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MEXICO'S ENERGY REFORM IN CONFLICT WITH THE HUMAN RIGHTS OF INDIGENOUS AND AGRARIAN COMMUNITIES

ALEJANDRA ANCHEITA* & ERIC JASON WIESNER**

Among the grave human rights violations that exist in Mexico, torture and forced disappearances are two of the most serious examples of the atmosphere of generalised violence that pervades the country. The lack of access to justice for the victims and their families has become established in a seemingly endless cycle of impunity. It is in this context that Mexico's agrarian and indigenous communities are experiencing attacks that seriously threaten their community life for generations to come. These attacks come in the form of violations of the right to the free use and enjoyment of their land, territory, and natural resources at the hands of transnational corporations in the absence of protection from the Mexican State. On 20 December 2013, reforms to Articles 25, 27, and 28 of the Mexican Constitution were published in the Official Journal of the Federation ('OJF'). These reforms authorised the private sector to pursue oil and gas exploration and the generation of electricity within national territory. Subsequently, on 11 August 2014, nine new laws and amendments to another 12 were published in the OJF that directly affect agrarian and indigenous communities' rights to the free use and enjoyment of their land, territory, and natural resources and to free, prior, and informed consultation. This article seeks to analyse the Mexican State's legal basis for placing the interests of private enterprise above the respect, protection, guarantee, and promotion of collective rights. It will also explore transnational strategies that human rights organisations and affected communities are developing to resist such infringement on their rights by corporate actors.

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I INTRODUCTION

On 20 December 2013, historic reforms to the *Mexican Constitution* took effect that opened up the country's energy sector to private investment for the first time since President Lázaro Cardenas nationalised Mexico's mineral and oil resources in 1938. Only a few months later, Mexican President Enrique Peña Nieto was hailed on the cover of TIME Magazine as "Saving Mexico", crediting him with pushing through controversial reforms that prior administrations had failed to achieve.¹ However, the TIME cover sparked harsh criticism and outrage in Mexico, where the reforms continued to face fierce resistance from those who viewed them as a giveaway of the nation's patrimony to Transnational Corporations ("TNCs").²

Despite the deep undercurrents of dissent, the Mexican Congress moved ahead with its project of opening the energy sector to foreign investment, and on 11 August 2014, it passed a series of secondary laws aimed at implementing the prior year's constitutional reforms.³ Among those secondary laws were provisions prioritising hydrocarbon exploration and production, as well as electricity generation and distribution, over any other use of land.⁴ New legal easements became available that allow energy companies to demand access to indigenous and agrarian lands, with no right of refusal provided to affected communities.⁵ These secondary laws came into conflict with international human rights standards, recognised by Mexico, that protect indigenous lands from incursions without prior, free, and informed consultation and consent. Since these international human rights standards are now enshrined in the Federal Constitution itself, they must take priority over secondary legislation implementing the energy reform.

¹ See Michael Crowley, 'The Committee to Save Mexico', *TIME* (online), 13 February 2014 <<http://content.time.com/time/covers/pacific/0,16641,20140224,00.html>>.

² See, eg, Carolina Moreno, 'Enrique Peña Nieto's TIME Cover Sparks Outrage in Mexico', *The Huffington Post* (online), 17 February 2014 <http://www.huffingtonpost.com/2014/02/17/enrique-pena-nieto-time_n_4803677.html>; Moreno's article highlights a Change.org petition, that at the time had collected close to 9000 signatures, demanding that TIME remove Peña Nieto from the cover.

³ See, eg, Rodrigo Dominguez Sotomayor, *Mexico Energy Reform: Secondary Legislation Enacted* (12 August 2014) National Law Review <<http://www.natlawreview.com/article/mexico-energy-reform-secondary-legislation-enacted>>.

⁴ See *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 4, arts 100–17; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation] ch 8, art 71.

⁵ See *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], arts 106–9; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], arts 79–81.

On 11 June 2011, the Mexican Congress enacted a series of amendments to the National Constitution that, for the first time, expressly incorporated protections provided by 'international human rights treaties to which the Mexican State is a party'.⁶ Through these amendments, known as the Human Rights Amendments, the Constitution directly bound the Mexican State to provide its citizens the human rights protections guaranteed under international law. Thus, for example, where a TNC seeks to use land held communally by an indigenous community for an energy-related project, the Mexican government must ensure that the development of such a project adheres to international human rights standards. These include the International Labor Organization ('ILO') *Convention 169*, the *United Nations Declaration on the Rights of Indigenous Peoples*, and the *American Convention of Human Rights*.

Nonetheless, having human rights protections enshrined in the National Constitution is one matter, but ensuring that those rights are respected in practice is another. In the Isthmus of Tehuantepec ('the Isthmus') in southern Mexico, natural wind currents have attracted Spanish energy companies to build wind-turbine parks in areas with large indigenous populations. While conglomerates like Bif Hioxo ('BH') and Eólico del Sur ('ES') have already constructed at least 20 wind-turbine parks in the region by ignoring well-established collective landholding systems,⁷ indigenous and agrarian communities in the Isthmus are demanding real and meaningful participation in the development process. They are doing this not only by bringing cases before international tribunals like the Inter-American Court for Human Rights, but by tenaciously pressing on the levers that are available to them within the Mexican System. It is only through the collective demands of those negatively affected by the land-use provisions of the energy reform, like the largely Zapotec communities of the Isthmus, that the promise of the 2011 Human Rights Amendments can be made real and become institutionalised within the Mexican legal system.

⁶ *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 1, para 1 [Victor Elk trans]; see also Victor Manuel Collí Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges' (2012) 20(1) *Human Rights Brief* 1, 7–14.

⁷ See Asociación Mexicana de Energía Eólica [Mexican Wind Energy Association], *Capacidad Instalada de Energía Eólica en México* [Installed Wind-Energy Capacity in Mexico] <<http://www.amdee.org/parques-eolicos-mexico-2015>>; 'En 2016, Oaxaca tendrá 23 parques eólicos: Cué' [In 2016, Oaxaca will have 23 wind energy parks: Cué], *Noticiasnet.MX* (online), 22 January 2015 <<http://www.noticiasnet.mx/portal/oaxaca/general/gobiernos/258298-2016-oaxaca-tendra-23-parques-eolicas-cue>>.

Mexican human rights defenders and non-governmental organisations ('NGOs') are assisting affected indigenous and agrarian communities to make those collective demands. One of these NGOs, the Project of Economic, Social, and Cultural Rights ('ProDESC'),⁸ has been working for several years with Zapotec communities in Juchitán, Oaxaca, an area within the Isthmus, who are seeking a greater say in the development of wind-turbine farms on their communally-held, or *ejidal*, lands. ProDESC has had significant success utilising the *amparo*, a judicial process used in Mexico that is similar to an injunction, to slow down development of wind-turbine farms in Juchitán and press the Mexican government to comply with its now constitutional obligation to respect international human rights norms.

Mexico's slow march towards a greater democracy and transparency in government institutions has taken a major leap forward with the end of one-party rule in 2000. However, the environment for human rights defenders in Mexico remains hostile, and often dangerous, which the forced disappearances of 43 student teachers in Iguala, Guerrero on 26 September 2014 so shockingly demonstrated.⁹ Mexico is still a country where organised crime asserts its interests with violent impunity, while poverty and government corruption makes access to justice a near-impossible goal for much of the population. Nevertheless, some of the most impoverished and politically-powerless communities in Mexico have stood up to threats and harassment to demand that their government place the human rights of its citizens ahead of the economic interests of TNCs.

II LAND USE PROVISIONS OF MEXICO'S ENERGY REFORM

In December 2013, a set of constitutional reforms took effect that opened Mexico's energy sector to private investment and competition.¹⁰ Less than a year later, President Enrique Peña Nieto signed decrees enacting a series of secondary laws implementing the constitutional energy reforms, consisting of nine new laws and 12 amendments to

⁸ 'ProDESC' is based on the Spanish-language acronym.

⁹ See, eg, Randal C Archibold, 'Mexico Officially Declares Missing Students Dead', *The New York Times* (online), 27 January 2015 <http://www.nytimes.com/2015/01/28/world/americas/mexico-officially-declares-missing-students-dead.html?_r=0>.

¹⁰ See *Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía* [Decree that amends different provisions of the Political Constitution of the United Mexican States in energy matters] (Mexico) 20 December 2013, *Diario Oficial de la Federación* [Official Journal of the Federation] arts 4, 7, 9, 10, 11, 13, 18, 20, and 21.

existing laws.¹¹ Two of these secondary laws are the Hydrocarbons Law,¹² which creates a new legal framework for all hydrocarbon-related activities, and the Electricity Law,¹³ which opens the electric industry to private-sector participation in generation, transmission, distribution, and power marketing activities. Both of these laws include land use provisions that force property owners to allow energy companies access to their land to pursue hydrocarbon or electricity-related projects.

A Hydrocarbons Law

The land use provisions of the Hydrocarbons Law state that hydrocarbon-related activities are in the public interest, and therefore must take precedence over any other activity that requires surface or subsoil use.¹⁴ The law further creates a detailed process by which property owners and energy companies must negotiate consideration for the purchase, use, or occupation of land for the purpose of energy exploration or production.¹⁵ If these negotiations do not produce an agreement within 180 days, the law allows the energy company to either (1) request a 'legal hydrocarbon easement' from a civil or agrarian court; or (2) request the Institute of Administration and Appraisals of National Assets, a state entity in charge of administering national assets, to conduct a mediation pursuant to a specific process established in the law.¹⁶ Where a mediation session occurs but does not result in agreement between the parties, the law provides that the national Ministry of Energy ('SENER'),¹⁷ may ask the executive branch to impose a legal hydrocarbon easement.¹⁸

The legal hydrocarbon easement is a new procedure created by the Hydrocarbons Law, which can be imposed either judicially, by a competent judge, or administratively, by the

¹¹ *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation]; *Ley de Ingresos Sobre Hidrocarburos* [Hydrocarbon Revenues Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation]; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation].

¹² *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation].

¹³ *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation].

¹⁴ *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 4, arts 100–17.

¹⁵ *Ibid.*

¹⁶ *Ibid* art 106.

¹⁷ 'SENER' is based on the Spanish-language acronym.

¹⁸ See *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 4, arts 100–17art 108.

executive branch.¹⁹ Once established, the easement grants the right to (1) transit personnel; (2) transport, handle, and store any construction materials, vehicles, and goods; and (3) construct, install, and maintain infrastructure or carry out any works necessary for carrying out a hydrocarbon-related entitlement or contract.²⁰

The availability of the legal hydrocarbons easement denies property owners the right to refuse energy companies with contracts for hydrocarbon exploration or production access to their land. The only issue to be negotiated is under what terms and conditions that access will be granted. Although the Mexican Government has stated that the Hydrocarbons Law creates equality between parties negotiating over the use or occupation of land, and carefully extricated any mention of the term expropriation from the law,²¹ the ultimate trump card that the new easement hands to one side of the negotiation belies the government's claim.²²

B *Electricity Law*

The Electricity Law enacted under the energy reform amendments gives special priority to activities related to the transmission and distribution of electricity, in much the same way that the Hydrocarbons Law gives priority to activities related to exploration and production of hydrocarbons.²³ More specifically, the Electricity Law establishes the right of energy companies to occupy privately-owned land for the location, construction, and operation of site-specific generation projects and transmission and distribution facilities.²⁴

As under the Hydrocarbons Law, the Electricity Law requires that the energy company first negotiate directly with property owners for the purchase, use, or occupation of land.²⁵ If the parties do not reach agreement, however, the energy company may (1)

¹⁹ *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation] art 109.

²⁰ *Ibid* 14.

²¹ See Mexican Ministry of Energy ('SENER'), 'La Reforma Energética Establece Condiciones de Equidad para el Uso y Ocupación de la Tierra: Pedro Joaquín Coldwell' [The Energy Reform Establishes Equitable Conditions for the Use and Occupation of Land: Pedro Joaquín Coldwell] (Media Release, 22 May 2009) <http://www.sener.gob.mx/portal/Default_blt.aspx?id=2948> [author's trans].

²² See Tony Payan and Guadalupe Correa-Cabrera, 'Land Ownership and Use Under Mexico's Energy Reform' (Issue Brief No 10.29.14, Rice University's Baker Institute for Public Policy, 2014) 3.

²³ See *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation] ch 8, art 71.

²⁴ *Ibid*.

²⁵ *Ibid* art 73.

request a legal easement from a civil or agrarian judge; or (2) request a mediation with the Ministry of Agricultural, Territorial, and Urban Development.²⁶ If a mediation session occurs and does not result in an agreement within a set time, the executive branch may impose an easement.²⁷ Again, the availability of easements for electricity-related projects denies property owners the right of outright refusal, and therefore forces them to negotiate with energy companies on drastically unequal footing.

III MEXICO'S SYSTEM OF SOCIAL LAND OWNERSHIP

Mexico has a unique system of land ownership that must be taken into account when energy companies seek to reach agreements with property owners to access or occupy land for hydrocarbon or electricity-related projects. Energy companies in Mexico have often attempted to circumvent collective land rights by entering into rental agreements with small landholders. Where land is held in a social trust that is recognised under Mexican law, however, such rental agreements are invalid without the consent of the community as a whole.

Article 27 of the *Mexican Constitution* establishes the framework for ownership of the country's land and natural resources.²⁸ The Article vests in the nation 'ownership of the lands and waters within the boundaries of the national territory' and 'direct ownership of all natural resources of the continental shelf ... all minerals and substances ... deposits of precious stones ... solid mineral fuels; petroleum and all solid, liquid, and gaseous hydrocarbons'.²⁹ The Constitution grants to the federal government 'the right to transmit title [of land] to private persons.'³⁰

Article 27 further sets out three categories of land ownership: private, public, and social.³¹ Private land ownership grants title to possession and use only of the surface of the land, with no rights to subsoil resources.³² Public ownership means that government agencies control possession or use of the land.³³ The third category, social land

²⁶ Ibid art 79.

²⁷ Ibid art 81.

²⁸ See *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 27 [Victor Elk trans].

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² See Payan and Correa-Cabrera, above n 22, 3.

³³ Ibid.

ownership, is unique to the Mexican system, and includes a form of communal property called *ejido*.³⁴

After the Mexican Revolution, the Federal Government expropriated lands from private owners and distributed them primarily to peasant communities to be held collectively as *ejidos*.³⁵ In its initial form, the Mexican land tenure system allowed *ejido* members, or *ejidatarios*, to use this communal property for their own benefit, but not to transfer title to the land to third parties.³⁶ In February 1992, however, a reform of Mexico's land tenure rules was enacted that gave *ejidatarios* 'formal title to their land, enabling them to lease or sell their plots if a majority of members of their *ejido* agreed'.³⁷ The reform also halted any further distribution of *ejido* lands and legalised joint ventures between *ejidos* and private enterprises.³⁸

The 1992 reform of the *ejido* system was followed by a major push on the part of the Mexican Government to encourage privatisation of collectively held lands through the division of *ejidos* into individual parcels, title to which could be sold or conveyed by their owners.³⁹ In the end, however, the Government's privatisation effort largely fell flat, as only a small proportion of *ejidos* took the step of subdividing and selling off their parcels.⁴⁰ In fact, most of the land that was initially designated as *ejido* still maintains that classification, and as of April 2012, socially-held land comprised 51 per cent of the Mexican national territory.⁴¹

In October 2014, a paper written by Tony Pavan and Guadalupe Correa-Cabrera, for Rice University's Baker Institute for Public Policy, presciently highlighted the potential for social conflict in many parts of Mexico that contained both large tracts of social land and

³⁴ Ibid.

³⁵ See Gabriela Sanchez Luna, 'Algunas notas en relación con la tenencia de la tierra en México' (1995) 84 *Boletín Mexicano de Derecho Comparado* (1995) 1139–54.

³⁶ See Pavan and Correa-Cabrera, above n 22, 3.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Secretaría de Desarrollo Agrario, Territorial y Urbano ('SEDATU'), *Boletín No. 053, La Superficie de Ejidos y Comunidades de México, Más Grande Que Algunos Países* [Bulletin No 053, The Surface Area of Ejidos and Communities of Mexico, Bigger than Some Countries] (22 April 2012) <<http://www.sedatu.gob.mx/sraweb/noticias-2012/abril-2012/12166/>>.

significant areas targeted for energy development projects due to rich hydrocarbon deposits:⁴²

Given the [Hydrocarbon] law's prioritization of land use for energy sector activities, the development of Mexico's hydrocarbon resources will face challenges ranging from peaceful protests to potentially violent social unrest associated with the displacement of farmers, ranchers, and other land users, including indigenous peoples.⁴³

The same reasoning applies where energy companies seek to develop electricity generation and transmission projects in parts of Mexico, like the Isthmus, with high proportions of social land ownership. Moreover, social lands are often held by indigenous communities, who may have cultural or spiritual bonds with their land that transcend monetary value, and thus they may not be willing to cede their land rights to energy companies for mere 'market value'.⁴⁴

Where indigenous or agrarian communities seek to resist encroachment on their lands by energy companies, social land tenure is one tool they may utilise within the Mexican legal system. Energy companies cannot legitimately obtain rights to occupy or use *ejido* land by negotiating rental or lease agreements with individual parcel holders. Instead, they must negotiate with the *ejido* itself through its chosen leaders. Well-organised *ejidos* will be in much better positions than individual property owners to negotiate effectively with energy companies seeking access to their land, and to extract concessions that will benefit the community as a whole.

IV LEGAL REMEDIES AVAILABLE TO INDIGENOUS AND AGRARIAN COMMUNITIES AFFECTED BY ENERGY REFORM LAND USE PROVISIONS

A Amparo

The writ of *amparo* is a legal procedure established in Articles 103 and 107 of the *Mexican Constitution* that allows an affected party to seek an injunction of the implementation of a law, project, or governmental administrative action until the

⁴² See Payan and Correa-Cabrera, above n 22, 2–4.

⁴³ *Ibid* 4.

⁴⁴ See generally Ethelia Ruiz Medrano, *Mexico's Indigenous Communities: Their Land and their Histories* (University Press of Colorado, 2011).

constitutionality of the action can be determined by a court of law.⁴⁵ Article 103 states that the purpose of the *amparo* is to protect against 'general rules, acts or omissions of the authorities that violate human rights and guarantees recognised for their protection granted by this Constitution and by international treaties to which the Mexican State is a party'.⁴⁶ The legal standard for the procedure is set out in Article 107, and then further developed in a secondary law called the '*Amparo Law*'.⁴⁷ The *amparo* procedure provides a powerful tool for Mexican citizens to challenge government actions that undermine the basic rights provided to them in their Federal Constitution.

B 2011 Human Rights Amendments

On 10 June 2011, a series of amendments to the *Mexican Constitution* (the 'Human Rights Amendments') were enacted that significantly enhanced the human rights protections afforded to the country's citizens.⁴⁸ As of that date:

there was no longer any doubt that international human rights standards contained in treaties to which Mexico was a signatory formed part of the Mexican legal system and enjoyed the same rank in the hierarchy as the norms established in the Constitution.⁴⁹

First among the Human Rights Amendments was a change to the name of Title 1, Chapter 1 of the Constitution from 'Individual Rights' to 'Human Rights and their Guarantees', signalling a change in how rights are viewed in the constitutional framework.⁵⁰ This was the first change to this Chapter since the Constitutional Assembly of 1917, which further demonstrates its import.⁵¹

⁴⁵ See Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges' above n 6, 13 n 9.

⁴⁶ *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 103, para 1 [Victor Elk trans]; see also Elk, above n 6, 13 n 9.

⁴⁷ *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 107, para 1 [Victor Elk trans]; see also Elk, above n 6, 13 n 9.

⁴⁸ See Carlos Cerda Dueñas, 'Incorporating International Human Rights Standards in the Wake of the 2011 Reforms of the Mexican Constitution: Progress and Limitations' (2013) 10(9) *Sur International Journal on Human Rights* 37 <<http://www.conectas.org/en/actions/sur-journal/issue/19/1000455-incorporating-international-human-rights-standards-in-the-wake-of-the-2011-reform-of-the-mexican-constitution-progress-and-limitations>>; Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges', above n 6, 7–14.

⁴⁹ Dueñas, above n 48, 43.

⁵⁰ *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917 [Victor Elk trans]; see also Elk, above n 6, 8.

⁵¹ See Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges', above n 6, 8.

The next change was to Article 1 of the Constitution, amended to state:

In the United States of Mexico, all persons shall enjoy the rights recognised by the Constitution and international treaties to which the Mexican State is party, as well as guarantees for their protection, the exercise of which may not be restricted or suspended, except in cases and under conditions established by this Constitution.⁵²

Article 1 was further modified to state that 'rules on human rights shall be interpreted in accordance with the Constitution and international treaties on the subject, at all times favouring the broadest protection for the people'.⁵³ According to Victor Manuel Collí Elk, a researcher and Constitutional Law professor at the Universidad Autónoma de Campeche, Mexico, this new language establishes in the Constitution the principle of *pro homine*, meaning that the text should be interpreted to provide the broadest possible protections to the individual.⁵⁴ Previously, courts had often applied a highly restrictive mode of constitutional interpretation, limiting human rights protections to those expressly recognised in the Constitution itself.⁵⁵ By adopting the *pro homine* principle, the amendment requires courts to now interpret rules consistently not only with rights explicitly provided in the Constitution, but also with international human rights agreements ratified or endorsed by Mexico.⁵⁶

On 3 September 2013, a ruling by Mexico's highest court, the National Supreme Court of Justice ('SCJ'), definitively resolved the question of the rank of international human rights standards in the country's legal framework.⁵⁷ As Carlos Cerda Dueñas, a Professor and Researcher at the Monterrey Institute of Technology, explained the ruling, the SCJ in a ten-vote majority determined:

⁵² *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 1, para 1 [Victor Elk trans].

⁵³ *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 1, para 2 [Victor Elk trans].

⁵⁴ See Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges', above n 6, 9.

⁵⁵ *Ibid*, citing Action of Unconstitutionality 22/2009, 4 March 2010.

⁵⁶ *Ibid*.

⁵⁷ See Contradicción de Tesis 293/2011, 'SCJN determina que las normas sobre derechos humanos contenidas en Tratados Internacionales tienen rango constitucional' [National Supreme Court of Justice determines that the human rights norms contained in International Treaties have constitutional rank], 3 September 2013

<<http://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientoid=556>> [author's trans].

[I]nternationally-framed human rights based on amended [A]rticle 1 of the *Mexican Constitution* possessed the same normative efficacy as the rights set forth in the Constitution. In other words, they were henceforth acknowledged as enjoying the same constitutional status.⁵⁸

At the same time, however, the SCJ arguably took a step back from the *pro homine* principle established in the amended Article 1, when it held in the same case that an internationally-recognised human right could be limited by an express constitutional provision.⁵⁹

In the words of Professor Elk, the Human Rights Amendments mean that the national Constitution 'now accepts the application of international law and human rights standards to Mexican laws and allows human rights advocates to use international standards as a tool for asserting human rights violations'.⁶⁰ The legal superiority of international human rights protections over secondary energy reform legislation is now clearly established under Mexican law. Where the two are in conflict, rights provided in international human rights agreements recognised by Mexico must take precedence.

C International Human Rights Agreements

Indigenous and agrarian communities may rely in particular on three international human rights agreements to demand a real and meaningful say in how hydrocarbon or electricity-related projects on their land proceed: (1) the International Labor Organization ('ILO') *Convention No 169*; (2) the *United Nations Declaration of the Rights of Indigenous Peoples*; and (3) the *American Convention on Human Rights*.⁶¹ As all three of these agreements have been ratified or endorsed by Mexico, the human rights protections they provide are afforded constitutional authority through the 2011 Human

⁵⁸ See Dueñas, above n 48.

⁵⁹ See Contradicción de Tesis 293/2011, ficha técnica, 3 September 2013 <<http://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientoid=556>>.

⁶⁰ See Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges', above n 6, 9.

⁶¹ *General Recommendation No 23 on Indigenous Peoples* UN Doc CERD/C/51/Misc.31/Rev.4 (1997), art 4, para d; The duty of States to effectively consult with indigenous peoples is also grounded in the core human rights treaties of the United Nations, including the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') and the International Covenant on Civil and Political Rights. For example, the ICERD requires States to '[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.'

Rights Amendments, and thus take precedence over the land use provisions of secondary legislation enacting the energy reform.

1 *ILO Convention No 169*

The *ILO Convention No 169* on Indigenous and Tribal Peoples (the 'Convention') has been ratified by twenty countries and covers a broad spectrum of issues ranging from land rights to education.⁶² 'The fundamental principles of the Convention are that indigenous and tribal peoples should be consulted and should fully participate at all levels of decision-making processes that concern them'.⁶³ Mexico ratified the Convention on 5 September 1990, and it remains in force in the country.⁶⁴

The Convention does not narrowly define who are indigenous and tribal peoples, but instead takes a practical approach by providing only criteria for the peoples it aims to protect.⁶⁵ Overarching these criteria is the principle of 'self-identification' which 'shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.⁶⁶ Thus, if a group views itself as indigenous, the group should generally be considered as such with respect to the Convention.

(a) Right to Consultation

Article 6 of the Convention states:

In applying the provisions of this Convention, governments shall ... consult the peoples concerned, through appropriate procedures and in particular through their respective institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.⁶⁷

⁶² See ILO, *Indigenous and Tribal Peoples, Conventions* <<http://www.ilo.org/indigenous/Conventions/lang-en/index.htm>>.

⁶³ Ibid.

⁶⁴ ILO, *NORMLEX Information System on International Labour Standards* <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102764>.

⁶⁵ See ILO, *Indigenous and Tribal Peoples, Convention No 169* <<http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm>>; According to the ILO website, elements of indigenous peoples include: (1) traditional life styles; (2) culture and way of life different from the other segments of the national population, eg, in their ways of making a living, language, customs, etc.; (3) own social organisation and political institutions; and (4) living in historical continuity in a certain area, or before others 'invaded' or came to the area; Ibid.

⁶⁶ *Indigenous and Tribal Peoples Convention No. 169*, opened for signature 7 June 1989, art 1, s 2.

⁶⁷ Ibid art 6, s 1(a);

A tripartite committee of the ILO governing body emphasised that 'the spirit of consultation and participation constitutes the cornerstone of *Convention No. 169* on which all its provisions are based'.⁶⁸

The Convention further sets out the standard that 'consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.⁶⁹ An ILO Committee determined that such a good faith consensual decision-making process requires that States 'endeavour to achieve consensus on the procedures to be followed; facilitate access to such procedures through broad information; and create a climate of confidence with indigenous peoples which favours productive dialogue'.⁷⁰ Creating a climate of confidence in consultation proceedings is of particular importance when the interests of indigenous peoples are at issue, 'given their lack of trust in State institutions and their feelings of marginalisation, both of which have their origins in extremely old and complex historic events, and both of which have yet to be overcome'.⁷¹

One critical element of a consensus-based consultation process that involves natural resource exploitation or development projects affecting indigenous lands is access to 'full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment'.⁷² To this end, the State must 'carry out environmental and social impact studies so that the full expected consequences of the project can be known', which should then 'be presented to the indigenous groups concerned at the early stages of the consultation, allowing them time

The duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected in regard to their particular interests.

James Anaya, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (15 July 2009), para 63.

⁶⁸ *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No 169)*, made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres ('CEOSL'), para 31.

⁶⁹ *Indigenous and Tribal Peoples Convention No 169*, opened for signature 7 June 1989, art 6, s 2.

⁷⁰ *Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No 169)*, made under article 24 of the ILO Constitution by the Federation of Country and City Workers ('FTCC') GB.294/17/1; GB.299/6/1 (2005), para 53.

⁷¹ *Report of the Committee set up to examine representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No 169)*, made under article 24 of the ILO Constitution by the Authentic Workers' Front ('FAT'), para 107.

⁷² Anaya, above n 67, para 53.

to understand the results of the impact studies and to present their observations and receive information addressing any concerns'.⁷³

In the context of the Mexican energy reform, the Convention obligates the national government to engage in timely and meaningful consultation with indigenous communities before allowing hydrocarbon or electricity-related projects to go forward on their land.⁷⁴ Under the plain language of the Convention, consultation is insufficient when the outcome is predetermined or the affected communities have not been provided with adequate information to make a free and informed decision. Rather, indigenous communities must have a real opportunity to influence the terms and conditions under which a project proceeds with full access to information, including environmental and social impact studies.⁷⁵

(b) Indigenous Land Rights

Buffeting affected communities' right to consultation with respect to development of energy projects are the Convention's provisions specifically protecting the land rights of indigenous and tribal peoples. Article 13 provides:

⁷³ Ibid.

⁷⁴ Ibid; The State cannot evade this obligation by passing it along to private enterprises to which it has granted contracts or concessions. As Special Rapporteur Anaya explained:

[T]he State has the responsibility to carry out or ensure adequate consultation, even when a private company, as a practical matter, is the one promoting or carrying out the activities that may affect indigenous peoples' rights and lands. In accordance with well-grounded principles of international law, the duty of the State to protect human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity.

The Mexican Government itself recognised this obligation when it included provisions in the energy reform legislation mandating that the National Government undertake prior, free, and informed consultation with indigenous communities prior to authorising development projects on their land; see *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 5, art 120; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación*, tit 4, ch 2, art 119.

⁷⁵ *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 5, art 119; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación*, tit 4, ch 2, art 120; The secondary energy reform laws require federal authorities or companies seeking contracts to conduct social impact assessments prior to granting authorisation for hydrocarbon or electricity-related development projects. While including these provisions in the energy reform legislation was potentially a positive step on the part of the Mexican Government toward protecting the rights of affected communities, they have little value unless the assessments are openly shared in the consultation process and are allowed to guide project development. No such assessment has been shared with affected communities in connection with the Consultation in Juchitán. Moreover, none of these provisions contemplates any direct involvement of affected communities in guiding social impact assessments for projects that affect them. Thus, affected communities may be easily relegated to a marginal role in this critical piece of the decision making process.

[G]overnments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.⁷⁶

This provision is especially pertinent where affected communities may be unwilling to accept 'market value' for the sale or use of their socially-owned property due to higher cultural or spiritual value they place on the land.⁷⁷ The Convention requires that this non-monetary value be taken into consideration when governments or TNCs are negotiating with indigenous communities.

The Convention also specifically addresses circumstances where the State retains ownership of mineral or sub-surface resources of lands occupied by indigenous or tribal peoples, which is the case in Mexico where land ownership is constitutionally limited to surface use and does not extend to underground hydrocarbon or mineral resources. In such cases:

[G]overnments shall establish or maintain procedures through which they consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.⁷⁸

This provision further reinforces the principle of meaningful prior consultation, set out in Article 6.

When development projects require relocation of indigenous peoples as a 'necessary and an exceptional measure' Article 16 provides that 'such relocation shall take place only with their free and informed consent'.⁷⁹ If such consent cannot be obtained, 'such relocation shall take place only following appropriate procedures established by

⁷⁶ *Indigenous and Tribal Peoples Convention No 169*, opened for signature 7 June 1989, art 13.

⁷⁷ See generally Medrano, above n 44.

⁷⁸ *Indigenous and Tribal Peoples Convention No 169*, opened for signature 7 June 1989, art 15, s 2.

⁷⁹ *Ibid* art 16, s 2.

national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned'.⁸⁰

Thus, the Convention imposes a much higher bar when governments carry out projects that cannot reasonably coexist with an indigenous community's continued presence on the land. In those cases, consultation alone is not sufficient. Such projects can only proceed with the consent of affected communities.

2 United Nations Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* (the 'Declaration') was adopted by the General Assembly on 13 September 2007, with 144 states in favour, four votes against, and eleven abstentions.⁸¹ The principles of the Declaration are in harmony with those established in the Convention, and its adoption by the General Assembly highlights a broadening acceptance of those principles in the international community.⁸²

Mexico voted in favour of the Declaration.⁸³ Moreover, Mexico publicly reaffirmed its strong support for the Declaration when its Permanent Representative to the United Nations, Ambassador Luis Alfonso de Alba, made a statement at a high-level commemoration of the fifth anniversary of the Declaration on 17 May 2012.⁸⁴ In his remarks, the Ambassador emphasised the relevance of the Declaration in protecting indigenous land and territory, and in guiding the Mexican government in its consultations with indigenous communities.⁸⁵

⁸⁰ Ibid.

⁸¹ United Nations, *Permanent Forum on Indigenous Issues*

<<http://undesadspd.org/indigenouspeoples/declarationontherightsofindigenouspeoples.aspx>>.

⁸² See ILO, *Indigenous and Tribal Peoples, Convention No 169*

<<http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>>.

⁸³ United Nations, *Bibliographic Information System*

<<http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=VM&term=ares61295>>.

⁸⁴ *Foro Permanente para las Cuestiones Indígenas de la Organización de las Naciones Unidas, 11o Periodo de Sesiones, Tema 9, Quinto aniversario de la aprobación de la Declaración de las Naciones Unidas sobre los derechos de los pueblos indígenas*, GA Res 66/142

<<http://www.un.org/esa/socdev/unpfii/documents/5th-anniv-undrip/pf12alfonso327es.pdf>>.

⁸⁵ Ibid; En los últimos años hemos podido constatar la relevancia de la Declaración en ámbitos tan diversos como ... la protección de las tierras y territorios ... En México la Declaración ha sido de gran utilidad para guiar con mayor claridad las políticas del Gobierno en los aspectos relacionados con el desarrollo de los pueblos indígenas, incluyendo mecanismos de consulta que se deben seguir perfeccionando a través de la experiencia adquirida y la práctica constante [In recent years we have been able to maintain the relevance of the Declaration in areas as diverse as ... the protection of land and territory ... In Mexico the Declaration has been of great utility in guiding with greater clarity the policies of

The Declaration reiterates the Convention's outright prohibition of forced relocation of indigenous people:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.⁸⁶

The Declaration also reinforces the right to consultation provided in the Convention:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁸⁷

States are further obligated to:

[O]btain [the] free and informed consent [of indigenous peoples] prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.⁸⁸

This provision is particularly relevant in the context of hydrocarbon or electricity-related projects developed on land socially owned by indigenous communities. The Declaration makes clear that such projects can only be undertaken after consultation with the affected communities, and with their free and informed consent.

the Government with respect to the development of indigenous communities, including consultation mechanisms that we must continue perfecting through acquired experience and constant practice] [author's trans].

⁸⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 10; see also Anaya, above n 67; The Declaration recognises two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. These situations include when the project will result in the relocation of a group from its traditional lands.

⁸⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 19.

⁸⁸ *Ibid* art 32.

3 *American Convention on Human Rights*

The American Convention on Human Rights, also known as the *Pact of San José, Costa Rica* ('the Pact'), was ratified by Mexico on 2 March 1981.⁸⁹ Article 21 establishes the 'Right to Property', stating that '[e]veryone has the right to the use and enjoyment of his property'.⁹⁰ Although the Pact places limitations on the right to property, providing that '[t]he law may subordinate such use and enjoyment to the interest of society',⁹¹ case law interpreting the Pact makes clear that special consideration must be provided before a government may infringe on the land rights of indigenous or tribal peoples.⁹² Specifically, the affected indigenous community must give prior, free, and informed consent before a development project may proceed on its traditionally-held territories.⁹³

In the *Saramaka* case, a tribal community from the upper region of the Suriname River brought a complaint against the State of Suriname for losses that it suffered when a large hydroelectric project caused flooding of its lands.⁹⁴ In finding that the State violated the Saramaka tribe's right to property, as established in Article 21 of the Pact, the Inter-American Court of Human Rights held:

[R]egarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions.⁹⁵

In distinguishing between consultation and consent, the Court relied on the observation of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, that whenever there are large-scale projects in areas occupied by indigenous communities, it is likely that those communities will go through profound social and economic changes

⁸⁹ Organization of American States, *Department of International Law* <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm>.

⁹⁰ *American Convention on Human Rights*, art 21.

⁹¹ *Ibid.*

⁹² See Contradicción de Tesis 293/2011, ficha técnica <<http://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientoid=556>>; Mexico's Supreme Judicial Court recently affirmed that all Mexican national courts are bound by decisions of the Inter-American Court of Human Rights, including in cases to which Mexico was not a party, provided the decision is protective of human rights.

⁹³ See *Pueblo Saramaka vs Surinam*, Inter-American Court of Human Rights, 28 November 2007 [James Anaya trans].

⁹⁴ *Ibid* paras 1, 11.

⁹⁵ *Ibid* para 134.

that government authorities are incapable of understanding, much less anticipating.⁹⁶ Therefore, the Special Rapporteur concluded, free, prior, and informed consent are essential to protect the human rights of indigenous peoples when large development projects are involved.⁹⁷

The right of indigenous communities to effective and fully-informed consultation in decisions that will affect their traditional territories was also recognised in *Comunidades Indígenas Mayas en el Distrito de Toledo v Belice*.⁹⁸ In that case, the Inter-American Commission on Human Rights held that 'full and informed consent' at a minimum required that 'all the members of a community are fully aware of the nature and consequences of the process and are provided an effective opportunity to participate in an individual or collective manner'.⁹⁹

Thus, under the jurisprudence of the Inter-American system, which is binding on Mexico as a signatory to the Pact, hydrocarbon or electricity-related activities can only proceed on indigenous lands with effective and fully-informed consultation of the affected communities, and in the case of large-scale development projects, with their free, prior, and informed consent. Unfortunately, as the experience of Zapotec communities in the Isthmus bears out, the Mexican State has yet to live up to this standard.

V CASE STUDY OF WIND-TURBINE PARK DEVELOPMENT IN JUCHITAN, OAXACA

A Context for Human Rights Defenders in Mexico

Mexican human rights defenders and communities opposing encroachment of TNCs on their land often face severe threats, harassment, and intimidation — in some cases with the involvement or tacit support of government authorities. According to Human Rights Watch's World Report, the United Nations High Commissioner for Human Rights registered 89 aggressions against human rights defenders in Mexico between November 2010 and December 2012, yet none have resulted in a conviction.¹⁰⁰ Similarly, the UN

⁹⁶ Ibid para 135.

⁹⁷ Ibid.

⁹⁸ *Indigenous Mayan Communities in the District of Toledo v Belize*, Inter-American Commission of Human Rights, Informe 40/04, Fondo. Caso 12.052 [author's trans].

⁹⁹ Ibid.

¹⁰⁰ Human Rights Watch, *World Report 2014: Mexico* <<http://www.hrw.org/world-report/2014/country-chapters/mexico>>; see also Amnesty International, *Mexico Human Rights*

Committee Against Torture stated in a December 2012 report that it was 'seriously concerned at the large number of murders, disappearances and acts of intimidation' committed against human rights defenders and journalists in Mexico.¹⁰¹ Mexico's National Human Rights Commission ('CNDH') has itself reported that since 2005, 18 human rights defenders have been killed and many more have faced death threats.¹⁰² The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has cited evidence that 'many of the attacks against journalists and advocates are carried out by authorities'.¹⁰³

Human Rights Watch recently highlighted that many of the reported attacks against human rights defenders occurred 'in the context of opposition to infrastructure, or resource extraction "mega-projects"'.¹⁰⁴ Amnesty International has likewise concluded that '[m]arginalised communities whose lands are sought for economic development are at risk of harassment, forced eviction or denial of their right to adequate information and consultation'.¹⁰⁵

Forced disappearances, extrajudicial killings, and torture persistently occur on a wide scale in Mexico, adding to the already hostile environment for human rights defenders. In February 2013, the administration of Mexican President Enrique Peña Nieto acknowledged that more than 26 000 people had been reported disappeared or missing since December 2006.¹⁰⁶ A year-and-a-half later, 'the government acknowledged that the whereabouts of over 22 000 people who had gone missing since 2006 remained unknown, but failed to disclose corroborating evidence, or information on how many of these cases are forced disappearances'.¹⁰⁷

<<http://www.amnestyusa.org/our-work/countries/americas/mexico>>: 'Journalists and human rights defenders are killed, harassed or face fabricated criminal charges.'

¹⁰¹ *UN Committee against Torture: Concluding observations on the combined fifth and sixth periodic reports of Mexico as adopted by the Committee at its forty-ninth session*, UN Doc CAT/C/MEX/CO/5-6 (11 December 2012) para 14.

¹⁰² See Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/26/36/Add.1 (28 April 2014) para 75.

¹⁰³ *Ibid* para 76.

¹⁰⁴ Human Rights Watch, *World Report 2014: Mexico* <<http://www.hrw.org/world-report/2014/country-chapters/mexico>>.

¹⁰⁵ Amnesty International, *Mexico Human Rights* <<http://www.amnestyusa.org/our-work/countries/americas/mexico>>.

¹⁰⁶ See, eg, Catherine Schoichet, 'Mexico reports more than 26,000 missing', *CNN* (online), 27 February 2013 <<http://edition.cnn.com/2013/02/26/world/americas/mexico-disappeared/>>.

¹⁰⁷ Human Rights Watch, above n 100.

In June 2013, Mexico's CNDH reported that it was investigating 2443 disappearances in which it had found evidence of involvement of state agents.¹⁰⁸ The CNDH has since 'issued 12 reports documenting the enforced disappearance of 30 victims ... and found evidence of probable participation of state agents in approximately 600 other disappearance cases'.¹⁰⁹

Between January and September 2013, the CNDH received over 860 complaints of torture or cruel or inhuman treatment at the hands of federal officials.¹¹⁰ Following his visit to Mexico last year, the UN Special Rapporteur on Torture Juan Méndez stated that 'torture and ill-treatment are generalised in Mexico', and that the government's failure to investigate 'the large number of complaints and testimonies' of such treatment 'is evidence of a disturbing level of impunity'.¹¹¹ Similarly, a fact-finding mission of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions conducted in the Spring of 2013 concluded that since the Federal Government's 'war on drugs' began in 2007, 'widespread extrajudicial executions were perpetrated by the security forces as well as the cartels, often without accountability'.¹¹²

It is in this context that indigenous and agrarian communities in Mexico, and the human rights defenders and NGOs that accompany them, are resisting encroachment of TNCs on their social lands for energy reform projects. In the Isthmus, members of Indigenous communities who have opposed construction of large-scale wind-turbine parks on *ejido* or communal land have frequently faced harassment, threats, and even physical attacks. Nonetheless, with the assistance of NGOs like ProDESC, many have utilised the tools available within the Mexican legal system to demand that these projects adhere to the protections guaranteed by the National Constitution and international treaties to which Mexico is a party.

¹⁰⁸ Ibid 104, 265.

¹⁰⁹ Ibid 107, 378.

¹¹⁰ Ibid 104, 268; see also Amnesty International, *Out of Control: Torture and other ill-treatment in Mexico* <<http://www.amnestyusa.org/research/reports/out-of-control-torture-and-other-ill-treatment-in-mexico>>.

¹¹¹ Juan Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Mexico (21 April to 2 May 2014)*, UN Doc A/HRC/28/68/Add.3 (29 December 2014) paras 23, 32.

¹¹² Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum, Mission to Mexico*, UN Doc A/HRC/26/36/Add.1 (28 April 2014) para 8.

B Zapotec Communities of Juchitán Resisting Encroachment of TNCs on their Land

Juchitán, located in Oaxaca State on the southern end of the Isthmus, is an Agrarian community with collectively-held *ejido* lands established by presidential decree of 17 June 1964. The population of Juchitán is largely comprised of Indigenous Zapotec people, who retain their own political, social, cultural, economic, and judicial institutions.

The narrow land bridge of the Isthmus between the Pacific and Atlantic Oceans is a virtual wind tunnel that makes the area very attractive for wind-energy projects.¹¹³ TNCs have already constructed at least twenty wind-turbine parks in the region,¹¹⁴ and the Mexican Minister of Energy, Pedro Joaquín Coldwell, announced plans earlier this year for private investment of \$US 14 billion into wind-energy infrastructure in the next four years.¹¹⁵ None of these projects were implemented with prior consultation or consent of the impacted communities.

For the last several years, ProDESC has been assisting Zapotec communities in Juchitán to demand that their basic human rights are respected as two Spanish TNCs, Bií Hioxo ('BH') and Eólico del Sur ('ES'), attempt to move forward with construction of new wind-turbine farms on their land. To do this, ProDESC has developed a unique multipronged strategy, called 'integral defence', consisting of (1) organising and outreach to empower local communities impacted by energy projects, which after ten years of experience, ProDESC considers to be the key element for successful campaigns; (2) legal action within the Mexican judicial system designed to press federal and state authorities to respect the human rights protections guaranteed under the *Mexican Constitution* and international law; (3) documentation of human rights violations; (4) political engagement and policy advocacy; (5) coordination and coalition-work with

¹¹³ See *Los parques eólicos en Oaxaca: Preocupaciones sobre las violaciones de derechos humanos en el estado* [Wind-Energy Parks in Oaxaca, Worries about human rights violations in the state] (Peace Brigades International, Mexico Project) 1 <http://www.pbi-mexico.org/fileadmin/user_files/projects/mexico/files/PBI_Publications/1403BriefingEolicosPBI.pdf>.

¹¹⁴ See *Asociación Mexicana de Energía Eólica* [Mexican Wind Energy Association], *Capacidad Instalada de Energía Eólica en México* [Installed Wind-Energy Capacity in Mexico] <<http://digitalcommons.wcl.american.edu/hrbrief/vol20/iss1/2/>>; 'En 2016, Oaxaca tendrá 23 parques eólicos: Cué' [In 2016, Oaxaca will have 23 wind energy parks: Cué], *Noticiasnet.MX* (online), 22 January 2015 <<http://digitalcommons.wcl.american.edu/hrbrief/vol20/iss1/2/>>.

¹¹⁵ Sonia Corona and David Marcial Pérez, 'Las eólicas españolas invertirán 9.000 millones de dólares en México' [Spanish wind-energy companies will invest \$US 9 billion in Mexico], *El País*, 13 January 2015.

organisational allies in Mexico and abroad; (6) communication and engagement with media; and (7) strategic corporate research.¹¹⁶

1 BH

BH wind-energy park was built on the *ejido* land of Juchitán de Zaragoza. In 2013, community members reported that they began to notice the appearance of unknown individuals on their property.¹¹⁷ According to interviews with indigenous community leaders conducted by ProDESC, when these community members attempted to ascertain the identities of these individuals, the trespassers physically attacked them.¹¹⁸ As a result of this confrontation, the community learned that the attackers were BH employees who were on their land to develop a wind-turbine park.¹¹⁹ Federal and state authorities had been collaborating with BH for several years to design and implement the energy development without making any attempt to inform or consult with the local Zapotec community.¹²⁰

Once they learned of the project, community leaders made several attempts to enter into a dialogue with BH representatives regarding the use of their land, but BH refused them.¹²¹ Community leaders also expressed their opposition to what they viewed as BH's unlawful invasion of their property to federal, state, and municipal authorities.¹²² They made clear in these communications that they were never informed of the existence or potential impact of the project, much less engaged in prior, informed, and

¹¹⁶ 'Metodología para el diseño e implementación de estrategias para el fortalecimiento social, la exhibibilidad, defensa y justiciabilidad de los derechos económicos, sociales y culturales' [Methodology for the design and implementation of strategies for social empowerment, enforceability, defence, and justiciability of economic, social and cultural rights] (ProDESC). In ProDESC's methodology, the seven prongs are carried out in a manner that is (1) interdisciplinary (2) strategic and impactful, meaning that the ultimate goal is not only to resolve a particular case, but to address the underlying issues that gave rise to the case (3) respectful of diversity of identities and backgrounds and (4) pedagogical, promoting the education and development of both human rights defenders and the communities in which they work. Objectives of the integral defence framework are: (1) clarification of the underlying facts (2) identification and sanction of those responsible for human rights violations (3) full compensation for any damages suffered (4) to develop measures to ensure that problems do not repeat themselves and (5) to promote the awareness of and commitment to the idea that human rights are the responsibility of all.

¹¹⁷ 'Caso Comunidad Indígena Zapoteca de Juchitán, Oaxaca: Defensa del derecho a la tierra, territorio y bienes naturales; a la consulta y al consentimiento libre, previo e informado' [Case of the Indigenous Zapotec Community of Juchitán, Oaxaca: Defence of the right to the land, territory and natural resources to consultation and to free, prior and informed consent] (Case Summary, ProDESC) <<http://www.prodesc.org.mx/?p=3182>> [author's trans].

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

free consultation as required under international agreements that Mexico has ratified and endorsed.¹²³ Nonetheless, the project proceeded, and BH attempted to legitimise its occupation and use of the land by entering into contracts to rent individual parcels.¹²⁴ In so doing, BH ignored the collective ownership structure of *ejido* lands, which rendered their rental contracts invalid.

On 1 October 2013, members of the Zapotec community of Juchitán, represented by ProDESC attorneys, filed a writ of *amparo* in Oaxaca state court making two demands: first, an immediate halt in construction of the wind-energy park; and second, a rescission of the government authorisations granted to BH for the project.¹²⁵ The assigned judge denied the first request, and ProDESC appealed the interlocutory order.¹²⁶ The Thirteenth Circuit Administrative Court sitting in Oaxaca de Juárez, Oaxaca affirmed the lower court order denying the request for immediate suspension of the project on the ground that the complainants did not provide adequate proof of *ejido* membership.¹²⁷ The state court has yet to resolve the underlying request regarding permitting for the project.

ProDESC's challenge to BH's development plans is premised on the argument that the Zapotec community of Juchitán was denied its right to fully-informed and voluntary consultation and consent prior to the implementation of an energy project on its land.¹²⁸ This right is guaranteed under international law recognised by Mexico, such as the Convention, the Declaration, and the Pact, and given constitutional authority through the 2011 Human Rights Amendments. BH's claims to priority use of the land for electricity generation and transmission activities under the energy reform secondary laws must be subordinated to the international human rights protections provided in the National Constitution. Moreover, as collective owners of the *ejidal* lands on which BH built the wind-turbine park, all of the members of the Zapotec community of Juchitán are harmed by the loss of their traditional territories.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid 3.

¹²⁶ Ibid; *Tribunal Colegiado del Décimo Tercer Circuito en materia Administrativa* [Thirteenth Circuit Court for Civil and Administrative Matters] 45/2014, 15 August 2014 [author's trans].

¹²⁷ See *Tribunal Colegiado del Décimo Tercer Circuito en materia Administrativa* [Thirteenth Circuit Court for Civil and Administrative Matters] 45/2014, 15 August 2014, 30–6 [author's trans].

¹²⁸ Ibid.

The courts' response to the underlying question of whether BH and the Mexican Government denied Indigenous communities in Juchitán their right to meaningful consultation and free, prior, and informed consent will likely have repercussions for all of the wind energy projects in the region. If the courts agree with ProDESC that the Federal Constitution and international law obligated the Mexican Government to consult with local communities before allowing BH to proceed with its project, the same logic would also presumably apply to the 20 other wind-turbine parks on the Isthmus that were built without a consultation process.

In the meantime, ProDESC's focus on the right to effective and fully-informed consultation with respect to development of energy projects on indigenous land seems to have gained significant traction. One sign of this is the Mexican Government's decision to initiate a consultation process in Juchitán in anticipation of another wind-turbine park development in the area. While Mexican authorities have not acknowledged that their decision to consult with the community resulted from the legal challenges launched against Bií Hioxo, the timing of the announcement of the consultation soon after ProDESC filed its *amparo* against BH is telling.

2 ES

ES is seeking to develop a new wind-turbine park in the municipalities of El Espinal and Juchitán, Oaxaca, very close to the site of the BH project.¹²⁹ Unlike in the case of BH, however, the Mexican Government announced that it was initiating a consultation process with the local Zapotec community that it touted as a first of its kind, and a model for development projects instituted under the energy reform.¹³⁰

On 3 November 2014, the first phase of a five-stage consultative process began. The five successive phases were referred to as: (1) Prior Agreements [Acuerdos Previos]; (2) Informative [Informativa]; (3) Deliberative [Deliberativa]; (4) Consultative

¹²⁹ See 'Caso Comunidad Indígena Zapoteca de Juchitán, Oaxaca: Defensa del derecho a la consulta y al consentimiento libre, previo e informado [Case of the Indigenous Zapotec Community of Juchitán, Oaxaca: Defense of the right to consultation and free, prior and informed consent]' (Case Summary, ProDESC) <<http://www.prodesc.org.mx/?p=3072>> [author's trans].

¹³⁰ Ibid; Pedro Matías, 'Buscan amparo contra proyectos eólicos en Oaxaca' [*Amparo* against wind-energy projects in Oaxaca is sought], *Proceso* (Mexico City), 27 April 2015; Silvia Garduño, 'Denuncian anomalías en consulta indígena' [Anomalies in Indigenous Consultation are denounced], *Reforma* (Mexico City), 27 April 2015.

[Consultativa]; and finally (5) Execution and follow-up.¹³¹ In anticipation of the consultation, ProDESC, along with several other NGOs, formed an Observation Mission to ensure that the process adhered to the principles of free, informed, and prior consultation and consent, as established in the Convention, the Declaration, and the Pact.¹³² As the Mexican Government itself claimed that the Consultation would provide a model for development projects going forward, the NGOs comprising the Observation Mission believed that it was critical to ensure that it be carried out in strict compliance with the highest international standards. To date, representatives of the Observation Mission have been present at every session of the Consultation.

Participants in the Consultation faced threats and intimidation from the very beginning of the process.¹³³ On 4 and 5 November, representatives of a local community organisation called the Popular Assembly of the People of Juchitán ('APPJ') were subjected to a variety of hostile acts, including death threats, in the vicinity of the Consultation venue.¹³⁴ On 6 November, the Observation Mission issued a bulletin expressing its serious concerns with the lack of adequate security for community members participating in the Consultation, placing into question whether it could be considered a free and voluntary process.¹³⁵

This bulletin was quickly followed by an Observation Mission Report detailing problems in the process that had already become evident in the first week of the Consultation.¹³⁶ Among those were: (1) the lack of adequate information provided to community participants in a process that was supposed to be 'fully informed'; (2) the failure to provide Spanish-Zapotec interpretation by certified interpreters for all sessions; (3) a lack of clear decision-making mechanisms, which caused a hostile environment in many sessions as groups with conflicting interests clamoured to be taken into account; (4) demonstrated bias on the part of moderators in favour of municipal authorities, even to

¹³¹ See ProDESC, above n 129, 2.

¹³² Ibid. The other NGOs that formed part of the Observation Mission were the Project on Organizing, Development, Education, and Research ('PODER') and the Comité de Defensa Integral de Derechos Humanos Gobixha ('Codigo DH').

¹³³ Ibid.

¹³⁴ 'APPJ' is based on the Spanish acronym; See *ibid.*

¹³⁵ Ibid.

¹³⁶ See 'Reporte de la "Misión de Observación" de la primera semana de sesiones de la Consulta para la implementación de un proyecto Eólico en Juchitán, Oaxaca [Report of the 'Observation Mission' on the first week of sessions of the Consultation for the implementation of a wind-energy project in Juchitán, Oaxaca]' (ProDESC, PODER, Código DH) [author's trans].

the point of yelling at participants who raised sensitive topics; and (5) the persistence of security threats against community members who were critical of the project.¹³⁷

Despite the problems identified by the Observation Mission, the first phase of the process continued for six sessions, at which representatives of federal, state, and municipal government were present.¹³⁸ The closing session occurred on 2 December 2014, at which community members presented a number of proposals for changes to the Protocol, the guiding document for the process that had not been made available to many participants even after the Consultation began.¹³⁹ None of those proposals were ever publicly discussed or decided upon.¹⁴⁰ The first phase of the Consultation was called to a close without any formal or written agreement with representatives of the Zapotec community.¹⁴¹

The second phase of the Consultation began the following day with the Technical Committee presenting a series of topics that were to be covered at a series of seven meetings in subsequent months. These topics were: (1) System of generation and distribution of electricity in Mexico; (2) Determination of electricity rates by consumption and cost of production; (3) General presentation of the project promoted by ES; (4) Environmental impacts and mitigation methods; (5) Health impacts of the wind-energy parks; and (6) Impacts on culture and archaeological research.¹⁴² Community members were not provided any opportunity to put forward the topics that they believed were most important to ensure that their interests were taken into account.¹⁴³

As the thematic meetings proceeded, the Observation Mission became aware of new acts of aggression against participating community members.¹⁴⁴ In one instance, an APPJ member reported that, at the close of the 3 December session, after he and others had been shouted down and insulted when they expressed doubts regarding information

¹³⁷ Ibid.

¹³⁸ Ibid 3.

¹³⁹ See 'Segundo Reporte de la Misión de Observación sobre el proceso de Consulta Indígena para la implementación de un proyecto eólico en Juchitán, Oaxaca [Second Report of the Observation Mission about the Consultation Process with the Indigenous Community for the implementation of a wind-energy project in Juchitán, Oaxaca]' (ProDESC, PODER, Código DH) 2–3 [author's trans].

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid 3.

¹⁴³ Ibid 7–8.

¹⁴⁴ See ProDESC, above n 129, 3.

about the project provided by the Federal Government, an unknown car followed him as he drove several APPJ members home.¹⁴⁵ After he arrived back at his house, he noticed the car that had been following him earlier parked outside for several minutes.¹⁴⁶ The following morning, he saw two individuals on a motorcycle with their faces covered pass in front of his house three times.¹⁴⁷

Another APPJ member reported that minutes after arriving home after the 3 December session, she heard several gunshots fired outside.¹⁴⁸ She called the police, but none arrived.¹⁴⁹ All of these incidents were reported in a letter dated 4 December 2014 to Victoria Lucia Tauli-Corpuz, the United Nations Special Rapporteur for the Rights of Indigenous Peoples.¹⁵⁰

On 23 February 2014, the Observation Mission presented its Second Report on the Consultation, covering the time period from the close of the first phase through to the first three sessions of the second phase.¹⁵¹ The Report reaffirmed and expanded upon the numerous concerns that the Observation Mission raised in its First Report. In particular, the Report documented at least twenty security incidents that continued to threaten the free and voluntary nature of the process.¹⁵² Most of those incidents were directed against members of the APPJ and other representatives of the local Zapotec community.¹⁵³

These security incidents included threatening telephone calls and text messages demanding that community members cease their participation in the process; surveillance and acts of intimidation at people's homes; and verbal aggression and threats.¹⁵⁴ The most serious of these occurred on 14 November 2014, when an APPJ member was threatened by an armed assailant at the Consultation venue at the end of a

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ See Letter from ProDESC to Victoria Lucia Tauli-Corpuz, UN Special Rapporteur for the Rights of Indigenous Peoples, 4 December 2014.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ See 'Segundo Reporte de la Misión de Observación sobre el proceso de Consulta Indígena para la implementación de un proyecto eólico en Juchitán, Oaxaca' [Second Report of the Observation Mission about the Consultation Process with the Indigenous Community for the implementation of a wind-energy project in Juchitán, Oaxaca] (ProDESC, PODER, Código DH) 2-3 [author's trans].

¹⁵² Ibid 4-6.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

session.¹⁵⁵ Five criminal complaints were filed with state authorities based on these incidents.¹⁵⁶

On 18 December 2014, a representative of the federal environmental authority participating in the Consultation received a verbal threat from an unidentified individual dressed in black.¹⁵⁷ Although members of the Technical Committee promised at the time to announce the occurrence of the threat at the next Consultation session, it was never raised publicly.¹⁵⁸ At the session the following day, a person took the microphone and made a threat in the Zapotec language to a small group of people gathered in front of him.¹⁵⁹ Some participants alerted the moderator that they did not feel safe expressing their opinions in the hostile environment created by these threats.¹⁶⁰ Although moderators on a few occasions asked that those present refrain from such behaviour, this was insufficient to halt the verbal confrontation and jeering that predominated at most of the sessions.¹⁶¹

Besides the security threats, the Second Report of the Observation Mission highlighted numerous procedural flaws, including: (1) lack of transparency in providing information about the project to affected community members; (2) failure to conduct the proceedings in a way that was culturally adequate for indigenous participants; (3) a lack of clear and fair decision-making mechanisms that included real input from impacted communities; and (4) the inappropriate and undue involvement of ES itself in the process.¹⁶²

Moreover, the Observation Mission openly questioned whether the Consultation could meet the 'prior' requirement when a representative of SEMARNAT, the federal environmental agency, revealed in the first session of the Informative phase that the environmental impact assessment that ES submitted had already been approved.¹⁶³ Having federal agency sign off on key environmental requirements for the project before the Consultation even began was evidence that authorities were treating the process as

¹⁵⁵ Ibid 4–5.

¹⁵⁶ Ibid 5.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid 6.

¹⁶² Ibid 6–15.

¹⁶³ Ibid 16.

a rubber stamp on a predetermined outcome, with participation of indigenous communities providing an illusion of legitimacy. Despite these and many other failings detailed by the Observation Mission, the second phase of the Consultation was called to an end on 20 April 2015.¹⁶⁴

On 24 April, after making the determination that the process had become too compromised to continue with any assurance that international human rights standards would be respected, ProDESC attorneys filed a writ of *amparo* in the state court of Oaxaca on behalf of members of the Zapotec community of Juchitán.¹⁶⁵ The *amparo* demanded a halt to the Consultation due to the grave flaws highlighted in the two Reports of the Observation Mission. These flaws made clear that Mexican authorities failed to meet their obligation, established in international law and incorporated into the National Constitution, to consult with local Zapotec communities regarding development of a wind-turbine park on their land in a free, informed, and prior process.

VI CONCLUSION

The 2011 Human Rights Amendments to the *Mexican Constitution* were a major step forward in ensuring that the Mexican Government complies with its human rights commitments under international law, especially with respect to treatment of indigenous and agrarian communities. The secondary laws enacted under the recent Energy Reform, which purport to place the use of land for hydrocarbons exploration and energy generation above any other use of the land, cannot take precedence over human rights obligations that are incorporated into the Constitution itself as a result of the 2011 Human Rights Amendments.

ProDESC and organisations like it have had important successes working through the Mexican legal system to ensure that long-recognised communal land rights are not infringed upon without prior, informed, and free consultation and consent, as guaranteed by the Convention, the Declaration, and the Pact. Although some of these cases may ultimately make their way to international human rights tribunals, such as the Inter-American Commission for Human Rights, it is critical to first utilise the legal

¹⁶⁴ See 'Caso Comunidad Indígena Zapoteca de Juchitán, Oaxaca', above n 129, 3.

¹⁶⁵ See, eg, Pedro Matías, 'Buscan amparo contra proyectos eólicos en Oaxaca' [*Amparo* against wind-energy projects in Oaxaca is sought] *Proceso* (Mexico City), 27 April 2015; Silvia Garduño, 'Denuncian anomalías en consulta indígena' [*Anomalies in Indigenous Consultation are denounced*] *Reforma* (Mexico City), 27 April 2015.

mechanisms that are available within the national system to push for adherence to international law that protects the most marginalised and politically-powerless members of Mexican society.

The Consultation with the Indigenous communities of Juchitán in connection with ES's proposed wind-energy park was a vital test of how the Mexican Government will approach its international human rights obligations in the wake of the energy reform. Unfortunately, as the work of the Observation Mission demonstrates, the Government authorities that were responsible for this Consultation fell far short of passing. To be sure, Mexico's commitment to the human rights of its citizens appears clearly and beautifully in the words of the Federal Constitution, particularly in the 2011 Human Rights Amendments, and the various international treaties that the nation has ratified and signed. Words on the page mean little, however, if they are not carried out in practice. In working with ProDESC to challenge the Consultation through the *amparo* process, the Zapotec communities of the Isthmus are demanding that their Government make real the human rights obligations that it has committed to on paper. If they are successful, indigenous communities throughout Mexico faced with the prospect of energy reform projects on their traditional lands will be one significant step closer to achieving a meaningful say in determining their own destinies.

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