“Our Bodies and Our Lands Are Not for Sale:” A Comparative Analysis of Law, Transnational Allyship, and Development-Related Violence

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DEDICATION

This dissertation is dedicated to my family and friends for all their support over the past six years. In particular, to my husband, David, who has been unfailingly patient and supportive both as my partner and anthropological colleague. You are my best friend, my soul mate, and my all-around favorite human being. I love you. Also to my mother, Elizabeth, and brother, Aaron, who have cheered me on, cheered me up, dusted me off, and pushed me back into the ring innumerable times. To my wonderful family-in-law for your love and support. I couldn't ask for a better second family.

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ABSTRACT

While Canadian mining projects are routinely linked to acts of violence around the world including sexual violence, community displacement, environmental harms, use of forced labor, intimidation, and murder, the Canadian government has repeatedly failed to pass legislation holding Canadian-based corporations accountable for human rights abuses committed outside Canada's national borders. In a globally unprecedented move, Canadian civil courts have begun asserting their jurisdiction over cases of development-related violence committed abroad. Through comparative analysis of two of these ongoing lawsuits, *Caal v. Hudbay*, addressing sexual violence in Guatemala, and *Araya v. Nevsun*, concerning the use of forced labor in Eritrea, "Our Bodies and Our Lands" explores the ways civil law is being used to address incidents of corporate capitalist development-related violence and how engagement in the legal process affects stakeholder perceptions of law, justice, human rights, and trauma.

Composed of three stand-alone articles woven together to explore the lived experience of both development-related violence and the legal process, this dissertation is grounded in three overarching themes: 1) defining "violent landscapes" and its applications for studying transnational development-related human rights violations; 2) comparative analysis of transnational allyship in Canada's new sphere of jurisprudence with an eye towards developing best practices; and 3) understanding cycles/legacies of violence by situating the experiences of the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun* within their broader historical and structural contexts. Ultimately, my research positions law as a space of both creativity and constraint, of hope and frustration, for stakeholders in *Caal v. Hudbay* and *Araya v. Nevsun* and presents transnational law as an exciting emergent field of study for legal scholars and social scientists alike.

PREFACE

In the summer of 2011, I was sitting in a clearing in the highlands of Guatemala listening to a group of Q'eqchi' Maya women describe their experiences of being gang-raped four years earlier. While their stories were intensely personal, these women also wanted to emphasize the bigger picture: their rapes were part of a much larger project of development-forced displacement. Maya communities across the province were being evicted from their ancestral lands because a Canadian mining corporation claimed to have purchased the land in 1965. Without a means of securing legal land rights, these subsistence farming communities would remain trapped in states of chronic insecurity. To the women in that clearing the connection was obvious: physical violence was part of a broader system of structural violence, and the rape of the people could not be disconnected from the rape of the land. As one woman put it, "our bodies and our lands are not for sale."[1]

That same year these women filed a civil suit in Ontario, Canada against the mining corporation that claimed to own their lands, Hudbay Minerals, Inc. (hereafter "Hudbay"). Hudbay fought to have the case thrown out, but in 2013 – against all legal precedent – the Ontario Superior Court of Justice agreed to hear the case. *Caal v. Hudbay* is the first lawsuit against a Canadian mining company for human rights violations committed abroad to be accepted for trial in a Canadian court. In following the progress of *Caal v. Hudbay* I learned several other, similar cases, including *Araya v. Nevsun*, had also been filed in civil courts throughout Canada. I began researching the lawsuits, as well as the violence the plaintiffs alleged. The more I read the more I realized the complexity of these cases.

[1] Community meeting with Guatemala Human Rights Commission (GHRC) delegates, August 2011.

The fact human rights violations are routinely treated as the cost of business in the world of transnational corporate capitalist development was not news to me or to anthropology in general. For decades, numerous scholars have documented the lived experience of individuals and communities affected by development-related violence. However, I became fascinated with the networks of passionate activists, advocates, and allies who supported the plaintiffs and their communities and helped make these lawsuits possible. I wanted to "study up," to understand where the lawyers, amica curiae, human rights activists, and judicial, legislative, and economic policies of various nations fit in to this narrative. This dissertation is my attempt to use comparative analysis of *Caal v. Hudbay* and *Araya v. Nevsun* to better understand the structures, processes, and policies that lead to development-related violence, as well as the ways in which transnational allyship has led to new spaces of resistance in the Canadian judicial system.

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PART I: VIOLENCE IN CONTEXT

Introduction

How is the power of law used to address cases of development-related transnational human rights violations? Over the past decade, Canadian mining projects have been linked to hundreds of acts of violence internationally including sexual violence, destruction of property, community displacement, the use of forced labor, intimidation, and murder (CCSRC 2009; Gordon and Webber 2008; Imai, Maheandiran, and Crystal 2014; Welker 2009). While the Canadian government has repeatedly failed to pass legislation holding Canadian corporations accountable for human rights abuses committed outside Canada's national borders, in an unprecedented move Canadian civil courts have begun asserting their jurisdiction over cases of development-related violence committed abroad. What is the potential for these cases to address the transnational systems of neoliberal capitalist development that foster violence, and what are the strengths and limitations of these legal mechanisms in effecting positive change for affected communities and individuals?

This dissertation assesses the intersection of legal normativity and lived experience in two groundbreaking cases: *Caal v. Hudbay* (Guatemala) and *Araya v. Nevsun* (Eritrea). Specifically, I examine how transnational networks of lawyers and human rights advocates have collaborated with members of the Lote Ocho community in Guatemala (*Caal v. Hudbay*) and refugees from the Nevsun Bisha mine in Eritrea (*Araya v. Nevsun*) to pursue justice and accountability for harms either committed or enabled by Canadian mining corporations. Using an analytical framework derived from anthropologies of law and policy, development, and human rights along with the disciplines of peace and conflict studies, geography, law, and international development, the project examines how physical and structural violence interface in processes of

transnational development backed by corporate capitalism, and assesses the capacity of the law for redress and resistance.

Case Backgrounds

In Guatemala, an internal armed conflict spanning from 1960 to 1996 occurred largely due to land disputes between indigenous communities, non-indigenous landholders, and private corporations. The 1996 Peace Accords included provisions for land reform, yet indigenous communities continue to be denied legal access to land and suffer disproportionate rates of displacement and poverty compared to non-indigenous Guatemalans (CEH 1999; UNDP 2018). In 2007, security personnel from the Hudbay Fenix mine, together with Guatemalan military and police forces, allegedly used destruction of crops and property, intimidation, physical assault, and sexual violence to evict Lote Ocho from their ancestral lands. In 2011, eleven Lote Ocho women filed a lawsuit against the mining company in the Ontario Superior Court of Justice for gang-rapes they allege were committed during the eviction. The case, *Caal v. Hudbay*, is the first lawsuit against a Canadian mining company for human rights violations committed abroad to be accepted for trial in a Canadian court (Imai, Maheandiran, and Crystal 2014).

In Eritrea, totalitarianism, corruption, and human rights violations have increased since the end of the 1998 border war with Ethiopia. Individual and collective rights have been set aside in the bid for security and stability while democracy has been put on hold indefinitely. The Eritrean government routinely uses forced conscription, torture, forced labor, repression of religious freedom and freedom of expression, enforced disappearances, and other human rights violations as tools of statecraft (Hepner 2012; Kibreab 2009; Poole 2009; UNHCR 2016). In November 2014, three Eritreans filed a lawsuit in the Supreme Court of British Columbia alleging that forced labor was used in the Nevsun Resources, Ltd. Bisha copper-zinc mine,

established in 2008. In 2016, the Supreme Court of British Columbia agreed to hear the case, making *Araya v. Nevsun* the first time a civil case will be heard in Canada against a Canadian corporation for breaches of customary international law (Gifford and Lam 2016).

These two lawsuits represent a growing judicial trend in Canada, now including five cases, in which alleged criminal acts committed in international contexts are being tried as civil cases in the country in which the corporations are based rather than where the violations took place. My research examines how transnational networks of lawyers and human rights advocates have collaborated with members of the Lote Ocho community in Guatemala and refugees from Eritrea to pursue justice and accountability for harms stemming from the intersection of corporate and national development policies in Canada, Eritrea and/or Guatemala. Lastly, I analyze the relationship between the theoretical or normative dimensions of law and the grounded experience of it among participants (defined here as plaintiffs, lawyers, and activists)[2] with an eye towards developing recommendations for best practices for transnational human rights allyship[3] amongst activists, lawyers, and affected communities and individuals.

I chose to study these two cases in particular for a number of reasons. First, I already had access to stakeholders in both cases thanks to prior work I had conducted in Guatemala and to my advisor's previous work with Eritrean diaspora networks. Second, of the five transnational law cases currently in Canadian courts, four, including *Caal v. Hudbay,* regard human rights violations taking place in Guatemala and one, *Araya v. Nevsun*, examines violations within

[2] While concerted efforts were made to contact both Hudbay and Nevsun for research permissions, I was repeatedly told to refer to the companies' official statements about the cases, available on their websites. As such, defendant perspectives on the cases – beyond the information published on their websites, in press releases, or observed during court proceedings—is not included in this dissertation.

[3] The term "allyship" is examined more thoroughly in Articles II and III, but is defined within this dissertation as the process of building trust and accountability-based relationships focused on achieving a common goal for the mutually determined benefit of a marginalized group of individuals and/or peoples. It should be noted that, while allyship involves defining and working towards a common goal, this does not mean all allies share the same motivation for achieving that goal.

Eritrea. I felt comparing cases which had two very different sets of stakeholders would provide a richer sense of how transnational legal allyship networks form and function, as opposed to focusing on two cases from Guatemala where a lot of stakeholder overlap exists in terms of the legal and human rights allies and advocates involved. Third, examining cases of corporate capitalist development-related violence occurring in two countries with different historical backgrounds and present circumstances, rather than confining my work to Guatemala, provided a far more compelling way to examine how legacies/cycles of violence operate and to assess the broad applicability of a theory of landscapes of violence.

Structure of the Dissertation

This dissertation is presented as a series of three stand-alone articles, woven together to address the broader research questions and objectives outlined above. The order of the articles follows my own intellectual process as I conducted my research and analysis, while the wide variation between the articles reflects the richness and complexity of corporate capitalist-related violence and the multiple avenues of inquiry available for current and future research.

The first article assesses the potential and limits of law to address the bureaucratic mechanisms and grounded experiences of corporate-development-related violence, and the changing relationship between states, corporations, law, and human rights in the modern global era. This article provides historical context for *Araya v. Nevsun* and *Caal v. Hudbay*, laying bare the complex underlying structures of domestic governance, transnational corporate capitalism, and development in Canada, Guatemala, and Eritrea that collectively form a system that sets the conditions for development-related harms to occur. These systems, structures, policies, and positions which enable violence to occur are collectively defined as the bureaucracy of violence.

The second article focuses on the transformative process of human rights law, what Sally Engle Merry (2006) terms "vernacularization" and Shannon Speed (2009) calls "local appropriation." What has the impact of transnational allyship during the legal process been for both the plaintiffs and the legal actors assisting them? How has this collaboration shaped these individuals' internalization and interpretation of human rights and the legal system? How has it influenced their hopes, fears, and goals related to the potential and limits of law to address both the plaintiffs' immediate safety and security and the broader structures that engender development-related violence?

The third article examines the complexity of resistance, further unpacking the dichotomy between the formal legal system as a space where power imbalances are reinforced and also as a site of empowerment for marginalized individuals and groups. In a country where the executive and legislative branches have repeatedly failed to hold corporations responsible for human rights abuses committed abroad, Canada's judicial system is emerging as a space where the causes of social inequality, and assignment of responsibility, are being reimagined beyond the boundaries of the nation-state. This article's ethnographic examination of *Caal v. Hudbay* and *Araya v. Nevsun* provides a salient reminder that resistance is often as much about creating spaces and opportunities for dissent within existing power structures as it is about dismantling those structures. Lastly, this article situates the successes of *Caal v. Hudbay* and *Araya v. Nevsun* in being heard domestically in Canadian courts within a broader understanding of established responses to international and transnational human rights violations.

While each of the three articles in this dissertation examines very different aspects of how the power of law is being used in Canada to address cases of development-related transnational human rights violations, three overarching themes weave throughout: 1) defining "violent

landscapes" and its applications for studying transnational development-related human rights violations; 2) comparative analysis of transnational allyship in Canada's new sphere of jurisprudence with an eye towards developing best practices; 3) understanding cycles/legacies of violence by situating the experiences of the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun* within their broader historical and structural contexts.

Conceptual Framework: An Interdisciplinary Approach to the Study of the Application of Domestic Law to Transnational Development-related Violence

Given the multidisciplinary and multi-sited nature of my research, this dissertation draws upon a broad range of scholarship and theoretical insights. First, it builds upon legal and legal anthropology literature regarding the relationship between law, justice, and legal consciousness as well as the changing understanding of jurisprudence and jurisdiction in a global era. Second, it is informed by development anthropology, geography, and sociology's work on the relationship between states and corporations as well as neoliberal capitalist globalization, development, human rights, and violence. Lastly, anthropological and sociological literature regarding conflict, trauma, biopolitics and biopower are woven throughout the dissertation. Together, these varied theoretical approaches provide a framework for understanding the lived, grounded experience of corporate capitalist development-related violence and transnational legal allyship.

Research Design and Methodology

The research for this dissertation combined in-person interviews and participant observation with Skype and telephone interviews and analysis of primary and secondary documents. Over the course of eight years I spoke with plaintiffs, family and community members of the plaintiffs, attorneys, amica curiae, expert witnesses, translators and non-profit workers and human rights proponents affiliated either with the court cases or the plaintiffs and

their communities in general. Participant observation of legal proceedings related to the cases, day to day operations of the Ontario Superior Court of Justice, the Supreme Court of British Columbia, court preparation by the attorneys, and day to day non-profit organization operations, as well as community meetings in Lote Ocho also contributed significantly to my research.

The data collected examines three specific aspects of how individuals and groups attempt to use legal mechanisms to address the immediate harms of development-related violence as well as the broader frameworks that engender such violence: 1) the expectations and goals of the participants in *Caal v. Hudbay* and *Araya v. Nevsun*, defined as plaintiffs, lawyers, and activists associated with the cases; 2) the potential (and limits) of civil cases to address the specific incidences of violence alleged by the plaintiffs; 3) the potential (and limits) of civil cases to address the broader matrices of power within which development-related transnational human rights violations occur.

The first research question contributes to three theoretical subquestions: 1) what is the potential for these civil cases to address corporate and national development policies that contribute to development-related violence; 2) how do the various actors within these two court cases view the relationship between law and justice; 3) how does Canada's changing jurisprudence fit in with broader narratives of resistance to the violence of corporate capitalist development? For example, research participants were asked what they hope to achieve by participating in the lawsuits, both short term and long term, and why they are participating.

The second objective was to identify whether, and how, *Caal v. Hudbay* and *Araya v. Nevsun* can address the specific incidences of violence alleged by the plaintiffs. The participants involved in the cases were asked what (if any) they believe the practical impact of the cases will be on the plaintiffs' daily lives, or what changes they may have seen already.

The third objective is to identify whether, and how, participants in *Caal v. Hudbay* and *Araya v. Nevsun* are attempting to use the power of law to address chronic insecurity in Guatemala and Eritrea. Are these cases addressing gang-rape and forced labor, respectively, linked (or not) to larger ambitions for obtaining long-term security for vulnerable Guatemalans and Eritreans? If so, how do the identified stakeholders view the cases' relationships to these broader goals?

Data was collected using in-person, Skype-based, and telephone informal and semi-structured interviews as well as participant observation in the courts in Toronto and Vancouver and in the community of Lote Ocho. In addition, a large database of primary and secondary documents was compiled and analyzed to assess how historical social, economic, and political policies in Guatemala, Eritrea, and Canada have contributed to the production of community and individual vulnerability to development-related violence. The database includes archival research of press releases and reports related to *Caal v. Hudbay* and *Araya v. Nevsun* as well as the vast array of legal documents generated by the two cases. Secondary literature related to corporate capitalism, development-related violence, international human rights law, Guatemala's historic and modern land access practices, and Eritrea's historic and modern use of forced labor were also incorporated into the study for the purposes of providing context for the research. Lastly, I obtained a full time job as a paralegal for a trial attorney in Knoxville, Tennessee. The year and a half I've spent in this position has helped me greatly in understanding the intricacies of the legal process and learning legalese, invaluable skills in deciphering hundreds of pages of case filings.

For interviews, approximately twenty research participants were selected using purposive and snowball sampling. Unless already publicly associated with a particular statement or quote, to preserve the privacy of my research participants their names are not listed in this dissertation

or specifically attached to quotes or concepts. Both in-person interviews as well as interviews conducted via Skype were employed in this study. Preliminary research conducted in 2011 and 2013 demonstrated that Skype and other technological communication forms, such as WhatsApp and email, are primary ways in which the transnational actors engaged in *Caal v. Hudbay* and *Araya v. Nevsun* communicate with each other. Conducting research using the same methods my participants use to communicate was an important element of this project and contributes to a growing body of research concerning the changing nature of conducting ethnographic fieldwork in the digital age (Hallett and Barber 2014; Lo Iacono, Symonds, and Brown 2016). While some scholars (Cater 2011; Seitz 2015) have concluded that the use of Skype as an interview tool can hamper the development of rapport between the researcher and their research participants, other researchers have found it to be an effective ethnographic tool, particularly when used in conjunction with in-person research such as participant observation (Deakin and Wakefield 2013; Murthy 2008). This dissertation's research participants have repeatedly mentioned the benefits and limitations of building allyship via remote technology, and exploring firsthand the pros and cons of VoIP (Voice over Internet Protocol) technology was an important aspect of this project.

In addition, seven weeks of supplemental fieldwork in Guatemala, Toronto and Vancouver focused on participant observation, including attending public court hearings and community meetings. This provided insight into how the interests of various participants are determined and represented. Fieldwork was not conducted in Eritrea due to the political sensitivity of the project and the highly restrictive research environment in the country.

All data collected was reduced and processed into textual materials for analysis. Interviews were transcribed and this data, along with all notes, was entered into Microsoft Word

files. Inductive analysis of these items, along with primary and secondary documents, was employed as well as deductive coding to identify themes and patterns in goals and expectations of the research participants. These themes and patterns allowed the ethnographic data to be connected to theoretical debates regarding the effectiveness of legal mechanisms in addressing both immediate harms and the broader structures of violence in cases of development-related violence. HyperRESEARCH was used to pile-sort information and conduct frequency analysis, allowing research themes to be identified based on response similarities over time. In addition, codebooks developed during the interview and observation processes identified themes and allowed the researcher to label them as they were encountered and determine the variables contributing to the development of those themes.

Observations Regarding Remote Ethnography

The increasingly transnational nature of anthropological research has invariably led to exploration of the ways technology can assist with ethnographic data collection. While there are many proponents for remote ethnography, it has yet to become a mainstream methodology. Much of the hesitation in using remote ethnography is the physical distancing factor, which seems so counterintuitive for anthropological work. However, the transnational nature of my own research, combined with personal and professional jet-setting limitations, means that my dissertation is particularly well suited for exploring the use of Skype as an ethnographic tool. I am also deeply interested in the idea of research that is both methodologically and theoretically rigorous as well as socially and environmentally responsible. Is it possible to have a "light-footprint" approach to ethnographic research while still obtaining richly detailed data?

Conducting ethnographic research predominantly via remote technology turned out to be a surprisingly transformative experience, albeit with a real learning curve. My usual use of Skype

and phone calls is either personal – chatting with close friends and family – or professional: remote conference presentations, job interviews, or connecting with clients overseas. Conducting ethnography via remote technology was something altogether different, something that existed in the space between strictly personal and strictly professional, and it took me a while to navigate that space.

For the first few chats with each participant I tried to retain a strictly professional standard. I'd set my computer up so a bare wall showed behind me. If I was at home I would put my two dogs outside and my two cats in a bedroom to ensure no awkward interruptions. I wore business casual attire. The first time this façade of strict professionalism was broken, one of the cats escaped from the bedroom and jumped onto my computer keyboard, as cats do. The individual I was interviewing was treated to a view of her derriere, tail held high. Externally I apologized profusely, laughed it off, and moved on. Internally I was embarrassed at the collapse of my professional image.

However, a few weeks later I was chatting with some fellow anthropology friends about funny fieldwork stories and realized embarrassing, unprofessional things happen all the time during fieldwork. When put into perspective, the cat incident was far and away not the most embarrassing fieldwork moment I had experienced. In Lote Ocho, Guatemala after the conclusion of a community meeting I was observing in 2011, I asked to use the outhouse of the family hosting my fellow GHRC delegates and I for lunch. I exited the outhouse rather more forcefully than I had intended, accidentally ripping the door off its hinges. The hinges were made of wrapped fibers so there was no hope of quickly remounting the door before someone noticed. There was nothing I could do but awkwardly prop the door against the outhouse and confess. Telling that family, who had just opened up to me about the most traumatic time in their lives,

that I had wreaked structural havoc on their only restroom was not my finest professional moment, though they were very gracious.

I thought, too, about all the fieldwork I had conducted while holding children, cats, dogs, and chickens in my lap; interviews conducted while needing to take frequent breaks to deal with the ill-effects of E. coli poisoning; participant observation I did while my forehead was slathered in thick, white paste after receiving a horrific sunburn on a cloudy day high in the Andes mountains. I thought about the time when, on my very first archeological excavation as an undergraduate, I fainted dead away into one of the excavation pits thanks to a sudden blood sugar crash. Somehow these circumstances did not make me any less professional in the eyes of my research participants or colleagues (or at least they told me it did not). In fact, in many ways these moments of vulnerability helped break down the barriers of impersonal propriety and build the trusting, open relationships necessary for conducting in-depth fieldwork. So what made my fieldwork via remote technology feel so different?

The "stranger in a strange land" element that often accompanies more traditional cultural anthropology fieldwork is a built-in reminder to us as researchers that we are there to learn from our research participants. We are in someone else's space. We are the students, our research participants are the teachers, and as such we allow ourselves to step back from the expert role. Up until I started gathering data using remote technology, my experience with ethnographic research had always contained an element of my own displacement. However, in the early stages of conducting remote interviews from my own home and office, I had somehow failed to fully make that transition into the student role.

In searching for the right professional/personal balance, I came to the realization I had a unique opportunity to share with my interviewees what, in my previous work, my research

participants had so often shared with me: my home and lived environment. I started conducting informal interviews on my back deck while drinking coffee or a glass of wine. I introduced some of my research participants to my pets (faces only). I conducted interviews at my kitchen table, with my fruit bowl and reproduction of Gustav Klimt's "Water Serpents" serving as backdrop. On one occasion the Klimt sparked a conversation about art, while another interviewee remarked that the bananas in my fruit bowl didn't look so good (they were plantains, I explained, and I wanted them to be brown) and we began talking about cooking.

It took longer to reach a level of personal comfort with my research participants via remote technology that it probably would have in-person, particularly as I was navigating remote ethnography for the first time. However, while I cannot say I prefer conducting research at home to traveling, I ultimately found conducting fieldwork via remote technology to be every bit as richly informative as my in-person research in Guatemala and Canada, and it offered me an unexpected opportunity to discover and address some personal biases I was unaware I had regarding what constitutes anthropological fieldwork.

As the articles in this dissertation demonstrate, studying new spheres of inquiry requires methodological adaptation. Rethinking how we define "the field" is nothing new in anthropology. The concept of fieldwork as requiring the territorially-based embeddedness of the researcher as the only way to obtain reliable data and to set anthropology apart from other social science disciplines has long been critiqued as contributing to the fetishizing of both the discipline and the people and cultures we study. By the late 1990s the movement to decolonize anthropology had led scholars to call for a reconceptualization of fieldwork that involved "less of a sense of 'the field' (in the 'among the so-and-so' sense) and more of a sense of a mode of study that cares about, and pays attention to, the interlocking of multiple social-political sites and

locations" (Gupta and Ferguson 1997:37). Regarding conducting fieldwork in the modern global age, Roger Sanjek observes that "both how we conduct fieldwork and what we study now involve digital dimensions that must be embraced" (2016:10).

While anthropology's early forays into explorations of the impact of the digital age on ethnography focused on how technology could be used to make conducting fieldwork and processing the resulting data easier – for example, the use of word processing, email communication between colleagues or advisors and their students in the field, transcription programs, and coding software – the development of technology increasingly calls for anthropology to study the technological lives of our research participants themselves (Sanjek and Tratner 2016). As it becomes more and more common for human interaction to occur within the realm of technology, we as anthropologists have an obligation to investigate these new non-physical sites of interconnection. Neither *Araya v. Nevsun* nor *Caal v. Hudbay* would have been possible without remote technology enabling a network of far-flung transnational allies to forge deep personal and professional connections despite the absence of regular in-person interaction. Without becoming engaged within that network myself and experiencing first-hand the benefits and limits of remote technology faced by my own research participants, my research would not have achieved the level of depth that it has.

Observations Regarding Conducting Research on Ongoing Lawsuits

Conducting fieldwork on ongoing lawsuits presented a number of unique challenges, particularly regarding confidentiality. While over half of my research participants are publicly named as being involved in the lawsuits – for example the names of plaintiffs, attorneys, and amica curiae associated with the cases are available in open court records – this did not necessarily mean those individuals did not desire some degree of anonymity. Additionally, the

stakeholder network included non-profit workers who were sometimes the only, or one of only a few, individuals from their organization affiliated with the case. Something as simple as my identifying a human rights advocate as male or female or working for a particular organization would be enough to erase that person's right to confidentiality. On top of all this was the desire of legal actors to retain confidentiality regarding particular facts or legal strategies, or at the very least requests for sensitivity as to the timing of when certain information I had obtained would be publicly released. Any information the stakeholders provided had the potential to be used as evidence in the lawsuits and ensuring that no harm came to the cases was of central importance to all of the stakeholders, and to me as well. As I began writing up my results, I found myself needing to redact all but the most basic identifying information about my research participants, removing everything from names to organizational affiliation to gender identity even as I was weaving in quotes from newspaper interviews or legal briefs which were openly attributed to specific stakeholders.

Though my research participants were immensely interesting, inspiring people, in many ways they became flattened during the writing process. The passion and conviction and pain and hope in their statements remained vibrant, but the speakers themselves became blurred, indistinct. This often proved to be frustrating, particularly as I was writing a dissertation centering around the lived experience of development-related violence and the legal process. However, this balancing act of determining what stays private and what is public, of naming and not-naming, became a key feature of how I came to think about law and the legal process, ultimately contributing to Article III's discussion about the duality of law. Even as it provides a forum for marginalized individuals and communities to break their (often externally enforced)

silence, success within the legal system also encourages the redaction of voice and individual experience.

PART II: ARTICLES

Part II: Section I: Bureaucracies of Violence and the Glocality of Power and Capital

In all its forms – physical, symbolic, and structural – violence is overarchingly understood as actions or conditions causing, directly or indirectly, physical or emotional harm. Viewed as a process set within particular contexts, violence both uses and creates the conditions of marginalization that renders particular individuals or groups vulnerable to harm (Scheper-Hughes and Bourgois 2004). Far from being isolated incidents of sexual violence and forced labor, the human rights violations committed against the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun* occurred within broader frameworks of violence. I call these frameworks, or contexts, "violent landscapes"— in which the social, political and economic positions of marginalized communities and individuals, as well as their relationships with the physical terrain, put them at high risk for exploitation. These violent landscapes are constructed over decades, even hundreds of years, and at the center of their construction is the bureaucracy of violence.

When I first started researching *Caal v. Hudbay* and *Araya v. Nevsun* in earnest, I never expected the study of bureaucracy to become so central to my work. However, very early on I realized that transnational corporate capitalist development, as well as the law, are both heavily bureaucratic systems and this plays a central role in both the perpetuation of violence against the plaintiffs and the experiences stakeholders have in navigating the legal process. Without grasping the complex transnational systems and structures that govern corporate, legal, and government policies and practices in the modern global world it is impossible to understand how research permissions for mining had been granted on Lote Ocho's ancestral lands or how Canadian corporations could claim ignorance of, and non-responsibility for their perpetuation of, Eritrea's well-known use of forced labor.

While the term "bureaucracy" usually evokes aggravating yet mundane images of triplicate forms and unenthusiastic civil servants behind metal desks, the reality is that bureaucracy routinely perpetuates systemic structural and symbolic violence and enables physical violence. Priya Kandaswamy (2010) examined this link between bureaucracy and violence through analysis of the United States welfare system and its treatment of domestic violence survivors and perpetrators. Kandaswamy noted that the term "The Man," popularly used to refer to an authority in a position of power over others, is a metaphor for a system of practices that create structural violence. Like the mythical hydra, bureaucracy is made up of many individual heads all working independently yet in cooperation, and this multi-headed structure keeps those within its power under siege from a variety of sides, entrapping them within a violent landscape where their recourse against abuse is limited. The women in Kandaswamy's research may have escaped an abusive partner (a man), but as part of the welfare system they were thrust into new controlling and abusive relationships with the state (The Man) in which bureaucracy is used to control everything from access to social services, job access, housing, legal systems, political representation, and even civic engagement (2010). Similarly, Wendy Wolford and John D. French examined how members of governmental bureaucracy in Brazil, including lawmakers, politicians, and government officials, "constitute, represent, negotiate, and enact the state," revealing the complicated, heterogeneous reality of entities often assumed to be homogenous monoliths (2016).

As such, an analysis of bureaucracy reveals the forms and episodes of violence alleged in *Caal v. Hudbay* and *Araya v. Nevsun* are not just singular instances of poor local project management or a corrupt individual causing harm. Rather, they are part of a systematic perpetuation of violence inherently tied to the corporate capitalist development process: a

transnational The Man, made up of many actors constituting and enacting states, corporations, and supranational finance organizations.

Ultimately, I found the study of bureaucracy crucial to identifying the causes of development-related violence, as it reveals the individual policies, practices, and actors that coalesce to form violent landscapes and place the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun* at risk for harm. As Wolford and French (2016) noted, "the sociologist Phillip Abrams (1988:59) once famously observed that 'we have come to take the state for granted as an object of political practice and political analysis while remaining quite spectacularly unclear as to what the state is'" (16). Their work demonstrates that understanding the relationship between states and citizens is most effectively done by dismantling "the state" as a single, homogenous entity and focusing instead on how members of the bureaucracy (lawmakers, politicians, officials) themselves work in their various roles to bring about the state. A study of the bureaucracy involved in the perpetration of the violence alleged in *Caal v. Hudbay* and *Araya v. Nevsun* allows for the dismantling of seemingly monolithic, homogeneous entities, whether that be "the state" or "the corporation" or "the law," into specific, identifiable policies, practices, and actors. This shift from the abstract to the concrete enables us to locate and identify the many heads of the metaphorical transnational corporate capitalist development bureaucracy hydra, giving us a better sense of the potential, and limits, of civil law in addressing the harms claimed in these two cases.

Lastly, a study of bureaucracy became important for assessing what so many of my research participants kept telling me: *Caal v. Hudbay* and *Araya v. Nevsun,* while dealing with transnational mining practices, weren't so much about mining itself but about the way development is conducted in the modern era. The labor practices, the land grabbing, the deals

between corporations and state governments which fail to leave space for the people living on the lands in question or those expected to carry out the labor – all these practices smack of neo-imperialism. Legacies and landscapes of violence are about chronic disenfranchisement, and through civil law the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun* are not just protesting their specific maltreatment, they are demanding a seat at the table: the right, legally and in actual practice, to self-determination and participation in the determining of what development looks like.

Article I: Violence, Development, and Canada's New Transnational Jurisprudence

This chapter is the result of a panel held at the 2017 annual meeting of the Society for Applied Anthropology (SfAA) on the topic of bureaucracies of violence and appears as a published article in *Conflict and Society.* Echeverry, Eliza Guyol-Meinrath. 2018. "Violence, Development, and Canada's New Transnational Jurisprudence." *Conflict and Society* 4: 167-185. Minor changes have been made only to reflect the formatting requirements of this dissertation.

Abstract

For decades, Canadian-based corporate development projects have been linked to acts of violence in countries all over the world. These acts include sexual violence, destruction of property, community displacement, the use of forced labor, and other forms of violence. While Canada has repeatedly failed to pass legislation holding Canadian-based corporations accountable for human rights abuses committed abroad, Canadian courts are increasingly asserting their jurisdiction over cases of development-related violence. Analyzing two ongoing court cases—*Caal v. Hudbay*, regarding sexual violence in Guatemala, and *Araya v. Nevsun*, regarding forced labor in Eritrea—this article examines the potential and limits of law to address the bureaucratic mechanisms and grounded experiences of corporate-development-related violence, and the changing relationship between states, corporations, law, and human rights in the modern global era.

Introduction

In 2007, security personnel from the Canadian-based Hudbay Minerals Inc. Fenix mine, together with Guatemalan military and police forces, used destruction of crops and property, intimidation, physical assault, and sexual violence to evict the Q'eqchi' Maya community of

Lote Ocho from their lands.[4] In 2011, eleven Lote Ocho women filed a lawsuit against the mining company in the Ontario Superior Court of Justice for gang-rapes that they allege were committed during the eviction. The case, *Caal v. Hudbay*, is the first lawsuit against a Canadian mining company for human rights violations committed abroad to be accepted for trial in a Canadian court (Imai, Maheandiran, and Crystal 2014).

In November 2014, three Eritrean refugees filed a lawsuit in British Columbia, Canada, alleging that forced labor was used in Eritrea's Nevsun Resources Ltd. Bisha mine, established in 2008. The plaintiffs are seeking damages on behalf of all Eritreans forced to work in the mine, as the use of forced labor is a violation of customary international law. In 2016, the Supreme Court of British Columbia agreed to hear the case, making *Araya v. Nevsun* the first civil case being heard in Canada against a Canadian corporation for breaches of customary international law (Gifford and Lam 2016).

These two ongoing cases represent a burgeoning judicial trend in Canada in which criminal actions committed in international contexts are being tried as civil cases in the country in which the corporations are based rather than where the violations took place. Over the past decade, Canadian mining projects have been linked to hundreds of acts of international violence, including sexual violence, destruction of property, community displacement, the use of forced labor, intimidation, and murder (CCSRC 2009; Gordon and Webber 2008; Imai, Maheandiran, and Crystal 2014; Welker 2009). However, the Canadian government has repeatedly failed to pass legislation holding Canadian corporations accountable for human rights abuses committed outside Canada's national borders. Furthermore, there is currently no international legal precedent for transnational or multinational corporations to be held responsible for human rights abuses committed abroad or for their role in the production of physical or structural violence in

[4] Community meeting with Guatemala Human Rights Commission (GHRC) delegates, August 2011.

other countries (AI 2012). As such, *Caal v. Hudbay* and *Araya v. Nevsun* demonstrate a marked shift in Canadian jurisprudence and are important sites in which to study the changing relationship between national law, corporations, human rights, and development.

Far from being isolated incidents of sexual violence and forced labor, the human rights violations committed against the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun* occurred within broader historical frameworks. To fully assess the importance of these two cases, we must situate them within the complex bureaucratic structures of domestic governance, transnational corporate capitalism, and development collectively form a system that sets the conditions for development-related harms to occur: the bureaucracy of violence. Combining ethnographic research and analysis of primary and secondary data pertaining to *Caal v. Hudbay* and *Araya v. Nevsun*, this article examines how transnational and state development processes and policies, as well as legal statutes and precedents, not only engender violence but have also established decades-long policies of impunity for that violence.

Development as Violence

In all its forms—physical, symbolic, and structural—violence is overarchingly understood as actions or conditions causing, directly or indirectly, physical or emotional harm. Violence does not spontaneously occur; it is a process with specific historical contexts and inputs that both uses and creates the conditions of marginalization that render particular individuals or groups vulnerable to harm (Scheper-Hughes and Bourgois 2004). This makes analysis of both individual experience and the broader matrices in which risk and vulnerability to harm are produced critical to studies of violence (Farmer 2009). Recognizing vulnerability to harm as "the conceptual nexus that links the relationship that people have with their environment to social forces and institutions and the cultural values that sustain or contest them" (Oliver-Smith 2009b:

10), we must situate the plaintiffs' vulnerability in these two court cases to development-related violence within transnational corporate capitalist development more broadly.

Corporations are a constant presence in the daily lives of almost all people around the world: our medications, office buildings, cell phones, cars, and clothing are all part of the global network of corporate production and distribution. While corporate capitalist development champions itself as a tool for social well-being, the process of capitalist development by its very nature produces inequality that can easily translate into conflict, marginalization, and human rights violations. Ethnographic evidence demonstrates that corporate capitalism and the resulting production of inequality is woven into our everyday lives at the intersection between personal experience and structural violence (Welker et al. 2011). In the 1980s, June Nash (1980) observed that the political economy of tin mining in Bolivia was highly exploitative and virtually synonymous with a political economy of violence. Nancy Scheper-Hughes (1997) noted the connection between neoliberal capitalist expansion and state-sanctioned violence against the poor in post-conflict South Africa and Brazil, Philippe Bourgois (1989) noted the ways in which Central American banana plantations exploited class and ethnic divisions among workers to increase their profits, and Suzana Sawyer (2004) found that neoliberal capitalist development in Ecuador not only failed to provide the infrastructure and education improvements corporations promised but also exacerbated preexisting inequalities and resulted in severe ecological and sociocultural damage to the country. Development projects collectively form an economy of violence and dispossession in which land is transformed into capital, and the interests of the transnational elite often depend on the predation of local communities (Barkan 2013; Gellert 2015; Ong 2006).

Ethnographic studies demonstrate that the extractive industry in particular is fraught with violence, including incidents of community displacement, mass unemployment, exploitive labor practices, violence and intimidation by paramilitary groups hired to support mining operations, and the undermining of traditional economies via contamination or dispossession of land and resources (CCSRC 2009; Cisneros and Christel 2014; Gordon and Webber 2008). Mining companies frequently depict themselves as environmentally responsible, key for national and community development, and may even serve as surrogate states in poor areas, providing education, sanitation, and technology services to local communities. However, transnational development projects, such as the Bisha mine in Eritrea and the Fenix mine in Guatemala, are frequently linked to violence and displacement, particularly where preexisting inequalities are deeply entrenched (Hetherington 2011; Kirsch 2014). Some scholars contend that mining is inherently incompatible with the well-being of affected communities, citing its unsustainability, the potential for industrial runoff, loss of arable land, and destabilization of local ecosystems (Cisneros and Christel 2014; Gordon and Webber 2008).

To understand how the transnational nature of corporate capitalist development operates in practice, we next look at the specific policies and practices in Guatemala, Eritrea, and Canada that created the conditions for the violence alleged in *Caal v. Hudbay* and *Araya v. Nevsun* to occur.

Caal v. Hudbay: Sexual Violence in Guatemala

In 2007, security personnel from the Canadian-based Hudbay Minerals Inc. (hereafter Hudbay) Fenix mine, together with Guatemalan military and police forces evicted the Guatemalan Q'eqchi' Maya community of Lote Ocho from their lands. Their eviction process included the destruction of crops, animals, and property; looting; intimidation; physical assault;

and sexual violence. As mentioned earlier, eleven Lote Ocho women filed a lawsuit in 2011 against Hudbay in the Ontario Superior Court of Justice for gang-rapes they allege were committed during the eviction.

When asked about the violence charged in *Caal v. Hudbay*, the eleven plaintiffs described how hundreds of members of the police and military, as well as Hudbay-affiliated security forces, arrived in their community of Lote Ocho on 17 January 2007. While the men were at work in the fields, between nine and twelve of them gang-raped eleven women in the community. The aftermath of the violence and trauma of the attacks has included miscarriages, stillbirth, the breakup of marriages, and stigma against the women for being "unclean" as a result of the rapes.[5]

The brutal sexual violence, as well as the other forms of violence the plaintiffs experienced during Lote Ocho's eviction, is unfortunately not unique to their community. Similar incidents have occurred throughout Guatemala for decades and are part of a much longer continuum of structural and physical violence relating to land use and treatment of Indigenous communities (Fox 2015; Imai, Maheandiran, and Crystal 2014). Beginning with Spanish colonization in the sixteenth and seventeenth centuries, an inequitable system of land distribution was established in which Indigenous communities were given very little land and/or land of poor quality. Today, Guatemala has the largest rural population in Central America, with more than sixty percent of its inhabitants depending on subsistence agriculture to survive. However, it has the second most inequitable distribution of land in Latin America, with seventy percent of the land being owned by only two percent of the population (Barry 2012; Brown, Daly and Hamlin 2005; Hale 2009).

[5] Ibid.

Longstanding conflicts over land rights led to attempts in the mid-1950s to address land disputes between Indigenous communities, non-Indigenous landholders, and private corporations. In 1952, democratically elected President Jacobo Árbenz announced a plan to redistribute corporate landholdings to the peasant population. However, concern in the United States of the potential spread of communist ideals—combined with intense pressure from the United States-based United Fruit Company, which stood to lose most of its Guatemalan landholdings—led to Operation PBSUCCESS, a 1954 United States-backed military coup that overthrew Árbenz and installed a series of military dictators (Rabe 2004). Guatemalan opposition to these dictators resulted in an internal armed conflict (IAC) that lasted from 1960 to 1996. During this time, the Guatemalan military carried out hundreds of massacres and acts of genocide against the Indigenous population. An estimated 200 thousand civilians were killed, with 500 thousand displaced and fifty thousand more forcibly disappeared. It is estimated that ninety-three percent of the atrocities were committed by the military (CEH 1999). While the Guatemalan government has consistently portrayed the IAC, commonly referred to as La Violencia, as a conflict about political control and ideology, it was also very clearly used as a vehicle for foreign economic development of the region. From the outset, foreign political and economic interests played a key role in disenfranchising and controlling Indigenous communities to benefit corporate capitalist development (Imai, Maheandiran, and Crystal 2014; NACLA 1972; Sanford 2003).

Mining-related violence against Indigenous communities from the northeastern department of Izabal, where Lote Ocho is located, began in earnest in the 1960s when Canadian mining companies first obtained open-pit mining leases from the Guatemalan government. At the time, Guatemalan law banned open-pit mining due to the enormous amount of environmental

damage it produces. However, when the Canadian-based International Nickel Company (INCO) proposed building an open-pit mine in Izabal, their proffered $250 million investment provided INCO enough political and financial influence that the Guatemalan government suspended the constitution and temporarily dissolved the Guatemalan Congress in 1965. This enabled a new mining code to be passed, legalizing open-pit mining (Fox 2015; NACLA 1972). The new code was authored primarily by an engineer hired by INCO and heavily favors corporate interests over community or environmental concerns. With the new code in place, INCO purchased a forty year land lease in Izabal near the El Estor municipality. Many Guatemalans opposed the proposed mine, and public protests resulted in mass arrests, driving then-President Carlos Arana to suspend the right to assembly. Professors based out of the University of San Carlos formed a commission in protest of the mine. The Guatemalan military occupied the university, and death squads assassinated several members of the commission in 1970 (Imai, Maheandiran, and Crystal 2014).

At the time of INCO's land purchase, the Guatemalan military was already heavily engaged in the IAC. It established a campaign to remove and/or massacre Indigenous communities throughout rural Guatemala, ostensibly to prevent them from aiding the guerrillas (Sanford 2003). In the El Estor region where INCO had purchased the land for its open-pit mine, the Guatemalan military forcibly removed or killed an estimated three thousand to six thousand individuals, mostly Maya Q'eqchi', conveniently leaving the land free for economic development (Imai, Maheandiran, and Crystal 2014).

In 2004, the Canadian-based mining company Skye Resources purchased INCO's soon-to-expire concession and contracted its operation of the mine to the Guatemalan-based Compañia Guatemalteca de Níquel (CGN). However, the United Nations, after investigating land

distribution practices in the country, announced in 2006 that the Guatemalan state had breached international law by granting mining rights without consulting Indigenous communities. In the wake of this ruling, communities that had been displaced in the 1960s and 1970s started moving back onto their ancestral lands in Izabal. In 2007, Skye Resources arranged with the CGN, local police, and the Guatemalan military to have several of these communities removed, claiming that they were illegal "squatters" on corporate-owned land (Imai, Maheandiran, and Crystal 2014; KBS 2013). The gang-rapes of the eleven Lote Ocho women were allegedly committed during this removal period. A statement of claim filed by the plaintiffs in the Ontario Superior Court of Justice on 6 February 2012 states the mining company had engaged in an oral agreement with its Guatemalan subsidiary, the CGN, regarding the eviction of the Lote Ocho community. However, the informal oral agreement "failed to include rules of conduct for security personnel and failed to impose standards regarding the appropriate use of force and failed to require adequate training of security personnel".[6]

In 2008, Skye Resources sold the mine to Hudbay, a sale that made Hudbay legally responsible for all actions committed by Skye Resources during its ownership of the Fenix mine (Imai, Maheandiran, and Crystal 2014). As such, the plaintiffs in *Caal v. Hudbay* claim Hudbay is responsible for negligence that led directly to the gang-rapes. This demonstrates not just the complexity of corporate mining practices in Guatemala but also that the mine's history is steeped in violence and bound up in the political, economic, social, and military interests of several countries.

The plaintiffs in *Caal v. Hudbay* allege they were gang-raped as part of the community of Lote Ocho's forced eviction from lands that they claim are their ancestral territory. However,

[6] *Margarita Caal Caal, Rosa Elbira Coc Ich, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chun, Luisa Caal Chun, Carmelina Caal Ical, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib, and Irma Yolanda Choc Quib v. Hudbay Minerals, Inc. and HMI Nickel, Inc.,* Ontario Superior Court of Justice, No. CV-11-423077.

Hudbay also claims to legally own that land. The Constitutional Court of Guatemala ruled on 8 February 2011 that Q'eqchi' communities in the El Estor area have valid legal, collective rights to their claimed ancestral lands.[7] However, the Guatemalan government's refusal to address the violence experienced by Lote Ocho and neighboring communities demonstrates that, in practice, the possession of a physically documented land title—such as the one Hudbay has—is often given first priority over an ancestral claim. This reflects Guatemala's shift toward World Bank–driven, market-assisted land reform beginning in 1997, in which land is converted from a collective economic and cultural asset to a generic, individually owned commodity (Gauster and Isakson 2007).

Since the end of La Violencia, mining has boomed in Guatemala. Mining projects are routinely granted land and license to operate despite opposition from local communities, which is backed by several national and international laws supporting community rights to land ownership and usage (Fulmer, Godoy and Neff 2008; Pedersen 2014). Guatemala is a signatory to the International Labour Organization's Indigenous and Tribal Peoples Convention (C169), which protects the rights of Indigenous people to participate in decisions regarding development projects. However, Guatemala has not incorporated C169 into national law, and the Constitutional Court has remained vague on the state's responsibility to uphold the convention in the absence of codified legal measures of implementation (Fulmer, Godoy and Neff 2008).

In December 2013, the Constitutional Court of Guatemala—the nation's highest court—ruled that community referendums regarding whether mining projects can be developed must be held in affected communities and that municipal governments must respect the results. While groundbreaking in its own right, this decision does not apply to communities without legally recognized land titles (CS 2013), and the legislation is often not enforced in practice. From 2012

[7] Ibid.

to 2013, the Ministry of Energy and Mines of Guatemala approved 387 exploration and exploitation licenses for metallic mining despite the fact more than one million Guatemalans have participated in community consultations to vote "no" on proposed mining projects within their territories (Pedersen 2014).

In addition, communities and individuals who protest such development projects are often targeted for reprisal via intimidation and physical violence. For example, the World Bank–supported Chixoy Dam and hydroelectric plant, which provides 80 percent of Guatemala's electricity, was constructed in the 1970s and required the eviction of thousands of Guatemalans from the area (Johnston 2009). The evictions were later deemed to have been illegal, and then President Otto Pérez Molina issued an apology in 2014 and announced that $20 million in reparations would be paid to affected individuals. However, the leader of the Guatemalan human rights group that lobbied for this decision, ADIVIMA, has since been forced to flee Guatemala because of threats received in the wake of Molina's announcement (Evans 2016). Thus, land remains a highly contested issue for the community of Lote Ocho and for thousands of other Indigenous communities regardless of their possession of legally recognized land titles or ancestral claims. In Guatemala, the letter of the law (de jure) and enforcement of the law (de facto) do not always coincide, leaving communities like Lote Ocho vulnerable to future violence and displacement by corporate capitalist development projects.

A history of colonialism, racism, international political intervention, and neoliberal social and economic policies have all contributed to the when, where, why, and how of the violence alleged in *Caal v. Hudbay*. This demonstrates that "suffering is structured by historically given (and often economically driven) processes and forces that conspire—whether through routine, ritual, or, as is more commonly the case, these hard surfaces [of individual suffering] to constrain

agency" (Farmer 2009: 12). Clearly, the physical violence experienced by the plaintiffs in *Caal v. Hudbay* is part of a much more complex system of structural violence fostered by the social, political, and economic policies, laws, and systems in Guatemala—a system of violent bureaucracy in which both protection from and justice for violence are denied to particular segments of the population. Lote Ocho's contested land rights reveal that implementation and enforcement of law is largely dependent on society's internalization of and support for the law rather than on the existence of the letter of the law (Merry 2006). The law is shaped by society, and corporations hold great power in society (Barkan 2013). After the initial filing of *Caal v. Hudbay*, it took three years of pretrial motions to determine whether the case would be heard in Canadian courts. Two years after that, in 2015, the plaintiffs had to obtain a court order to compel Hudbay to comply with the rules of evidence disclosure. Another two years later—a decade after the gang-rapes had been committed—the plaintiffs were formally deposed for the first time. During this time, the plaintiffs have been subject to threats and intimidation for continuing with the lawsuit (Russell 2017). While law can serve as a site of empowerment for marginalized groups, as evidenced by the successful filing of *Caal v. Hudbay* in Canadian courts, the gap between law and justice cannot be bridged within sites of law alone.

Araya v. Nevsun: Forced Labor in Eritrea

The second case, *Araya v. Nevsun*, is being heard in the Supreme Court of British Columbia. The case was filed in November 2014 on behalf of three Eritrean refugees and alleges that forced labor was used in the Nevsun Resources Ltd. (hereafter Nevsun) Bisha mine, established in 2008. The plaintiffs allege they were paid roughly the equivalent of $1 a day to work in the mines and that they suffered poor treatment such as inadequate shelter, water, and

food.[8] The three plaintiffs seek damages on behalf of all Eritreans forced to work in the Bisha mine. It is the first case to be heard in Canada against a Canadian corporation for breaches of customary international law (Gifford and Lam 2016). An October 2016 decision by the court ruled the case would go forward in that forum despite Nevsun's protests, a decision upheld by the British Columbia Court of Appeals in November 2017 (Barutcisk, Little, and Scheinert 2018).

When Eritrea first achieved independence from Ethiopia in 1991, the new country had a democratically constructed constitution and strong civil society unified by the independence movement. However, Eritrea today is a highly isolationist, totalitarian country. Regarding Eritrea's trajectory since winning independence, Magnus Treiber notes: "A revolutionary struggle, declared and perceived as anticolonial and attuned to an emancipating world-revolutionary process, which won sympathy and credit among the Western left because it was both anticapitalist and anti-Soviet, thus turned into a state capitalist project controlled by a totalitarian dictatorship" (2009: 108).

The use of forced labor, while a violation of international law, has become an integral part of Eritrean citizenship. The Eritrean National Service (NS) was established in 1991 and went into effect in 1994. All Eritreans between the ages of eighteen and forty are required to serve six months of military training followed by a year of military service. However, after the 1998 border war with Ethiopia, the government made military service an indefinite endeavor. Service limits for new conscripts were abolished, and citizens can be reactivated into national service at any time (Kibreab 2009). Visas, land tenure, food aid, and licenses are tied to this mandatory service, while desertion and draft dodging are punishable by physical discipline,

[8] *Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle v. Nevsun Resources, Ltd*. In the Supreme Court of British Columbia, No. S-148932.

including torture and/or incarceration (Kibreab 2009; Poole 2009). A totalitarian regime has thus normalized the government's use of forced labor through militarization and indefinite forced conscription (Kibreab 2009; Hepner and O'Kane 2009). This has laid the groundwork for corporations to do the same.

In 2016, a United Nations Office of the High Commissioner for Human Rights (OHCHR) commission of inquiry found that the Eritrean government has used enslavement on an "ongoing, widespread and systematic basis since 2002" as a form of population control, a violation of the Rome Statute to which Eritrea is party (OHCHR 2016: 11). While the Eritrean government defends the use of forced labor as a legal part of its NS program, the commission found that the primary function of conscription is for economic development work rather than military purposes. Eritrea today is one of the largest producers of refugees and asylum seekers because of indefinite conscription and endemic violent repression (Hepner 2012; UNHCR 2016).

While Eritrea has historically been a highly insular nation, it has increasingly encouraged foreign investment in its extractive industry and other business sectors over the past decade. The expansion of Eritrea's mineral exploration and exploitation industry has been praised by many in the international development community, which has long criticized Eritrea for failing to implement economic development initiatives and join the global market. The World Bank in particular has pushed Eritrea to diversify its economy beyond agricultural production as a means of improving its economic security and its human development index (HDI) and has praised its burgeoning mining industry as a key factor in the recent growth of Eritrea's gross domestic product (WBG 2018). In keeping with this goal, the State of Eritrea Ministry of Energy and Mines (2014) hosted a conference in 2014 with the slogan "Mining Excellent for Driving Economic Growth" and boasted of the country's "simple 'one-stop' licensing system," "write-

offs of exploration expenditure incurred anywhere in the country," and duty- and tax-free export policies. Additionally, on the website for the Embassy of the State of Eritrea (2018) in Sweden, the Ministry of Energy and Mines extols Eritrea's "liberal economic policy with competitive tax regimes, full guarantees and protection of investments, untapped geological terrains, highly motivated, disciplined and hardworking people, and administration free from corruption."

The Nevsun Bisha mine was the country's first modern mine. However, the country has since attracted interest from Australian, Chinese, and Indian companies. During its first five years of operation, the Bisha mine brought the country $800 million in taxes, royalties, and return on investment. Eritrea is anticipated to have three additional foreign-owned mines in operation by the end of 2018, increasing the potential for additional cases of corporate-development-related violence to occur (Anderson 2016). However, in keeping with the country's desire to use mining as a stepping-stone to building its economy and the mining industry's public portrayal of its operations as beneficial for developing nation-states, Todd Romaine, the vice president of corporate social responsibility for Nevsun, called Nevsun "a force for good in Eritrea," having financially enriched the country and provided meaningful employment for Eritreans (quoted in Martell and Blair 2016).

While diversification of Eritrea's economy is important for stabilizing the national economy and improving its HDI, some scholars have voiced concern that revenue from mining will bolster the totalitarian government's hold on power (Weldehaimanot 2010). This concern is not unfounded, as the mine and the Eritrean government are intimately connected. The Eritrean government holds forty percent ownership in the Bisha mine, with Nevsun holding the remaining sixty percent, meaning the Eritrean state has a vested interest in the Bisha mine's success.

Eritrea's high percentage of ownership is highly unusual. After Canadian junior mining firms discovered Eritrea was mineral-rich in the early 2000s and began negotiations with Eritrea to open the Bisha mine, the Eritrean government rewrote its mining code. Whereas the previous code had required foreign corporations to give the Eritrean government a ten percent stake in development projects, the new 2005 mining code raised that stake to forty percent. This raise is in keeping with the recommendations of development finance institutions such as the African Development Bank, which assert that developing nations routinely do not receive adequate payment for their resources by foreign corporations (Gajigo, Mutambatsere, and Ndiaye 2012). As such, Eritrea's development of the Bisha mine in many ways follows the best practices for economic development set out by the international and transnational development community.

Human Rights Watch (2013) and other human rights organizations such as Mining Watch (2017) and Amnesty International (2017), have spoken out against the Nevsun Bisha mine, saying that Nevsun failed to do their due diligence in ensuring human rights protections were established while knowingly operating in a country where the international community frequently sanctions the government for committing human rights violations against its own people. More than ninety percent of the labor force in Eritrea consists of Eritrean nationals who are subject to NS conscription (Lipsett et al. 2015). Nevsun's understanding of how the NS works in Eritrea has been, historically, questionable. Former Nevsun Chief Executive John Clarke is infamously quoted in a 2006 presentation to investors at a mining summit as saying, "Given that it's a poor country, they're [Eritrea] just using their resources extremely well, including their youngsters, who do a couple years national service after university, everybody contributing to nation building" (quoted in Martell and Blair 2016). While Clarke no longer works for Nevsun and the presentation has since been removed from the internet, it echoes the

same rhetoric used by the Eritrean government to justify its continued use of NS conscripts for nonmilitary purposes. This is a good example of how providing favorable conditions for corporate interests can come at the expense of human rights. While the international community has frequently cited Eritrea for its historically strict control over its territory and citizens, this type of strong governance translates into the corporate capitalist development sphere as not only acceptable but commendable.

The Trials of Justice and Accountability

Development-related violence such as that which occurred in Guatemala and Eritrea is part of a process called accumulation by dispossession (ABD), wherein "the means of production for the purpose of capital accumulation are obtained via extra-economic coercion or non-market means" (Gellert 2015: 67). ABD is characterized by the commodification and privatization of natural resources, consolidation of intellectual property rights, restriction of communal land rights, repression of alternative economies, forced displacement, and devaluation of labor (Harvey 2003: 180). It is at once a political, social, and economic project of dominance and control that has grown rapidly with the expansion of foreign direct investment (FDI), in which a country acquires business assets or establishes business operations in another country. FDI gives investor countries like Canada significant influence over the economies of developing nations such as Guatemala and Eritrea (Dougherty 2011; Oliver-Smith 2009b; Paczynska 2016).

FDI grew 200 percent from 1980 to 1990 in the areas of production, natural resource ownership and extraction, communications systems, and social services, and it continues to expand. Foreign corporations, foreign governments, and international investment groups such as the World Bank and the International Monetary Fund (IMF) provide technical, technological, and administrative support to many developing nations to bolster structural adjustment programs,

boost industry, and open markets to FDI under the guise of development and/or poverty reduction (Gordon and Webber 2008). In addition, the Bretton Woods Institutions—the IMF and the World Bank—routinely institute regulatory and legal reforms favoring foreign investment, giving corporations increased power over services previously controlled by the state (Campbell 2008). The results of these reforms are reflected in the fact that, of the one hundred largest economies in the world, fifty-two are now corporations rather than states (Wetzel 2016)[9]. ABD and FDI are part and parcel of modern corporate capitalist development, placing corporations in positions of power over nation-states and producing transnational and supranational "best practices" for corporate development that privilege the interests of industry over human rights.

Recognizing that business and industry play critical roles in the production of development-related violence, the United Nations in 2011 created the Working Group on Business and Human Rights and passed the Guiding Principles on Business and Human Rights with the goal of regulating how transnational corporations operate with respect to corporate social responsibility (CSR) standards. In particular, the Guiding Principles are notable for their encouragement of host states to protect against third-party human rights abuses, the expectation that corporations themselves strive to protect human rights and other corporate social responsibility standards, and the need for accessible judicial and nonjudicial mechanisms of justice for those whose rights are violated (Seck 2013).

However, these initiatives have thus far only produced soft, unenforceable mechanisms for human rights compliance. The spirit of the Guiding Principles notwithstanding, corporations in practice often to seek out countries with lax human rights standards, such as Guatemala and Eritrea, leaving the corporations' operating costs low, profits high, and reputations as human

[9] As of 2019 this number is now 71.

rights compliant intact. In addition, there is evidence that the guidelines have encouraged a "race to the bottom" among some developing nations seeking to attract foreign corporate investment. In these cases, human rights standards are intentionally reduced, business is deregulated, and environmental restrictions are relaxed with the understanding that less regulation can translate to more profit for foreign corporations (Blitt 2012; Dougherty 2011). Problematically, when human rights or other CSR violations do occur, the nation-states in which the corporations are based often cite the sanctity of the host nations' state sovereignty and/or the potential to damage competitiveness and free markets as reasons to not intervene in corporate operations abroad (Macklin and Simons 2014; Seck 2013).

Araya v. Nevsun illustrates many of these problems. A 2015 human rights audit conducted by Nevsun and the Eritrean National Mining Corporation regarding the Bisha mine specifically mentions Nevsun's commitment to, and compliance with, the UN's Guiding Principles (LKL International Consulting 2015). Additionally, while former Nevsun Chief Executive Clarke openly praised Eritrea's NS during the earliest stages of securing funding for the Bisha mine, Nevsun's current leadership has repeatedly denied that NS conscripts ever worked in the Bisha mine. In a press release published just days before the Human Rights Watch report was released, Nevsun (2013) stated that concerns arose in 2009 over the potential use of forced conscripts in their mines and that they established strict screening procedures for their workers as a result, indicating a commitment to human rights above and beyond the baseline established by the UN's Guiding Principles. However, the plaintiffs in *Araya v. Nevsun* maintain that these screening procedures were inadequately enforced and often circumvented. Demonstrating the complex, transnational nature of mining bureaucracy, Nevsun subcontracted the Bisha mine's operations to the South African–based engineering firm SENET, which in turn

hired the Eritrean-based companies Mereb and Segen, both run by the Eritrean government, to carry out construction of the mine and hire the labor force.[10] As such, Nevsun (2013) maintains that, even if NS conscripts were forced to work at the mine, they would not be responsible for this human rights violation, as they subcontract day-to-day operations. In turn, the Eritrean government has maintained that the allegations made by former workers were untrue and designed to bolster their claims for asylum in Europe (Martell and Blair 2016).

Similarly, Hudbay has a page on its website under the "Responsibility" section addressing the claims of the *Caal v. Hudbay*. The page maintains that Hudbay violated neither Guatemalan law nor international human rights standards and that police reports show the evictions were carried out peacefully and without uniformed CGN or other private security personnel present, "no illegal occupiers" (meaning Lote Ocho community members) were at home on the day the alleged rapes occurred, and the corporation mitigated any potential harms by negotiating "a financial compensation package for loss of housing materials and goods with the illegal occupiers from the community where the rapes were alleged to have occurred" immediately after the evictions took place. The page also notes that Hudbay purchased the mine almost a year after the alleged rapes took place, relieving them morally, if not legally, of responsibility for the attacks (HM 2018).

Indeed, the transnational nature of development-related corporate capitalism makes culpability for violence and human rights abuses particularly difficult to determine (Johnston 2009). Development projects such as the Nevsun and Hudbay mines in Eritrea and Guatemala, respectively, are planned and operationalized within broader contexts of structural violence and oppression in their countries of operation. In addition, abuses can occur at any point during

[10] *Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle v. Nevsun Resources, Ltd*. In the Supreme Court of British Columbia, No. S-148932.

development projects, from planning to construction to day-to-day operations. Stakeholders in these projects include national governments, civil society, international and supranational funding agencies, and transnational corporations. They are approved and funded within the intersections of international treaties, state law, transnational commercial law, and local social license. This creates a "Rorschach 'inkblot' test of social responsibility" (Fulmer, Godoy and Neff 2008: 97) in which jurisprudence is not so much a matter of legal plurality but rather a kaleidoscope of ever shifting legal philosophy. This makes it extraordinarily difficult to secure meaningful sanctions or accountability against the corporate form (Brown 2015).

Canada's Judicial Branch Goes Rogue

What measures, then, has Canada taken to reduce the risk of corporate-development-related violence? Canada's laws and regulations regarding extractive development have significant global implications. Canada owns three-quarters of all mining and exploration companies globally, and Canadian-based companies operate more than eight thousand exploration and exploitation projects in more than 120 countries. As of 2014, one in fifty Canadians worked for a mining company. All legally employed Canadians are required to pay into the Canadian Pension Plan, which is bound up in $2.5 billion worth of Canadian mining company stocks. In total, Canadian-based companies export roughly $102 billion in coal, metal, and nonmetal materials annually (Pedersen 2014). In short, Canada is the global leader in resource extraction and exploitation, and mining is a fundamental part of the Canadian state, economy, and citizenship.

In 2005, a report from Canada's Standing Committee on Foreign Affairs and International Development recommended public sanctioning of Canadian-based corporations accused of committing gross human rights violations abroad. Similar recommendations have

been made by the Canadian National Round Table on the Environment and the Economy, an agency tasked with advising the government on sustainable development practices. However, the agency has been heavily critiqued for doing little to address the prevalence of development-related violence (Campbell 2008). Canadian extractive companies have been implicated in four times as many violations of commonly accepted CSR standards than the next most highly rated nation. Violations include forced displacement, rape, murder, attempted murder, water and air pollution, bribery, intimidation, unsafe working conditions, and the use of forced labor. The most violations occurred in Latin American countries, though similar incidents have occurred throughout Canada, Southeast Asia, and Africa (CCSRC 2009; Gordon and Webber 2008; Imai, Maheandiran, and Crystal 2014; Welker 2009).

In 2009, Liberal MP John McKay introduced Bill C-300—the Corporate Accountability of Mining, Oil or Gas Corporations in Developing Countries Act—to the Canadian House of Commons. The legislation required extractive companies operating in developing countries to comply with "best practices"—as identified by the extractive industry—regarding international human rights and environmental standards. Failure to comply would result in those companies no longer receiving federal assistance. The bill failed to pass then and on several other occasions since (CCSRC 2009). The mining industry has lobbied heavily against Bill C-300 and for industry regulation to remain voluntary rather than nationally legislated, citing formal regulation as potentially devastating to international competitiveness (Whittington 2010).

In keeping with such recommendations, the Office of the Extractive Sector CSR Counsellor was established in 2009. In 2014, the office updated its strategy with a renewed commitment to promoting CSR guidelines, providing advice and support to companies on incorporating CSR guidelines into practice, and promised "withdrawal of Government of Canada

support in foreign markets as a penalty for companies that do not embody CSR best practices and who refuse to participate in the CSR Counsellor's Office dialogue facilitation processes" (CSR Counsellor 2018). Like the National Round Table, the office has been heavily criticized for its lack of enforceability, including its inability to investigate allegations of CSR violations or truly enforce human rights compliance. Its mandate ended 18 May 2018, and a Canadian Ombudsperson for Responsible Enterprise and a multi-stakeholder Advisory Body on Responsible Business Conduct will replace it at some point in the future (Simons 2015; Torrance and Burns 2018).

While addressing and preventing global human rights violations linked to Canada's extractive industry is clearly an important topic in Canada, the focus has largely centered on soft law guidelines and policy recommendations and nonjudicial justice and reconciliation mechanisms such as mediation and other dispute resolution practices. As such, it is of particular interest that, during the same time that Canada's executive and legislative branches have opted to focus on soft law tactics, the judicial system has made a marked departure from established jurisprudence by accepting cases such as *Caal v. Hudbay* and *Araya v. Nevsun*—the first of their kind to be tried in Canadian civil courts. Grounded in the emerging field of transnational law, these cases use state courts to address violations of international law "norms" that take place in a different state (Barutcisk, Little, and Scheinert 2018). What is the potential—and what are the limits—of Canada's shift to this new transnational approach to law to address corporate development-related violence?

The relationship between law and justice is a matter of debate among anthropologists, sociologists, and legal scholars. Some scholars maintain that government-based justice initiatives, like court cases, focus on short-term jurisprudence and employ a top-down structure

that fails to fully engage affected communities (Merry 1992; Sundar 2004). Some anthropologists assert that legal justice is ill-equipped to transform the social structures in which violations are rooted and that the relationship between law and justice is weak at best (Goodale and Clarke 2010; Nader 2010). Shannon Speed (2008) has argued that a focus on positive law may in fact serve to further cycles of violence by empowering states through legitimization of their ability to recognize the rights of communities (or not)—to "reinscribe the very relations of power they [communities] are resisting" via rights-based movements. In contrast, other academics and practitioners (Brahimi 2007) maintain that legal or punitive measures such as *Caal v. Hudbay* and *Araya v. Nevsun* are required to achieve justice for those who face abuse. Hence, scholars in international law, political science, anthropology, and human rights studies have been asking critical questions regarding the relationship between law, governance, and persistent structural inequality (Merry 1992; Nagengast 1994; K. Nash 2009; Sanford 2003).

Before *Caal v. Hudbay* and *Araya v. Nevsun*, there were several unsuccessful attempts to try in Canadian courts cases of human rights abuses committed abroad by Canadian-based corporations. In 2010, the Association Canadienne Contre L'impunité (ACCI) filed *ACCI v. Anvil Mining Ltd.* in Quebec, alleging that the company provided support to the Democratic Republic of Congo's military during the 2004 massacre of a community near the mine. While Anvil Mining is based primarily in Perth, Australia, it also has an office in Montreal, Canada. ACCI argued that this gave Canada jurisdiction over the case. While the Superior Court of Quebec originally accepted the case for trial, the Court of Appeal of Quebec dismissed the case on grounds of jurisdiction in 2012. The massacre occurred in 2004, and the Montreal Anvil Mining office was not opened until 2005 (Imai, Maheandiran, and Crystal 2014). Similar types of cases have been rejected on the grounds of jurisdiction, lack of duty of care (in which the

defendant cannot be reasonably held responsible for anticipating or preventing the accused harm), and forum non conveniens, in which the court declines to try a case on the grounds that it should be heard in a more appropriate court or jurisdiction.

Julia Ruth-Maria Wetzel maintains that existing legal frameworks cannot adequately address corporate-development-related human rights violations, as they can only focus on the actions of individuals rather than on the broader systems that engender violence. *Caal v. Hudbay* and *Araya v. Nevsun*, while important for encouraging improved standards of corporate social responsibility, do not address the root causes of the sexual violence committed in Lote Ocho or Eritrean conscripts' vulnerability to forced labor under the National Service. However, Wetzel also recognizes that "without legal intervention, the moral obligation of corporations to act according to established human rights law will remain *a fata morgana*" (2016: 4). Law is necessarily reactive, as law cannot be made until violations are defined based on analysis of past actions. Thus far, the law's reaction time to the reality of the expansion of transnational corporate development and its associated forms of violence has been noticeably slow. In some instances, the law has actually set back efforts to address this gap.

In 2013, *Kiobel v. Royal Dutch Petroleum* was filed in the United States based on the Alien Tort Statute, often used as grounds for cause in hearing cases in US courts for human rights violations committed outside the United States. The case was originally filed in 2002 to address claims that Royal Dutch Petroleum Company assisted the Nigerian government in the 1990s in committing numerous violations of international law—including torture, extrajudicial killing, and violation of the rights to life, liberty, security, and association—against those resisting oil development projects in the Ogoni Niger River Delta (Karp 2014). The Supreme Court ruled that the statute does not apply extraterritorially, establishing a precedent that has

made it more difficult in the United States to hold transnational corporations accountable for human rights violations committed abroad. With *Caal v. Hudbay* and *Araya v. Nevsun* poised to set legal precedent within Canadian national law, both a win for the plaintiffs and a loss carry significant implications not only for the plaintiffs' future security but also for the willingness and ability of other individuals and communities affected by development-related violence to access legal justice within Canadian courts. As Susan Silbey notes, "in institutions of meaning, social inequality and legal consciousness are forged" (2005: 360).

The obstacles of judicial will and legal precedent, however, are only part of the bureaucratic mechanisms that hinder the ability of legal mechanisms to protect the victims of development-related violence. The burden of proof is on the plaintiffs to prove their case, and it is up to the affected communities and their advocates to document and collect evidence of human rights abuses demonstrating not just that violations have occurred but also corporate culpability in those violations. This requires knowledge of the law, access to either funds to hire an attorney or to a network that help raise funds for an attorney, potentially necessary access to translators, and capacities such as literacy. As Priscilla Hayner notes, "the purpose of criminal trials is not to expose the 'truth,' however, but to find whether the criminal standard of proof has been satisfied on specific charges" (2002: 100), an observation that applies also to civil trials. The resources available to the plaintiffs in cases of development-related violence are often limited compared with those of the corporations they are suing (Johnston 2009). This has certainly been the case in both *Caal v. Hudbay* and *Araya v. Nevsun,* which have relied heavily on private donations as well as pro bono legal aid.

It goes without saying that a trial cannot be held without a crime having been committed, making civil cases such as *Caal v. Hudbay* and *Araya v. Nevsun* sometimes feel like a case of

Monday morning quarterbacking. The cases are only part of a much larger picture, though, and the broader scope of these cases is well understood by those involved. For the stakeholders in *Caal v. Hudbay* and *Araya v. Nevsun*, these cases are about more than setting legal precedent: they are about taking a stand against the globalized systems, structures, hierarchies, and processes—the bureaucracy of violence—that led to the human rights violations being alleged. The plaintiffs and their advocates in *Caal v. Hudbay* and *Araya v. Nevsun* are using the law as a way to gain visibility and voice within the Canadian justice system and to highlight the role of Canadian corporations in producing development-related violence abroad. These cases are necessary steps in addressing the bureaucracies of violence that set the conditions for development-related violence to occur. However, the transnational structures within which corporate development-related violence is produced are incredibly complex, spanning time and space. They are seated within economic, social, and political spheres ranging kaleidoscopically from the local level to the state, international, transnational, and supranational levels. The task of creating meaningful change and long-lasting security for Eritrean workers and Indigenous Guatemalan communities is truly daunting.

Conclusion

By examining how bureaucracies of violence function to create the lived, emplaced experience of development-related violence for individuals and communities, we are better equipped to see the potential—and limitations—of cases like *Caal v. Hudbay* and *Araya v. Nevsun* to address the underlying causes of such violence. Undoubtedly, *Caal v. Hudbay* and *Araya v. Nevsun* represent an important shift in the relationship between Canada's executive, legislative, and judicial branches and are opening new frontiers in Canadian jurisprudence. In a 2013 press release from Klippensteins, the firm representing the women in *Caal v. Hudbay*, the

attorney Cory Wanlass stated, “We fully expect that more claims like this one will be brought against Canadian mining companies until these kinds of abuses stop” (KBS 2013). This claim was prescient, as Canadian civil courts have now accepted several other cases relating to development-related violence. However, as the legal scholars Shin Imai, Bernadette Maheandiran, and Valerie Crystal conclude, “in a globalized world, encouraging ethical behavior cannot be left to a single jurisdiction or a single institution” (2014: 21). Exactly what other measures Canada will take to address the rampant violence associated with Canadian-based corporate development is yet to be seen.

The anthropologist William Fisher perfectly summarizes the complexity of development-related violence and displacement: “These struggles are not simple stories of monolithic development regimes pitched against an overwhelmed local populace, nor of domestic development efforts derailed by a heroic transnational alliance. These stories involve complicated, fluid, and parallel networks engaged in struggle” (2009: 177). The seeming goliaths of global capital, neoliberalism, and transnational corporate development, in reality, are made up of historicized, culturally specific processes of control and exclusion, of identifiable policies and observable practices. Thus, analysis of *Caal v. Hudbay* and *Araya v. Nevsun* reveals just how central bureaucratic processes are to the production of development-related violence. Legal, corporate, and transnational development policies and practices produce violence by systematically privileging industry over human rights, and restrict the ability of affected communities and individuals to utilize legal mechanisms to prevent or address these harms. As this article demonstrates, it is not just corporate capitalism or transnational development policies and practices that can contribute to the predation of local communities, but the legal process as well.

Part II: Section II: Vernacularization and Appropriation as Two-Way Streets

Western popular culture has long romanticized the judicial process. Legal dramas and crime solving shows feature heavily in film and television and, for many of us, these dramatizations shape the bulk of what we know – or think we know – about the legal system. When I spoke with friends and family about my research I got the sense many of them thought my time spent observing court happenings in Vancouver and Toronto would consist of high drama scenes, with lawyers yelling phrases like "you can't handle the truth!" while defendants on the stand quibble over the definition of "is" and judges bang their gavels and yell for order in the court. In reality, I sat in the back of small, drop-ceilinged courtrooms under florescent lighting and watched for hours as legal experts debated the minutiae of evidentiary procedure.

The vast majority of legal proceedings are either motion hearings regarding the interpretation of legal codes or processes closed to the public, such as depositions[11] and discovery review. While I find motion hearings to be enormously interesting and ethnographically rich, they lack flash or drama. It can take judges days, weeks, or even months to rule on a particular motion, so there is rarely any sense of instant gratification for observers. Even in *Caal v. Hudbay* and *Araya v. Nevsun* – two well-publicized, groundbreaking, high-level court cases regarding transnational human rights violations – I was frequently the only observer to court proceedings. However it is these perhaps unremarkable, often unobserved processes that ultimately determine the outcomes of legal cases. Lawsuits such as *Caal v. Hudbay* and *Araya v. Nevsun* are tend to be low key but high stakes, as they proceed largely outside of the public eye yet their outcomes set legal precedent which, in turn, will influence the standards of legally acceptable corporate behavior within Canadian society.

[11] Also called "examinations for discovery" in Canada.

It is the hope of legal anthropology that, by studying the form of law as well as law's regulation, enforcement, and how society conceives of and relates to the law, we can observe the structures of power and legitimacy that scaffold society itself. As philosopher and founder of modern utilitarianism Jeremy Bentham is credited with saying, "the law creates rights by creating a crime." Societies (or the most dominant groups therein) determine what ideally should be, use law to imbue those ideals with the weight of particular consequences, and apply them to specific empirical situations. While legal anthropology has extensively studied the fields of civil law, international law, and legal pluralism, *Caal v. Hudbay* and *Araya v. Nevsun* bring an entirely different, emerging sphere of legal study to the table: transnational law. Transnational law concerns domestic legal standards governing actions that transcend international borders (Barutcisk, Little, and Scheinert 2018). While the application of Canadian law remains tied to specific geographic locations – insofar as the authority of courts to enforce law in specific territorial places amongst particular populations – as globalization and transnationalism become the new norms of doing business for Canadian-based corporations, transnational law is reimagining the boundaries of Canada's legal jurisdiction. How can territorially-bound Canadian civil law be reimagined to address harms committed not just outside provincial borders, but international ones?

Using Sally Engle Merry's concept of vernacularization (2006) and Shannon Speed's theory of local appropriation (2009) with respect to human rights norms and laws, I explore the impact of this reimagining on stakeholders in *Caal v. Hudbay* and *Araya v. Nevsun*. How do the plaintiffs in these two cases connect with and internalize Canadian legal perspectives, prescriptives, and processes? Litigation over jurisdiction alone lasted years in both cases, while cultural and circumstantial differences between stakeholders has colored the evidentiary

expectations of the presiding judge, the processes of collecting witness testimony, the legal standards being applied, and the various ways plaintiffs conceive of justice, the law, human rights, and the trauma they have endured. How exactly has this reshaping of law also helped reshape the perspectives and actions of the stakeholders themselves?

To answer these questions, I combined interviews and participant observation of court proceedings with an ethnographic examination of thousands of pages of written documents related to the lawsuits. Court cases can produce hundreds of thousands of documents, from discovery to legal briefs, subpoenas, affidavits, expert witness reports, and press releases. While cultural anthropologists have long recognized documents as important primary and secondary data sources, attempts to conduct ethnography through written records have remained relatively uncommon. However, an ethnographic reading of these documents provides a wealth of information about how law is vernacularized and appropriated over time. To conduct such a reading, I developed a process in which I isolated and traced the statements of individuals over time and across a variety of documents then examined the resulting narratives as I would a series of in-person interviews. Unlike discourse analysis, which focuses largely on context and its effects on the meaning of specific discourse, an ethnographic reading of documents more closely resembles content analysis in terms of data coding and reduction. However, unlike in traditional content analysis, documentary data was used in conjunction with data gathered via interviews and participant observation. This process shed light on the complex relationships between the stakeholders even where in-person interviews are not possible. Through the inclusion of case-related written records in ethnographic analysis, this article demonstrates we can use documents to literally read between the lines to better understand of how stakeholder understandings of law,

justice, and human rights are internalized and translated across cultures even as legal proceedings themselves remain grounded in local institutions and prescriptives.

Article II: Transnational Legal Allyship and Under-Oath Ethnography: Examining the Role of Documents in Ethnographic Research

Abstract

Legal cases produce an abundance of documents, from depositions and court testimony transcripts to press and advocacy campaign releases. My research regarding two court cases currently being heard in Canada, *Caal v. Hudbay* and *Araya v. Nevsun,* has included collection and analysis of thousands of text-based documents. Where does this textual information fit within the broader framework of ethnography-based research? What can these documents tell us about the ways in which law is translated, transformed, and internalized by various stakeholders? By identifying specific narrative threads within these documents and tracing those narratives over the duration of the legal process, I argue ethnographic analysis of text-based documents provides the researcher a unique and critical understanding of power relations between stakeholders in legal cases and the processes of legal allyship, lending insight to the complex relationship between law, justice, and human experiences of violence.

Introduction

Legal cases produce hundreds, even hundreds of thousands, of documents, including depositions and court testimony transcripts, press releases, and expert witness reports. Where does this textual information fit within the broader framework of ethnographic research? What can these documents tell us about the ways in which law is translated, transformed, and internalized by various stakeholders? This study examines two lawsuits currently being heard in Canadian courts, *Caal v. Hudbay* and *Araya v. Nevsun*, to examine what transnational allyship means in the context of transnational law, and how participating in transnational allyship during the legal process has impacted both the plaintiffs and the legal actors assisting them. How has

this collaboration shaped case stakeholders' internalizations and interpretations of human rights and the Canadian legal system? How has it influenced their hopes, fears, and goals related to the potential and limits of law to address both the plaintiffs' immediate safety and security and the broader structures that engender development-related violence? By identifying specific narrative threads within these documents and tracing those narratives over the duration of the legal process, I argue that ethnographic analysis of text-based documents situates the specific experiences of the case stakeholders within the broader contexts of law, transnational corporate capitalist development, and Eritrean and Guatemalan history. This provides the researcher a unique and critical view of power relations between stakeholders in legal cases and the processes of legal allyship, providing insight into the relationship between law, justice, and human experiences of violence.

In 2007, security personnel from the Hudbay Minerals, Inc. (hereafter "Hudbay") Fenix mine, together with Guatemalan military and police forces, allegedly used destruction of crops and property, intimidation, physical assault, and sexual violence to evict Lote Ocho as part of a land dispute near El Estor, Guatemala. Hudbay, based out of Toronto, Canada, asserts they legally own the land on which Lote Ocho is located while the community of Lote Ocho maintains the land is ancestrally theirs. In 2011, eleven Lote Ocho women filed a lawsuit in Ontario, Canada against the mining company for gang-rapes they claim were committed during the eviction process. With the men in the village at work in the fields, the case alleges that, on 17 January 2007, members of Fenix mine security personnel, members of the military, and police officers arrived in Lote Ocho with the intention of evicting the community. After the operation's leaders demanded to speak with the men, nine of these individuals gang-raped eleven women in the community. This resulted in severe emotional trauma for the women along with the breakup

of marriages,[12] and miscarriage and stillbirths for several of the women who were pregnant at the time of the attacks.[13]

Caal v. Hudbay claims negligence on the part of Hudbay directly led to the rapes of the plaintiffs, giving Ontario courts jurisdiction over the case. Despite appeal by Hudbay that the case is better suited for Guatemalan courts, the plaintiffs' jurisdictional claim was upheld by a 2013 Ontario Superior Court of Justice decision. *Caal v. Hudbay* is the first lawsuit against a Canadian-based mining company for human rights violations committed abroad to be accepted for trial in a Canadian court, and is the product of collaboration between the plaintiffs, Lote Ocho community members, transnational human rights organizations, and Canadian-based attorneys (Imai, Maheandiran, and Crystal 2014).

In November 2014, three Eritrean plaintiffs filed *Araya v. Nevsun* in British Columbia, alleging forced labor was used in Canadian-based Nevsun Resources, Ltd.'s (hereafter "Nevsun") Bisha copper-zinc mine west of Asmara, Eritrea's capital. The plaintiffs allege they suffered poor treatment at the mine, including inadequate shelter, water, and food. The conscripts were paid roughly $1USD a day to work in the mines.[14] The case alleges that Nevsun is directly liable for condoning the Eritrean military's used of forced labor and, by extension, for harms committed against conscripts by the Eritrean military and the Eritrean-based subsidiary parastatal companies Segen and Mereb, which oversee the mine's operations (Ting 2017). In 2016, the Supreme Court of British Columbia rejected Nevsun's appeals and agreed to hear the case. *Araya v. Nevsun* is the first time a civil case will be heard in Canada against a Canadian corporation for breaches of customary international law (Gifford and Lam 2016). Since the filing

[12] Some members in the community consider the women "unclean" as a result of the rapes. Blame for sexual violence is still often attributed to the victim/survivor in many Guatemalan communities, including Lote Ocho.
[13] Meeting with the plaintiffs and Guatemalan Human Rights Commission (GHRC) delegates, August 2011.
[14] *Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle v. Nevsun Resources, Ltd*. In the Supreme Court of British Columbia, No. S-148932.

of the case, the action has grown to include eighty-seven plaintiffs, all of whom are now refugees scattered across approximately fourteen countries.[15]

While the plaintiffs in *Araya v. Nevsun* prevailed in motion hearings determining that a civil tort claim can involve issues of customary international law (CIL) and that the case should be heard in British Columbia as a result of the inability of the plaintiffs to obtain a fair trial within Eritrea, they lost their motion to have the case heard as a class action suit. Justice Abrioux, the Supreme Court judge hearing the case, found that the varied personal experiences of the plaintiffs while working at the mine would warrant individual rather than collective examination (Ting 2017). As such, the original *Araya v. Nevsun* claim has been divided into ten lawsuits being heard as joined cases. Plaintiffs for each lawsuit are grouped according to similarity of experience.[16] Under CIL damages are being sought for the use of slavery, torture, forced labor, crimes against humanity, and cruel, inhumane, or degrading treatment. Under tort law damages are being claimed for battery, unlawful confinement, conversion, conspiracy, and unlawful agreement to use forced labor (Ting 2017).

Both *Araya v. Nevsun* and *Caal v. Hudbay* are particularly compelling as there is currently no legal precedent for transnational or multinational corporations to be held responsible for their role in the production of physical or structural violence – defined as the social conditions that put populations at risk for harm – in other countries (AI 2012; Farmer 2009). The study of legal jurisdiction itself is a fairly new field of legal theory, what Justin B. Richland calls the "jurisprudence of jurisdiction" (2013: 211), and this newly expanded definition of Canada's legal jurisprudence is part of a burgeoning trend in the country dubbed transnational law: law that concerns domestic legal standards governing actions that transcend international borders

[15] Personal communication with *Araya v. Nevsun* legal actors, December 2018.
[16] Ibid.

(Barutcisk, Little, and Scheinert 2018). The Ontario Superior Court of Justice has also accepted two other cases regarding Hudbay's Fenix mine. *Choc v. Hudbay* alleges the corporation is responsible for the 2009 murder of community leader Adolfo Ich Chamán in nearby El Estor, while *Chub v. Hudbay* alleges the corporation's responsibility for the 2009 shooting, and resulting paralysis of, German Chub Choc. In addition, the Supreme Court of British Columbia has ruled in favor of hearing another, similar case: *García v. Tahoe Resources, Inc.* The case alleges Tahoe is responsible for the 2013 shooting-related injuries of several individuals protesting a Tahoe-owned mine in southeast Guatemala.

While the threshold for jurisdictional acceptance remains incredibly high, with strict standards regarding burdens of proof, discovery production timelines, territorial requirements, and highly specific definitions for what harms can be claimed and by whom, there is every indication that legal precedent is being set and civil cases against Canadian-based mining corporations regarding violence committed abroad will continue to be accepted in Canadian courts. Considering three-quarters of extractive companies worldwide are based in Canada and that, over the past decade, Canadian mining projects have been accused of hundreds of acts of international violence, including destruction of property, sexual violence, the use of forced labor, intimidation, community displacement, and murder, it is crucial for us to consider the place of legal documents in ethnographic research (CCSRC 2009; Gordon and Webber 2008; Imai, Maheandiran, and Crystal 2014; Welker 2009). How can an ethnographic reading of case-related documents help shed light on the relationship between normative law and the lived experience of the law, as well as the changing relationship between national law, corporations, human rights, and development?

Ethnography and the Realities of Absence

Given the groundbreaking nature of *Caal v. Hudbay*, over the past eight years the plaintiffs have been heavily interviewed by the media as well as social science and legal researchers. While I had been able to interview the plaintiffs earlier in my research, by the time I entered the later stages of my work the plaintiffs were experiencing publicity and research fatigue and had expressed the desire to their attorneys to not to be interviewed about their experiences unless absolutely necessary, a wish I respected.

In *Araya v. Nevsun*, the plaintiffs are scattered across the globe and very few have reliable access to a phone or the internet. In addition, given the precarious situation for these refugees as they build new lives outside Eritrea, they are deeply suspicious of speaking with anyone other than their established inner circle of allies. Between logistical difficulties and the very real dangers underlying the Eritrean refugee experience, interviews with the plaintiffs in *Araya v. Nevsun* were difficult at best.

These factors heavily informed the development of my research, leading me to shift my focus to the process of transnational legal allyship rather than primarily studying the plaintiffs' experiences, as had been my original intention. Without a doubt, an ethnographic analysis of written documents and other media pieces containing first-hand statements from plaintiffs proved a crucial way to access plaintiff perspectives when access to the plaintiffs themselves was limited.

To assess how written records can best contribute to ethnographic research, I collected data using interviews and participant observation with plaintiffs, non-plaintiff Lote Ocho community members, and human rights and legal actors affiliated with *Caal v. Hudbay* and *Araya v. Nevsun*. This data was compared with data collected from court filings, written

discovery, legal summaries, press releases, news articles, and television and radio interviews given by stakeholders in the cases. The data used regarding *Caal v. Hudbay* was collected between 2011 and 2019 while the data regarding *Araya v. Nevsun* was collected between 2015 and 2019. Codebooks for each case were developed based on common themes that arose within the data. These codebooks were used to conduct frequency analysis of the data to examine differences in the goals and priorities of various stakeholders in the cases as well as changes in stakeholder attitudes and priorities over time.

The Cases in Context

The violence experienced by the cases' plaintiffs and the legal paths that successfully brought the two cases to Canadian courts are the result of the complex relationship between violence, corporate capitalist development, and international and domestic law. A key component of studying *Caal v. Hudbay* and *Araya v. Nevsun*, then, has been to assess the ways these relationships are internalized and understood by the various stakeholders in the cases. As such, putting the violence alleged in *Caal v. Hudbay* and *Araya v. Nevsun* into the broader context of development, corporate capitalism, and displacement is critical for understanding what these tort cases mean for the plaintiffs and their legal allies.

Land Disputes in Guatemala

In Guatemala, land disputes between Indigenous communities, non-Indigenous landholders, and private overseas corporations fueled an internal armed conflict (IAC) spanning from 1960 to 1996. Approximately 200 thousand civilians were killed, 500 thousand displaced, and fifty thousand forcibly displaced as a result of massacres and acts of genocide against the Indigenous population. It is estimated that the Guatemalan military was responsible for ninety-

three percent of the atrocities and that eighty-three percent of the victims were Indigenous Maya (CEH 1999).

The 1996 Peace Accords included provisions for land reform, yet Indigenous Guatemalans continue to be denied legal access to land by the government and suffer disproportionate rates of displacement and poverty compared to non-Indigenous Guatemalans (CEH 1999; UNDP 2018). Indigenous communities, including Lote Ocho, are particularly vulnerable to displacement as Guatemala lacks comprehensive land laws addressing indigenous rights to land. The vast majority of Indigenous communities have never held official land deeds, and during the IAC, when Indigenous communities were being slaughtered or displaced from their lands en masse, a large number of deeds to these newly (and conveniently) available lands were produced by the Guatemalan government and issued to foreign corporations for extractive and agricultural development (Imai, Maheandiran, and Crystal 2014).

The forced displacement of existing populations to create available territory for states and corporations to develop in their own economic interests is known as territorial conditioning and has been a significant contributor to the number of internally displaced peoples (IDPs) throughout Latin America (Gellert 2015; Harvey 2003; Oslender 2007). In the region where Lote Ocho is located, the Guatemalan military forcibly removed or killed an estimated three thousand to six thousand individuals, mostly Maya Q'eqchi'. It was during this time that the land where Lote Ocho is located was sold for development of the Fenix mine[17] (Fox 2015; Imai, Maheandiran, and Crystal 2014; NACLA 1972).

[17] The land deed for the Fenix mining project was originally obtained by Canadian based International Nickel Company (INCO) from the Guatemalan government in 1965. The mine has been sold several times since then, with Hudbay purchasing the mine in 2008. While this purchase occurred after the 2007 gang-rapes of the plaintiffs, Hudbay owned the mine at the time *Caal v. Hudbay* was filed in 2011 and, due to the terms of the purchase contract, Hudbay is legally liable for all actions carried out by the former owner(s).

Thus the conflict between Hudbay and Lote Ocho is part of a broader process of corporate capitalist development, an industry that thrives at the intersection between local dispossession and transnational accumulation (Gellert 2015). The forced removal of communities from their homelands for the purposes of economic development – broadly called development-forced displacement (DFD) – has become a serious problem worldwide and in Guatemala in particular (Fisher 2009; Oliver-Smith 2009a, 2009b). Graffiti protesting DFD can be found throughout Guatemala, and is a particularly common theme for graffiti in Guatemala City [Figures A1 and A2 in Appendix A].

There is no long-term economic or physical security for Indigenous Guatemalan communities that have been displaced. Living in states of chronic uncertainty and vulnerability can lead to psychological, physiological, and sociocultural stresses that manifest at both the individual and community levels (de Wet 2009). For rural subsistence farmers, like the families in Lote Ocho, removal from their lands means the loss of years, even generations, of work tending their plots. With malnutrition already a rampant problem in rural Guatemala, families whose lands are seized for corporate or government development projects are forced to live off smaller and smaller parcels of land. The inhabitants of Lote Ocho continue to live a chronic state of uncertainty and insecurity, and these stresses loosen "their cultural anchors, lessen their material well-being, limit their choices and control over their circumstances" (de Wet 2009:81).

The World Bank mandates that forcibly displaced peoples should be compensated for their land, even those without legal title to the land of which they have been dispossessed. However, existing Guatemalan law does not recognize the need to provide compensation to those without formal land titles and the courts have not established a reliable legal precedent one way or the other (Koenig 2009). Even if the community of Lote Ocho had been consulted about being

relocated and/or offered resettlement assistance, would they have agreed to be resettled? Conversations with community members indicate not, as their ancestral claim encompasses more than a monetary connection to the land.[18] As Margarita Caal Caal, one of the plaintiffs in *Caal v. Hudbay,* declared to a room full of people in Toronto in 2017, "[i]n my community we are fighting for our lands and we will protect them until we die" (Small 2017). As with many Indigenous subsistence-framing communities, for Lote Ocho land provides life, livelihood, and connection to their ancestors. This deep-seated sense of belonging to a particular parcel of land, existing in conflict with Hudbay and the Guatemalan state's interest in development, means the defendants and the plaintiffs view the lawsuit in very different ways: a claim to cultural rights versus a claim to free enterprise.

I had heard similar narratives many times before, this link between the land and cultural and personal identity, while studying violence and development in Guatemala, Mexico, Peru, and Rwanda. Human bodies and physical landscapes are inherently intertwined, and violence against one is tied to violence against the other. In some cases, as in Guatemala, this interconnection between identity and land plays out via disenfranchisement and erasure of Indigenous claims to land – or of Indigenous bodies themselves. In others, such as Eritrea, territoriality is central to nation-state building, and the government uses National Service to enforce the narrative that the bodies of Eritreans as well as the land, belong to and comprise the Eritrean State.

Isolationism and Forced Labor in Eritrea

The authoritarian Eritrean government routinely uses forced conscription, torture, forced labor, repression of religious freedom and freedom of expression, forced disappearances, and other human rights violations as tools of statecraft. Over the past decade or so, Eritrea has produced as many as five thousand refugees each month, making it one of the top producers of

[18] Meeting with the plaintiffs and Guatemalan Human Rights Commission (GHRC) delegates, August 2011.

refugees in the world (Kibreab 2009; Poole 2009; Hepner 2012; UNHCR 2016). Established in 1991, the Eritrean National Service (NS) went into effect in 1994. All Eritreans between the ages of eighteen and forty are required to serve six months of military training followed by a year of military service. After the 1998 war, with Ethiopia, however, the government made military service an indefinite endeavor, removing the maximum time limits for new conscripts and reactivating of those who have already served their required time (Kibreab 2009). As a result Eritreans today may serve for decades, making it difficult to create a stable and independent life outside of the military. Visas, land tenure, food aid, and licenses are tied to NS, and desertion and draft dodging are punishable with incarceration and/or physical discipline up to and including death (Kibreab 2009, 2014; Poole 2009).

While required military service is not in itself a human rights violation, a 2016 commission of inquiry carried out by the United Nations Office of the High Commissioner for Human Rights (OHCHR) found that the Eritrean government's primary use of NS labor was for economic rather than military purposes. While the plaintiffs in *Araya v. Nevsun* were assigned as conscripts to work in the Bisha mine, conscripts may also be used as laborers on privately-owned farms of high-ranking officers, or on construction or civil engineering projects. As such, Eritrea's abuse of its NS program meets the definition of forced labor, a violation of both international humanitarian law (IHL) and customary international law (CIL) (Hepner 2012; Kibreab 2009; UNHCR 2016).

Since its independence from Ethiopia in 1991, and particularly since the border war with Ethiopia in 1998-2000, the Eritrean state's policy has been that, for the sake of security and autonomy, the only good reliance is self-reliance. As such, isolationism has been a key feature of Eritrean statecraft, with the international (particularly Western) sphere depicted as a space of

foreign predation. Despite these ideological claims, Eritrea has, in practice, been economically engaged with international and supranational lending programs since soon after its independence (Hepner 2009, 2012).

Eritrea has been heavily criticized by the international community for its restrictive political and economic policies. International development agencies, and the World Bank in particular, have pushed Eritrea to improve its human development index (HDI) through the diversification of its economy beyond agricultural production (WBG 2018). In 2008, construction on the Nevsun Bisha mine—Eritrea's first modern mining operation—began. The mine processed oxide ore from 2010 to 2013 and the addition of a zinc expansion plant occurred in 2016. The mine has been praised both domestically and internationally for being constructed and operated well under budget, and during its first five years of operation the mine brought the country $800 million in taxes, royalties, and return on investment. True to Eritrea's command economy structure the Eritrean state holds an impressive 40 percent ownership of the mine. Since the opening of the Nevsun Bisha mine, Australian, Indian, and Chinese extractive companies have expressed interest in setting up operations in Eritrea as well, and three more foreign-owned mines are planned for the near future (Anderson 2016).

2018 brought further changes indicating Eritrea's long stated policy of isolationism may be ending, or at least relaxing. The election of a new Prime Minister in Ethiopia led to the brokering of a peace deal between the two countries. For the first time in over a decade, a senior United States diplomat visited Asmara, and in November the United Nations lifted sanctions against the country that had been in place since 2009 (Stigant and Knopf 2018). The oppressive political climate in Eritrea has heavily influenced the course of *Araya v. Nevsun*, particularly the argument for using Canada as the legal venue in order to assure a fair trial and access to justice

for the plaintiffs. All the plaintiffs are now refugees who have fled Eritrea and ethnographic data, including interviews with the attorneys and human rights advocates as well as court records, including motions and expert reports, illuminates their refugee status as being highly influential in both the legal proceedings and the experiences of the plaintiffs and their legal allies.

Law and Justice

Anthropologists, sociologists, and legal scholars have long debated the relationship between law and justice. Some scholars claim government-based justice initiatives, including court cases, only focus on short-term jurisprudence and employ top-down structures that do not fully engage affected communities throughout the legal process. Goodale and Clarke (2010) further argue that a focus on positive law has the potential to further cycles of violence by empowering states via the legitimization of their ability to recognize (or not) the rights of communities– to "reinscribe the very relations of power they [communities] are resisting" through rights-based movements (Speed 2008). As such, scholars in international law, political science, and human rights studies have been asking critical questions regarding what constitutes "justice" and to whom, as well as the relationship between law, governance, and persistent structural inequality (Merry 1992; Nagengast 1994; K. Nash 2009; Sanford 2003). But what does an ethnographic reading of the court and case-related documents in *Caal v. Hudbay* and *Araya v. Nevsun*, in conjunction with data collected via interviews and participant observation, tell us about stakeholder perceptions of the relationship between law and justice? What are the expectations of stakeholders regarding how the case will affect the lived experience of DFD or forced labor, respectively, and/or the state and corporate structures that inform such violence?

In cases of corporate capitalist development-related violence, the global structures that produce and enforce law and the ways in which laws are internalized and applied in national and

local justice systems must both be assessed. By definition, *Caal v. Hudbay* is a civil tort case while *Araya v. Nevsun* encompasses both tort and CIL claims. Tort law involves wrongful acts or injury leading to emotional, physical, or financial damages to another person. CIL encompasses law that is considered so globally normative as to be peremptory in nature. The application of CIL lies in the concept that such norms are legal obligations (*opinio juris*) and, as such, states should enforce CIL through domestic law (state practice) (Baker 2016).

Only *Araya v. Nevsun* is overtly tackling the idea that international law should be codified into enforceable law in Canada via its CIL damages claims. However, the hope of setting legal precedent in Canada recognizing that globalization in practice necessitates the upending of territory-based law – that Canada has a duty and a right to extend legal jurisdiction over harms committed beyond its nation state borders—lies at the heart of both cases. Many of the goals of the plaintiffs and their allies center around a desire to promote, protect, and enforce international human rights standards. This creates an interesting dual reality for case participants, as the human rights ideals driving the cases are translated into tort claims in practice. For example, while sexual violence is prohibited under both IHL and CIL and has been identified as a criminal act in numerous international statues, based on Canada's criminal codes there are no legal grounds for filing criminal claims in Canadian courts for crimes committed outside Canadian territory. However, sexual assault falls neatly under the definition of negligence within Ontario's civil code of unintentional tort law. As one legal ally joked, it is like working in the United States' Florida legislature, where use of the terms "climate change" and "global warming" is prohibited, even when discussing climate change and global warming-related

policies.[19] With no current precedent to rely upon, the attorneys in each case are working to fit square-shaped problems into triangular legal boxes.

Navigating the Legal Waters

There were numerous advantages to filing *Caal v. Hudbay* and *Araya v. Nevsun* as civil cases despite the criminal nature of the alleged harms. The standard of proof in a criminal case is the famous "beyond a reasonable doubt," while civil cases are based on a balance of probabilities and culpability. In addition, an unintentional tort claim prevents the need to prove the defendant intended to inflict harm, only that harm did occur as a result of the defendant's actions or inaction, as the case may be. Criminal cases also require only the plaintiffs to produce discovery while civil cases require discovery production from both sides, meaning the plaintiffs have been able to request thousands of documents from Hudbay and Nevsun regarding their operations in Guatemala and Eritrea, respectively.[20]

Perhaps the most critical advantage to filing a civil rather than criminal case from the perspective of transnational legal allyship, however, is the fact that a civil claim gives greater control to the claimants. In a civil case, the plaintiffs are the individuals who experienced the claimed harm(s). In a criminal case, the plaintiff is the State, acting on behalf of the victims/survivors' interests. Given the marginalized status of the claimants in both legal and social terms, this element of representation and empowerment has remained a central concern for every stakeholder with whom I spoke and is a crucial part of what plaintiffs and legal allies alike agreed justice in this case would look like. One plaintiff in *Caal v. Hudbay* commented that, to her, justice meant finding a way to have her story told in her own voice to people outside her own community, while a human rights organization worker who had been working with Lote

[19] Personal communication with *Araya v. Nevsun* legal ally, January 2019.
[20] Personal communications with *Caal v. Hudbay* legal actors, October 2018; Personal communication with *Araya v. Nevsun* legal actor, December 2018.

Ocho since its initial displacement said she felt justice meant ensuring the plaintiffs had a primary role – had agency – in determining their own futures.[21]

Of course, there are also distinct disadvantages to filing a civil claim. Civil claims must be paid for by the parties, including court costs, attorneys' fees, hiring of expert witnesses, investigators, court reporters, and numerous other potential costs. Canada is a cost-based jurisdiction, meaning the losing party in each motion heard in the case must pay the fees incurred by the winning party, if so specified in the motion. The deep pockets of Hudbay and Nevsun and their extensive legal departments make a civil case an expensive, long-term investment for the plaintiffs and their allies.[22] All these considerations were presented to the plaintiffs by the attorneys and legal advocates associated with the case prior to the filing of the cases.

Caal v. Hudbay

Along with consulting the eleven women who were gang-raped, the community of Lote Ocho as a whole was also consulted prior to filing *Caal v. Hudbay*. There would be little advantage to pursuing an unpopular action that would further marginalize the women within their own community, so support from the community was key. Particularly early on in the development of the case, between 2007 and 2011, ethnographic data from Lote Ocho community members and transnational human rights activists revealed that a lawsuit regarding sexual violence claims was not necessarily in line with overall community priorities. Observation of a Lote Ocho community meeting in August 2011 demonstrated that land access, land deeds, and long–term security for the families in Lote Ocho via the ability to farm and raise livestock were the topics of greatest concern to the community as a whole. Most of the meeting was centered

[21] Meeting with the plaintiffs and Guatemalan Human Rights Commission (GHRC) delegates, August 2011; personal communication with human rights worker September 2015.
[22] Thus far, the plaintiffs' costs in *Caal v. Hudbay* and *Araya v. Nevsun* have largely been paid for by fundraising campaigns through organizations including Avaaz, as well as donations from human rights organizations and private parties.

around the community's disastrous dealings with Hudbay in trying to purchase land rights. The process had been severely hampered by language barriers and high rates of community illiteracy and resulted in the community paying out nearly all of their assets in exchange for a small plot of land from which Hudbay retains the right to evict them at any time. The rapes were not mentioned at all at this community meeting.

In contrast, a meeting with just the plaintiffs during that same trip to Lote Ocho demonstrated addressing the rapes, alongside long-term familial security, were critical to the women who had been assaulted. With strong familial relationships forming the basis of community members' social and economic security, the impact of the gang-rapes on these relationships was central to every single woman's narrative. Few of the women discussed the rapes with their husbands or families for a long while after they had occurred, or even with each other, for fear of stigmatization. The aftermath of the violence and trauma of the attacks included miscarriages, stillbirth, and the breakup of marriages. It is perhaps unsurprising, then, that comments regarding children, pregnancy, loss of pregnancy, husbands, and loss of relationship with a husband, rather than being framed as incidents in the past, were far more frequently presented as discussions of their present and future.

As one plaintiff noted in 2011, four years after her rape, "I carry that pain with me every day, every minute." Another plaintiff described her miscarriage following the rapes as "my baby is lost," rather than "I lost my baby."[23] Over time the women have continued to discuss the pain and trauma they experienced in 2007 as an ongoing destabilization. In 2016 plaintiff Margarita Caal Caal gave an interview to the New York Times in which she stated "[t]he fear is not over…I still fear, all the time…remembering is reliving…it hurts. It hurts as a woman'" (Delay

[23] Meeting with the plaintiffs and Guatemalan Human Rights Commission (GHRC) delegates, August 2011.

2016). Table 1 (in Appendix B) further illustrates the contrast in priorities, as seen in 2011, between the now-plaintiffs and the community as a whole.

Despite these differences, by the time the case was filed in 2011 community leaders had given their blessings, as it were, for the case to proceed. Discussions of legal strategy between the potential plaintiffs, the attorneys, and non-profit based advocates had demonstrated that a civil case regarding the gang-rapes had the strongest potential for addressing the violence that accompanied operation of the Fenix mine. In Guatemala, raising international awareness of harms committed against the population is often the best way to keep vulnerable groups and individuals safe and is a long-standing practice of many human rights groups operating in the country.[24] Given the absence of enforceable legal measures for ensuring ethical international or transnational business practices, the court of public opinion can be a powerful force when it comes to monitoring and modifying corporate behavior (Merry 2010). In addition, the potential for a financial payout should the plaintiffs win the case—which asks for a total of $55 million CAD in damages—is another avenue for obtaining long-term security, as it makes the future lease or purchase of land a financial possibility.

With the plaintiffs and the Lote Ocho community leaders on board, the case proceeded. Lote Ocho is a remote community that lacks access to the internet or reliable cell service and this has made it difficult for the plaintiffs and their attorneys to be in touch on a regular basis. However, over the past nearly eight years, the plaintiffs and their legal allies have taken the case through appeals, examinations for discovery, and various motions thanks to a network of allies who serve as intermediaries between the plaintiffs and attorneys.

For the examinations for discovery, in which Hudbay's attorneys took the testimony of the plaintiffs, the plaintiffs were flown to Toronto. This is the only time the women have come to

[24] Ibid.

Canada in person. A few times a year, the plaintiffs' attorneys meet their clients in the municipality of El Estor near Lote Ocho. Most communication, however, is kept up via phone calls, email, Skype, or other electronic communication using allies from human rights organizations affiliated with the case and/or Q'eqchi' translators, all of whom serve as go-betweens when the attorneys have information or questions to relay to the plaintiffs. Trust between the plaintiffs and their legal allies is crucial for the functioning of this network, not only due to the precarious living situation of the women and their community and the sensitive nature of the claims, but because the plaintiffs are illiterate and the plaintiffs and attorneys must rely on Q'eqchi'-to-English or Q'eqchi'-to Spanish-to English translators. Without trust that conversations or written documents are being accurately represented through the chain of communication, the network of communication would break down.[25]

Araya v. Nevsun

A number of years prior to the filing of *Araya v. Nevsun,* Nevsun had been identified by human rights advocates as contributing to human rights violations through their operations abroad. After researching Nevsun's work in Eritrea and hearing stories of forced labor being used in the mine, these advocates worked with attorneys dedicated to human rights-based work to put together the lawsuit. They used the Internet message boards popular within the Eritrean diaspora community and the popular Paris-based Eritrean-specific radio station Radio Erena to spread the word that a class action lawsuit was being filed against Nevsun for the use of forced labor at the Bisha mine. The oppressive experience of National Service has become so normative for Eritrea's citizens that many of the plaintiffs hadn't understood their experience could be legally contested until attorneys and allies put the call out for plaintiff participation in the

[25] Personal communication with *Caal v. Hudbay* legal actors and allies, March 2015 and October 2018.

lawsuit.[26] While the original *Araya v. Nevsun* class action lawsuit has been reformulated into ten separate lawsuits representing eighty-seven plaintiffs as of the writing of this article, the cases are being heard collectively under one Supreme Court judge, Justice Patrice Abrioux.

While all the plaintiffs participating in *Araya v. Nevsun* have been vetted by the attorneys and legal allies as having experienced human rights abuses while being forced to work at the Nevsun Bisha mine, the nature of the Eritrean refugee experience has presented a number of obstacles for both the plaintiffs and their legal allies. Those who flee Eritrea face a difficult and lengthy process in seeking asylum or being resettled as refugees. Navigating the interview requirements, document production, health checks and other elements of the vetting process is complex and exhausting. In addition, the Eritrean state continues to influence and exert control over the diaspora community. Eritrea mandates a two percent flat tax on income, which is collected and used without the state divulging how or where it is applies, and actively monitors the diaspora population to keep tabs on their loyalties (Hepner 2009). For plaintiffs with family or friends still in Eritrea, being seen as a dissident may put their loved ones in danger. Refugees and asylum seekers must walk the fine line between proving their need to flee to host countries and ensuring they are not seen as agitators by the Eritrean state. As one human-rights organization worker affiliated with the case, an Eritrean refugee themself, explained, "[t]hey [the plaintiffs] have to paint a picture of a situation so dire that your life is in danger and that is why you need refugee status, but you also can't badmouth the regime. You have to think about what might get back home and how it can hurt your friends and family. You have to be careful."[27] This social control beyond Eritrea's national borders can also isolate diaspora communities within their host nations, making it difficult for those who have resettled to build stable and

[26] Personal communication with *Araya v. Nevsun* legal actors, December 2018.
[27] Personal communication with *Araya v. Nevsun* affiliated human rights worker, May 2017.

productive futures away from Eritrea's geographic borders (Hepner 2009). As a result, the number of plaintiffs engaged in *Araya v. Nevsun* has fluctuated, with at least six plaintiffs deciding not to continue participating in the case. Additionally, this has made it difficult to find translators to work with the plaintiffs, as each must be heavily vetted to satisfy concerns regarding privacy and interference by the Eritrean State.[28]

While bringing plaintiffs to Canada for some of the proceedings would be ideal, their refugee status has proven an obstacle for obtaining Canadian travel visas, particularly for those who remain in refugee camps. Those who have not been permanently resettled and put down roots in the form of community engagement, familial reunification, or job attainment are viewed as high risk visa applicants, the fear being that they will fail to return to the refugee camp after their business in Canada is done and, instead stay on illegally in the country.[29] The attorneys and other allies engaged in *Araya v. Nevsun* have kept these considerations at the forefront of their work and their relationships with the plaintiffs. While the majority of their interactions with plaintiffs take place long-distance using technology, concerted efforts have also been made to connect with plaintiffs in-person. For example, attorneys and amica curiae have traveled to meet with various plaintiffs in Ethiopian-based refugee camps as well as in Canada and various locations in Europe as plaintiffs are granted permanent resettlement.

Assuring plaintiffs that their needs are at the forefront of the lawsuits is imperative to maintaining good relationships between the stakeholders, a process which includes navigating the difficulties, restrictions, and dangers presented by the Eritrean diasporic experience. As the Eritrean state monitors its citizens in diaspora, "fear about the reach of the Eritrean state beyond its territory is a discrete category of emotion experienced by most Eritrean migrant (Bozzini

[28] Personal communication with *Araya v. Nevsun* legal actors, December 2018.
[29] Ibid.

2015:40). Beyond fears of personal consequences, Eritreans in diaspora must worry about the state imposing fines or taking away employment or property from family members still in Eritrea, even the possibility their friends and family may be arrested or otherwise abused (Hepner 2009). Under this constant threat of surveillance, long-distance communication via the internet or phones and employing translators and other middlemen makes even the process of basic communication between case stakeholders enormously difficult.

Learning to Speak to the Law

Shifting Perspectives

After seven years spent in litigation, how has long-term exposure to the legal process, grounded within a human-rights oriented transnational network of legal allies, impacted the ways in which the plaintiffs conceive of human rights, law, justice, and the violence they experienced? Are the goals of participants in the plaintiff-ally network compatible? Have they changed over time?

The ability of local actors to "harness human rights discourse and invest it with meaning" is what Shannon Speed refers to as "local appropriation" (2009:242) and what Sally Merry (2006) terms "vernacularization." The adaptation of international human rights ideals to local meanings and institutions is a largely top-down process facilitated by middlemen or translators who negotiate between global and local systems of meaning. Merry calls these translators "knowledge brokers," whose power lies in their ability to influence others while remaining constrained by the existing structures within which they must work, including ideas, institutions, and practices (Merry 2006).

An assessment of the networks of plaintiff-allies involved in *Caal v. Hudbay* and *Araya v. Nevsun* illustrates the difficult position of knowledge brokers. The trust relationship established

between the plaintiffs, the human rights organization employees serving as middlemen, and the Canadian attorneys is essential to the functioning of the network, yet everyone I spoke with expressed frustration with the limitations presented by law, bureaucracy, and the constraints of a system in which corporations wield great power with seeming impunity. At the same time, these same individuals expressed hopefulness that *Caal v. Hudbay* and *Araya v. Nevsun* are making a positive difference in the lives of the plaintiffs, the community of Lote Ocho as a whole, and in Canadian legal precedence, and will impact in the way Canadian mining corporations operate overseas.

Grahame Russell, an advocate who has worked with the plaintiffs from the start of the case and is affiliated with Rights Action, described plaintiff Margarita Caal Caal triumphantly exclaiming "¡ganamos!" meaning "we won!" after undergoing eight hours of examination by Hudbay's legal team in Toronto in November 2017 (2018). Russell points out that, as far as the actual status of the case was concerned, nothing had been won at all that day. Caal's testimony was just a routine deposition, part of the discovery process. However, the very act of telling her truth in the face of Hudbay's denials felt like a victory to Caal. It is also important to note her use of the first person plural "we" form of the verb. For the plaintiffs, the truth telling of one woman was a victory for them all.

Attorneys in the case have repeatedly called the lawsuit an essential step in the increased regulation of how Canadian-based corporations operate overseas and one intimated that, even today with the case ongoing, it has already been a victory due to the broad public interest it has generated.[30] The overarching goal of raising international awareness of the harms committed against the plaintiffs by Hudbay is central to the women's definition of justice. The sheer fact that all eleven plaintiffs have remained part of the lawsuit over the past seven years, even in the

[30] Personal communication with *Caal v. Hudbay* legal actors, October 2018.

face of bouts of pressure and intimidation from both their own community and Hudbay to drop it, demonstrates their commitment to the ideal that legal measures are a means to obtaining justice for themselves and their community.[31] However, by comparing how the plaintiffs themselves speak about their experiences over the duration of the case, it becomes clear that concepts such as pain/trauma, law, and human rights have become notably more prominent in the language used by the plaintiffs.

Several legal allies associated with the case said they had seen, to various degrees depending on the plaintiff, a shift in their understanding of the sexual violence committed against them as a human rights violation rather than a domestic matter, as well as an expanded understanding of the legal mechanisms and processes available to address these harms. For example, the concept of human rights was only briefly mentioned by the women when I spoke with them in 2011, though it has become a prominent part of their statements in later years. As plaintiff Rosa Elbira Coc remarked in a 2016 interview, "[a]ll women should be respected, including us" (Jimenez 2016). An Indigenous human rights advocate who has worked in the El Estor region for several decades remarked about the women:

> I see a change in them [the plaintiffs]. Things aren't perfect, marriages have broken apart. Some of the women have moved in with other family members. It's hard. They've lost so much. But I see where that pre-existing understanding of the power of women, women supporting each other and being really the heart of the community and the family…they are seeing that power as something they can take out into the world at large.[32]

The fact these women feared to tell their husbands and other relatives, even each other, about their rapes when they initially occurred, yet a few short years later were willing to discuss them with outsiders – including Canadian male attorneys and the international press –

[31] Ibid.
[32] Personal communication with Guatemalan human rights worker, May 2017.

demonstrates a marked shift in the way the women conceive of sexual violence and the power of being connected to a transnational human rights network via human rights and legal allyship.

Additionally, early interviews with the plaintiffs demonstrated the women used few if any phrases related to international human rights, corporate social responsibility (CSR) or the law. Later interviews with the plaintiffs and with human rights allies showed increased use of language similar to what is used by the attorneys themselves and what is used in case filings, for example words and phrases such as "physical and psychological harm" (coded under pain/trauma), "liability" (coded under law/justice) and "duty of care" and "negligence" (coded under corporate social responsibility).[33] While the details of the plaintiffs' stories have not changed over the years, the language they use to describe their experiences has incorporated human rights and CSR rhetoric. Comparing the way the plaintiffs discussed the gang-rapes in 2011 to interview and written case-related document data collected between 2012 and 2018, Table 2 demonstrates how much more prevalent the use of human rights language has become for the women in describing their experiences.

In *Araya v. Nevsun*, legal actors and allies noted marked shifts in plaintiff understandings of how their experiences fall under the definition of human rights violations. The Notice of Civil Claim, filed on 20 November 2014, describes the grueling working conditions, meagre food rations, and verbal and physical violence used to subjugate the workers. The individual in charge of Segen's operations at the mine threatened conscripts with detention at a facility infamous for its use of torture, forced conscripts to roll in the hot sand as they were beaten to the

[33] *Margarita Caal Caal, Rosa Elbira Coc Ich, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chun, Luisa Caal Chun, Carmelina Caal Ical, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib, and Irma Yolanda Choc Quib v. Hudbay Minerals, Inc. and HMI Nickel, Inc.,* Ontario Superior Court of Justice, No. CV-11-423077.

point of losing consciousness, and employed a tactic called the "helicopter,"[34] leaving the conscript bound and left out in the sun in up to fifty degrees Celsius.[35] An estimated one thousand conscripts were exposed to such treatment while working at the mines, and there are decades worth of reports of similar abuse at other conscript-staffed projects across Eritrea (Hepner 2009).[36] However, for many of the plaintiffs initially, such inhumane treatment and torture that the international community may define as criminal was, to the plaintiffs, a normative (if untenable) part of military service.

A Canadian legal advocate associated with the case noted, "[i]t has been a bit of a revelation for some of them [the plaintiffs]. They tell you their stories and how it's impacted their lives...the fear, the nightmares…and you tell them 'oh, that feeling, those reactions…they have a name. It's called PTSD and it's real and there are ways to treat it' and they are just, like, …really?"[37] Another advocate noted how much more willing the plaintiffs have become over time in sharing their stories, saying "most of these men have never really talked about their experiences [at the mine]. They are surprised someone cares about what happened because, to them, that's just what service can be like. It's nice that they are seeing 'oh, this is important and people want to hear it. This was a violation of my rights…I have rights.'"[38] In short, the terms and phrases being used by the plaintiffs appears to be incorporating the language introduced by legal and human rights allies working with the plaintiffs. This shift to rights-based language and rhetoric, discussion of trauma and mental health, and more open-dialogue has been an important, and encouraging, emergence over the past four years since the filing of the lawsuit.

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[34] The "helicopter" involves tying together the individuals elbows behind their back as well as binding their feet at the ankles, contorting the body for extended periods of time.
[35] *Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle v. Nevsun Resources, Ltd*. In the Supreme Court of British Columbia, No. S-148932.
[36] Ibid.
[37] Personal communication with *Araya v. Nevsun* affiliated human rights worker, May 2017.
[38] Personal communication with *Araya v. Nevsun* affiliated human rights worker, August 2018.

This process has also been noted by other scholars working with members of the Eritrean diaspora, where working with attorneys and advocates regarding human rights-related claims can raise awareness within diaspora members as being rights-bearing subjects by virtue of being human, leading to a shift in identity and consciousness. As Tricia Redeker Hepner observes, the process of seeing asylum and/or refugee status reveals the forms of abuse which the Eritrean state employs as citizenship requirements and/or population control to be the selfsame abuses which make an individual eligible for refugee status outside Eritrea (2009). This first-hand exposure to international human rights ideals, and to national laws which uphold such ideals, can serve as "a trigger for critical consciousness" amongst refugees (2009:125).

Notes Franka Winter, "as any other narration, rather than 'positive truth,' testimony reveals the ways survivors experienced atrocity, the meanings they attribute to their experiences, and the discursive resources they have to make sense of their lives" (2009:94). While the particulars of survivor narratives may remain the same over time, through telling after telling the meanings and discursive resources used are likely to change. This exemplifies the process of vernacularization, in which law and legality operate in dialogue with and through transnational social networks, seen in the way the plaintiffs increasingly discuss their experiences using international human rights concepts and legal terminology and frameworks. Comparing the language used in case filings to verbal and written interview data, it's clear the highly specific language used to define the claims in the lawsuits, as well as the broader concepts of human rights that drive the lawsuits, are being appropriated into the consciousness and language of the plaintiffs themselves.

Narratives of Trauma

The process of giving witness testimony, particularly regarding an incident that was traumatic for the witness, can be deeply upsetting. As such, attorneys do their best to prepare witnesses so they are not caught off guard during questioning under oath, a process that often involves going over their testimony a number of times prior to testifying to ensure the narrative is concise, coherent, consistent, and accurate. In short, "in contrast to a popular cliché, testimony is not an especially *spontaneous* or *authentic* genre of speech—it should be interpreted instead as a narration which is carefully adapted to the special and subjectively dangerous situation of a public hearing and the hopes and fears the speaker invests in it" (Winter 2009:96). Despite the emphasis given on the plaintiffs remaining in control of the lawsuits as much as possible, attorneys and other legal allies have enormous influence over the way the plaintiffs' experiences are packaged and publicly presented.

Specifically, testimony under oath necessitates speaking within the hegemonic narrative structures of legal discourse. No matter how objectively true a traumatic narrative is, if the circumstances and harms presented by that narrative do not fit within the codified requirements of the law the plaintiff claims was violated, the narrative holds no legal weight. For example, *Caal v. Hudbay* was filed as a civil tort case under Ontario's statute of negligence. Under unintentional tort law, negligence occurs when the defendant, called the tortfeasor, is shown to have caused harm by failing to exercise an ethical and/or appropriate standard or duty of care to ensure the safety of others. Without proving this occurred, simply proving the gang-rapes happened isn't enough for the plaintiffs to win their case against Hudbay. In *Araya v. Nevsun,* the tort claim alleges the use of forced labor but uses the legal language and statutes of battery and forced confinement, which are admissible civil claims under the Supreme Court of British

Columbia's jurisdiction. The attorneys must show not just that the plaintiffs were subjected to forced labor using CIL and tort rules, but that the physical and emotional harms claimed are the result of forced labor used at the Bisha mine specifically, not from the experience of living under a repressive regime in general or previous or subsequent forced labor experiences.

Thus the production of testimony is done within highly structured atmospheres. Those testifying or being deposed must learn how to express their experiences in ways that render their suffering legible to the Canadian civil code of unintentional torts. Legible narratives serve as currency within the justice economy. The more the narratives conform to what the courts require for the burden of proof to be met, the more capital an individual's story has. This imbues some speakers with power and authority while others may be disregarded as unreliable or even dishonest witnesses (Winter 2009). These narratives take personal memory and the textures of experience and translate them into what is either accepted by the court as truth or rejected as unable to be proven as fact.

One of the most frustrating aspects of the legal process is that any deviation in detail as the story is told and retold, any gaps in memory, can be used by opposing counsel to cast doubt on the veracity of the entire narrative. In *Caal v. Hudbay*, the plaintiff perhaps doesn't recall which man penetrated her with what or where or how deeply. They may not remember every detail of the hour after the attack. How, then, do we know she is telling the truth? Can anyone corroborate her story? How can no one else have seen what happened? Why did she not immediately tell her husband/mother/friend about the attack? Why did she not go to a doctor for a rape kit? This is the reality of providing legal testimony, a situation compounded by cultural differences and the structures of marginalization within which the women of Lote Ocho live. For an isolated Indigenous community in Guatemala where sexual violence often leads to

stigmatization of the survivor, where access to a hospital or medical clinic is limited, and where the local police themselves are named as perpetrators of violence, the expectations of the Canadian legal system regarding what a woman who has been sexually assaulted should, would, or could do in response simply does not always fit with the reality of the plaintiffs' lived experiences.

Similar frustrations are seen in *Araya v. Nevsun*. Why don't the plaintiffs recall exactly what day and time a particular event occurred? How can we know they are telling the truth when Nevsun has no record of their employment at that time to corroborate their narrative and the plaintiff has no paystub or tax return? Why didn't they request, either from Eritrean doctors or medical providers in the refugee camps, medical or psychological treatment for the harms they say they endured? Again, the reality of the lived experiences of the plaintiffs – that of forced laborer-turned-refugee – does not always fit with a Canadian expectation of behavior.

This is compounded by the fact that the Canadian legal system being used in this case is not the system that typically deals with refugees and asylum seekers. Canada has a separate division, the Refugee Protection Division, to process refugee-related cases. As such, neither the judge nor the system itself is familiar with the particular difficulties of refugee life. The attorneys, amica curiae, advocates and allies working with the plaintiffs have worked with experts to educate themselves, the opposing counselors, and the court. Expert testimony regarding why Eritrean refugees may not have certain personal documents or have been able to seek medical care for starvation, exposure, or beatings are often treated circumspectly, however. The expert may be able to speak with authority regarding Eritrean experiences broadly, but not

necessarily specifically about the experiences of the plaintiffs themselves, leaving the credibility of expert testimony and briefs open to attack under the rules of hearsay.[39]

Additionally, the difficulty of producing official documents such as birth certificates and medical and employment records has been central to the early stages of litigation in *Araya v. Nevsun*. During a multi-day motion hearing in December 2018, counselors representing Nevsun argued they were unable to proceed effectively with their defense as the plaintiffs had failed to produce an adequate number of the requested discovery documents. As one defense attorney put it to the judge, they were working in a "documentary vacuum."[40] The defense argued they had produced over forty-six thousand documents comprising upwards of 650 thousand pages of discovery material while the plaintiffs had produced only 416 documents. Without having the full evidentiary picture, Nevsun's attorneys argued, how were they supposed to prepare an effective defense strategy?

This argument strikes at the heart of the difficulties faced by the plaintiffs and their legal team. The refugee experience does not lend itself well to having access to an abundance of personal documents. As one advocate noted, if they, personally, were forced to flee their home for a refugee camp their tax returns would not be at the top of the list of things to grab and carry with them.[41] Many Eritreans do not place importance on celebrating dates such as birthdays and may not know their date of birth or have a birth certificate issued by the state at all. Additionally, refugees fleeing an oppressive, authoritarian government are not going to write to government departments asking for copies of personal documents. As such, what may seem a routine part of the discovery process for Canadian litigants is unthinkable for the plaintiffs. Getting involved

[39] Motion hearing, December 2018.
[40] Ibid.
[41] Personal communication with Eritrean human rights advocate, July 2017.

with the government, in their experience, only leads to trouble.[42] As Hepner notes, "national and international policies and laws…manage 'the refugee' not as a whole person grappling with enormously painful experiences, but as a technical problem to be managed and controlled (2009: 121).

Adding to these difficulties is the transnational nature of the refugee experience. The plaintiffs are scattered across the globe, and each government or authority had its own forms and procedures for responding to document requests. Navigating this bureaucracy is enormously time consuming. In at least one instance, which is currently under investigation, one plaintiff who has been resettled in northern Europe was fired from their job immediately following an employment record request by attorneys in the case. While it is uncertain whether the two events are linked, it is exactly the sort of incident that refugees struggling to build new lives abroad fear by engaging with *Araya v. Nevsun*.[43] As studies of displaced peoples reveal, the longer a migrant or exile has lived outside their country of origin, the more likely they are to engage in transnational activities as they have had more time to become stable in their host country and gain legal status protection their positions there (Al-Ali et al. 2001). For the vast majority of the plaintiffs in *Araya v. Nevsun*, they have not yet achieved this level of stability.

Despite having worked for a number of years on corporate and police accountability cases, human rights, Indigenous rights, and environmental law cases, one attorney said he was struck during the grueling process of examinations for discovery in *Caal v. Hudbay* by how unrealistically the legal system treats memory as something that should be perfect, unchanging, and complete in all details. The parties bringing the lawsuit are expected to treat deeply traumatic experiences with emotional detachment in order to be considered professional, in the case of

[42] Personal communication with *Araya v. Nevsun* legal actor, December 2018
[43] Ibid.

attorneys, or reliable, in the case of the plaintiffs.[44] Similar sentiments were found amongst the legal actors and allies in *Araya v. Nevsun*. The plaintiffs have already been through so much trauma. Seeing the legal process contribute to this trauma – seeing the plaintiffs' integrity questioned, their experiences examined under a microscope, having them accused of being untruthful and in search of a payout rather than resilient survivors of human rights abuses – reveals the flaws of pursuing justice through formal legal channels. Innocent until proven guilty may be the ideal of justice, but that ideal creates its own injustices.

Of additional concern is the ever-expanding body of research that shows eyewitness testimony to be not altogether infallible, particularly when the witness was under stress at the time of the event (Wells 2018; Wells and Quinlivan 2009). Truth telling in a legal context, then, is extremely complicated. Testimony must relay the experiences of victims/survivors of trauma in a way that allows for their personal truth to be conveyed while minimizing retraumatization for the witness, rendering their narrative legally legible, and navigating growing scientific skepticism about the reliability of memory and event recall (Combs 2010).

These, along with the other, aforementioned verbal accounts from legal allies and knowledge brokers of the frustrations of trying to fit a moral sense of justice into a rigid legal box, show how deeply these stakeholders have been affected by the case. In this way, the vernacularization process becomes a two-way street, where the lived experience of the plaintiffs impacts the way their legal allies reflect upon their own understandings and expectations of the legal systems of which they are part. Unfortunately, none of the written documents I analyzed corroborated these accounts or revealed much in the way of the personal or professional frustrations of the legal allies at all. Rather, such narratives were revealed only through interpersonal communication. This indicates that legal documents, while helpful for tracing the

[44] Personal communication with *Caal v. Hudbay* legal actors, October 2018.

process of appropriation and vernacularization amongst the claimants, does not provide the same level of insight into the legal allies involved with the case.

Conclusion

The law is often viewed as a passive, reactionary system in which responses are made to harms that have already occurred. In reality it is also a transformative system that influences and shapes the actors involved in legal cases. *Caal v. Hudbay*, *Araya v. Nevsun*, and the four other, similar cases being heard in Canadian courts are particularly important to our understanding of how ideals like law, justice, and human rights are internalized and translated across cultures and grounded in local legal application.

The highly structured nature of witness testimony and the legal process have led some scholars, myself included, to conclude that witness testimony in human rights-oriented cases "is ill equipped to help us understand either the causes or context of human rights violations...[and] methodologically unable to explore the ways in which social, political, economic, and structural forces influence its implementation" (Morgan and Turner 2009:7; Guyol-Meinrath 2015). However, after studying the verbal and written ethnographic data in *Caal v. Hudbay* I strongly believe that the study of written documents associated with legal cases is essential for understanding the process of legal vernacularization and internalization amongst those affected by human rights violations. By identifying specific narrative threads within these documents, tracing those narratives over the duration of the legal process, and comparing them to verbal ethnographic data, I argue ethnographic analysis of text-based documents provides the researcher a unique and critical understanding of the power relations between stakeholders in legal cases and the processes of legal allyship, lending insight to the complex relationship between law, justice, and human experiences of violence.

Part II: Section III: Negotiating Power: Narratives of Resistance

As I began work on this article in 2018, the topic of resistance was taking a prominent spot in my life. In my 2018 Introduction to Cultural Anthropology courses students frequently wanted to discuss the current political climate in the United States, and many students wrestled with where they stood on issues like immigration reform and removal of Civil War monuments from public spaces and movements like Black Lives Matter and the Women's March. My students debated what methods of resistance they feel are most effective and why and considered their personal comfort levels regarding active participation. Did they want to be on the front lines of protest marches? Should they speak up or stay quiet at family gatherings when loved ones raised contentious political issues? Did they prefer more private acts such as signing a pre-written petition or making phone calls to their legislators? Then came the more existential questions: Do any of these actions really make a difference in how these issues will, ultimately, play out? Is marching and sign-making and petitioning just something we do to make ourselves feel important and give us a sense of control over our lives, or is it part of a powerful moment of social revolution that will make its way into the history books for future generations to study? These student-led discussions became one of my favorite parts of teaching in 2018.

Of particular interest to me were our discussions regarding the difference between protest and resistance. The distinction between the two, as reached by my students, was that protest referred to an action while resistance was more of an ideology. Protest could potentially be done in an afternoon; resistance was a long-term commitment. Resistance, my students determined, required stamina and dedication born of deep-seated conviction.

I found myself thinking about these conversations during my work with stakeholders in *Caal v. Hudbay* and *Araya v. Nevsun*. Participants in the case had lobbied and testified, given innumerable interviews to the media and to scholars and filed motion after motion in courts of law. Many of these participants – plaintiffs and their families, attorneys, amica curiae, translators, human rights non-profit workers, and expert witnesses, amongst others – had been engaged in these cases for years. Other stakeholders dropped out of the lawsuits as they progressed, most notably several of the plaintiffs in *Araya v. Nevsun* and some non-profit volunteers who had been engaged with *Caal v. Hudbay.* These stakeholders had disengaged with the lawsuits for various reasons. Some moved (or were granted refugee status and permanently resettled, in the case of some *Araya* plaintiffs), changed jobs, grew weary of the legal process, became caught up in the demands of their day-to-day lives, or felt the risks of participating outweighed the potential benefits. No one I spoke with begrudged their decisions to opt out. As Carolyn Nordstrom writes:

> Violence comes with intent, the willful decision to harm another...It is the intent, and thus the emotive context of the act, that defines violence and its relationship to political will. Violence isn't intended to stop with the crippling of physical bodies. Violence is employed to create political acquiescence; it is intended to create terror, and thus political inertia; it is intended to create hierarchies of domination and submission based on the control of force. As Elaine Scarry writes, it 'unmakes the world' (Nordstrom 2004: 60-1).

In other words, violence wears people down. In some, however, it also lights or fuels a spark of resistance. As some of the plaintiffs in *Caal v. Hudbay* noted to one attorney in the case – after nearly twelve years of struggle for justice for themselves and their community – "there is beauty and dignity in the struggle."[45]

The other particularly important point that came out of these conversations was the power of narrative. Depending on whom you talked to, symbols such as the Confederate flag or a Civil

[45] Ibid.

War monument were characterized either as oppressive, dangerous, and racist or as symbols of familial and cultural pride. Movements such as Black Lives Matter were variously depicted as peaceful and empowering or terroristic in nature. The narrative shifted depending on who was controlling or guiding the discourse around these topics. This, two, became an important theme I saw pop up in my research again and again. Depending on what document I was reading or which stakeholder I was speaking with, the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun* were variously inspiring, conniving, survivors, liars, brave, deserters, rights-defending, or lawbreaking. As the lawsuits seek to determine culpability for corporate capitalist development-related harms, the parties are also engaging in a power-struggle over the right to control public narrative.

Each stakeholder I spoke with who remains involved in the lawsuits appears driven by a broader ideal, whether it is improving access to justice, establishing new standards for corporate operations overseas, raising global awareness over human rights violations related to corporate capitalist development, or wanting to establish stability and security for their families and communities. This speaks directly to what legal allyship means within the context of these transnational law cases. The central importance of trust and accountability amongst stakeholders was apparent from the start of my work with case stakeholders. Attorneys, translators, human rights advocates and allies, and plaintiffs all spoke of the time and energy put into learning to trust and rely upon each other, particularly given the ongoing vulnerability of the land-insecure plaintiffs in *Caal v. Hudbay* and refugee plaintiffs in *Araya v. Nevsun*. Much of this trust stemmed from the explicit work by non-plaintiff stakeholders to bolster the agency of the plaintiffs within the legal system. However, it should be noted that not all stakeholders had the same motivation for being engaged with the cases. The allyship developed by the stakeholders in

both *Araya v. Nevsun* and *Caal v. Hudbay* is thus better understood as heterogeneous and conjunctural in nature, rather than based on a singular, collective ideal or vision. Participation in the lawsuits involves numerous acts of protest, and these acts are designed to fuel broader goals of resistance to corporate capitalist development-related violence, to abuse of Indigenous people and spaces, to authoritarianism, and/or to impunity for human rights violations.

Throughout my research I saw this resistance take many different forms, ranging from unstructured narrative sharing conducted in a clearing near Lote Ocho's community meeting space to formal, stylized motion hearings in Vancouver courts that at once followed the prescriptions of the law and pushed its boundaries. Seeing the different forms of resistance utilized by participants in the cases and how various approaches could be used hand-in-hand, became particularly important for this project. The formal legal system has often been critiqued as a space too heavily embedded within existing – often inequitable – power dynamics for lawsuits to generate meaningful change. There is no doubt, as article two illustrated, that law can be a space for meaningful discourses of change as well as a space of frustrating limitation.

I was particularly struck by the duality of the legal system, its ability to both empower and constrain, while conducting participant observation at the Supreme Court of British Columbia in Vancouver. This duality was embedded even within the very architecture of the courthouse, which presented as something both openly accessible and strictly regulated. The courthouse itself is a concrete structure with a large glass atrium forming the main public corridor. Thanks to this atrium, the general public can see into the building while those inside the building can see out into the rest of the city, evoking a sense of both literal and figurative transparency. However, while numerous photos of this atrium area are available online on the occasions when I visited, courthouse security officers discouraged individuals from taking

photos of the public space. While I did not see any signs posted supporting this policy, I heard several officers announce this policy and saw security officers request several people to delete photos they had taken on their phones, citing the photos as a security risk. I found great irony in this, particularly as I stood in front of a statue of Themis, the Greek goddess of divine law, natural law, order, and custom [Figure A3].

In 2015 I had written an article that critiqued this very duality, as my early research of the *Caal v. Hudbay* case showed the potential for focus on a Canadian-based legal case to perpetuate an alarming disconnect between the needs and interests of the Lote Ocho community as a whole and the goals of the lawsuit itself. I maintain the article is solid in its conclusions. However, further study of *Caal v. Hudbay*, in conjunction with comparative analysis of *Araya v. Nevsun*, demonstrated to me that rather than simply laying out the pitfalls of a focus on legal justice, analysis of resistance to corporate capitalist development-related violence must include a more nuanced understanding of law and legal justice as a creative space.

While my early research largely focused on Lote Ocho's struggles against the Hudbay Fenix mine, set within the historical context of land access disputes in Guatemala, it became clear that critique of a Canadian-based lawsuit required a broader methodological approach. I began incorporating New Legal Realism's (NLR) interdisciplinary focus and methodological push for transnational, multi-sited qualitative research. NLR encourages scholars to examine the flows of laws, institutions, people, and ideas beyond nation-state borders and situate law both historically and within its social, economic, and political contexts, understanding law not just as not just a cultural construct but also a political and economic one (Merry 2006). Privileging discrimination, poverty, and globalization as key sites of inquiry as well as the importance of social context in forming law and vice versa, an NLR-based approach assesses how law operates

in the quotidian experience of participants as well as in formal legal institutions, making it an ideal theoretical approach for my work on the emerging field of transnational law (Merry 2006; Suchman and Mertz 2010).

Ultimately, I found that even within spaces of constraint and prescriptive standards, resistance to corporate capitalist development-related violence can come through in a variety of powerful, if unexpected, ways. This observation, born of classroom conversations on advocacy and activism and self-critique of my own past work, became the driving force behind this third and last article. Drawing upon Jon Shefner's (2001, 2008) work regarding coalitions and using an NLR-based approach that theoretically situates *Caal v. Hudbay* and *Araya v. Nevsun* at the intersection between biopolitics, biopower, and transnational corporate capitalist development, in the following article I examine these narratives of resistance, assessing the emerging use of civil law to address cases of transnational human rights violations and the ways in which Canada's legal system simultaneously constrains and enables, empowers and re-marginalizes those engaged in *Caal v. Hudbay* and *Araya v. Nevsun*.

Article III: Making Space: Resistance and the Duality of Law

Abstract

Transnational corporate capitalist development, and Canadian-based mining operations in particular, have profited from and contributed to systemic structural and physical violence in both Eritrea and Guatemala. While Canada's legislative and executive branches of government have repeatedly failed to hold corporations accountable for human rights abuses committed abroad, Canada's judicial system has recently begun accepting cases regarding mining-related violence and human rights violations. These cases are part of an emerging sphere of law in Canada called transnational law, in which cases against Canadian-based corporations for human rights violations committed abroad are being heard in Canadian civil courts (Barutcisk, Little, and Scheinert 2018). *Caal v. Hudbay*, which alleges acts of sexual violence committed in Guatemala, and *Araya v. Nesun*, which alleges the use of forced labor in Eritrea, are the first cases of their kind to be heard in Canada. Through these cases, civil law is being used by the plaintiffs and their allies to reclaim legal legibility and protest the "bare life"[46] states produced by corporate capitalist development, even as Guatemalan law marginalizes and disenfranchises Indigenous communities and as Eritrean law constructs individual bodies and labor as biopolitical property of the State. While the formal legal system has often been critiqued as a space too heavily embedded within existing – often inequitable – power dynamics for lawsuits to generate meaningful change, analysis of *Caal v. Hudbay* and *Araya v. Nevsun* shows that law can also serve as an important site of resistance.

[46] As defined by Giorgio Agamben, a tool of statecraft in which particular populations are established within a society who are denied legal and political representation. This occurs via the determination of inclusion (citizens) and exclusion (those without the full rights of citizenship) (1998).

Introduction: Human Rights and Development

While development is commonly portrayed as a way to bring underdeveloped nations into the fold of social and economic prosperity, the inherent inequality of the global capitalist system means developing nations are often viewed by developed nations as spaces for production outsourcing rather than equal members in the global economy (Dougherty 2011; Fulmer, Godoy and Neff 2008; Gill 2000; Pieterse 1996; Sawyer 2004; Trouillot 2001). Ethnographic research has long shown that structural and physical tools of violence –murder, torture, terror, displacement, impoverishment, the breakup of social and economic networks, marginalization — are all part and parcel of development (Bourgois 1989; Nash 1980; Sawyer 2004; Scheper-Hughes 1997). As Joshua Barkan notes, suffering and death are intimately linked to processes that are purported to foster stability and prosperity (2013).

At the heart of development-related violence lies the reality that development projects require the reorganization of space, and this reorganization includes determinations of who has access to the space as well as how the space may be used. As such, development projects are, by default, a way for states and foreign investors to control land usage and access, and – by extension – populations (Bourgois 1989; Nash 1980; Sawyer 2004; Scheper-Hughes 1997; Vandergeest 2003). As analysis of *Caav. v. Hudbay* and *Araya v. Nevsun* demonstrates, corporate capitalist development projects are thus an example of corporate-backed biopolitics. Julia Sagebien, Nicole Lindsay, Peter Campbell, Rob Cameron and Naomi Smith conclude "corporate citizenship has perhaps unwittingly become the continuation of state policy by other means" (2008: 120).

Corporate capitalist development, and the extractive industry in particular, has come under intense critique in the past few decades, as the profit-driven model can easily translate into

violence, marginalization, and/or conflict. Corporate capitalist development initiatives, focused on the production of capital, often fail to ask fundamental questions regarding who decides what "development" means and whose economic interests are being served (Fulmer, Godoy and Neff 2008). In fact, there is compelling evidence that corporations often seek out countries with low or lax human rights standards (Blitt 2012; Dougherty 2011). Low pay and poor labor and environmental regulations make it easier for corporations to keep operating costs low and boost their profit margin while technically keeping their reputation as human rights compliant intact. In turn, developing countries desperate to attract foreign investment have been known to deregulate business and lower their human rights and environmental standards (Blitt 2012; Dougherty 2011). Such is the case in both Eritrea and Guatemala, where the relationship between corporate capitalist development and authoritarian states positions already marginalized citizenry for development-related harm.

The extractive industry is largely a transnational one, with a corporation's headquarters based in one country and extraction occurring in others. Such is the case with the mining corporations involved in *Araya v. Nevsun* and *Caal v. Hudbay*. Nevsun is based in British Columbia, Canada, and operates the Bisha mine in Eritrea, while Hudbay is based in Ontario, Canada and operates the Fenix mine in Guatemala. Mining companies have been repeatedly linked to harms such as the undermining of traditional economies via contamination or dispossession of land and resources, incidents of community displacement, mass unemployment, exploitative labor practices, and violence and intimidation by paramilitary groups hired to support mining operations (CCSRC 2009; Cisneros and Christel 2014; Gordon and Webber 2008). Today, three-quarters of extractive companies worldwide are based in Canada and, over the past decade, Canadian mining projects have been accused of hundreds of acts of international

violence, including destruction of property, sexual violence, the use of forced labor, intimidation, community displacement, and murder (CCSRC 2009; Gordon and Webber 2008; Imai, Maheandiran, and Crystal 2014; Welker 2009).

The formal legal system has often been critiqued as a space too heavily embedded within existing – often inequitable – power dynamics for lawsuits to generate meaningful change in cases of development-related harm (Speed 2008; Weztel 2016). While jurisdiction is often questioned during the legal process, the authority of the court as an institution that can apply law and the authority of the state (whom the court represents) is rarely challenged. The very act of bringing grievances to legal forums is a way of legitimizing these norms, as "sovereignty is presumed, and enacted" (Richland 2013: 211). However, analysis of *Caal v. Hudbay* and *Araya v. Nevsun* demonstrates that law can also serve as an important site of resistance. These lawsuits are part of the emerging field of transnational law, in which the domestic courts of one country are being used to address harms committed in another country via transnational allyship.

Sociologist Jon Shefner's use of coalitions as units of analysis provides a particularly useful framework when observing the creation and application of transnational collaborations formed in the pursuit of transnational law. Unlike other forms of allyship, coalitions specifically capitalize on the politics of both space and time, establishing a broad network of far-flung actors working towards specific common actions rather than a common ideology (Shefner 2008; Kirsch 2014). The intention of the coalition is to produce strong, trusting partnerships to achieve the goal action yet retain the flexibility to dissolve once the action has been achieved. Such a framework allows researchers to explore how individual actors with individual aims can unite over common grievances, forming conjunctural relationships that can be disbanded once they are no longer useful (Shefner 2008). These networks connect displaced and marginalized individuals

and communities to broader social networks of activism and advocacy. The coalitions formed amongst stakeholders in *Caal v. Hudbay* and *Araya v. Nevsun* are linking the plaintiffs, who have been marginalized within their own countries, with individuals in other countries to generate discourse and use law to challenge how law itself is conceived of and applied. These conjunctural relationships are, thus, making it possible for transnational problems to be addressed in domestic courts.

As such, these two lawsuits are allowing victims/survivors of corporate capitalist development-related violence to reclaim narratives of legal legibility in the transnational sphere, even as Guatemalan law marginalizes and disenfranchises Indigenous communities and as Eritrean law constructs individual bodies and labor as property of the State. Recognizing that no analysis of resistance can be done without first understanding what is being resisted, this article situates *Caal v. Hudbay* and *Araya v. Nevsun* within the broader frameworks of biopower, biopolitics, and transnational corporate capitalist development.

Biopolitics, Biopower, States, and Corporations

Both the Eritrean and Guatemalan states have long and violent histories of employing biopolitics and biopower to control their citizens. Biopolitics is defined as the strategies and mechanisms through which human life processes are managed under regimes of authority over knowledge, power, and the processes of subjectivation. Biopower is the mechanization of biopolitics, in which a power exerts control over the bodies of its subjects (Foucault 1997). While the use of biopolitics and biopower to regulate society is common practice for all nation-states, Eritrea and Guatemala have routinely violated international human rights norms in their quest to not just govern, but to subjugate, their citizenry.

Assessing who profits from this regulation of life and bodies and who suffers is essential for understanding power constructs. Thus, the study of biopolitics and biopower must include study of the relationships between "power processes, knowledge practices, and modes of subjectivation" (Lemke, Casper, and Moore 2011:119). Such an analysis illustrates that, while the apparatuses of social control are frequently assumed to be the purview of governments, transnational and multinational corporations increasingly profit from and wield biopolitics and biopower themselves.

June Nash (1980), in her studies of the political economy of tin mining in Bolivia, found that mining was an inherently violent and exploitative industry. Nancy Scheper-Hughes (1997) found neoliberal capitalist expansion deeply intertwined with state-sanctioned violence against the poor in post-conflict South Africa and Brazil, while Suzana Sawyer (2004) determined that neoliberal capitalist development in Ecuador exacerbated preexisting social inequalities within the country and severely damaged the country both ecologically and socioculturally. Land and lives, states and corporations, are all bound up together within corporate capitalist development. As such, within the globalization of neoliberal capitalism the primary form of resistance and social struggle has become that of the struggle for human rights.

Araya v. Nevsun

Araya v. Nevsun, filed in 2014, is being heard in the Supreme Court of British Columbia. The lawsuit alleges the plaintiffs were forced to work as laborers in the Bisha copper-zinc mine just west of Asmara, Eritrea. The mine is owned by Canadian-based corporation Nevsun Resources, Ltd. (hereafter "Nevsun") and operated by Eritrean parastatals Segen and Mereb. The case contends the plaintiffs were paid approximately $1 per day and given inadequate access to

food, water, and shelter. This is first civil case heard in Canada against a Canadian corporation for breaches of customary international law (Gifford and Lam 2016).

At the time of its independence from Ethiopia in 1991, Eritrea was poised to be a promising democratic space. Levels of crime and corruption were low, the constitution had been drafted in a highly participatory manner, and the liberation movement had mobilized society to come together despite ethnic, religious, or gendered divides (Connell 2011). However, today Eritrea is a state plagued by totalitarianism, corruption, and a government that commits human rights violations against its own citizens. Individual and collective rights have been put aside in the bid for security and stability while democracy has been put on hold indefinitely (Hepner 2013; Hepner and O'Kane 2009).

Population control is enforced via the Eritrean National Service (NS), which was established in 1991 and went into effect in 1994. All Eritreans between the ages of eighteen and forty are required to serve six months of military training followed by a year of military service. After the 1998 war, however, the government removed the time limits for military service. The state can, and does, retain new conscripts indefinitely and reactivates the service of those who have already served their required time (Gaim 2009). Travel visas, land tenure, food aid, and licenses are all tied to service. In addition, desertion and draft dodging are punishable with physical discipline, incarceration, and even death (Kibreab 2009, 2014; Poole 2009).

The Eritrean State has routinely used NS conscripts for non-military purposes, assigning conscripted military youth to harvest state owned plots as well as the plots of the elderly or disabled whose own children are dead, in diaspora, or under conscription orders elsewhere. This turns even privately owned land into a nation-building project and inserts government into family and community spheres of life (Poole 2009). Conscripts are also often used as laborers on

privately owned farms of high-ranking officers, on construction or civil engineering projects, and in corporate owned mines such as the Nevsun Bisha mine. As such, Eritrea's abuse of its NS program meets the definition of forced labor, a violation of both international humanitarian law (IHL) and customary international law (CIL) (Hepner 2012; Kibreab 2009; UNHCR 2016).

The Nevsun Bisha mine, established in 2008, was the first modern mine in Eritrea, part of a larger push for the country to diversify its economy beyond agricultural production. International and supranational actors, such as the World Bank, have praised Eritrea's diversification into the extractive sector as a means for improving its human development index (HDI) and long-term economic security (WBG 2018). The Bisha mine has proven profitable for the country, bringing in $800 million in taxes, royalties, and return on investment during its first five years of operation, and additional mines are planned for the future (Anderson 2016). Eritrea's interest in the Bisha mine's success is particularly high, as the government owns a forty percent share per its 2005 mining code, with Nevsun owning the remaining sixty percent (Gajigo, Mutambatsere, and Ndiaye 2012). As more than ninety percent of the labor force in Eritrea consists of Eritreans eligible for conscription into the NS, and given the government's penchant for using conscripts for economic rather than military purposes, the perpetration of future human rights violations such as the ones alleged in *Araya v. Nevsun* are a near-certainty (Lipsett et al. 2015). The use of forced labor as a means of statecraft in Eritrea is thus a particularly good example of the intersection between biopower, biopolitics, and violence, as mandatory service has become a particularly effective way of rendering citizens legible to, and reliant upon, an authoritarian state.

Caal v. Hudbay

Caal v. Hudbay, filed in 2011, is being heard in the Ontario Superior Court of Justice. The lawsuit alleges the eleven plaintiffs, members of the Lote Ocho Indigenous Q'eqchi' Maya community, were gang-raped by Guatemalan military and police forces and security personnel from the Canadian-based Hudbay Minerals, Inc.'s (hereafter "Hudbay") Fenix nickel mine. The rapes occurred in 2007 and were part of a series of violent actions taken against the community, including threats, verbal and physical intimidation, the burning of homes and crops, and slaughtering of animals as part of an effort to evict the community from that area. The community of Lote Ocho claims the land is ancestrally theirs while Hudbay claims they are the rightful owners.

Between 1960 and 1996, a thirty-six year internal armed conflict (IAC) between the military-run government and several guerrilla groups wracked Guatemala. The conflict was driven largely by Guatemala's long history of land disputes between indigenous communities, non-indigenous landholders, and private corporations. The IAC, often referred to by Guatemalans as "*La Violencia*," resulted in the deaths of roughly 200 thousand civilians with 500 thousand displaced and fifty thousand disappeared. The military government's scorched earth campaigns, launched in the primarily Indigenous highlands region, were later determined to be acts of genocide, as Indigenous villages were specifically targeted for eradication. Of the 200 thousand civilians killed, approximately eighty-three percent were Indigenous. It is estimated that ninety-three percent of the atrocities were committed by the military (CEH 1999; Sanford 2003).

Since the signing of the Peace Accords in 1996, the post-conflict reconfiguration of the apparatuses of power in Guatemala has mostly involved reshuffling the officials in power during

the IAC into different positions of power. The military's counterinsurgency and militarism practices have been reconfigured in peacetime "as a mix of repressive state apparatuses and 'civil affairs,' producing novel configurations of what military theorists call 'low-intensity conflict' and Foucault (1980) calls biopolitics: the simultaneous 'right of life and power over death'" (McAllister and Nelson 2013: 5). Today, the same sense of uncertainty and chronic insecurity that were key features of *La Violencia* – particularly for Indigenous communities regarding cultural and land rights – continues in the post-conflict period in alternate forms, a "war by other means," with symbolic and structural violence taking the place of state-sanctioned physical violence (McAllister and Nelson 2013: 4). Indigenous communities continue to be denied legal access to land and suffer disproportionate rates of displacement and poverty compared to non-indigenous Guatemalans (CEH 1999; UNDP 2018).

Forced-displacement of rural communities and funneling of the population into model villages during *La Violencia* was a particularly devastating form of biopolitics that continues to resonate throughout the Indigenous population today. The breakup of communities and resulting breakdown of established social networks served to destroy local economies in already marginalized, poor, rural spaces where social bonds formed the foundation for economic prosperity and political representation (Torres 2004). Meanwhile, military elites, who were primarily Ladino, were granted the lion's share of the seized land, property and business contracts, ensuring that wealth and resources would remain concentrated in the upper echelons of power, a condition in Guatemala which continues today (Torres 2004).

It is also at this time that the military-led government sold off land, made newly-available through either forced-displacement or massacres of Indigenous communities, to foreign corporations (Sanford 2003). Such is the case in the El Estor region, where the Hudbay Fenix

mine is now located. In the 1960s, between three and six thousand individuals, mostly Maya Q'eqchi', were removed from the area when a Canadian-based corporation expressed interest in leasing land for open-pit mining (Imai, Maheandiran, and Crystal 2014). The land leased by that corporation, International Nickel Company (INCO), is the same land now claimed by both the community of Lote Ocho and Hudbay.

Lastly, it is important to note that violence in Guatemala is as much about presence as it is about absence. For decades the government's official narrative was that the civilians killed during the war were armed guerilla fighters, a narrative that has only really begun to be challenged in the last ten years despite overwhelming ethnographic and forensic evidence showing mass graves full of unarmed men, women, children, and the elderly (Clouser 2009; Sanford 2003). Many military and government leaders still deny that the military committed genocide against Indigenous communities, and Indigenous activists are frequently labeled as liars and/or dangerous dissidents. Resistance to these competing narratives regarding the IAC can be seen all over Guatemala in the form of graffiti [Figures A4 and A5].

In Eritrea, by tying corporate capitalist development to national service, and national service to citizenship, those who do not serve are turned into bare life through both state and corporate mechanisms. Indeed it is difficult, if not impossible, "to separate processes and discourses of development from those of militarism" (Hepner and O'Kane 2009: xxviii). In Guatemala, Indigenous claims to land have routinely been violated and dismissed by the government in favor of transnational corporate capitalist development interests, resulting in bare life states for communities such as Lote Ocho. For the plaintiffs in both *Araya v. Nevsun* and *Caal v. Hudbay*, access to legal and political protections via the State, while historically

problematic, have been further compromised by the states' relationships with foreign corporations.

Ultimately, mechanisms of social control are not only or even primarily tied to particular political or economic ideologies and histories, but rather the processes of modernization, particularly in places where power and resource access are poorly distributed. As Aihwa Ong found in her work in Malaysia amongst female factory workers, biopolitics is "the state organization of the population to secure its control, welfare, and productivity" (1990: 258). Programs emerge that empower the elite to disempower the many in the name of development and progress, driven by globalization and neoliberalism in the form of corporate capitalist development. Preserving the economic bottom line through violence remains profitable for corporations, and often even government entities, as there is little legal recourse for sanctioning those who commit such violence. This relationship between states, corporations, and the violent exercise of biopolitics and biopower lies at the heart of the harms perpetrated against the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun.*

Paul Farmer concludes that human rights abuses are "symptoms of deeper pathologies of power that are linked, intimately, to the social conditions that so often determine who will suffer abuse and who will be shielded from harm" (Farmer 2003: 7). Risk, or vulnerability, then, is crafted by the social, political, and economic structures within which societies exist. Nations such as Guatemala, which has historically disenfranchised and committed genocide against its Indigenous population, and Eritrea, which has exploited its population under the guise of national security, are ideal sites for transnational corporate capitalist development to occur. Corporations are assured support from a government that has already paved the way, over

decades and by force, for cheap land and cheap labor. Within this system, the use of violence by states and corporations is simply business as usual.

Resistance and the Dark Horse of Civil Law

Resistance to international and transnational human rights violations has long been an area of interest to anthropologists. Resistance movements may utilize a variety of approaches, and scholars have identified four main forms of resistance, which may be applied individually or together: judicial, legislative, civil disobedience, and transnational activism (Dougherty 2011; Fulmer, Godoy and Neff 2008; Gordon and Webber 2008; Welker 2009). In judicially-based resistance national and international courts are used to address grievances, while legislative resistance advocates for new national legislation regarding policies and practices that contribute to violence. Civil disobedience focuses on actions like protests and blockades, while transnational activism connects local communities and individuals to foreign non-profit and non-governmental advocacy groups to launch campaigns to shame states and corporations that are producing or contributing to human rights harms (Dougherty 2011).

As resistance movements are usually about challenging existing power structures in the pursuit of change, judicial and legislative resistance – which utilize existing power structures – are frequently characterized as somewhat ineffectual methods of addressing the underlying structures of violence. Government-based justice initiatives, including court cases, have frequently been criticized for using short-term jurisprudence and employing top-down structures that fail to fully engage affected communities (Merry 1992; Speed, 2009; Sundar, 2004). Some scholars contend a focus on positive law may, in fact, perpetuate cycles of violence through the empowerment of states via legitimization of their ability to recognize, or deny, community and individual rights (Speed 2009). Additionally, Julia Ruth-Maria Wetzel's (2016) studies regarding

the link between transnational corporations and human rights violations maintain that existing legal frameworks cannot adequately address human rights violations as they can only focus on the actions of individuals rather than the broader systems which engender violence.

However, Wetzel also recognizes that legal intervention is essential for holding corporations responsible for operating abroad in a way that respects international human rights law and norms (2016). In short, resistance via legal mechanisms can reinforce unhealthy power dynamics, making it difficult to establish meaningful change. On the other hand, resistance that does not include legal changes to the existing system makes it difficult to establish lasting, enforceable change. As such, law is variously depicted as an essential space for establishing and enforcing accountability to discourage harmful behavior (Fulmer, Godoy and Neff 2008), as important at the domestic level but woefully ill-equipped to deal with the realities of power and globalization (Godoy 2006; Merry 1992; Scheper-Hughes and Bourgois 2004), or as a system perhaps doomed to do more harm than good as it reinforces destructive power relations between citizens and states (Speed 2008; Theidon 2012).

For example, Shannon Speed's work in Mexico found judicially-based resistance reinforced the authority of government and legal forums which are part of the system that perpetuates injustice, noting that "many rights-based movements and NGOs in Mexico and around the world are caught within the power of law. That is, they are trapped waiting for the sovereign to recognize their 'rights' while leaving the power and myth of the sovereign unquestioned" (2008:153). Nandini Sundar (2004) finds that the proliferation of truth commissions, war crimes tribunals, and reparations programs established since WWII to address international and transnational human rights violations, while valuable, overwhelmingly finds developed nations as the organizers, prosecutors, and judges of human rights-related justice

proceedings in developing nations. The role played by developed nations in creating the circumstances for human rights violations in developing nations remains woefully under-addressed.

Studies such as these, regarding judicial or legislative-based responses to international and transnational human rights violations, have tended to focus on four different types of response: 1) domestic criminal cases, where suit is brought within the same country in which the violations occurred and where the requested remedy is imprisonment of individual actors (Burt 2009; Pruitt 2015); 2) domestic criminal cases, where suit is brought within a different country than where the violations occurred and where the defendant may or may not actually be under the legal jurisdiction of the court (Dickinson 2004; Jonas 2013); 3) domestic transitional, reconciliation, and/or reparations processes, in which national governments establish tribunals to repair social ties after violence or conflict through the use of alternative justice mechanisms, mediation, truth telling, and/or monetary compensation (Chakravarty 2006; Ingelaere 2016; Theidon 2012); and 4) internationally driven transitional and/or truth and reconciliation processes, in which organizations such as the United Nations establish and oversee tribunals to repair social ties after violence or conflict through the use of mediation, truth telling, and/or monetary compensation (Graybill 2004; Etcheson 2005).

Some studies examine the intersections of these approaches. For example, the Spanish Court's 2011 issuance of an arrest warrant for Guatemalan military officials allegedly responsible for the 1982 Dos Erres massacre in Guatemala, in which the entire community save one individual was murdered by the army as part of the military-run government's (purported) effort to cut off Indigenous support to guerrilla forces,[47] has been heavily researched for its

[47] Many Guatemalans and human rights activists believe this rhetoric was simply an excuse to eradicate Indigenous communities from the mineral-rich highlands region

application of domestic criminal law to foreign human rights violations. The Spanish Courts' actions resulted in the collection of crucial evidence which was then turned over to domestic Guatemalan prosecutors. While this evidence did not lead to prosecution in Spain of the military officers for whom the Spanish Courts had issued warrants, it did lead to the prosecution of four lower-level Guatemalan military soldiers in Guatemalan criminal court (Jonas 2013).[48] Other studies have examined the intersection between Indigenous models of law and justice and state-based legal systems. Angelina Snodgrass Godoy's (2006) work in the Guatemalan community of Santa Atitlán found that Indigenous justice models, based on the regulatory power of shaming and ostracizing, were effective in keeping communities safe from military-related violence if the community is close-knit and the members are all of equal social status. Absent these factors, state-based criminal law was more effective in providing community security.

Despite the large body of research conducted on the application of law to transnational and international human rights violations, civil law has, for several reasons, largely been overlooked as a space to address such violations. First, human rights violations are generally accepted as the purview of criminal law as they are largely defined within domestic and international legal codes as criminal acts. Second, transnational civil litigation, and transnational law in general, is a relatively new field of law and successful cases have thus far been limited[49]. However, the tides are changing and new spaces for resistance are emerging within transnational civil law. After decades of such cases being rejected on jurisdictional grounds, lack of duty of care (where it is determined the defendant cannot have reasonably been expected to prevent or anticipate the harm), and *forum non conveniens* (in which the court declines to try a case on the

[48] One officer was indicted in Guatemala, but his trial was suspended. The other was arrested in Canada and extradited to the United States, where he was charged with immigration infractions.
[49] Successful cases to date, meaning those actually being heard transnationally, consist of *Caal v. Hudbay*, *Choc v. Hudbay, Chub v. Hudbay*, *García v. Tahoe* and *Araya v. Nevsun,* all being heard in Canadian courts.

grounds there is another, more appropriate court or jurisdiction for the case), five development-related violence cases falling under the definition of transnational law, including *Araya v. Nevsun* and *Caal v. Hudbay*, are now being heard in Canada.

Similar shifts demonstrating the power of civil law are becoming evident in the United States as well. On 27 February 2019 the United States Supreme Court issued a seven-to-one opinion in *Jam v. International Finance Corporation* establishing that international finance institutions, in this case the World Bank, can be sued when foreign development projects under their financial investment may have caused harm to the communities in which they were implemented (Kim 2019). This is an important shift from earlier legal precedent, in which contestations over jurisdiction made it difficult to hold international and transnational corporations, much less supranational finance organizations such as the World Bank, accountable for human rights violations committed abroad. The use of civil law to address transnational human rights violations is, thus, a particularly exciting, though as-yet underexamined, emerging field of legal anthropology.

Labeling Legality

Georgio Agamben theorized that the establishment of populations who are denied legal and political representation – what he termed the creation of bare life –serves as an essential part of statecraft. To legitimize the use of force against its own population, the state has to label its victims as dangerous, dissident, and unworthy of the rights of citizenship. Rather than being an incidental practice, Agamben saw the creation of bare life as central to the consolidation of sovereign power and an important element of statecraft (Jagannathan and Rai 2015). This process is directly tied to the law, for, as Clifford Geertz once wrote, law is "part of a distinctive imagining of the real" (1983:184). Law helps define our experience of the world through the

labeling of people based on categories of inclusion and exclusion: immigrant, refugee, citizen, criminal. Justin B. Richland (2013) notes that law and legality operate in dialogue with social networks, with the flow of influence going both ways: law influencing society and society influencing law (216). These categories, based on legal definitions, are imbued also with social meaning: the establishment of in-groups and out-groups.

Legal scholars assert the ways in which law creates social order through this use of categories—and through the criminalization, marginalization, and punishment of particular categories of people (out-groups) – provides a means for the powerful to define and consolidate their control over people, territory, and resources. As Émile Durkheim's "labeling theory of deviance" (Collier 1975) propounds some people in society must be labeled as deviants in order to make evident the moral boundaries of a society. Definitions of deviance, and determination of who is deviant, are based in large part upon social stratification: the powerful make the law, and the least powerful are most likely to be criminalized or marginalized within law (Collier 1975). Notes Shannon Speed, "[l]aw, with its delimiting and regulating capacities, provides a privileged space for the state to engage in neoliberal subject making" (2008:163).

The production of bare life via states of exception and legal categorization is generally seen as being tied to national or state sovereignty. However, these processes are also part and parcel of transnational corporate capitalist development. As seen in the Nevsun Bisha mine and Hudbay Fenix mine, states and corporations routinely work hand in hand to marginalize particular segments of a population. The plaintiffs in both *Araya v. Nevsun* and *Caal v. Hudbay* have been denied legal and political representation within Eritrea or Guatemala, respectively, leading them to seek out justice in other venues, namely the civil courts of Canada.

The stakes for both the Guatemalan government and Hudbay are high in this case, as the significant publicity generated by the plaintiffs has built international pressure for the establishment of more stringent human rights standards. There is potential for significant financial losses for both Hudbay and the Guatemalan state if either the Canadian courts or the court of public opinion find the plaintiffs to be the more credible party in the lawsuit. Since 2007, Hudbay has consistently framed the plaintiffs in *Caal v. Hudbay*, and the community of Lote Ocho as a whole, as illegal squatters on land rightfully and legally owned by Hudbay. President and CEO of Skye Resources, Inc., the company that owned the mine at the time of the gang-rapes and evictions, Mr. Austin, made numerous public statements regarding the company's efforts to work with the local communities, describing community engagement programs of "open, transparent, and meaningful dialogue with all stakeholders…based on the principals of trust, respect, and understanding" and "efforts to peacefully and lawfully resolve what are historical land issues."[50] This narrative of a corporation doing its best to work with the communities unlawfully occupying their land takes pride of place on the corporation's official website's "CSR Issues" page (Hudbay 2017) and is directly in opposition to the community's claims the land is ancestrally theirs. It is also contrary to United Nations' findings that the Guatemalan government breached international law by granting land concessions to mining companies in the El Estor area without consulting Indigenous communities (Imai, Maheandiran, and Crystal 2014; KBS 2013), and to a 8 February 2011 Constitutional Court of Guatemala ruling which found Maya Q'eqchi' communities have valid rights to the land.[51]

[50] *Margarita Caal Caal, Rosa Elbira Coc Ich, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chun, Luisa Caal Chun, Carmelina Caal Ical, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib, and Irma Yolanda Choc Quib v. Hudbay Minerals, Inc. and HMI Nickel, Inc.,* Ontario Superior Court of Justice, No. CV-11-423077.
[51] Ibid.

While *Caal v. Hudbay* only debates whether or not Hudbay was responsible, via negligence, for the gang-rapes of the plaintiffs and does not directly address the subject of land ownership,[52] the company's efforts to discredit the women and their community by labeling them "illegal squatters" reframes the defendants as the law abiding party and the plaintiffs as unlawful. Such narratives attempt to create a culpability grey area, where Hudbay is portrayed as a victim of the Lote Ocho community's actions even as the company itself is accused of unlawful behavior. This type of narrative is an extension of the Guatemalan State's long-established narrative regarding Indigenous dishonesty and false claims of violence regarding genocide during the IAC. As one Guatemalan non-governmental organization worker who has worked with Lote Ocho since the initial violence in 2007 explained:

> They [the plaintiffs and Lote Ocho community] are Q'eqchi. Indigenous. They are poor. Who will listen to them? Who will protect them? The government that killed their people? The [mining] company? They [the Guatemalan government and mining company] say they [Indigenous people] are all liars. These [Indigenous] communities are not seen as citizens with rights…they are an inconvenience to people who want to be rich. The racism runs so deep. We cannot find justice here [in Guatemala], where the people who have hated and abused the Indigenous population for generations are leaders.[53]

As such, these narratives painting the plaintiffs and their community as liars and illegal squatters are more than just a legal tactic associated with one lawsuit: it is part of a long established practice of symbolic violence that has been used for decades by those in power – namely the Guatemalan government and foreign corporations –to disenfranchise Indigenous peoples in Guatemala and increase the profitability of corporate capitalist development.

In *Araya v. Nevsun*, the Eritrean government uses National Service as a way to reduce its own population to a state of bare life, citing the NS as necessary to national security. As such,

[52] Filings in the lawsuit do discuss Lote Ocho's claim to the land, though only within the context of establishing why the evictions were being carried out and to demonstrate the company knew there was conflict between the local communities and mining operations/security.
[53] Personal communication with Guatemalan NGO worker, May 2017.

the Eritrean state has decried the plaintiffs as deserters of national duty and of their homeland, criminal offenses punishable under Eritrean law with penalties up to and including death. Additionally, Nevsun has labeled the plaintiffs, alternately, as a variety of crisis actor or as genuine victims of crimes that Nevsun had no idea were happening. Nevsun's legal team has repeatedly insinuated that the plaintiffs are only part of the lawsuit because they were coerced into it by plaintiffs' counsel with the promise of a potential monetary award. According to these insinuations, the agenda of the case has been set by the attorneys and the charges in *Araya v. Nevsun* are either fabricated or unable to be substantiated.[54] An Eritrean human rights advocate affiliated with stakeholders in the case noted:

> Some of these refugees, they are ashamed. They know what happened to them was not right, but they have abandoned their homeland, their friends, for some of them their family. What do you do when you are forced to give everything to your country – your blood and sweat? Your dignity? But it's not enough. You say 'no more' and you have to run. And then you feel, sometimes, you are a coward. You're labeled a traitor [by the Eritrean government]. So then the government wants more. It wants your life, and you can't ever go back [to Eritrea]. And you tell your story and then you are labeled a liar.[55]

Throughout its collaborations with the Eritrean State, Nevsun has stood by its partnership with Eritrea as completely above-board, so far as it was aware. Nevsun's vice president of corporate social responsibility, Todd Romaine, has even stated Nevsun is "a force for good in Eritrea," thanks to its ability to provide meaningful employment for Eritreans (quoted in Martell and Blair 2016). Court filings by the defendants rely on jurisdictional and distancing claims, namely that the plaintiffs did not and do not reside in British Columbia, that the claims against Nevsun "require an inquiry into sovereign decisions of the State of Eritrea,"[56] an action that lies outside the court's jurisdiction. As in *Caal v. Hudbay* this sort of narrative is intended to

[54] Motion hearing, December 2018.
[55] Personal communication with Eritrean human rights advocate, November 2018.
[56] *Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle v. Nevsun Resources, Ltd*. In the Supreme Court of British Columbia, No. S-148932.

introduce the possibility that the victim in this case may in fact be Nevsun rather than, or in addition to, the plaintiffs. Any blame for wrongdoing is shifted onto the Eritrean state. As in *Caal v. Hudbay*, the narratives of legal legibility being crafted by both the Eritrean government and Nevsun are tapping into long-established narratives that have weaponized the labeling of deviance to subjugate populations and financially profit states and corporations.

Legal Legibility

Arguably, then, one of the primary benefits of legal cases like *Caal v. Hudbay* and *Araya v. Nevsun* is that those who have been oppressed are given a forum above and beyond the courtroom in which to speak and be heard (Soyinka 2004; Winter 2009; Speed 2009). This provides the claimants a way to reclaim narratives of legality and legal legibility. The plaintiffs in *Caal v. Hudbay* have repeatedly, and publicly, told their stories in media pieces, in legal settings, and to researchers and advocates interested in the case. These narratives then circulate through local, national, and global spaces. Michelle McKinley refers to this process as the creation of a narrative economy of traumatic storytelling (2009). The production and consumption of traumatic narratives raises awareness of human rights violations at local, national, and international levels. Through this discursive flow, those who were previously marginalized become primary actors in the justice process. Richard Wilson noted a similar process amongst survivors of genocide engaged in international legal actions, where participation in the transnational legal process aided in the formation of new identities for survivors of violence by linking them to the international community, helping them to see themselves as actors in the much larger global human rights landscape (2009). As Tricia Redeker Hepner has found in amongst Eritreans in diaspora, "[d]riven by the experience of abuse and asylum, recent

refugees have picked up on the ways that human rights discourse and movements connect them to legal and political norms that present genuine possibilities for resistance" (2009: 130).

The hopes the plaintiffs in *Caal v. Hudbay* and the community of Lote Ocho place in their connection to the global human rights sphere is evident in the way they discuss the case within the broader context of their displacement. Explained one Lote Ocho community member:

> We want people to know that we belong here [on the land where Lote Ocho is located]. It is ours. We know this in our hearts. Still, we tried to work with the company [Hudbay]. We paid them and still we have no land deed in our hands. We are still unsettled. The violence, the loss…it's just more of the same for us [the Q'eqchi']. We ask the local government, the government in Guatemala City, but no one wants to take responsibility. So we have help now to take our claims elsewhere, to make our voices heard elsewhere. And maybe they will listen. Maybe they will see we are not squatters. This is our land. What happened to us was wrong.[57]

Similar hopes are seen amongst the stakeholders in *Araya v. Nevsun.* A Canadian non-profit organization worker opined:

> Everyone knows Eritrea uses slave labor, forces their citizens to work. The international companies there know this too. How can they not? We all know. The [Eritrean] government tries to justify itself. The companies too. Maybe once it's [plaintiff testimony] recorded in the courts, in the newspapers here [in Canada] and the US and elsewhere…maybe then people will see the truth and things will change.[58]

The use of law to craft narratives of legal legibility – and, by extension, social determinations of innocence, belonging, and deservingness – was a theme I saw repeatedly throughout my research and which was used by, and against, plaintiffs and defendants alike. In 2011, while examining the way Guatemalan law is being used (or not) to address human rights violations, I attended the Dos Erres criminal trial in Guatemala City. The case regarded the culpability of four alleged former Kaibiles[59] in the 1982 massacre of 251 people in the village of

[57] Meeting with the plaintiffs and Guatemalan Human Rights Commission (GHRC) delegates, August 2011.
[58] Personal communication with *Araya v. Nevsun* human rights ally, January 2019.
[59] Guatemalan special forces soldiers.

Dos Erres.[60] While inside the courtroom the prosecution was painting a picture of almost incomprehensible brutality and depravity, just outside the courthouse the narrative regarding the defendants was drastically different. The families and friends of the defendants had set up a series of banners in the public square outside the courthouse depicting the former soldiers as dedicated family men and upstanding members of the community [Figure A6].

Also in Guatemala, studies of La Puya, a village consisting entirely of individuals who have gathered since 2012 to protest and blockade the El Tambor gold mine, owned by Reno, Nevada-based Kappes, Cassiday & Associates (KCA), show that KCA and the Guatemalan government have labeled the protest community as criminals working to subvert economic progress. Labeling the movement as being opposed to development initiatives that will help Guatemala integrate into the global market economy has allowed the state (and corporation) to define these communities as "subversive," providing an excuse to forcibly remove them from lands earmarked for "progress" (Pederson 2014). However, the Guatemalan courts sided with the protestors in a 15 July 2015 decision, calling for operations at the mine to cease. While work at the mine continued in defiance of this ruling, the protestor's success in obtaining legal legibility led to members of the United States Congress putting pressure on the Guatemalan President to uphold the court's decision. In February 2016, the Guatemalan Supreme Court ruled to suspend KCA's mining license for the El Tambor mine (Wayland and Kuniholm 2016).

Discourse, as Foucault noted, is a vehicle of power used to craft narratives of legality and legal legibility. Discourse can also serve to undermine power by creating alternative narratives, making forums for public discourse sites of control as well as sites of rebellion (1978). *Caal v. Hudbay* and *Araya v. Nevsun* are offering ways to challenge the narratives touted not only by Hudbay and Nevsun but by the Guatemalan and Eritrean states and reframe the plaintiffs, both

[60] All four defendants were ultimately convicted by the court and sentenced to over 6 thousand years each in prison.

legally and in the court of public opinion, as victims/survivors of human rights abuses who are well within their rights to access legal and political protections under the rule of law. In this way, the bare life states of the plaintiffs – the denial of legal and political representation by their countries of origin – are also contested. The plaintiffs are being recognized as rights bearing individuals within Canadian law as well as the international court of public opinion.

The success of this is apparent in the multitude of media pieces available about the case. A 2013 award winning documentary, "Defensora," produced by 6kidsProductions and Girl Edge Films in partnership with Rights Action, and a mini documentary produced by photographer Roger LeMoyne for Macleans magazine, features the plaintiffs and details their daily struggles after their rapes and the importance of *Caal v. Hudbay* to their search for justice. Feature articles in the New York Times (2016), Vice (2016), The Guardian (2017), NOW Magazine (2017), and many others also detail the struggles of the plaintiffs and of Lote Ocho as a whole as they proceed through the legal process. In contrast, the only place I was able to find stories depicting Hudbay as the sympathetic party was the Hudbay corporate website.

In *Araya v. Nevsun,* the plaintiffs have not made many public statements given the precariousness of their position as refugees, however the lawsuit has been covered thoroughly by business and mining-related publications, such as The Northern Miner (2015), and Mining Technology (2017) and articles produced by business and law-oriented human rights organizations, such as the Canadian Center for International Justice (2016) Business and Human Rights (n.d.), and Canadian Lawyers for International Human Rights (2017). All of these articles have identified *Araya v. Nevsun* as a game-changing warning-shot for mining corporations to improve their human rights records regarding their operations abroad. As with *Caal v. Hudbay*,

the only place I was able to find articles presuming the innocence of Nevsun was Nevsun's own website.

As such, the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun*, through the use of their legal testimony and interviews with the media regarding the alleged violence, are publicly re-defining, on their own terms, their statuses as victims/survivors of human rights abuses. This reveals the dual nature of law: while it can be used to marginalize and oppress, it can also provide means, as well as sites, of protest and resistance by non-elites (Merry 2006b).

Life in the Margins

Anthropology has provided a number of studies examining the relationship between marginalization, the power of narrative, and resistance. For example, Philippe Bourgois (1995) studied the ways in which crack dealers in Harlem, New York in the 1980s and 1990s created alternative labor systems and conceptualizations of masculinity and femininity in the face of social, economic, and political marginalization. Srinath Jagannathan and Rajnish Rai (2015) found that the marginalization of Muslims in Gujarat, India involved labeling the Muslim population as dangerous, a threat to civilian or national security, deviant, or responsible for public disorder. This led to the state committing both physical and structural violence against the Muslim population. Resistance movements in the region worked to contest these discourses, reframing Muslims as every bit as "authentically" Indian as the majority Hindu population. Through this contestation, the Indian state's sovereignty and legitimacy are also called into question: if the state says the Muslim population is a threat, narratives framing Muslims as peaceable Indian citizens serve to discredit not only the Indian state's narrative, but also their justification for committing violence against the Muslim population. In this way, discourses of dissent are both powerful (for the marginalized) and dangerous (for those in power) (2015).

Additionally, Maylei Blackwell (2012) found that Indigenous women in Mexico pushing for women's rights used their marginality to generate a conceptual shift, redefining the concept of autonomy as a right granted by the state to a practice of decolonization that is part of everyday life and community sociality (703). These studies demonstrate that marginality can be leveraged to generate new discourse regarding the relationship between legality, citizenship, rights, and belonging.

Krista Brumley and Jon Shefner note that the choices advocates for change make regarding the methods of resistance they use are often shaped, even constrained, by the contexts in which they are raised, as "the broader political context creates opportunities or barriers for action, and in turn shapes strategic choices…based on …interpretation of opportunities and threats in the local political context" (2014:79). For those trapped within violent landscapes of bare life, access to legal or political justice within their own countries is, at best, limited. However, numerous studies demonstrate "the margin can also be a creative space" (Bernal 2005: 672). Protest, blockades, law, international pressure, and internal shifts in legal consciousness amongst individuals and communities all provide avenues for marginalized peoples to create spaces of and for resistance, even where agency is limited.

In Guatemala, Lote Ocho's lack of a legal land deed and continued proximity to the Fenix mine, in combination with ongoing pressure and threats for the plaintiffs in *Caal v. Hudbay* to drop the lawsuit has left the community in a state of chronic insecurity.[61] In Eritrea, the refugee status of the plaintiffs has left them disconnected from their friends, family, country, and culture. Victoria Bernal notes that the creation of transnational community is particularly important for those in diaspora, as they have been displaced from their homelands yet often are not fully re-emplaced in their host nations (2005). The same may be said, arguably, for internally displaced

[61] Personal communication with *Caal v. Hudbay* legal actors, March 2015 and October 2018.

peoples (IDPs) or those without secure land access. Carolyn Nordstrom notes that "violence reconfigures its victims and the social milieu that hosts them…Violence becomes a determining fact in shaping reality as people *will* know it, in the future" (2004: 59-60; emphasis in original).

For the plaintiffs in *Caal v. Hudbay* and *Araya v. Nevsun*, violence has physically displaced them from their homes and altered their social ties as well as generated new social networks and new spheres of agency. The transnational networks of legal and human rights allies working together to bring *Caal v. Hudbay* and *Araya v. Nevsun* to fruition provide space for exercising citizenship and belonging even in the absence of a shared physical location. For those marginalized within or by their own countries, coalitions formed via transnational allyship enable these displaced individuals to access judicial mechanisms of resistance in ways that would not otherwise be possible. Noted one Canadian human rights worker associated with the plaintiffs in *Araya v. Nevsun*:

> As a refugee there is so much disconnect. You leave friends and family and start over somewhere new, usually with a new language and rules and climate and you have to learn how to function and find a job and 'move on,' as though you left your trauma behind when you left Eritrea. Connection to this [the lawsuit] is grounding. It's anchored in their pasts but means everything for their future. They are forming relationships with people all over the world now, ones they know they can trust and it's just…it's an anchor to something familiar but also so new. It's a new way of thinking about their place in the world and the world's place for them.[62]

This fits with Hepner's work with Eritrean diaspora communities. She finds that displaced Eritreans have formed transnational communities in their countries of settlement which are "adopting human rights concepts and strategies that connect their organizations and experiences to international institutions, discourses, and identities in new ways," ways which are not possible within Eritrea itself (2009:130). Given the heavily restrictive nature of the Eritrean government, for many Eritreans physical displacement from the Eritrean state is the key to forging new spaces

[62] Personal communication with Eritrean human rights advocate, July 2017.

of connection and belonging. Even as the plaintiffs in *Araya v. Nevsun* claim bare life status through their navigation of the refugee process, through their participation in a civil suit recognizing their inherent right to human rights protections the plaintiffs are reclaiming their status as rights bearing individuals.

For the plaintiffs in *Caal v. Hudbay*, their marginality as members of an Indigenous community in Guatemala stretches back decades, even centuries. However, the lawsuit has given them an international stage on which to tell their story. Explains an American non-profit organization worker who has worked in the Lote Ocho region for years:

> Human rights groups, non-profits…they have known for years about the violence committed here against Indigenous communities. But the general [international] public? They see it as something far away, a problem for other people in another country. Taking this case to Canada, to a Western, developed nation and showing them 'hey, you guys are causing this [violence] too. It's their bodies, their lands…but it's your companies, your policies, your law and government. These women and their community…they are real people with real families and real emotions and real pain and now you can't ignore it.' We're going to put it in your face. They aren't in the shadows anymore. They are here, in your space, your country. Speaking to you. And maybe then they'll [the international community] care.[63]

As with many individuals around the world who are living in the margins of society, the plaintiffs in *Caal v. Hudbay* are using Canadian recognition of their right to legal and political representation to challenge the narratives and circumstances of their marginalization. Rebecca Galemba (2013) found a similar process among communities at the Guatemala-Mexico border, finding that the definitions of the state of legality, morality, rights, and belonging may not match up with the day-to-day experiences of those living in spaces "that the state alternately neglects, seeks to control through violence or cooptation, or consigns to illegality and chaos,"(274) leading residents to construct their own notions and definitions of legality and rights. While the law can be used as a space of constraint and marginalization by states and corporations via the

[63] Personal communication with Guatemalan NGO worker, May 2017.

limitation of rights to land, liberty, life, and autonomy, the emerging ability of transnational civil law to re-emplace plaintiffs within a legal system as rights-bearing individuals – to challenge the bare life states produced by states and corporations –demonstrates the dual nature and transformative power of law.

Conclusion

While *Araya v. Nevsun* and *Caal v. Hudbay* may be civil cases bound to the Canadian court system, the lawsuits have global implications, as they will set legal precedent and establish new social norms and expectations regarding how Canadian corporations operate abroad. While *Caal v. Hudbay* may not challenge the pervasive problem of land access in Guatemala, it does aim to hold Hudbay responsible for enabling, supporting, and promoting practices and systems of structural and physical violence related to land access in Guatemala. While *Araya v. Nevsun* does not directly challenge the right of the Eritrean State to impose indefinite service on its citizens, it does contend that Nevsun had a duty of care to ensure no National Service conscripts were used as laborers in the Bisha mine.

The making of corporate power as a hegemonic force is situated in law, with contestations of how and where corporations hold power being the primary focus within legal spheres. As Susan Silbey notes, "in institutions of meaning, social inequality and legal consciousness are forged" (2005: 360). The ultimate outcome of the cases carries significant implications not only for the plaintiffs' future security but also for the willingness and ability of other individuals and communities affected by development-related violence to access legal justice within Canadian courts. However, while law can serve as a site of empowerment for marginalized groups, Joshua Barkan holds that the gap between law and justice cannot be bridged within courts of law alone (2013).

As such the process of the lawsuits and the surrounding dialogue that has accompanied them is, arguably, equally as important for generating change as it provides space for resistance to state and corporate controlled narratives of culpability. Law, then, offers not only the opportunity to establish new, enforceable social norms but to provide legal legibility – meaning the capacity of individuals and communities to have their voices recognized by the legal system – to those otherwise marginalized and reduced to bare life by their own governments and/or within the transnational system of corporate capitalist development. It is here, in the reimagining of how law can be applied, to whom, and where, that law opens new spaces for resistance, and where transnational law is offering new spaces in which marginalized individuals and groups can access legal legibility.

PART III: CONCLUSION

New Shit Has Come to Light, Man

"You cannot have a functioning global economy with a dysfunctional global legal system: there has to be somewhere, somehow, that people who feel that their rights have been trampled on can attempt redress."

- Ian Binnie, former puisne justice of the Supreme Court of Canada

There is a scene in the movie "The Big Lebowski" in which the main character, The Dude, is trying to explain how a seemingly straightforward situation had been revealed as much more complex than he had initially been led to believe. As I undertook the ethnographic research for this project – the most extensive project I have conducted thus far – I often felt as though I was bumbling around, uncovering new avenues of inquiry almost by accident as I examined the lived experiences of the stakeholders in *Caal v. Hudbay* and *Araya v. Nevsun*. The scope of my dissertation became increasingly broad and complex and I found myself struggling to narrow down which themes to pursue. When I began putting together all my research notes and interview transcriptions and primary and secondary documents, then started coding and analyzing everything, I felt like The Dude. There was so much information and I knew it was all important, but I couldn't quite grasp how it fit together yet. When I would try to explain to others what I saw emerging from the data, I found myself thinking of Jeff Bridges' now-iconic statement of gross oversimplification: new shit has come to light, man.

Caal v. Hudbay and *Araya v. Nevsun* are two of a series of cases being heard in Canadian courts that are changing the way Canadian civil courts conceive of and apply legal jurisprudence. This new approach of applying civil law to transnational human rights violations, called transnational law, is paving the way for plaintiffs around the world to address the harms of corporate capitalist development, even when marginalized and denied legal recourse in their own countries. The articles in this dissertation cover a range of topics, from an examination of the underlying bureaucratic mechanisms that enable corporate capitalist development-related

violence to occur, to the ways in which the legal process has encouraged shifts in the ways case stakeholders understand law, justice, and the violence they have experienced, to an assessment of how civil law has become an unexpected yet effective tool for marginalized individuals to challenge the narratives of their marginalization. However, these articles only scratch the surface of the burgeoning relationship between Canadian civil law and cases of transnational corporate capitalist development-related violence.

Where does analysis of transnational law go from here? There are innumerable possibilities. The four other cases currently being heard in Canadian civil courts regarding mining-related violence committed abroad should be included alongside studies of *Caal v. Hudbay* and *Araya v. Nevsun* for a more comprehensive understanding of how this new sphere of law is impacting case stakeholders. Additionally, work that situates the cases within the context of Canada's own history of Indigenous disenfranchisement would be appropriate. Lawsuits, truth and reconciliation initiatives, and reparations programs have all been implemented by and within Canada to address abuse of First Nations communities and lands. Where, then do these cases regarding harms committed overseas fit in or contrast with these initiatives? Of course, in the long-term studies of how the final outcomes of *Caal v. Hudbay* and *Araya v. Nevsun* should be conducted to assess the impact of the Courts' rulings on how Canadian-based mining corporations operate overseas as well as on Guatemalan and Eritrean practices regarding partnerships with foreign corporate development projects. The impact of the final rulings on the day-to-day lives and long-term outlook for the plaintiffs should also be investigated, though only time will tell if the plaintiffs will wish to engage with further research projects. Likewise, scholars should keep a lookout for how other nations engaged in corporate capitalist development, and mining in particular, respond to Canada's new definition of jurisprudence. As

mentioned in article three, there is already some indication that the United States Supreme Court is leaving the door ajar for future transnational law cases.

Overall, there is much work to be done as transnational law continues to find its footing within the Canadian legal system. The three articles presented here represent the potential for legal and social science scholars and practitioners, and anthropologists in particular, to better understand the ways in which law grows, changes, adapts, and transforms, as well as the ways in which it encourages growth, change, adaptation, and transformation amongst those it touches.

It is my intention that the analysis presented here can be used as a starting place for such future work. There are the beginnings here of a guide for best practices for transnational allies engaged in civil lawsuits, with my research participants providing invaluable insight into what works, what hasn't worked well, their hopes and fears for the process, and their joys and frustrations regarding both the practical and the theoretical elements of practicing a new sphere of law. As more research is conducted, both in regards to *Caal v. Hudbay* and *Araya v. Nevsun* and to transnational law in general, it is my hope that the research can be applied in practical ways to assist future coalitions of legal allyship.

In addition, I hope this research will contribute to anthropology's embrace of remote-ethnography. While research using technological communication methods will never replace in-person research, under the right circumstances it can be an invaluable tool for increasing connectivity between researchers and research participants. As we continue as a discipline to redefine our understanding of "the field," I hope that projects such as this one will contribute positively to the conversation.

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APPENDICES

Appendix A: Figures



Figure A1. Displacement graffiti in Guatemala City in August 2011. Translation: The Widmann family are repressors. No [more] evictions." This specific image refers to the March 2011 evictions of almost 800 families in twelve communities in the Polochic Valley by the Widmann family-owned company Chabil Ttzaj, which grows sugarcane and African palm on an industrial scale. Copyright Cristobal Morales. Used with permission.



Figure A2. Graffiti in Guatemala City in August 2011. Translation: “When the world is for sale, to be betrayed in natural.” Copyright Cristobal Morales. Used with permission.



Figure A3. Inside the Supreme Court of British Columbia in Vancouver. The statue of Themis appears at the far right. Photo taken by the author December 2018.



Figure A4. Graffiti in Guatemala City in August 2011 featuring photos of the disappeared. Translation: “Justice. Where are they?” Copyright Cristobal Morales. Used with permission.



Figure A5. Genocide graffiti in Guatemala City in August 2011. Translation: "Yes, there was genocide here. Justice." Copyright Cristobal Morales. Used with permission.



Figure A6. Banner in support of defendant Carlos Carias, showing him posing with Guatemalan youth soccer teams. Translation: “Carlos Caria and his family have suffered 20 YEARS of anguish for the Dos Erres massacre, with which he had nothing to do; Carlos is not Kaibil so he COULD NOT PARTICIPATE in the Dos Erres massacre.” Photo taken by the author in Guatemala City in August 2011.

Appendix B: Tables

Table 1: Comparison of Group A with Group B
Group A: Lote Ocho community meeting August 2011
Group B: Meeting with Plaintiffs in Lote Ocho August 2011

Frequency (A)	**Topic (A)**		**Frequency (B)**	**Topic (B)**
14	Land access		22	Rape/gang-rape/sexual violence
12	Land deed		18	Family/families/children
10	Family/families/children		14	Future
9	Security (personal, community)		13	Security (personal, community)
7	Future		9	Pain/trauma
7	Crops/fields		8	Prevention/prevent
6	Livestock/animals		8	Home/house
5	Home/house		5	Land access
5	Prevention/prevent		3	Crops/fields
5	Pain/trauma		3	Land deed
4	Human rights/rights		3	Law/justice
3	Law/justice		2	Livestock/animals
0	Rapes/gang-rape/sexual violence		2	Human rights/rights
0	Legal reform		0	Legal reform
0	Corporate social responsibility		0	Corporate social responsibility

Table 2: Comparison of Group B with Group C
Group B: Meeting with Plaintiffs in Lote Ocho August 2011
Group C: Written Plaintiff statements from court filings and published interviews 2012-2018

Frequency (B)	**Topic (B)**		**Frequency (C)**	**Topic (C)**
22	Rape/gang-rape/sexual violence		58	Rape/gang-rape/sexual violence
18	Family/families/children		64	Pain/trauma
14	Future		42	Law/justice
13	Security (personal, community)		38	Human rights/rights
9	Pain/trauma		34	Family/families/children
8	Prevention/prevent		29	Prevention/prevent
8	Home/house		12	Home/house
5	Land access		9	Future
3	Crops/fields		8	Corporate social responsibility
3	Land deed		8	Legal reform
3	Law/justice		7	Security (personal and community)
2	Livestock/animals		5	Land access
2	Human rights/rights		1	Crops/fields
0	Legal reform		1	Livestock/animals
0	Corporate social responsibility		0	Land deed

VITA

Eliza Guyol-Meinrath Echeverry was born in Concord, New Hampshire and raised in Kansas City, Missouri. She completed her undergraduate degree in Classical Archaeology, with minors in Anthropology and Spanish, at the University of Evansville. During her time at UE she also spent semesters abroad in England and Egypt. Eliza completed her Master's degree in Cultural Anthropology at the University of Tennessee-Knoxville with a focus on post-conflict reconstruction and emphasis on genocide studies. Concurrent with her doctoral degree, Eliza also completed a Graduate Certificate in Disasters, Displacement, and Human Rights (DDHR) through the University of Tennessee Department of Anthropology. Eliza served as co-chair of the 2015 DDHR Conference and has greatly enjoyed watching the program grow over the years. For the past two years Eliza has worked full-time as a paralegal for a defense attorney in Knoxville, an experience that has greatly augmented her understanding of and appreciation for legal anthropology.

Eliza currently resides in Knoxville, Tennessee with her husband, David, and four fur-children, Nala, Saffi, Kafka, and Simone. Eliza and David will welcome their first human child, Eva, in May 2019. Post-graduation Eliza looks forward to taking a brief sabbatical to putter around in her garden, read and write for fun, and figure out how to raise a human.