusation that a politically motivated lawsuit would constitute an abuse of the legal system.

Elmer's U.S. attorneys responded to these allegations by stating that Newmont Mining did not present any evidence of the applicant's bad faith.[32] They argued that neither Mar's nor EarthRights International's political convictions were relevant to the lawsuit and stated,

> Even if Newmont were to show that Mr. Campos' U.S. or Peruvian counsel agreed to represent him because of their advocacy interests in challenging police violence against those who protest environmentally destructive mining projects in Peru, that would have no effect on the merits of his Application – just as it makes no difference why Newmont Mining's counsel agreed to represent Respondents. – *Applicant Elmer Eduardo Campos-Alvarez, Opposition to Respondent's Motion to Conduct Discovery*[33]

Newmont Mining's motion to dismiss the case on these grounds delayed the progress of the proceedings. EarthRights International feared that the corporation was intentionally delaying it so that the obtained evidence could ultimately not be used in Peru.[34] The NGO therefore submitted a Motion to Expedite Consideration of the application in November 2014.[35] In March 2015, Judge Robert E. Blackburn finally issued an order in Elmer's case and approved the application for discovery, but limited to the district of Colorado and to a specific time frame.[36] Newmont Mining had to disclose over 1,600 documents. However, the court's decision did not bring the dispute to an end but simply concluded the first of several stages.

In July 2015, Newmont Mining submitted a Motion for Protective Order and demanded eight documents to be declared confidential.[37] The company complained that shortly after the first court ruling, EarthRights International had issued several press releases suggesting that the company was linked to police repression in Peru. Newmont Mining stated that its fear that the NGO would misuse the documents for political purposes had been confirmed.[38] In March 2016, Judge Blackburn granted the TNC's motion.[39] Already in November 2015, Elmer's attorney had returned to

32 U.S. District Court for the District of Colorado 2014f, 8.
33 U.S. District Court for the District of Colorado 2014g, 8.
34 U.S. District Court for the District of Colorado 2014h, 6.
35 U.S. District Court for the District of Colorado 2014h.
36 U.S. District Court for the District of Colorado 2015a.
37 U.S. District Court for the District of Colorado 2015b. On the basis of public court documents, I understand that the eight documents concerned are internal company reports providing information on the deployment of private and public security forces to protect the mine site in Peru in November 2011.
38 U.S. District Court for the District of Colorado 2015b, 6.
39 U.S. District Court for the District of Colorado 2016a.

court and submitted a Motion for Supplemental Discovery to disclose further documents located in the United States, but outside of the District of Colorado. Newmont Mining's security office for the Americas is based in Nevada and the corporation, by strictly insisting on the wording of the court's first order, refused to disclose documents located outside of Colorado. In September 2016, this motion was granted.[40]

After losing in U.S. courts, the corporation then attempted to impede the submission of evidence in Peru. When two documents were filed in the criminal proceedings in Cajamarca, Minera Yanacocha questioned their authenticity because a certification of origin was lacking. EarthRights International returned to the U.S. courts with an Emergency Motion requiring the corporation to certify the documents' authenticity.[41] The NGO argued that the mining company "refuses to simply certify that the documents it produced are the documents it actually produced. It does so because it knows that without such certification, the Peruvian court […] is unlikely to accept the documents."[42] Judge Blackburn granted the motion in March 2018 and ordered Newmont Mining to certify the documents they had submitted almost three years earlier.[43] With this order, the court case on behalf of Elmer Campos was closed in the United States.

Acuna-Atalaya et al v. Newmont Mining Corporation et al

The FLA application on behalf of Elmer Campos was an attempt to use foreign courts in support of domestic litigation. However, similar to Leigh Day, EarthRights International is also convinced by the idea of suing TNCs in U.S. courts and holding corporations liable at home. As part of its efforts in this regard, the NGO filed a civil complaint for damages and equitable relief on behalf of Máxima Acuña and her family before the District Court of Delaware in September 2017. The claim was brought against Newmont Mining Corporation, Minera Yanacocha's parent company, and three of its entities.[44] As I mentioned in Chapter 5, the Chaupe family had made

40 U.S. District Court for the District of Colorado 2016b.

41 The mail correspondence published as exhibits in the U.S. case file indicate that the NGO first tried to obtain the documents' certification directly from the corporation. Newmont Mining refused to issue these certificates, therefore EarthRights International returned to court (U.S. District Court for the District of Colorado 2017).

42 U.S. District Court for the District of Colorado 2017, 1–2.

43 U.S. District Court for the District of Colorado 2018.

44 The complaint was on behalf of Máxima Acuña, her four children, two of her children's spouses, and one minor grandchild. Jaime Chaupe, Máxima's husband, was not involved in the lawsuit. When I asked why Jaime was not involved in the court case, I did not receive any information from EarthRights International's U.S. team.
The three corporate defendant entities included Newmont Second Capital Corporation, Newmont USA Limited, and Newmont Peru Limited (U.S. District Court for the District of Delaware 2017).

several attempts to take criminal action before local courts against Minera Yanacocha and its employees but had not been able to find relief or justice for the human rights abuses they suffered. In order to improve their situation, EarthRights International brought their legal claims to the United States.

In the transnational lawsuit, the Chaupe family demanded financial compensation for the emotional and physical harms and the damages to property they had suffered. The complaint listed more than fifty incidents in which employees of Minera Yanacocha, employees of the private security company Securitas, and police officers supposedly contracted by the mining company intervened in Tragadero Grande and harassed family members. The allegations included, *inter alia*, battery, assault, verbal threats, destruction of property and crops, surveillance, harming of livestock and pets, detention, and obstruction of access to Tragadero Grande. These incidents had occurred between 2011 and 2017.[45] From a legal point of view, the claim's intended outcome was to attribute responsibility to the parent company for acts carried out in the context of a subsidiary's operations. Thus, the case was comparable to the lawsuit against Monterrico in the United Kingdom, although there was no explicit claim for the violation of a duty of care.

The complaint was based on evidence EarthRights International had obtained in the FLA on behalf of Elmer Campos. As a Peruvian lawyer explained to me, due to a statute of limitation, it had not been possible to use the obtained documents to file a civil lawsuit on behalf of Elmer himself. However, the documents provided general information on Newmont Mining's involvement in the Conga conflict and contained details related to the situation of the Chaupe family. Most importantly, the documents demonstrated Newmont Mining's control over security issues related to the Conga project, and, as one of EarthRights International's attorneys explained, the documents revealed that "Newmont is […] the chain of command for security operations for Conga." Thus, based on the documents produced for Elmer, the NGO believed to have sufficient evidence to file the complaint on behalf of the Chaupe family.

Newmont Mining opposed the claim by arguing that the District Court in Delaware was not the appropriate forum to hear the case and submitted a motion to dismiss it on the grounds of the *forum non conveniens* doctrine. As I mentioned above, this is a legal argument widely used by companies in the United States to obtain a dismissal in a transnational lawsuit. In April 2018, the court followed this argumentation, granted Newmont Mining's motion, and dismissed the case.[46] The plaintiffs appealed against this order, and the case went to the Court of Appeals for the Third Circuit, where the appeal was granted, as I mentioned at the beginning of this chapter, in March 2019. The Court of Appeal argued that in the face of a corruption scandal

45 U.S. District Court for the District of Delaware 2017, 14–35.

46 U.S. District Court for the District of Delaware 2018a.

that shook the Peruvian judiciary to its core at the time, it was necessary to reassess whether Peru was indeed an adequate alternative forum for the plaintiffs to bring a claim.

The District Court in Delaware then addressed the case again, considering the aspects introduced by the Court of Appeal. In March 2020, Judge McHugh again decided that the plaintiffs had the opportunity to use the Peruvian judicial system and dismissed the case once more.[47] EarthRights International then filed another appeal.[48] However, in December 2020, the Court of Appeals for the Third Circuit upheld the lower court's ruling and dismissed the appeal by arguing that "the Peruvian forum is generally adequate despite the recent, serious allegations of corruption".[49] Based on this procedural argument that their case should be heard in Peru, the Chaupe family was denied access to the U.S. judicial system.

Interesting for this book's discussion is the fact that the U.S. judges' order to reject the Chaupes' claim were based on the reasoning that developments in Peru in recent years had demonstrated that the family did have access to the domestic legal system. In one of the orders of the U.S. district court, the responsible judge explicitly referred to the transnational advocacy campaigns in favor of the family and held that "Plaintiffs have generated intense interest in their cause, with all the salutary effects such public attention brings"[50] and that the "continued spotlight [placed on the Chaupes' case by the media and by human rights groups] makes it less likely that judicial proceeding in Peru will be subject to untoward influences."[51] The responsible judge thus indicated that transnational advocacy campaigns can positively support legal actions.

To underline this point, the U.S. judge noted that the family had been able to win a case against Minera Yanacocha in the Court of Cassation of Lima and in lower courts in Cajamarca. In doing so, he referenced the court case in which Minera Yanacocha had accused the family of illegally occupying Tragadero Grande, for which the family was first convicted and then acquitted by the Court of Appeal in Cajamarca and the Court of Cassation in Lima after several years of prosecution. The U.S. court thus interpreted this success of the family in evading criminalization and being acquitted as sufficient evidence that the Chaupe family "can be treated fairly by Peruvian courts."[52] The court thus concluded that Peru was an appropriate forum for the legal treatment of the complaints about the alleged abuses of the mining company. However, the U.S. court did not consider the fact that the Peruvian judicial system

47 U.S. District Court for the District of Delaware 2020a.
48 U.S. District Court for the District of Delaware 2020b.
49 U.S. Court of Appeals for the Third Circuit 2020.
50 U.S. District Court for the District of Delaware 2020a, 24.
51 U.S. District Court for the District of Delaware 2018b, 20.
52 U.S. District Court for the District of Delaware 2020a, 25.

has never followed up on any charges brought by the family and that no criminal investigations have been initiated against the company, even though the Chaupes had reported corporate abuses for years. Thus, being able to defend against legal mobilization *from above* was considered sufficient by the U.S. court to claim that access to the legal system was guaranteed in the plaintiffs' home country, even though all their attempts to mobilize the law *from below* had failed.

Expectations of law in litigation abroad

The three transnational lawsuits emerging from the Conga and the Río Blanco conflicts exemplify different aspects of legal mobilization that may emerge when turning to courts abroad. Several of these aspects are related to the Peruvian human rights movement's legal expectations and to the law's emancipatory force and thus link back to the discussion of Chapter 2. However, the transnational dimension of the court cases adds further aspects to this discussion and provides further insights into the perception of the Peruvian human rights movement regarding the use of law. The aspects I discuss in the following concern (1) financial compensation, (2) differences in legal culture, (3) the aim of having a deterrent effect on corporations, and (4) the aim of obtaining evidence or, more generally, having a supportive impact on domestic litigation.

Financial compensation

As I discussed in the previous chapters, human rights lawyers in Peru often rely on criminal or constitutional law. Civil claims are perceived as a less desirable option because the burden of proof is high, proceedings are even more lengthy than in criminal cases, and, most importantly, the state's role is less prominent because of its involvement as a mere mediator between disputing private parties. In consequence, indemnifying the injured parties often plays a subordinate role in domestic lawsuits, since criminal and constitutional cases are aimed at other legal outcomes, such as punishment or compliance with constitutionality. The issue of financial compensation has raised controversy within Peru's human rights movement, as I explained in the second chapter. However, at the same time, it is an integral part of the demand for justice, especially when it comes to dealing with human rights violations affecting marginalized groups. Bringing a civil case against a parent company abroad provides a way of obtaining such financial compensation, in particular because foreign direct liability cases based on tort law or cases claiming a parent company's negligence are aimed at obtaining this form of remedy. Financial compensation can therefore be a reason for filing a lawsuit abroad.

At the same time, the claim for compensation is sometimes a condition for filing a claim in a foreign court. Legal requirements in the United States, for example, set a minimum of at least US$75,000 to file a civil complaint before a federal court.[53] Claims for less money are heard in state courts, meaning that the amount of money in controversy sets the jurisdiction. In the case on behalf of the Chaupe family, this minimum sum was exactly the amount of money the plaintiffs demanded in compensation.[54] The U.S. legal system thus required them to demand money in order to gain access to federal courts, and the Chaupe family's legal representation fulfilled this requirement to be able to bring the case to a federal court, although the actual goal of bringing the claim to the United States was not financial compensation.

In the Cajamarca region, it is well known that Minera Yanacocha had offered the Chaupe family large sums of money to leave the disputed piece of land. Various people close to the family told me that the company had taken an aggressive approach with these sales offers and had also attempted to persuade individual family members to accept them, thus attempting to divide the family. However, Máxima Acuña repeatedly announced in public that their land was not for sale and that all she and her family wanted was to live in peace in Tragadero Grande. In this sense, Máxima continually declared that she did not want any money from the mining company. In the civil action in the United States, however, the foreign legal system expected her, as the plaintiff, to claim damages from the company in order to be admitted to court. Consequently, the transnational lawsuit caused concern among activists and lawyers in Peru.

During my fieldwork, several people shared their doubts with me as to whether a possible individual compensation payment by Newmont Mining may also have negative effects because it would provide grounds for criticism after the family had already been accused of enriching themselves by cooperating with international NGOs. They feared that the court case would lead to further exposure of the family. At the same time, these lawyers and activists immediately emphasized that the family is "of course entitled to financial compensation." Thus, they all stressed the family's right to reparations, but the question remained as to whether a civil lawsuit abroad potentially resulting in financial compensation involved risks that would outweigh the benefits for the plaintiffs.

This fear was, *inter alia*, based on the human rights movement's experience in previous transnational lawsuits, in particular in the Monterrico case. As I mentioned above, the plaintiffs in the Monterrico case had received compensation resulting from an out-of-court settlement reached with the parent company in the United Kingdom. The plaintiffs had agreed to this settlement after consultation with their British lawyers. Afterwards, they were harshly criticized for this decision, especially

53 28 U.S.C. § 1332(a).

54 U.S. District Court for the District of Delaware 2017, 93.

by other members of the local social movements, who accused them of being bought by the mining company when accepting the payments. The local protest movement subsequently experienced major internal disputes, as David and Rosa told me.

Mar, the *Coordinadora* lawyer involved in the case, recounted that some of the plaintiffs had been important leaders in the local resistance against Río Blanco. As a consequence of the settlement, they experienced hostility, since it "appeared as if they had been bought, that the company had covered their mouths, and that they were delegitimized before the community," as Mar explained. She told me that the mining company took advantage of these tensions and used the payments to discredit opponents and to weaken the social movement. This example thus illustrates that an individual financial compensation payment can in fact entail social costs and can therefore undermine the individual benefits.

In addition, the Monterrico case also illustrated problems arising from confidentiality agreements, which often form an integral part of out-of-court settlements. A group of plaintiffs is exposed in a transnational court case; the plaintiffs receive a compensation payment, but they are not allowed to talk about it. At the same time, however, it is publicly known that they accepted money from the company because the plaintiffs' lawyers also have an interest in disclosing that they have reached a settlement. Everyone knows that money has been paid, but the injured parties are not allowed to provide any information or clarification. Rumors arise and circulate, leading to accusations and social tension.

According to the Peruvian lawyers involved in the Monterrico case, one way to avoid friction within the social movement would have been to claim a communal compensation in London instead of, or in addition to, the individual compensation payment. These lawyers told me that the social tensions were, for the most part, not due to envy toward the individual claimants. Rather, the torture case was, from the perspective of the local protest movement, only one of several cases of human rights violations committed during the Río Blanco conflict. The lawyers of the *Coordinadora* and of *Fedepaz* argued that the torture case had to be understood in this larger context. Mar, for instance, told me that the acts of police violence had been a message to the *comunidades campesinas* and the protest movement as a whole, not only to the affected individuals. In her opinion, the case therefore had a clear "community dimension" (*dimensión comunitaria*), and the political context of the communities had to be considered when pursuing the claim abroad. This also refers to the expectation of the Peruvian human rights movement to support the *comunidades* in their political struggles through legal proceedings, as discussed in Chapter 2. Through the transnational lawsuit, however, the abuses the *comunidades* had suffered during the mining conflict were individualized and reduced to a single event.

Fedepaz lawyer David also understood the torture case as an act of violating individual and collective rights. As he explained, Leigh Day's lawyers, however, did not consider these aspects when bringing the claim because of a "different understan-

ding of collectivism." David criticized that their "perception is the individualistic British perception, isn't it? For them, collectivism doesn't exist, nor do they even have a way of knowing what it is." Mar argued along the same lines and told me that, in her opinion, in the form of individual compensation, "money cannot in itself be the end" of such a lawsuit but that "English lawyers, I mean, they don't understand that. They don't understand it!" She told me that they had tried to explain to the English lawyers that, according to Peruvian law, a *comunidad campesina* has a legal personality, and that it should therefore be possible to "include the community as a victim" in the claim. However, this concept ultimately did not come up in the claim, as the British lawyers only considered the individual plaintiffs. The action was brought under both English and Peruvian law, and the court would have decided which law would have been applicable in a later stage of the proceedings. Thus, in theory, it would have been possible to introduce the alternative approach of collective compensation. However, the British lawyers did not accept this proposal, and since it was ultimately them and not the Peruvian lawyers who controlled the lawsuit, the community dimension was not included in the claim.

Apart from this question of collective compensation, the financial compensation also led to social tensions in the communities because of the lack of follow up regarding the local dynamics following the settlement. Rosa told me that, in retrospect, it might have been better if *Fedepaz* had done a follow up (*seguimiento*) on the case, since Leigh Day did not do it. However, Rosa and her colleagues did not want to interfere in the case after the settlement. She told me that they had been heavily involved in the case in the beginning and had spent much time and effort to help bring the claim. Leigh Day had used them to establish contact and to gain the plaintiffs' trust. When it came to the settlement, however, the English lawyers traveled directly to Piura and no longer met with the NGO staff in Lima. In the logic of Leigh Day's lawyers, this was the only reasonable approach because they "take instructions" from "their clients," not from local NGOs (Leigh Day 2018, 5).

In addition, the plaintiffs had signed a confidentiality agreement, and *Fedepaz*' team was reluctant to approach them because they did not want the plaintiffs to feel like they were interfering. For Leigh Day, the case was closed after the settlement, and, consequently, no one was there to ensure that the case would not result in tensions in the *comunidades* and in allegations against the plaintiffs. Thus, the transnational lawsuit in London resulted in the opposite of what *Fedepaz* anticipated with the use of law – namely, the empowerment of local communities in their political struggle – and, in contrast, weakened the protest movement.

Differences in "legal ideologies"

As I have discussed in detail elsewhere (Lindt 2020), the Peruvian lawyers attributed the social tensions in the communities primarily to the fact that the Monterrico ca-

se was settled out of court. The out-of-court settlement led to major disagreements between the British and Peruvian lawyers, which was mainly related to the legal expectations the different actors had placed in the claim. For Leigh Day's attorneys, out-of-court settlements are a part of common court practice and legal culture. They see them as a reasonable way to secure financial compensation for plaintiffs without having to engage in lengthy and risky trials. In general, settlements offer *pro bono* lawyers "the best business option," as Kamphuis (2012a, 561) argued, and a safe means to recover costs.[55] Richard Meeran, Leigh Day's leading lawyer in the Monterrico case, wrote that settling a case against a parent company is "undoubtedly frustrating for academic lawyers and campaigners" but that it "reflects the financial realities and risks to [TNCs], the claimants and the claimants' lawyers of not settling" (2011, 10). In his opinion, "the risk of going to trial usually makes little commercial sense" (*ibid.*).

In transnational lawsuits against TNCs, going to trial poses a high risk for plaintiffs because such cases are often dismissed due to procedural hurdles or practical obstacles, as I explained above. On the one hand, this is because corporate defendants do all they can to avoid having their responsibility heard in court rooms in the Global North. At the same time, it is also because judges in the North attempt to evade the politically sensitive issue of parent companies' liability. In terms of procedural law, the Monterrico case, for example, entailed the risk of being dismissed as it had not yet been decided whether the court would apply English or Peruvian law, and the claims were time-barred under Peruvian law.[56] Leigh Day's concerns about a trial were therefore not unfounded.

The Peruvian human rights lawyers also acknowledged this risk of a trial, as they told me, not only because of the statute of limitations. Rosa recounted that they also feared a possible trial in London because the plaintiffs from Piura might have had to testify. From her work with the *comunidades*, Rosa repeatedly witnessed the difficulties people from rural areas faced while giving declarations before a local prosecutor or judge. She doubted that appearing before a court in another country, in a completely alien environment, would have had a positive effect on the plaintiffs. Veena Das argued that the settlement in the Bhopal case in India had negative impacts on the plaintiffs because they were deprived of their "day in court" and their "right to be

55 Lawsuits against corporate actors that resulted in out-of-court settlements have been critically assessed by various authors. See, for example, the work by Li (2017a, 185–7), Kamphuis (2012a, 561–2), and Kirsch (2006, 21–2, 2007, 308). Particularly detailed discussions were held on the settlement reached in relation to the Bhopal disaster (see, for example: Cassels 1991, Das 1995, Fortun 2001). For a more detailed discussion of this literature see: Lindt 2020.

56 This is exactly what happened to Leigh Day's lawyers some years later. They brought a similar case to the High Court in London against the mining company Xstrata. The lawsuit was on behalf of a group of Peruvians who had been maltreated in the context of protests against the corporation's project in Espinar, Peru (Vilca & Ors v Xstrata Ltd & Anor [2018] EWHC 27 (QB). This case was dismissed on the grounds of the Peruvian statute of limitations.

heard" (1995, 146). However, Rosa's view questions whether "to have a day in court" has a healing effect on plaintiffs in a transnational court case, given that it can be intimidating to "stand before the law" (Ewick and Silbey 1998). Rosa feared that a trial could become a re-traumatizing event for the plaintiffs if they had to testify about the abuses they had suffered.

In addition, Rosa was also concerned about whether the plaintiffs, under the difficult conditions of having to testify before a court in a completely foreign setting, would have been able to fulfill the expectations placed on them as "victims" of human rights violations. In doing so, Rosa referred to the difficulty of translating personal suffering into legal terms and of making experienced abuses understandable for judicial authorities. Several legal anthropologists have discussed this aspect in recent years. Jonah Rubin (2008), for instance, used the example of a U.S. court case in favor of a torture victim from El Salvador to illustrate how challenging this translation process can be for plaintiffs. As Rubin described, plaintiffs are required to translate the traumatic experience of a personally suffered human rights violation into the language of the law and face the challenge that their testimonies are limited to a "legally-acceptable form" (2008, 275). In a similar way, Rosa had been worried that the injured parties in the torture case from Piura would not have been able to provide the narratives that were expected and the translation into the language of law, especially in a foreign country.

In face of these challenges of going to trial abroad, *Fedepaz*' lawyers stressed their support for the plaintiffs' decision to settle the case, although they had hoped for a different outcome. Furthermore, David stressed that the payment of compensation was "also a manifestation of justice" for the plaintiffs. The lawyers in Peru hoped that it would allow the plaintiffs to "change their life" and "to compensate them for the acts of violence they had suffered." David rhetorically asked, "Who are we to take from them this opportunity?" Thus, he was also careful in stressing that the plaintiffs had a right to financial compensation.

In addition, David told me that Monterrico's concession to pay compensation can and should be interpreted as an admission of guilt. *Fedepaz* published a press release about the settlement that underlined this argumentation (Fedepaz 2011). For David, the compensation payment was a clear acknowledgment by the corporation of having committed mistakes, although it officially denied any moral or legal responsibility. He told me,

> I mean, the company didn't pay compensation because it occurred to them, right? The company paid compensation because it knew that its employees had acted badly, on behalf of the company. So, that's why it paid compensation. Beyond the fact that in the out-of-court settlement it is said that the company does not recognize responsibility, if it does not recognize responsibility, why does it pay? – *David, lawyer with* Fedepaz, *May 2017, Lima (interview transcript)*

In this way, *Fedepaz* attempted to interpret the out-of-court settlement as a kind of attribution of responsibility. In retrospect, though, David admitted that this attempt had achieved little success. He referred to the fact that the settlement avoided a trial; in consequence, the actual process of adjudicating did not occur, the question of the parent company's responsibility was not addressed, and no judgment was passed.[57] Therefore, *Fedepaz*' expectation of the law to create public recognition for a crime and to establish the truth, as I discussed in Chapter 2, remained unfulfilled. In our conversations, the Peruvian lawyers assessed the Monterrico case critically, not only because of the negative consequences of the compensation payments but, above all, because the settlement prevented the actual use of the "force of law" (Bourdieu 1987). Their expectation of law is to establish the truth and create public recognition for the harm the plaintiffs had suffered. However, in the lawyers' opinion, this can only be achieved with a trial and a judgment.

In cases that are settled out of court, the absence of a trial means that there is no adjudication and no judgment on the legal issue underlying the claim, i.e. the question of the parent company's responsibility. In this sense, I propose to compare out-of-court settlements to the form of "alternative dispute resolution" that Laura Nader (1999, 305, 308) has discussed in detail. In her analysis of "harmony law models," Nader claimed that alternative dispute resolution is aimed at achieving consensus between the parties about a conflict rather than being aimed at adjudication. She also states that it is based on negotiation in the private space rather than in a courtroom (see also: Mattei and Nader 2008, 18–9, 77). This is very similar to what we can observe when transnational lawsuits against parent companies are settled out of court (see also: Lindt 2020). In transnational lawsuits, access to justice is not equal for all, and corporations often "come out ahead" (Galanter 1974), as I demonstrated in the previous discussion on the hurdles and barriers in accessing foreign courts. However, the *Fedepaz* team believes in the counterhegemonic use of law, as we have seen in the previous chapters. The NGO's lawyers had hoped that litigating the case in London would support their struggle against state and corporate impunity in Peru and would help attribute legal responsibility to the corporation. This testifies to different expectations of the law than those that have been pursued by the lawyers working with Leigh Day.[58] The legal ideology of the Peruvian lawyers was in this regard very different from that of their British counterparts.

David expressed his disappointment by telling me, "We are not very much convinced of the extrajudicial agreement because we, as human rights defenders, what we want is that the truth is publicly known and that justice is established by official

57 For a more detailed discussion of out-of-court settlements and how they avoid adjudication, see: Lindt 2020.

58 These differences in expectations of the law became apparent in the interview I conducted with Richard Meeran, which, as mentioned above, I am unfortunately not allowed to quote.

acts. [*Queremos que se conozca públicamente la verdad y que se haga justicia de medida pública.*]" *Fedepaz* as an institution has a clear understanding of the role that litigation should play in the struggle against corporate impunity. Its strategy is to bring cases to trial and to provoke a response by the state. For *Fedepaz*, the trial holds great significance as a central space where responsibility is negotiated and determined. "Justice is to know the truth! [*Justicia es que se conozca la verdad*]," David told me. Bringing a claim abroad is a "subsidiary option" to the Peruvian lawyers' struggles in the domestic system of justice. They had hoped that litigating in the United Kingdom would contribute to the legal reconditioning of alleged corporate abuses in Peru. However, this was not the case.

Strengthening social struggles on the ground

The central aim of the Chaupe family's transnational lawsuit, in turn, was to ensure that "the family will finally be able to live in peace at Tragadero Grande," as one of the attorneys working with EarthRights International explained to me. The underlying purpose was to urge Newmont Mining to use its control over Minera Yanacocha and to put an end to the harassment against the family. This expectation relies on the assumption that legal proceedings, in particular a conviction for human rights violations, will cause major damage to a company's image, which will consequently change the corporation's behavior in the future. A lawsuit may result in a "litigation threat" (Schrempf-Stirling and Wettstein 2017, 556) when TNCs acknowledge the possibility of being held accountable in their home states for abuses committed abroad.

For EarthRights International, as a legal NGO, a lawsuit does not need to be financially viable, but politically relevant. They do not rely on winning cases to cover their costs – as Leigh Day, for example, does – because as an NGO they are funded by donors. In turn, the selection of cases that EarthRights International brings to court is guided by the organization's broader agenda and is aimed at supporting the social movements and grassroots organizations that the NGO collaborates with. In this sense, EarthRights International understands Máxima Acuña's lawsuit as an "emblematic" case to demonstrate the imbalance of power between marginalized people in the Global South and TNCs headquartered in the United States. One of EarthRights International's U.S. attorneys told me that the lawsuit on behalf of the Chaupe family is aimed at "giving a message to companies that they cannot act beyond the law, they cannot act with impunity, [and that] there should be consequences." Similar to the Peruvian human rights organizations, EarthRights International thus views the law as an emancipatory means for strengthening the rights of marginalized population groups. The U.S. NGO's aim is to "combine […] the power of law and the power of people in defense of human rights and the environment" (EarthRights International 2006, 77).

"I think it's fine that they try to sue Newmont Mining in their own home [*en su propia casa*]," an activist in Celendín commented when we talked about Máxima Acuña's lawsuit in the United States. This activist, however, did not know much more about the court case and about the legal strategies EarthRights International and the family pursued with this legal action, although he, as an active member of the PIC, was in constant exchange with lawyers of the international NGO. In general, the Chaupe family's lawsuit in the United States was hardly discussed in Cajamarca or Lima during my fieldwork. Only a few activists and human rights lawyers actually knew about the case, and those who did – for example, EarthRights International's team in Lima – were reluctant to discuss the case with me. They told me that this is an "issue dealt with by the NGO's main office in Washington D.C." and that lawyers in the United States would lead the case. Therefore, they did not want to comment further on it. Other lawyers and activists I talked to in Peru, however, were more direct in expressing concerns that, as mentioned above, the lawsuit or a possible compensation payment would lead to adverse effects for the family.

In a manual on transnational human rights litigation, EarthRights International acknowledged this danger that a court case could lead to social conflicts on the ground. There, the NGO stated that a "lawsuit may create tensions and jealousy, especially if a few plaintiffs stand to gain from it and their neighbors do not" (EarthRights International 2006, 39). Additionally, one of the NGO's U.S. lawyers explained to me that "[…] in general, when we evaluate a case, we don't only look at the facts […] but also what the case means in the politics of the region." Hence, EarthRights International seems aware of the risks of legal activism on the ground. But what did this mean in practice? How would the U.S. NGO staff prevent negative impacts from occurring on the ground?

A U.S. lawyer working at that time with the NGO explained to me that communication was key to avoiding such negative social outcomes in the plaintiffs' local communities. For her, it is important to, first, "just really listen and ask" the plaintiffs what they want, thus to have a close relationship with the affected people and to personally develop legal strategies in close collaboration with them. This approach is fully in line with the recommendations made in EarthRights International's manual on transnational lawsuits, which states that "victims and affected communities should take the lead in any transnational lawsuit. […] The victims should make the decision whether to file a case freely and with as much information as possible" (EarthRights International 2006, 7). A second important point the U.S. attorney referenced in the lawsuit of the Chaupe family was informing the wider population in Cajamarca about the ongoing U.S. lawsuit in order to avoid social tensions and a negative outcome of the court case. In her opinion, this could happen, for example, "by informing the local communities and the social movements via social media."

From the perspective of Peruvian human rights activists I talked to, the Chaupe family's lawsuit in the United States did not meet the requirements to be consid-

ered an example of how bringing a claim abroad could strengthen the political struggles on the ground. Although EarthRights International pursues similar ideas about what can be achieved through legal mobilization as many of Peru's human rights NGOs, the example of this lawsuit nevertheless reveals how the risks of legal activism may be assessed differently from the perspective of human rights lawyers in the Global North and their colleagues in the South.

Producing evidence in foreign courts

While the lawsuit against Newmont Mining in the United States was thus viewed cautiously to very critically from a Peruvian perspective, the FLA application on behalf of Elmer Campos was received much more positively. In contrast to the Monterrico and Chaupe case, this lawsuit was an attempt at using a foreign jurisdiction not to seek compensation or justice but to obtain evidence that would help to bring forward local lawsuits. In this sense, the approach represents a sort of paradigm shift in transnational human rights litigation.

The FLA application was based on close cooperation between EarthRights International's U.S. lawyers, their Peruvian colleagues and the *Coordinadora* lawyers, in particular Mar, who represented Elmer in the criminal case in Cajamarca. The fact that the central legal proceedings, i.e. the criminal proceedings on behalf of Elmer, occurred before domestic courts was of great importance for the Peruvian human rights lawyers. Litigating the case domestically contributed to their feeling of maintaining control over the case. The lawsuit abroad was, in contrast, only aimed at supporting this domestic claim. This allowed the Peruvian lawyers "to maintain the power to decide about the course of the lawsuits," as Mar told me.

Moreover, by focusing their efforts on the domestic proceedings, the Peruvian lawyers were able to pursue their expectations of the law to bring about institutional change. Mar told me that "in this way, it is possible to get things moving here [in Peru]," although she stressed that they did not yet have a favorable judgment in Elmer Campos' case in Peru and that, therefore, they could not yet "talk of a success." However, as I pointed out in Chapter 3, the Elmer's case has advanced further than other cases of police violence in mining conflicts. Even more importantly, the fact that the company Minera Yanacocha has been included in the proceedings as a civilly liable third party is already a great achievement for the Peruvian human rights movement, which the lawyers explicitly attribute to the FLA application in the United States.

The innovation of the FLA statute lies in its focus on disclosure of corporate documents that can then be used in domestic lawsuits. Thus, the legal action is directly aimed at supporting legal struggles on the ground. Access to evidence is key in litigation against TNCs. *Coordinadora* lawyer Mar explained to me that the FLA application's most significant outcome was to prove that important decisions concerning the collaboration between Minera Yanacocha and the police during the Conga pro-

tests were made in the United States.[59] Peru's human rights movement had known for a long time that a contract for extraordinary services existed between Minera Yanacocha and the police, and they had also assumed that Newmont Mining was well informed about its subsidiaries' activities on the ground. However, evidence backing up these assumptions had always been lacking.

As I described in Chapter 3, although obtaining and presenting evidence in a court case should be the responsibility of the prosecutor, in practice, the complainants' side often takes up this task in order to prevent a case from being closed because of a lack of evidence. In Elmer's criminal proceeding, important evidence was eventually obtained thanks to EarthRights International's efforts to bring the FLA application abroad. In this sense, the legal action in Colorado had a direct influence on the legal proceedings in the courts in Cajamarca and supported the human rights movement's struggles.

In addition, the FLA application also differed from the other two examples since it required the U.S. judge to conduct a different legal analysis than the two lawsuits on parent companies' liability. This made a crucial difference and helped the case to be successful. In the FLA application, the question at stake was not whether the parent company bears a legal responsibility for the committed crimes. Rather, the lawsuit was limited to the question of whether Newmont Mining had a certain degree of control over the operation in Peru and was therefore in possession of relevant documents. This helped EarthRights International claim a link between Newmont Mining's headquarter in Colorado and the police intervention in Cajamarca.

If we look at lawsuits in which plaintiffs seek to attribute legal responsibility to a parent company – for example, in the Monterrico case or in the lawsuit on behalf of the Chaupe family – courts in the Global North take a much more restrictive approach to establishing this link of control between different corporate entities.[60] In contrast, the question of parent liability was not at stake in the U.S. legal proceedings

59 The documents demonstrated that employees of Minera Yanacocha sent reports to the U.S. headquarters on a daily basis commenting about where protests in the Cajamarca region occurred.

60 A striking example of this is the civil lawsuit in the United Kingdom against Royal Dutch Shell plc (RDS) and Shell Petroleum Development Company of Nigeria Ltd (SPDC) for environmental pollution caused by the subsidiary in Nigeria. The parent company's level of control over its Nigerian subsidiary was the central issue discussed during a three-day hearing at the Court of Appeal that I attended in London in November 2017. Appellants used corporate documents such as RDS's annual and sustainability reports to convince the Court of Appeal that control was "exercised through mandatory policies" and that, as a result, the parent company had, in fact, a duty of care. Two of the three responsible judges did not follow this argumentation, and the court consequently dismissed the appeal, stating that the claimants failed to prove a relationship of proximity between the parent company and its subsidiary (Okpabi and others v Royal Dutch Shell Plc and another, [2018] EWCA Civ 191).

on behalf of Elmer. As I mentioned above, it is not only judges from the Global South but also their colleagues from the Global North who attempt to circumvent this political issue. In Elmer's claim, however, the elephant in the room went untouched, and the Court of Colorado accepted that there exists the necessary relationship between the corporation's headquarter in Colorado and the Peruvian mine site.[61]

Conclusion

Although transnational court cases are often aimed at attributing legal responsibility to the parent company, the example discussed in this chapter illustrates that this question is ultimately left out in such lawsuits. Furthermore, Elmer's case in the United States revealed that it is precisely the exclusion of the political question of parent companies' responsibility that can lead to the courts in the Global North granting a claim. If a lawsuit in a home state is based on the question of parent responsibility, it ends with a dismissal in most cases, as in the Chaupe case, or with an out-of-court settlement, as in the Monterrico case. This points to the political sensitivity of corporate responsibility, not only in countries like Peru, but also in the Global North. As a consequence of these circumstances, it was possible in the lawsuit on behalf of Elmer to obtain important documents in the United States that, in turn, had a positive effect on the legal struggles in Peru.

The Monterrico case, in contrast, had no impact on the Peruvian criminal proceedings. Moreover, ten years after the settlement, the *comunidades* in Piura faced new attempts by the state and the corporation to develop the Río Blanco project, while the local protest movement had been weakened as a result of the out-of-court settlement. All Peruvian lawyers with whom I discussed this lawsuit told me that they had learned much from the case. The major reason for the negative outcome of such lawsuits is, in their view, that their counterparts in the Global North were able to dictate the collaboration and that, as one lawyer said, "all the rules of the game [were] set from there." She expressed the hope for the future that "maybe at some point, we can count on a counterpart in the North who is more open" to the needs and aspirations of the social movements and the legal NGOs on the ground. In this sense, she hoped that international NGOs and *pro bono* law firms would learn from past experience and adapt their cooperation with partners in the South "in such a way that the decisions are taken in the South, the priorities continue to be taken in the South, and [the lawyers in the North] are simply operators."

61 The court's order was based on the fact that there were several managers working for both corporate entities, which, in comparison with other cases, is a rather simple way of proving parent control over a subsidiary.

David told me that their lack of experience in transnational lawsuits had been one of the principal obstacles. If members of *Fedepaz* were ever involved in such a case again, they would approach it differently in order to be able to maintain control over how a lawsuit evolves. The Peruvian lawyers' understanding of achieving justice entails determining who is responsible for the offenses and not just achieving individual financial compensation. Mar told me that the lawyers from the Global North are "super-efficient in their work, but their logic is only one of cost and benefit." For the Peruvian human rights lawyers, lawsuits do not need to make "commercial sense," but they do need to have a positive impact on the ground – for individuals and for the communities. Only in this way can such legal processes be seen as an emancipatory means to support the social struggles on the ground and to fulfill the expectations people place on law.