

ORIGINAL ARTICLE

On Care for Our Common Home: Ecological Materiality and Sovereignty over the Lempa Transboundary Watershed

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Abstract

For over a decade, Salvadorean grassroots movements and non-governmental organisations (NGOs) pursued legal innovations with the aim of protecting their water sources from potentially polluting industrial activities such as mining. They initially drafted bans on mining that would preclude the extractive-based development path embraced by neighbouring countries. Eventually, they scaled up their approach and devised a draft proposal for a transboundary waters treaty that addressed the challenges that the ecological materiality of international watercourses poses to national *de jure* sovereignty. In so doing, the transboundary watershed has become a useful heuristic, a spatial trope to which Salvadoreans have turned to substantiate their claims to sovereignty over the Lempa River waters that El Salvador shares with promising Guatemala and Honduras – claims imbued with an ethics of care rooted in wartime politics and Catholic morality.

Keywords: sovereignty; watershed; mining; care; politics; juridification

Introduction

On 7 February 2017, Andrés McKinley,¹ a US researcher at the Jesuit Universidad Centroamericana José Simeón Cañas (Central American University, UCA) and a vocal opponent of mining long based in El Salvador, was invited to a meeting of the Comisión de Medio Ambiente y Cambio Climático (Commission on the Environment and Climate Change, hereafter CMACC) at El Salvador's Asamblea Legislativa (Legislative Assembly) to explain why metal mining should be banned in this Central American country. As I had been invited by an anti-mining activist to attend that afternoon's commission meeting, I could follow it through a glass wall alongside journalists and political assistants. Seated around a table in a small

¹ I have kept a mixed policy regarding names. The names of those whose participation in public events can easily identify them have been maintained, whereas the names of those sharing ideas in the context of informal conversations or interviews have been anonymised.

meeting room were *diputados* (assembly members) from most of the political parties that enjoy representation in El Salvador's Asamblea Legislativa, along with McKinley himself. Through a one-hour presentation supported by images and scientific data from cases both within and beyond El Salvador, McKinley outlined to commission members the two primary arguments for a ban on mining – namely that mining had been and would continue to be a major source of conflict within the country, and that it would negatively affect El Salvador's already scant water resources. 'In our country, there aren't remote locations. There isn't the possibility of finding an adequate location for a mine in El Salvador without having an impact on the community. Or without damaging the environment', McKinley explained.²

In addition to making it clear to commission members why El Salvador is not an appropriate place for mining ventures, McKinley highlighted that the country's embrace of a de facto moratorium while pro-mining legislation remained in place amounted to an illegality: 'There's a de facto moratorium in El Salvador. But we need to be clear: in a way, we're violating our own mining legislation with this moratorium, because the mining law stipulates that the government should promote the mining industry through the Directorate of Mines and Hydrocarbons of the Ministry of Economy [...] We need to expedite this ban.'³

After McKinley had finished his presentation, Guillermo Mata, the commission president and a member of the guerrilla organisation turned political party Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí National Liberation Front, FMLN), opened up a discussion. The first one to speak among the commission members was Johnny Wright Sol, a young Alianza Republicana Nacionalista (Nationalist Republican Alliance, ARENA) politician from a wealthy family of sugar cane planters – traditionally a deeply conservative sector in El Salvador. One of his queries pertained to the mining projects in the neighbouring Central American countries that McKinley had said would have an impact on El Salvador; he asked what regional institutions should address the issue. McKinley's response to Wright Sol's question was categorical:

This problem is a regional one; it needs to be addressed as a regional problem. But the challenge for El Salvador is that we cannot make demands of other countries if we're not managing the problem at home. In other words, once we have passed a law that bans mining in El Salvador, we will have the moral legitimacy to demand that of others. And it is very problematic [...] The other countries do not have the same level of interest in regulating regional waters. El Salvador is the victim in all of this. All those contaminated rivers end up here [...] So we need to arrange things in our own home and then we will be able to demand the same regionally.⁴

Two interrelated issues emerged at this committee meeting that I seek to explore in this article. The first is the emphasis that various anti-mining sectors of Salvadorean society have placed on the jural over the years, all the way through to the mining

²Andrés McKinley, researcher at UCA José Simeón Cañas, speaking at the CMACC meeting at El Salvador's Asamblea Legislativa, San Salvador, 7 Feb. 2017.

³*Ibid.*

⁴*Ibid.*

ban passed on 29 March 2017. The judicialisation of politics, described by scholars as a feature of the Latin American region,⁵ is particularly prominent in the context of the mining disputes playing out in Central America. Judicialisation, these scholars explain, may take the form of judicial review or strategic litigation, as has occurred in Guatemala and to a lesser extent Honduras and Nicaragua with regard to mining ventures. Yet it can also manifest as an increased recourse to legal or quasi-legal languages and instruments by actors other than law professionals, or the influence of these languages and instruments in ever more social domains.⁶ Indeed, the process might be better defined as ‘juridification’ – as in the action or process of legally framing socio-political demands – in order to convey the relevance of law not only within but also beyond the courts. In their mobilisation against mining, Salvadoreans have made several attempts at transforming and drafting pieces of legislation since 2006. Over the years, the Mesa Nacional frente a la Minería Metálica (National Roundtable against Metal Mining, henceforth Mesa Nacional), for over a decade the country’s main coalition of organisations opposing mining, drafted ban proposals and lobbied in the Asamblea Legislativa in hopes of seeing these drafts discussed and the *de facto* moratorium transformed into a *de jure* ban.

The second issue that emerged at the meeting was a growing concern among opponents of mining that El Salvador, being a downstream riparian – meaning that it receives water flows from Guatemala and Honduras – will inevitably be affected by mining and other industrial activities in these neighbouring countries. This concern has led some activists to extend the reach of their legal mobilisation beyond El Salvador and draft a proposal for a transboundary waters treaty that would address the governance of shared watersheds. Given the lack of drinkable water in El Salvador, they are particularly concerned about the Lempa watershed – Salvadoreans’ main source of water supply for both domestic and industrial consumption. Although drafted by Salvadoreans, the treaty proposal has been discussed with populations and organisations across the border who share a concern about the impacts of their governments’ unscrupulous exploitation of natural resources. The drafting of this treaty and subsequent lobbying to promote it have remained priorities for some Mesa Nacional members but, as McKinley explained at the commission meeting, in early 2017 the transboundary issue had been sidelined in favour of a national ban on metal mining. Negotiations with Guatemala and Honduras, while not ceasing, were regarded as futile without first banning mining in El Salvador.

In the face of these two parallel law-making processes that have taken shape in El Salvador, I ask in this article how *de jure* sovereignty is being conceived and remapped through Salvadoreans’ juridification efforts. The question of who wields the political authority to make decisions regarding the use of certain territories and

⁵See, for instance, Rachel Sieder, Line Schjolden and Alan Angell (eds.), *The Judicialization of Politics in Latin America* (New York and Basingstoke: Palgrave Macmillan, 2005); Javier A. Couso, Alexandra Huneeus and Rachel Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge and New York: Cambridge University Press, 2010).

⁶See Rachel Sieder, ‘Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala’, in Couso, Huneeus and Sieder (eds.), *Cultures of Legality*, pp. 161–81; Sandra Brunnegger, ‘The Craft of Justice-Making through the Permanent Peoples’ Tribunal in Colombia’, in Sandra Brunnegger and Karen Ann Faulk (eds.), *A Sense of Justice: Legal Knowledge and Lived Experience in Latin America* (Stanford, CA: Stanford University Press, 2016), pp. 123–46.

the resources embedded therein is hotly contested in Central America and other parts of Latin America, especially as mining projects, hydroelectric dams and agribusinesses expand and the anthropogenic exhaustion and pollution of water flows increase apace. While these extractivist agendas at the expense of the environment originated in the Spanish colonial era, they have intensified and taken on new dimensions in recent decades. I explore here how the question of political authority is being addressed by Salvadoreans who have mobilised against mining, largely due to concerns over El Salvador's water shortages, and who have taken innovative legal initiatives in the process. I focus on the two juridification processes described above, both of which have emerged in El Salvador during the last decade and a half. These processes, I suggest, have increasingly crystallised into an understanding of the environment as a *common home* – an understanding informed both by El Salvador's history of collective organising in a great portion of the northern part of the country and by Catholic morality, especially as the country's religious sector became increasingly involved in the mobilisation against mining.

Yet, as demonstrated by the concerns over mining across El Salvador's borders, the envisioning of a *common home* is also underpinned by the premise that the environment sees no borders and therefore any juridical instrument that seeks to regulate it needs to transcend an approach to governance premised on local or national sovereignty; such a juridical instrument instead needs to aim for international co-responsibility. The challenge, however, is to delineate what is 'common' when the governments of Guatemala and Honduras have promoted extractive industries and violently quelled local opposition to them.⁷ The arguments put forth in this article draw from ethnographic research at meetings and from interviews conducted during annual one-month field trips to El Salvador between 2014 and 2018 and to Guatemala and Honduras in 2015 and 2017.

El Salvador's Water Problem

Several Mesa Nacional interviewees described the Lempa River to me as 'El Salvador's aortic artery' – a telling metaphor that evokes its centrality for Salvadoreans. The largest and most abundant of El Salvador's rivers, it is born in Guatemala and flows into north-western El Salvador and a stretch of the Honduran southern border before crossing back into El Salvador, where it bathes the north- and south-central regions until it discharges into the Pacific (see [Figure 1](#)). While El Salvador has nine other river basins, the Lempa and the country's two other international watercourses – Paz and Goascorán – cover 62 per cent of the country's territory and contain 34 per cent of its freshwater.⁸ Salvadoreans are hydrologically dependent on the Lempa basin or watershed; agriculture, industrial activities and domestic consumption rely on the Lempa's and its tributaries'

⁷Mariel Aguilar-Støen and Benedicte Bull, 'Protestas contra la minería en Guatemala. ¿Qué papel juegan las élites en los conflictos?', *Anuario de Estudios Centroamericanos*, 42 (Dec. 2016), pp. 15–44; Nick Middeldorp, Carlos Morales and Gemma van der Haar, 'Social Mobilisation and Violence at the Mining Frontier: The Case of Honduras', *The Extractive Industries and Society*, 3: 4 (2016), pp. 930–8.

⁸Meg Patterson and Alexander López, 'El Salvador', in Flavia Rocha Loures and Alistair Rieu-Clarke (eds.), *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* (Abingdon: Routledge, 2013), p. 197.

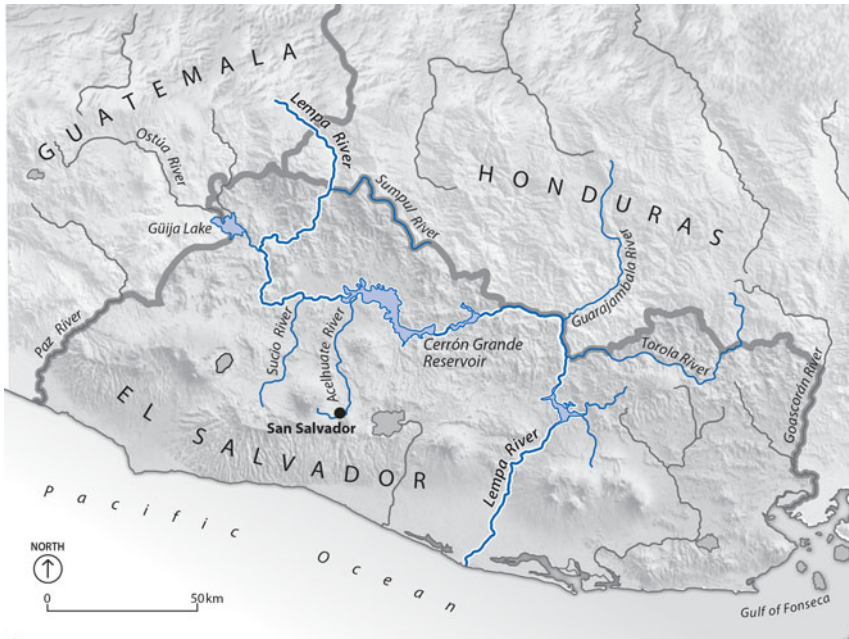


Figure 1. The Lempa River, Central America

Source: Lester Jones.

waters and the basin is home to 48 per cent of the country's population if we consider its broad ecosystem.⁹ Extraction for industrial activities and pollution of both groundwater and surface supplies, especially from watersheds like the Lempa, as well as uneven population distribution have increasingly rendered some of El Salvador's regions water-stressed.¹⁰ These are regions that barely meet their populations' demand for freshwater due to a basic lack, poor quality or both – a problem that El Salvador's neighbours do not experience to the same extent. Yet certain regions in Guatemala and Honduras also suffer from water scarcity and pollution, compounded most saliently by the heterogeneous distribution of the rainfall, both temporally and spatially, that is the main source of their rivers' recharge.¹¹

As a vital but finite resource, water in El Salvador is not just a *natural object* but also an important *public symbol* in Salvadoreans' everyday lives.¹² As I have experienced myself over 19 years of research in the country's rural areas, water has an important presence in El Salvador even when its physical supply is lacking. Water scarcity is the grim experience of many rural Salvadorean populations

⁹*Ibid.*

¹⁰Comisión Económica para América Latina y el Caribe (CEPAL), *La economía del cambio climático en Centroamérica* (Mexico City: CEPAL, 2011), p. 94.

¹¹*Ibid.*, p. 98.

¹²Hugo De Burgos, 'La Pila de San Juan: Historic Transformations of Water as a Public Symbol in Suchitoto, El Salvador', in John R. Wagner (ed.), *The Social Life of Water* (New York: Berghahn, 2013), pp. 98–118.

who do not enjoy daily running water, let alone those who reside in areas without any water system whatsoever and have to fetch water from springs, wells, public dispensers or even pools of untreated rainwater. In 2015, less than 60 per cent of Salvadorean rural households were connected to a water distribution system.¹³ Indeed, after Nicaragua, El Salvador is the Central American country with the lowest water services coverage in rural areas.¹⁴ The seasonality of the rainfalls that replenish the country's aquifers and rivers only exacerbates its declining water supply.¹⁵ For example, in Honduras-neighbouring Santa Marta – a rural area of Victoria, in northern Cabañas, repopulated before the end of the civil war (1980–92) and whose residents have themselves procured utilities and infrastructures non-existent in other rural areas with less proactive populations – water is typically supplied every 15 days during the rainy season and every 22 during the dry season. Filling water tanks and containers is thus crucial. Yet the water supply is not always predictable, driving many in rural areas throughout the country to leave their taps on so as not to miss the water when it unexpectedly reaches their homes. Nor is the quality of home-supplied water necessarily guaranteed or its consumption advisable. The Acelhuate River that supplies water to San Salvador and is a Lempa tributary has such a high concentration of heavy metals and waste that it has been deemed a biohazard and requires more than standard treatment to make it consumption-ready. Moreover, various rivers and streams throughout the country are highly polluted with pesticides.¹⁶ Indeed, chronic kidney disease is prevalent among the populations of the Lower Lempa that make a living from agriculture.¹⁷

Lack of available water, or low-quality water, is a problem in El Salvador regardless of whether water distribution is publicly or privately administered.¹⁸ Yet, despite the inefficiencies of El Salvador's state-run company Administración Nacional de Acueductos y Alcantarillados (National Administration of Aqueducts and Sewers, ANDA), which manages a great deal of the country's water distribution, there have been notable attempts at legal innovation to preserve public management and protect the country's water sources. Water being for Salvadoreans an important public symbol of social prosperity,¹⁹ as well as dispossession attempts

¹³United Nations Commission on Human Rights (UNCHR), Report by the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on His Mission to El Salvador, UN Doc. A/HRC/33/49/Add.1, 3 Aug. 2016, para. 40.

¹⁴CEPAL, *La economía del cambio climático en Centroamérica*, p. 100.

¹⁵Maureen Ballester, Virginia Reyes and Yamileth Astorga, 'Groundwater in Central America: Its Importance, Development and Use, with Particular Reference to Its Role in Irrigated Agriculture', in Mark Giordano and Karen G. Villholth (eds.), *The Agricultural Groundwater Revolution: Opportunities and Threats to Development* (Wallingford and Cambridge, MA: CABI, 2007), p. 101.

¹⁶James O. Buckalew, *Water Resources Assessment of El Salvador* (Mobile, AL: US Army Corps of Engineers, 1998), p. 11; Ballester, Reyes and Astorga, 'Groundwater in Central America', pp. 108, 110.

¹⁷Alexandre Ribó, Edgard Quinteros, Roberto Mejía, Reyna Jovel and Dina López, 'Contaminación de arsénico en suelos, sedimentos y agua en la región del Bajo Lempa, El Salvador', in *Libro de Resumen: VII Congreso de la Red Latinoamericana de Ciencias Ambientales* (San Carlos: Universidad Nacional de Costa Rica, 2013), pp. 566–75.

¹⁸See Ainhoa Montoya, *The Violence of Democracy: Political Life in Postwar El Salvador* (New York: Palgrave Macmillan, 2018), pp. 206–8.

¹⁹De Burgos, 'La Pila de San Juan'.

by elites, Salvadoreans have for well over a decade demanded constitutional recognition of the human right to water and a water law that would address the current fragmentation of water policy while curbing elites' attempts to commoditise it.²⁰ These demands are underpinned by a view of water as a *common good* rather than a *resource* – a distinction Salvadorean grassroots movements and NGOs have consistently made in recent years as a means to foreground social over economic valuation. Parallel to these efforts, and as part of the same attempts to protect water, Salvadoreans became involved in more than a decade of political-legal struggle to address the impactful activity of mining through a national ban.

Yet Salvadoreans' concerns about the pollution and exhaustion of their country's water sources span national boundaries. The Lempa watershed is transnationally shared, with Guatemala and Honduras controlling its upstream stretches and El Salvador being its downstream riverine. Both neighbouring countries aspire to pursue the 'extractive imperative' that has characterised the Latin American region for the past couple of decades, i.e. a development model, currently state-led but with roots in colonial extractive processes, which is based on the intensive, export-oriented exploitation of nature and natural resources, and which shapes regulation, policy and expectations.²¹ Yet, in stark contrast to left-led South American countries which have embraced extraction-centred development paths, Central American countries garner only a negligible portion of their gross domestic product (GDP) from extractive industries. Moreover, the conservative governments of Guatemala and Honduras have not sought to reverse poverty or inequality, but have instead enriched transnational companies as well as local oligarchs and elites at the expense of peasant and Indigenous populations that disproportionately bear the brunt of extractivism's socio-environmental liabilities. The Central American region, with the exception of El Salvador, has thus emerged as a divergent instance of the 'extractive imperative' – opening up to the extraction of value from nature at any cost, yet without devoting the resulting revenues to the pursuit of socio-economic redistribution.²² This is a key reason why some of the fiercest opposition to extraction is occurring in Central America.

Ecological Challenges to National Sovereignty

The material aspect of a watershed shared across borders, as stated by McKinley at the CMACC meeting at El Salvador's Asamblea Legislativa on 7 February 2017, victimises El Salvador, the most vulnerable country of the region since it suffers from volumetric changes in water flow and pollution resulting from industrial activity and waste disposal in the Upper Lempa stretches, over which it has no control.

²⁰El Salvador lacks a law that regulates the use of water resources, and related competencies are currently distributed among more than 20 institutions and regulatory bodies. UNCHR, Report by the Special Rapporteur, para. 25.

²¹See Murat Arsel, Barbara Hogenboom and Lorenzo Pellegrini, 'The Extractive Imperative and the Boom in Environmental Conflicts at the End of the Progressive Cycle in Latin America', *The Extractive Industries and Society*, 3: 4 (2016), pp. 877–9; 'The Extractive Imperative in Latin America', in *ibid.*, pp. 880–7.

²²Centro de Estudios de Guatemala (CEG) and Oxfam Guatemala, *La minería metálica en Centroamérica: Una valoración sobre impactos, transparencia y fiscalidad* (Guatemala City: Magna Terra Editores, 2017).

Moreover, unless the watershed management is shared, these circumstances can dramatically worsen for El Salvador given the impacts of climate change and the lower number of surface and groundwater sources on the Pacific side of Central America, where El Salvador is located, than on the Caribbean side.²³ It thus becomes evident how the materiality of nature defies national *de jure* sovereignty. Being downstream in shared watersheds like the Lempa that are crucial for its water supply, El Salvador is not fully sovereign when it comes to the effective regulation of its waters. The transboundary watershed thus becomes a spatial trope that both reveals and reflects the *de facto* contingency and incompleteness of national sovereignty. Given the 263 transboundary watersheds in existence globally, a similar absence of complete, unconditional sovereign rule, anchored in the same spatial trope of the shared watershed, is actually fairly typical.²⁴

El Salvador is itself unable to sovereignly manage the quality and volumetric changes of the stretch of the Lempa watershed located in Salvadorean territory, over which Guatemala's and Honduras' authority effectively extends. As highlighted by various research participants, Guatemala's governments have stated categorically their unwillingness to suspend their use of the watershed or to negotiate it. Guatemalan public officials have even gone so far as to insist that El Salvador would have to remunerate Guatemala for any increase in volumetric flow. Marcos, a leader of the research-focused NGO Centro de Investigación sobre Inversión y Comercio (Centre for Research into Investment and Trade, CEICOM) and Mesa Nacional member, explained in a 2015 interview:

Their real position is underpinned by the concept of sovereignty over water. [...] within that approach they conceive a treaty is possible as long as we [Salvadoreans], to put it bluntly, pay to obtain water from Guatemala. [...] what they call payment for environmental services, that is, that we contribute financially to building things. [...] In other words, they can think of a treaty as long as we acknowledge they're sovereign over the waters.²⁵

As he would go on to explain, this is all the more worrying for Salvadoreans given that Guatemala, like El Salvador, lacks legislation that specifically regulates water.

Prevalent in the work of scholars across a variety of disciplines has been a notion of *de jure* sovereignty tied to state territoriality.²⁶ This notion of *de jure* sovereignty is founded on the myth of the investment of absolute and indivisible authority within the bounded national territory of the state. Inherent to this myth are associated imageries of national borders and a finite and coherent body politic, as a

²³CEPAL, *La economía del cambio climático en Centroamérica*, pp. 97–8.

²⁴This is the case, for instance, of the Colorado Basin shared by the United States and Mexico. See Nina Lakhani, 'The Lost River: Mexicans Fight for Mighty Waterway Taken by the US', *The Guardian*, 21 Oct. 2019.

²⁵Author interview with Marcos, CEICOM leader, San Salvador, 10 Feb. 2017.

²⁶Arjun Appadurai, 'Sovereignty without Territoriality: Notes for a Postnational Geography', in Patricia Yaeger (ed.), *The Geography of Identity* (Ann Arbor, MI: University of Michigan Press, 1996), pp. 40–58; John Agnew, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics', *Annals of the Association of American Geographers*, 95: 29 (2005), pp. 437–61; *Globalization and Sovereignty* (Lanham, MD: Rowman and Littlefield, 2009).

territorialised form of political community. Within the seventeenth-century Westphalian order in which this myth is rooted, states are considered equal others with equivalent sovereign authority over their own territorialised political communities. In this vein, 'As a naturalized abstract individual, the state has acquired a personhood that then underwrites its special status as the locus of sovereignty.'²⁷ Yet studies of *de facto* or informal sovereignties have suggested otherwise. Foucauldian analyses have highlighted the diffuse nature of power, while transnational corporations, NGOs and criminal others who exercise *de facto* political authority have displaced the locus of *de jure* sovereignty and even denied its tenability altogether.²⁸ Transboundary basins, and non-living entities like the water flows that bathe co-riparian nation-states, likewise constitute an important challenge to the notion of *de jure* national sovereignty by exposing the myths upon which it rests. If borders and the body politic are not the definite objects that the notion implies, then national *de jure* sovereignty is necessarily incomplete or, alternatively, can overspill the boundaries of nation-states.

Yet the incompleteness of sovereignty does not render any less relevant the question of where political authority over a given territory, whether defined by the nation-state or not, and the administration of the natural resources deposited in it, resides. Existing international legislation on this matter attests to the challenges that exist, especially as both national borders and the body politic have an important political presence and effects despite their mythical nature. Previous disparate efforts of codification of international water uses notwithstanding, to date the main global legal instrument on this matter is the Convention on the Law of Non-Navigational Uses of International Watercourses, a treaty adopted by the General Assembly of the United Nations in 1997 – though it did not come into force until 2014²⁹ – whose objective is to regulate the governance of transboundary watercourses and the geopolitical challenges thereof. This agreement does not de-territorialise *de jure* sovereignty but instead proposes cooperation among nation-states that share watercourses, whether surface supplies or groundwater. Its existence and delayed ratification are the best evidence that disputes over international watercourses are widespread and rather spinous, often resolved through agreements benefiting the more influential nations,³⁰ or through legal settlements,³¹ rather than cooperation.

²⁷ Agnew, 'Sovereignty Regimes', p. 440.

²⁸ Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited', *Annual Review of Anthropology*, 35 (Sept. 2006), pp. 295–315; Caroline Humphrey, 'Sovereignty', in David Nugent and Joan Vincent (eds.), *A Companion to the Anthropology of Politics* (Malden, MA: Blackwell, 2007), pp. 418–37.

²⁹ Currently ratified by 37 member-states, it did not reach the 35th ratification, the minimum needed for a UN treaty to enter into force, until 2014. See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&clang=_en, last access 22 Jan. 2021.

³⁰ For instance, Mexico made compromises in reaching the 1944 Water Treaty with the United States to regulate water use in the Lower Colorado River. Kirsten J. Anderson, 'A History and Interpretation of the Water Treaty of 1944', *Natural Resources Journal*, 12: 4 (1972), pp. 600–14.

³¹ An instance of this is the ruling on the dispute between Argentina and Uruguay over the uses of the shared waters of the River Uruguay. Owen McIntyre, 'The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay', *Water Alternatives*, 4: 2 (2011), pp. 124–44.

Neither El Salvador nor its neighbours have signed or ratified the UN Watercourses Convention. They have nonetheless become increasingly concerned about the shared ecological challenges they face as a region. Plan Trifinio is the main outcome of their appreciation of these challenges. Touted as an exemplary case of regional integration, it was conceived as a means of coordinating the management of the biodiversity of the 7,500 km² territory spanning the border zones of El Salvador, Guatemala and Honduras.³² It took shape in the late 1980s, when peace negotiations to resolve civil conflicts were still underway in the region, as a path towards enhanced integration. Its final document stressed the three countries' shared interest in creating a tripartite body through which to co-manage their transboundary ecosystem and natural resources. Yet its scope has been limited to the Upper Lempa area and its scant efforts and funds funnelled towards soil and forest conservation. Although these indirectly include components of water preservation, Plan Trifinio subscribers have not devised a shared water management policy.

The proposed treaty is also seen as a means of forestalling a potential future conflict over water among neighbours, especially given the region's history of disputes over borderlands. The best example of such disputes is the 1969 Soccer War, also known as the 100-Hour War, between El Salvador and Honduras. In a conjuncture characterised by increased pressure over land that had built up in both countries since the early twentieth century, in 1969 Honduras expelled 100,000 Salvadoreans who had, over a number of decades, settled across the border.³³ El Salvador in turn disputed the heretofore undefined borders and invaded some Honduras borderlands. The name by which the war is known has its origins in the concurrent soccer competition for a place in a world championship that riveted the two countries and exacerbated nationalist sentiments and identities that were in turn productive to legitimise the conflict over land. While only four days long, the war resulted in several thousand casualties, the addition of 100,000 Salvadorean landless returnees to San Salvador's impoverished population, and the dissolution of the Central American Common Market. Controversies over borders between the two countries outlasted this war and have continued for decades.³⁴

Crucially, as acknowledged by a Guatemalan public official in an interview in February 2017, when it comes to water offprint – the volume of water required for industrial activity – or waste disposal in transboundary basins, both Guatemalan and Honduran officials invoke their *de jure* sovereignty within the

³²Raúl Artiga, *The Case of the Trifinio Plan in the Upper Lempa: Opportunities and Challenges for the Shared Management of Central American Transnational Basins* (New York and Paris: UNESCO, 2003), available at <http://unesdoc.unesco.org/images/0013/001333/133304e.pdf>, last access 22 Jan. 2021; Filippo Celata, Raffaella Coletti and Venere Stefania Sanna, 'La cooperación transfronteriza en la región del Trifinio y la difusión de modelos europeos de gobernanza de las fronteras en América Latina', *Si Somos Americanos: Revista de Estudios Transfronterizos*, 13: 2 (2013), p. 167.

³³Victor Bulmer-Thomas, 'Honduras since 1930', in Leslie Bethell (ed.), *The Cambridge History of Latin America*, vol. 7: *Latin America since 1930: Mexico, Central America and the Caribbean* (Cambridge and New York: Cambridge University Press, 1990), pp. 306–7; James Dunkerley, 'El Salvador since 1930', in *ibid.*, p. 266; Carlos Gregorio López Bernal, 'La guerra con Honduras: Del nacionalismo a la irracionalidad', *El Faro*, 17 July 2019.

³⁴Patterson and López, 'El Salvador', pp. 198–9.

territory of their nation and have adopted protectionist strategies that undermine the integrative ethos of Plan Trifinio. The spatial trope of the watershed works here as a heuristic that materially exhibits El Salvador's deficit of de facto sovereignty. As I will explain later, members of Mesa Nacional have thus claimed that these countries effectively exert their sovereignty at the expense of El Salvador's – hence the efforts of some of these members to draft a transboundary waters treaty proposal that remaps the locus of *de jure* sovereignty altogether. The sections that follow describe how the juridical efforts to ban mining in El Salvador and promote shared management of the Lempa transboundary watershed are both aimed at establishing a different balance of sovereignty, one informed by the politics and ethics of care with which Salvadoreans have infused the imageries of the *common home* and *common good*.

At the Asamblea Legislativa

The opposition to mining originated in the northern departments of Cabañas and Chalatenango, where deposits of minerals sit underneath communities historically aligned with the FMLN and with trajectories of political activity and collective organisation. In 2005 the Mesa Nacional coalition was born as local NGOs from these regions joined efforts with national NGOs.³⁵ Local populations from El Salvador's northern regions have taken part in the Mesa Nacional through organisations like the Asociación de Desarrollo Económico Social (Association for Economic and Social Development, ADES) and the Asociación para el Desarrollo de El Salvador (Association for the Development of El Salvador, CRIPDES), both founded by war refugees who repopulated areas of Cabañas and Chalatenango respectively in the late 1980s. It is significant that, in addition to being the location of El Salvador's would-be mines, these northern departments are, along with Morazán, where the majority of counter-insurgent actions and armed combat between the army and the guerrillas occurred during the 1970s and 1980s. Through wartime experiences of political organising in parts of these regions or in the refugee camps in Honduras to which large numbers of residents fled, many Salvadoreans – as in much of Latin America³⁶ – developed a sense of solidarity and collective values as well as participatory political forms, underpinned by liberation theology and an insurgent individuality. El Salvador's anti-mining struggle is an example of how they have carried these values and experiences into post-war political activity.

While conducting fieldwork in El Salvador in February 2017 on the role that the jural is playing in controversies over how minerals should be governed, I visited the Asamblea Legislativa the most. On 17 January, after a few years during which any discussions on mining legislation by El Salvador's government had been sidelined by a million-dollar arbitration dispute by the Pacific Rim corporation against the

³⁵On the formation and political struggles of Mesa Nacional, see Rose J. Spalding, 'After CAFTA: Anti-Mining Movements, Investment Disputes, and New Organizational Territory', in *Contesting Trade in Central America: Market Reform and Resistance* (Austin, TX: University of Texas Press, 2014), pp. 158–87.

³⁶Greg Grandin, *The Last Colonial Massacre: Latin America in the Cold War* (London and Chicago, IL: University of Chicago Press, 2004).

Salvadorean state,³⁷ members of the Mesa Nacional arrived at the Asamblea Legislativa to submit a request that El Salvador's CMACC resume discussions on the mining ban. The International Centre for Settlement of Investment Disputes (ICSID) award, published on 14 October 2016, had dismissed the lawsuit by Pacific Rim,³⁸ thereby putting an end to the seven-year arbitration dispute and opening a window of opportunity to discuss anew how minerals should be governed in El Salvador. In the months following, Mesa Nacional members observed renewed investment and lobbying activities on the part of OceanaGold, the Australian corporation that had acquired Pacific Rim in 2013. In the face of these apparent attempts to resume operations in the country, Mesa Nacional members recommenced lobbying and public actions themselves. However, the 17 January initiative did not progress because the right-wing faction of the Asamblea Legislativa refused to discuss it.

This was not the first attempt by Mesa Nacional members to demand a law banning metal mining in El Salvador. Mesa Nacional had been involved in law-making ever since it began its anti-mining campaign.³⁹ Although popular legislative initiatives are not legally recognised in El Salvador,⁴⁰ Salvadorean citizens drafted their own legislation proposals and requested that they be submitted by *diputados* for discussion at the Asamblea Legislativa. In a country where a political party like the FMLN – with origins in broad-based popular mobilisation – has been able to secure legislative majorities, social movements have seen law-making rather than law-enforcement juridification as a more viable route to pursue social transformation. In 2006, after the Asamblea Legislativa Comisión de Economía (Economy Commission) had issued a recommendation that no mining licences be issued until the country's mining juridical framework had been reviewed, Mesa Nacional members submitted their first legislation proposal, a 72-section prohibition of metal mining in all its forms and regulation of non-metal mining. This piece of legislation was handed over to *diputados* but never discussed by the Asamblea Legislativa.

³⁷The dispute consisted of a lawsuit filed by the Canadian corporation Pacific Rim before the ICSID, a World Bank institution that arbitrates disputes between private investors and the governments of host countries. For further details about the development and ramifications of this dispute, see Robin Broad, 'Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador', *University of Pennsylvania Journal of International Law*, 36: 4 (2015), pp. 851–74.

³⁸Rather than weighing on social and environmental factors that were a concern for the Salvadorean government and the populations opposing mining, the ICSID dismissed the company's claim on the grounds that it had not met all the legal requirements necessary to obtain an exploitation licence. See Ainhoa Montoya, Rachel Sieder, Yacotzin Bravo Espinosa, Rupert Knox and María C. Pauchulo, '2006–2016 Pacific Rim International Investment Arbitration against El Salvador', *The Legal Cultures of the Subsoil Database*, available at <https://ilas.sas.ac.uk/research-projects/legal-cultures-subsoil/pacific-rim-international-investment-arbitration-against-el>, last access 22 Feb. 2021.

³⁹For a more detailed account of this process, see Rose J. Spalding, 'From the Streets to the Chamber: Social Movements and the Mining Ban in El Salvador', *European Review of Latin American and Caribbean Studies*, 106 (July–Dec. 2018), pp. 47–74.

⁴⁰See 'La iniciativa legislativa popular en América Latina', *Convergencia: Revista de Ciencias Sociales*, 52 (Jan.–April 2010), pp. 155–86.

Before 2013 the conservative Partido de Conciliación Nacional (National Conciliation Party, PCN) and the FMLN had made their own attempts at reforming the existing mining law – once and twice respectively – only to encounter opposition from other parties and from opponents of mining who were adamant in their pursuit of a mining ban. At this point Mesa Nacional members drafted a new legislation proposal, a five-section law focused strictly on the banning of metal mining that they argued should be accorded a special legal status (*ley especial*, or ‘special law’) to ensure it would supersede any law with which it might clash. In 2015, anticipating a negative ruling in the arbitration dispute before the ICSID, Mesa Nacional members reconsidered their strategy, requesting that the FMLN government at least pass an executive decree that would remain in effect until a different aggregation of forces at the Asamblea Legislativa demonstrated a willingness to discuss a ban. At the time, with the vote share well dispersed across the political spectrum in legislative elections, the composition of the Asamblea Legislativa did not allow for easy majorities. Nor was the FMLN government willing to take any steps while the ICSID lawsuit was ongoing. The executive decree was requested once again, without success, in the aftermath of the granting of the ICSID award.

While the political actions by Mesa Nacional members in tandem with law-making efforts explain why a ban was finally passed on 29 March 2017, many of the Salvadoreans with whom I did research cited the active public involvement of the San Salvador archbishop as a decisive factor in the decade-long campaign for a mining ban. On 6 February 2017, the archbishop, along with other prominent religious officials and organisations, visited the Asamblea Legislativa with a legislation proposal to ban metal mining exploration and exploitation – small-scale as well as industrial – permanently. Carlos, a member of the Catholic Church NGO *Cáritas* whom I had interviewed, insisted that I not miss the event. When I arrived at the courtyard that flanks the Asamblea Legislativa, the press conference had just commenced. As the archbishop read aloud a statement announcing the univocal support of El Salvador’s religious sector for a mining ban, a mass of journalists gathered round to record and broadcast his statement and ask questions. Also present were the UCA vice-chancellor, the director of the UCA Instituto de Derechos Humanos (Institute of Human Rights, IDHUCA) and other UCA members; Franciscan monks, nuns and laypeople; members of the NGOs *Tutela Legal María Julia Hernández* (María Julia Hernández Legal Protection), *Cáritas* and Catholic Relief Services El Salvador; and residents of El Salvador’s northern municipalities where would-be mines were located. The courtyard, usually deserted, was crowded with people and the event received wide media coverage – evidence of the importance publicly accorded to it.

When the archbishop had finished answering questions from the press, the crowd headed towards the building entrance. In the vestibule, photojournalists and camera crews jockeyed for the most favourable positions from which to record the arrival of the archbishop, who distributed copies of the legislation draft to the *diputados* who were present. FMLN *diputado* Mata was the first one to arrive and the only one to speak plainly in favour of the proposed legislation and to pledge to support it. Noting that the FMLN had for some time considered calling for a ban on mining, he announced that the party had come to the conclusion that now was

the right time to do so. After Mata's declarations, the archbishop again addressed the press, explaining that mining was a great risk for the country and that El Salvador should be regarded as a *common good* that needed to be cared for. He implored the Asamblea Legislativa to address the mining ban with the sense of urgency it deserved and to avoid discussing it in a partisan way. When he finished speaking, some members of the crowd broke into impassioned cries of Mesa Nacional's motto: '*¡No a la minería, sí a la vida!*' ('No to mining, yes to life!').

Carlos, the Cáritas member who had urged me to attend the event, seemed thrilled as we observed the archbishop hand out copies of the drafted legislation. 'This is a historic moment', he turned to tell me. 'What do you mean?' I asked. 'A San Salvador archbishop setting foot in the Asamblea Legislativa with a political request has never occurred before. The Catholic Church had already taken a stand against mining but without actively supporting a ban. An archbishop coming to the Asamblea Legislativa to submit a legislation proposal is a historic event', he reiterated.⁴¹ One that, to many, conjured up memories of the political interventions of liberation theology-minded Salvadorean priests, among them San Salvador's Archbishop Romero, in the 1970s and 1980s. The mining ban submitted by the archbishop had been drafted by UCA members with input from the Colectivo Socioambiental Cuidemos la Casa de Todos (Let Us Care for Everyone's Home Socio-Environmental Collective) – an informal alliance of mostly religious organisations (some of which were also Mesa Nacional members) which, since its inception in 2014, had focused on lobbying and pedagogical endeavours within religious sectors. The archbishop's resolute support of the ban and appearance at the Asamblea Legislativa were partly by-products of these endeavours.

In a country where, notwithstanding the mushrooming of evangelical churches, the Catholic Church still enjoys enormous influence, the arrival of Archbishop Escobar Alas at the Asamblea Legislativa was a very powerful symbol.⁴² As in decades past, the country's highest religious authority was now siding with the people. Although the archbishop is known for his conservative views, his eventual involvement in the efforts towards a mining ban were not surprising, according to members of the collective. As José explained to me:

With Pope Francis, to speak about mining, to denounce, to speak about damage to the environment and other issues is no longer taboo. Because when a priest says, 'Look, if I say this to a mayor or a judge, I'm going to get myself into trouble', then one can tell him, 'But the Pope is saying it'. If the highest

⁴¹ Author conversation with Carlos, Cáritas member, San Salvador, 6 Feb. 2017.

⁴² Despite the notable increase of evangelical religiosity throughout Latin America since the end of the twentieth century, Catholicism remains the dominant religious affiliation in El Salvador, with 43.1 per cent of the population identifying as Catholic versus 38.5 per cent as evangelical. Moreover, the country's Catholic Church and evangelical churches are its most trusted institutions. Patricia B. Christian, Michael Gent and Timothy H. Wadkins, 'Protestant Growth and Change in El Salvador: Two Decades of Survey Evidence', *Latin American Research Review*, 50: 1 (2015), p. 140; Instituto Universitario de Opinión Pública (IUDOP), *Encuesta de evaluación del año 2016 y sobre los Acuerdos de Paz: Consulta de opinión pública de noviembre–diciembre 2016* (San Salvador: UCA, 2017), p. 146, available at www.uca.edu.sv/iudop/wp-content/uploads/INFORME-141.pdf, last access 22 Jan. 2021.

Catholic authority is saying it, why can't a priest empower himself and start speaking about these issues to the people at his church?⁴³

The influence of Pope Francis through his 2015 *Laudato Si': On Care for Our Common Home* encyclical has been considerable within and to some extent beyond the religious sectors of El Salvador. The moral view underpinning the encyclical easily permeates political rhetoric in a predominantly Catholic country like El Salvador. Mata's declarations to the press only a day after the archbishop's visit to the Asamblea Legislativa paraphrased Pope Francis in speaking of the Earth as our *common home* and our need and responsibility to care for it. Yet this moral view predates the encyclical.⁴⁴ In its 2007 'Cuidemos la casa de todos' ('Let Us Care for Everyone's Home') and its 2010 'Defendamos la vida y el bien común' ('Let Us Defend Life and the Common Good') pastoral letters, El Salvador's Bishops' Conference had already denounced the negative effects of mining on the environment and the health of citizens in neighbouring countries that promote mining and pleaded for decisions to be taken that would defend the *common good* that the environment constitutes.

The archbishop's public endorsement for the mining ban was followed by a concerted array of activities by the Mesa Nacional, the religious sector and other organisations. These activities included press conferences, a popular consultation in the northern municipio of Cinquera, a visit by *diputados* to the San Sebastián artisanal mine, public discussion forums, interviews of Mesa Nacional members and the archbishop in various mass media, and so on. Yet it was a rally on 9 March 2017 that seemingly constituted a turning point in the attitude of the *diputados*. Organised by Mesa Nacional members and headed by religious officials including San Salvador's archbishop, the rally was attended by thousands of Salvadoreans. Its endpoint was the courtyard flanking the Asamblea Legislativa – where many rallies terminate and where a month earlier the archbishop had delivered his public statement in support of the ban. The rally was welcomed by *diputados* to whom organisers delivered more than 30,000 signatures collected in a whirlwind eight-day, support-gathering campaign. It was then that FMLN *diputado* Mata pledged there would be a ban before Easter week.

From that point on, Mesa Nacional members arrived at the Asamblea Legislativa on several occasions. Encouraged by Mata's public declaration, they attended every CMACC meeting, starting on 21 March 2017 when the proposal submitted by the archbishop was first discussed. A week later, the commission voted in favour of every legislation section and issued the positive ruling on the proposal required to enable its discussion and vote at the Asamblea Legislativa's plenary. On 29 March, the law was passed by the Asamblea Legislativa, garnering 70 out of 84 votes, well over the qualifying majority and without a negative statement from any of the *diputados*. Thus did El Salvador become the first country ever to ban

⁴³ Author interview with José, member of Colectivo Socioambiental Cuidemos la Casa de Todos, San Salvador, 8 Feb. 2017.

⁴⁴ Rachel Nadelman, "'Let Us Care for Everyone's Home': The Catholic Church's Role in Keeping Gold Mining out of El Salvador', Center for Latin American and Latino Studies (CLALS) Working Paper, Series 9, Dec. 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2706819, last access 21 Jan. 2021.

all forms of metal mining.⁴⁵ If Mesa Nacional's relentless efforts and the Catholic Church's public endorsement paved the way for the ban, there is nonetheless a significant difference between El Salvador and its neighbours that explains why the former has not adhered to the 'extractive imperative'. In Guatemala and Honduras, active opposition from the public and Catholic sectors has likewise been widespread. In El Salvador, however, neither large transnational companies nor local elites have developed vested interests in the mining industry.⁴⁶ In other words, the dynamics of accumulation in El Salvador have not expanded to the mining industry as has occurred in Guatemala and Honduras. Post-war El Salvador also differs from its neighbours in having seen a non-elite party like the FMLN take office, which might in turn be related to its lower degree of state co-option by business elites than its neighbours.

Transboundary Juridification Efforts

During the 7 February 2017 CMACC meeting at El Salvador's Asamblea Legislativa, researcher and anti-mining activist McKinley expounded on the transboundary nature of the mining issue even as he acknowledged that the priority was to address the issue within El Salvador's borders:

We currently have more than 40 mining projects along the Honduran border, close to El Salvador, which would impact Salvadorean rivers if they were to begin operating. If those mines begin operations, they will pollute us. In the case of Guatemala, there are eight mining projects in addition to the infamous Cerro Blanco, which as we already said is polluting the Ostúa River.⁴⁷ The Ostúa River discharges into Güija Lake, pollutes it with cyanide and Güija Lake in turn discharges, through a small river, into the Lempa River (see Figure 1).⁴⁸

McKinley was referring to mining projects in Guatemala and Honduras that are not active but whose owners had already requested or even begun geological exploration.

Discussions on transboundary mining began soon after the Mesa Nacional was founded. CEICOM had become aware of the threat posed by mining ventures not

⁴⁵While Costa Rica passed a mining ban in 2010, it only comprehended future open-pit mining (it did not act retroactively) as well as exploration and exploitation in protected areas; underground mining was, however, allowed to continue elsewhere in the country. See, for example, 'Costa Rica Lawmakers Vote to Ban Open-Pit Mining', *Reuters*, 10 Nov. 2010, available at www.reuters.com/article/costarica-mining-idAFN0912629920101110, last access 22 Feb. 2021. In Argentina, bans on certain forms of mining exist in some provinces but national pro-mining legislation remains in place. See, for example, 'Factbox: Argentine Legislation that Targets Mining', *Reuters*, 17 Aug. 2010, available at www.reuters.com/article/us-argentina-glaciers-factbox/factbox-argentine-legislation-that-targets-mining-idUSTRE67G46320100817, last access 22 Feb. 2021.

⁴⁶Anthony Bebbington, Benjamin Fash and John Rogan, 'Socio-Environmental Conflict, Political Settlements, and Mining Governance: A Cross-Border Comparison, El Salvador and Honduras', *Latin American Perspectives*, 46: 225 (2019), pp. 84–106.

⁴⁷The number of projects varies depending on the source. See, for instance, Edgardo Mira, 'Las amenazas ambientales y la necesaria gestión compartida de las aguas transfronterizas en la región centroamericana', *Perspectivas*, 12 (Oct. 2016), p. 3.

⁴⁸Andrés McKinley, CMACC meeting, Asamblea Legislativa, San Salvador, 7 Feb. 2017.

only in the northern strip of El Salvador but also in the border zones of Guatemala and Honduras. The realisation of this threat years ago impelled CEICOM to lead an initiative to devise a tripartite regulation proposal. As an organisation originally from Metapán, a small town in the north-western department of Santa Ana that borders both Guatemala and Honduras and has more relationships with populations across the border than with other Salvadorean municipalities, CEICOM was, understandably, the first Mesa Nacional member to become concerned about transboundary mining. It was through Guatemalan citizens across the border, particularly locals from Asunción Mita in the Jutiapa department, that CEICOM learnt about the Cerro Blanco mine – the only mining project in a borderland that was close to exploitation and that first brought their attention to transboundary mining.⁴⁹

When I met with CEICOM members in July 2015, they were raising awareness of the impacts of ‘transboundary mining’ through public forums and working on a draft of the regulation proposal with the help of an expert in international law. A couple of years later CEICOM had shifted its discourse to a focus on ‘transboundary waters’. In an interview in February 2017, Marcos, a CEICOM leader, explained this shift of focus:

Our transboundary perspective arose out of our concern about metal mining [...] but at this point in the process, we’re absolutely confident that the problem is not just about [...] that mining is just one threat, that currently in border zones there are a number of economic and non-economic activities that pollute transboundary waters every day. [...] The problem of transboundary waters therefore transcends metal mining and requires an analysis of extractivism in the broader sense of the term.⁵⁰

On one hand, it is easier to generate consensus among the population on the issue of water than on mining – a crucial factor when devising a juridical instrument to be handed over to the relevant authorities of two countries (Guatemala and Honduras) with pro-mining governments. On the other, there are already comparable legal efforts to regulate transboundary watercourses in the Latin American region and beyond. Indeed, CEICOM modelled its treaty proposal on existing regulatory frameworks. These include the Helsinki Rules on the Uses of the Waters of International Rivers (1966) and the United Nations Watercourses Convention on the Law of Non-Navigational Uses of International Watercourses (1997), as well as regional bilateral or multilateral treaties addressing actual or potential water disputes, such as the precautionary agreement on the Guarani Aquifer underlying

⁴⁹Despite obtaining an exploitation licence in 2007, the formerly Canadian Goldcorp-owned Cerro Blanco suspended operations in 2013 due to technical difficulties. The mine’s acquisition by the Canadian junior corporation Bluestone Resources in 2017 suggests, however, that it might eventually become operative. For further details about this mining project, see Montoya *et al.*, ‘Cerro Blanco’, *The Legal Cultures of the Subsoil Database*, available at <https://ilas.sas.ac.uk/research-projects/legal-cultures-subsoil/cerro-blanco>, last access 22 Jan. 2021.

⁵⁰Author interview with Marcos, CEICOM leader, San Salvador, 10 Feb. 2017.

Argentina, Brazil, Paraguay and Uruguay,⁵¹ and existing jurisprudence on actual conflicts, such as the International Court of Justice ruling on the infamous case between Argentina and Uruguay concerning the installation of pulp mills on the River Uruguay.⁵²

CEICOM members have chosen to stick to what they regard as the more inclusive notion of the ‘watershed’ introduced by the 1966 Helsinki Rules, instead of that of ‘watercourse’ employed in the 1997 UN Convention. Building upon the Helsinki Rules, CEICOM has employed the spatial trope of the watershed as ‘a legal reality, a geohydrological fiction, and a socio-political imaginary’.⁵³ For CEICOM members, a watershed is not limited to a river and its immediate environment; it is instead a complex ecology constituted by both living and non-living entities. They rely on the physical maps and scientific studies of El Salvador’s watersheds provided by the Ministerio de Medio Ambiente y Recursos Naturales (Environment and Natural Resources Ministry) but do not limit themselves to these. They have mobilised a relational notion of the watershed. ‘When we talk of a water basin, we refer to territory, biodiversity, human beings, water, everything that is there’, declared CEICOM leader Marcos in my 2015 interview with him. ‘An area where water is shared, but also territory, culture, policies, etc.’⁵⁴ According to them, the watershed is not limited to a watercourse, but it is the ecology that contains the watercourse, through which the watercourse flows. The transboundary watershed denotes then the entanglement of living and non-living entities around a watercourse that transcends the boundaries of the nation – an entanglement which serves as ‘an ideal unit for understanding interconnected environmental processes and managing resources’.⁵⁵

In a preventative vein, CEICOM conceived of their proposed treaty as ‘the perfect complement’ to a mining ban in El Salvador. The treaty was completed, discussed with other organisations, amended, presented publicly and circulated widely from the end of 2015.⁵⁶ Conceived as a draft to be taken on and discussed by the authorities of the three relevant countries, the treaty is an embryonic juridical instrument that draws inspiration from international documents such as the 1992 Rio Declaration on Environment and Development as well as the aforementioned international water laws. It proposes a tripartite normative agreement to regulate the use of transboundary waters and the surrounding ecosystem, and the establishment of a tripartite authority to oversee their use, along with any problems that arise as a result. It promotes mutual responsibility and solidarity among signatories. Taking a cue from the Rio Declaration’s emphasis on the interdependency of nature, on environmental protection as integral to peace and development

⁵¹Pilar Carolina Villar and Wagner Costa Ribeiro, ‘The Agreement on the Guarani Aquifer: A New Paradigm for Transboundary Groundwater Management?’, *Water International*, 36: 5 (2011), pp. 646–60.

⁵²McIntyre, ‘The World Court’s Ongoing Contribution to International Water Law’, pp. 124–44.

⁵³Ashley Carse, ‘Watershed: Theorizing the Contemporary’, *Fieldsights*, 27 June 2018, available at <https://culanth.org/fieldsights/1465-watershed>, last access 22 Jan. 2021.

⁵⁴Author interview with Marcos, CEICOM leader, San Salvador, 4 June 2015.

⁵⁵Carse, ‘Watershed: Theorizing the Contemporary’.

⁵⁶A copy of the treaty proposal is available at Montoya *et al.*, ‘Citizen Transborder Treaty Drafting’, *The Legal Cultures of the Subsoil Database*, available at <https://ilas.sas.ac.uk/research-projects/legal-cultures-subsoil/2014-citizen-transborder-treaty-drafting-cerro-blanco>, last access 22 Jan. 2021.

and on citizen participation, the treaty foregrounds the responsibility of states to issue pertinent environmental regulation; the need for states to cooperate to address transboundary and global environmental problems; and the right of affected organisations and local populations, especially women, peasants and Indigenous people, to participate in decision-making. It seeks to overcome the limitations of the existing Plan Trifinio's regional agreement – namely its focus solely on the Upper Lempa and its lack of policy vis-à-vis shared watercourses – while granting a modicum of governing authority to local populations.

Having completed a draft of the treaty proposal, CEICOM has since focused on lobbying the Salvadorean, Guatemalan and Honduran governments as well as regional institutions such as the Sistema de la Integración Centroamericana (Central American Integration System, SICA) and the Parlamento Centroamericano (Central American Parliament, PARLACEN).⁵⁷ It has also, with other organisations in Guatemala and Honduras, forged an alliance called the Red Centroamericana por la Defensa de las Aguas Transfronterizas (Central American Network for Transboundary Waters Defence, RedCAT) to help disseminate the draft and bring it into the political agendas of all three governments – an endeavour that builds upon previous cross-border experiences of anti-mining mobilisation.⁵⁸ Yet most advances have been made in El Salvador, where the issue is most pressing and CEICOM's and other Mesa Nacional organisations' lobbying of the Cancillería Salvadoreña (Salvadorean Chancellery) has generated keen interest in finding avenues for initiating discussion of the issue of shared watercourses with neighbouring governments.

In a post-ban interview, Antonio, a friar of the Franciscan organisation Commission on Justice, Peace and the Integrity of Creation (JPIC), also part of Mesa Nacional and RedCAT, began speaking of the risks that El Salvador still faces with the potential pollution of the Lempa waters:

The issue of mining in El Salvador is one of life or death, right? We have managed to free ourselves from the mining threat internally, but internationally we still face the threat from Guatemala and Honduras [...] This is very delicate. [...] my neighbour is throwing garbage and I cannot intervene because it is not my business to solve the problem there, but then it is as if we haven't even done anything in our own country. [...] After the current struggle against mining, we are going to address the issue of water, which is closely related to mining in Guatemala and Honduras.⁵⁹

As implicitly noted by this Mesa Nacional member frustrated by Salvadoreans' inability to address environmental issues that originate beyond El Salvador's borders, the issue of sovereignty is the cornerstone of what is inevitably a transboundary problem.

⁵⁷SICA is the organisation responsible for regional integration among El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Belize and the Dominican Republic. PARLACEN is SICA's parliamentary body.

⁵⁸For details of these experiences, see Spalding, 'After CAFTA', pp. 163–7.

⁵⁹Author interview with Antonio, JPIC friar, San Salvador, 4 April 2017.

Remapping and Redefining Sovereignty

Determining who has the authority to decide how natural resources and territories are governed is a highly disputed issue throughout Latin America and elsewhere, as evidenced by the vast literature on mining conflicts.⁶⁰ Mining ventures and the conflicts thereof have not decreased even in the context of the latest decline in demand for global commodities, rooted partly in China's economic slowdown. The fate of minerals and the territories in which they are deposited has been at the root of the decade-long struggle led by El Salvador's Mesa Nacional. In a country where sovereign authority has taken the form of representative democracy since the end of the war in 1992, Salvadoreans have, through their struggle against mining, implicitly challenged and redefined the values and norms on which this authority is grounded. Catholic morality has no doubt inspired many in this struggle, especially the tenets of liberation theology that led poor Salvadoreans to contest inequality and injustice in the 1970s and 1980s.⁶¹ Yet many of the Salvadoreans involved in Mesa Nacional also embody histories of collective action that are foundational to their understanding of the environment as a *common home*.

As I explained above and as noted by many Salvadoreans I interviewed, Pope Francis has offered an ethical and spiritual perspective from which to denounce the degradation of the natural environment as an anthropogenic effect and has urged action to countervail the dire situation that otherwise lies ahead. His outspokenness on this issue has proven useful for Salvadoreans looking to ground their call for a mining ban in moral terms (see Figure 2). In his encyclical letter *Laudato Si': On Care for Our Common Home*, Pope Francis suggests that 'We have forgotten that we ourselves are dust of the earth (cf. Gen. 2:7); our very bodies are made up of her elements, we breathe her air and we receive life and refreshment from her waters.'⁶² To pursue activities that deplete natural resources is therefore to inflict harm on ourselves and the rest of humanity. Yet what resonates even more with activists in northern El Salvador is the encyclical statement that 'the natural environment is a collective good, the patrimony of all humanity and the responsibility of everyone'⁶³ – a *common home* as suggested in the title of the encyclical and the lexicon of a large segment of El Salvador's religious sector.

⁶⁰See, for instance, Chris Ballard and Glenn Banks, 'Resource Wars: The Anthropology of Mining', *Annual Review of Anthropology*, 32: 1 (2003), pp. 287–313; José de Echave, Alejandro Díez, Ludwig Huber, Bruno Revesz, Xavier Ricard Lanata and Martín Tanaka, *Minería y conflicto social* (Lima: CBC, CIPCA, CIES, IEP, 2009); Anthony Bebbington (ed.), *Social Conflict, Economic Development and Extractive Industry: Evidence from South America* (London: Routledge, 2011); Anthony Bebbington and Jeffrey Bury (eds.), *Subterranean Struggles: New Dynamics of Mining, Oil, and Gas in Latin America* (Austin, TX: University of Texas Press, 2013).

⁶¹From the late 1960s, in El Salvador as well as Latin America at large, liberation theology-minded priests promoted a progressive reading of the Bible that inspired a sense of solidarity with the poor, while encouraging poor people's critiques of the status quo and their emancipatory and transformative aspirations, largely channelled through their participation in *comunidades eclesiales de base* (ecclesial base communities, CEBs) and other organisations.

⁶²Pope Francis, *Laudato Si': On Care for Our Common Home* [Encyclical], 2015, pp. 3–4, available at http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf, last access 22 Jan 2021.

⁶³*Ibid.*, p. 70.

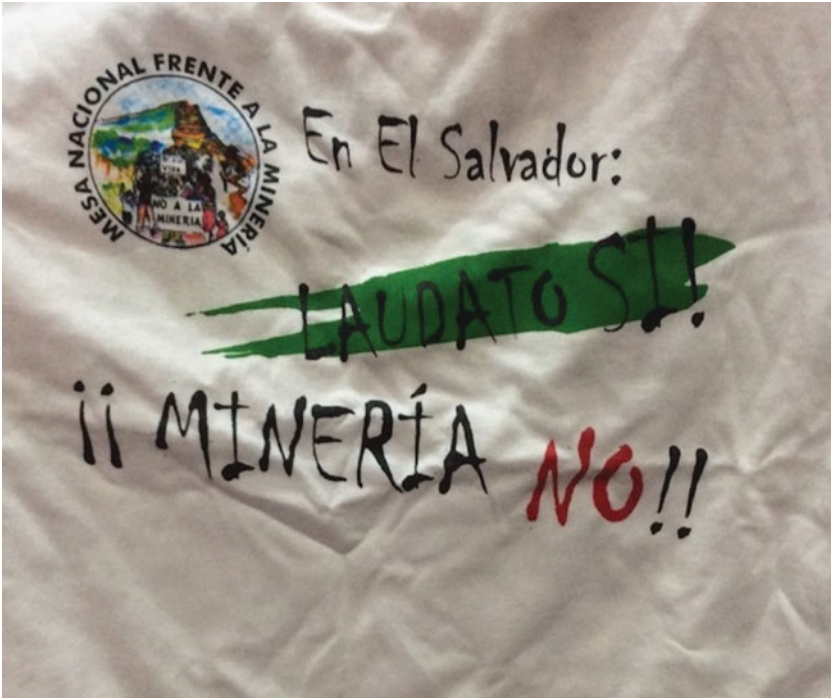


Figure 2. ‘Yes to Laudato, No to Mining’: Spanish Play on Words Used as a Mesa Nacional Motto
 Source: Author’s elaboration.

Upon returning to El Salvador in the late 1980s, when the civil war was coming to an end, those who had taken refuge in Honduras or Nicaragua fought to be acknowledged as citizens and granted basic civil and political rights, while introducing collective forms of organising social life they had developed either before fleeing El Salvador or at refugee camps in neighbouring countries. Indeed, they approached repopulation as collective subjects. These refugees ‘pursued a participatory social democracy – a democracy committed to the *collective good*’.⁶⁴ Their embrace of a fusion of the theological precepts and socialist ideologies that gained ground in the 1970s and the ‘post-insurgent individuality’⁶⁵ they developed in the face of an increasingly neoliberalised post-war period explain why the imagery of the *common home* and *common good* does not just resonate with the encyclical but actually precedes it.

The struggle by Mesa Nacional members has posed a moral and political challenge to the Salvadorean government grounded in the reverberations of these experiences of participation and collective organisation. Through both discourse and practice, Mesa Nacional members have claimed their right to exercise basic

⁶⁴Molly Todd, *Beyond Displacement: Campesinos, Refugees, and Collective Action in the Salvadoran Civil War* (Madison, WI: University of Wisconsin Press, 2010), p. 219. Emphasis added.

⁶⁵Leigh Binford, ‘Migration, Tourism, and Post-Insurgent Individuality in Northern Morazán, El Salvador’, in Jennifer L. Burrell and Ellen Moodie (eds.), *Central America in the New Millennium: Living Transition and Reimagining Democracy* (New York: Berghahn, 2013), pp. 245–60.

entitlements such as the participation in decision-making about the governance of local natural resources, namely minerals and water that directly affect their lives. A clear claim by Mesa Nacional has come in the form of the plebiscites promoted by its members and held in five municipalities of the Chalatenango and Cabañas departments from 2014.⁶⁶ Mesa Nacional's law-making efforts thus seem to have been a means through which to challenge state sovereignty and implicitly claim a more participatory form of politics.

The issue of sovereignty has been more explicitly addressed by Mesa Nacional members involved in the discussion and drafting of the transboundary waters treaty proposal though. Not only have they inscribed the right of citizens from the transboundary basin to participate in decision-making that concerns their livelihoods and basic rights, but they have also challenged the very notion of national *de jure* sovereignty. Specifically, they have done so in proposing a tripartite authority that would oversee the region's shared transboundary water sources and its environs. 'Guatemala has said, "We have national sovereignty and in our territory we can do what we want"', JPIC friar Antonio told me with dismay.

We instead maintain that environmental issues should be addressed globally, irrespective of borders. Climate change problems are borderless; they affect one country and cross the imaginary border that is nothing more than a consequence of human action. Climate change does not see borders and the same is true for water [...] These issues need to be approached internationally [...] so that I don't affect my neighbour and my neighbour doesn't affect me.⁶⁷

Through his words, the classical notion of sovereignty on which El Salvador's co-riparians build and the tensions that have historically accrued over the border become evident.

CEICOM member Marcos elaborated further on the issue of sovereignty in an interview in February 2017:

We break with the logic of national sovereignty. We're not saying that we're going to tell you what you're going to do, but there are going to be agreements that help determine what should not be done. It is a limiting of the notion of [national] sovereignty. It is a reduction of the term with the goal of defending the life and integrity of humans. Free trade agreements also reduce [national] sovereignty but in a negative way [...] This is a reduction of national sovereignty to actually strengthen people's sovereignty [...] to guarantee your reproduction as a human being.⁶⁸

Their redefinition of sovereignty is one that unsettles national boundaries, strengthens the participation of citizens and is oriented towards the sustainability of both

⁶⁶See Montoya *et al.*, 'Five Municipalities Declare Themselves "Mining-Free Territories" through Popular Consultation Procedures', *The Legal Cultures of the Subsoil Database*, available at <https://ilas.sas.ac.uk/research-projects/legal-cultures-subsoil/five-municipalities-declare-themselves-mining-free>, last access 22 Jan. 2021.

⁶⁷Author interview with Antonio, JPIC friar, San Salvador, 4 April 2017.

⁶⁸Author interview with Marcos, CEICOM leader, San Salvador, 10 Feb. 2017

populations and their territories. Ultimately, Marcos justified it through the sense of unity that pervades Central America: 'We should be one single territory, from Mexico to Panama [...] We're the corn culture'⁶⁹ – such a statement conveys a notion of the region and its environment as a *common home*. That statement is grounded in a pre-colonial Maya past, diverse as it was, and reaffirmed by the fact that in the Spanish colonial past the region was, until independence in 1821, part of the kingdom of Guatemala, which included Guatemala, Honduras and El Salvador, as well as Chiapas, Nicaragua and Costa Rica.⁷⁰ CEICOM considers the transboundary waters treaty a juridical project that stems from, and is a reflection of, a political problem and a political discussion. Sovereignty, CEICOM proposes, should transcend national borders and radicate instead on consensus and co-responsibility over the socio-ecological space of the transboundary watershed; yet, given the inevitable significance of borders in the realm of politics, the treaty serves as the juridical instrument that would regulate the tripartite relationship rather than wholly override national sovereignty.

There are thus two ways in which the processes described have challenged the notion of *de jure* national sovereignty. First, the anti-mining opposition of Mesa Nacional has put forth an alternative notion of national popular sovereignty that contrasts with national state sovereignty. Second, those who have created and promoted a draft proposal for a transboundary treaty have sought to draw a correspondence between sovereignty and the ecological materiality of the watershed. The problem remains, however, over the definition of what is 'common' and whether this can be agreed upon by all of those involved. While Salvadoreans' notion of the 'common home' initially denoted the territory of El Salvador, this notion has gradually blurred and expanded to include the transboundary Lempa watershed. Yet, Salvadoreans' gains with regard to the Lempa's volumetric flows might well be losses for Guatemalans and Hondurans. Even if an overarching agreement could be reached on caring about and protecting water from industrial pollutants as beneficial for the region, it would not be as straightforward deciding jointly over such matters as how to limit volumetric extraction in the Upper Lempa – whether for domestic or industrial use – or the types of industrial activities that could be carried out in the Lempa watershed.

Conclusion

El Salvador's past looms large in its contemporary resource struggles. Mesa Nacional members like CRIPDES and ADES and the populations that support them lived through a period in which 'politics became an immediate experience in the lives of many'.⁷¹ During the 1970s and 1980s, many Salvadoreans radicalised as a result of repression and became socialised in a *mélange* of socialist, progressive Catholic and liberal emancipatory ideologies that put forth more participatory notions of citizenship and democracy – notions in which sovereignty was no longer

⁶⁹*Ibid.*

⁷⁰Timothy Anna, 'The Independence of Mexico and Central America', in Leslie Bethell (ed.), *The Cambridge History of Latin America*, vol. 3: *From Independence to c. 1870* (Cambridge: Cambridge University Press, 1990), pp. 77–94.

⁷¹Greg Grandin, *The Last Colonial Massacre*, p. 7.

imagined as state-centred but rather defined by the people's will. Opposition to mining and the struggle for socio-environmental justice in El Salvador's northern regions have thus been historically embedded processes in which post-insurgent individualities have surfaced to yield environmentally sound forms of juridification and political authority. Through the promotion of a citizen-drafted ban on mining, Mesa Nacional put forth not simply a particular vision for how natural resources should be governed as common goods, but also the central role that citizens should enjoy in the definition of their country's economic and political future.

However, cross-border issues such as shared watersheds and climate change have forged new understandings of sovereignty among other Mesa Nacional organisations. The transboundary waters treaty has likewise been an effort to develop a policy and legal architecture that is deeply woven into the historical fabric of social and political organisation upon which much opposition to mining and the defence of water as a common good have been built. Both the mining ban and the treaty are thus illustrative of Mesa Nacional's concern about 'procedural inequity' as a key pillar of socio-environmental justice.⁷² Yet CEICOM members, who have taken the lead in the elaboration of the transboundary waters treaty, have gone one step further in defining the resource futures to which they aspire: they have destabilised conventional wisdom about where political authority effectively resides and delineated a proposal sensitive to the borderless nature of transboundary watersheds. In this vein, they have instantiated claims for a form of sovereign authority that is substantiated by ecological materiality as much as by the political will of citizens. Yet the ecological materiality of the watershed is a social and political construction of territory, as much as a scientific one, describing the material entanglement of living and non-living entities existing in and around a watercourse. For them, the watershed is the relational ecology through which the watercourse flows and upon which the watercourse can have effects, whether material or social.

The treaty proposal is not simply a transplant, but an original contribution modelled on existing multilateral legal instruments creatively appropriated and vernacularised to serve the particular historical, political and ecological circumstances of the region. The spatial trope of the watershed casts light on how taken-for-granted understandings of sovereignty are empirically unsettled by material-ecological as well as political challenges. On one hand, transboundary watersheds like the Lempa dispel the myth of sovereignty as anchored on the territory of a national and finite body politic. On the other, Salvadoreans and their neighbours involved in the drafting of the treaty proposal, and upholding it as a solution to the predicaments they anticipate from unfettered industrial activity across the borders, are re-territorialising sovereignty, this time rooting it in the watershed. Unlike global efforts to regulate transboundary watercourses, however, the territory upon which Salvadoreans are anchoring sovereignty does not unproblematically sit with the nation-state. In other words, while maintaining the association between sovereignty and territoriality, they are nonetheless working to delineate anew the

⁷²David V. Carruthers, 'Introduction: Popular Environmentalism and Social Justice in Latin America', in David V. Carruthers (ed.), *Environmental Justice in Latin America: Problems, Promise, and Practice* (London and Cambridge, MA: MIT Press, 2008), pp. 1–22.

territory upon which political authority should rest – namely, through ecological markers rather than simply the national boundaries between co-riparian states.

Given the centrality of the Lempa River in El Salvador, Salvadoreans have strived to foster a ‘sense of ethical action that would increase the State’s capacity to care for water’,⁷³ both in El Salvador and across its borders. They have done so by emphasising Catholic morality and its ethics of care towards the environment. The trans-boundary watershed is thus the material incarnation of the political and ethical notions of the common home and common good, as well as the imagery upon which CEICOM’s notion of sovereignty rests – an imagery of a body politic that is defined by contemporary relevant socio-ecological materiality over and above historically defined national boundaries. Notions of sovereignty tied to territoriality therefore continue to enjoy wide currency in political life, even though the territory upon which sovereignty rests may differ from that of the nation itself – for instance, a territory that would enable more adequate responses to current environmental challenges. Law-making processes in El Salvador have brought together elements of law, science and religion, yielding forms of juridification unique to contemporary environmental challenges. In this vein, we can expect the emerging or evolving cross-border environmental concerns stemming from the extractivist agendas of different Latin American governments to elicit competing moral values as well as give rise to relevant and creative political-legal renderings.

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Spanish abstract

Durante más de una década, movimientos de base y organizaciones no gubernamentales (ONGs) salvadoreñas promovieron innovaciones legales con el fin de proteger las fuentes de agua de su país de actividades industriales potencialmente contaminantes como la minería. Inicialmente redactaron prohibiciones de la minería con el fin de evitar la senda de desarrollo en base a la extracción adoptada por los países vecinos. Eventualmente, ampliaron su enfoque y diseñaron una propuesta de tratado de aguas transfronterizas que tomase en cuenta los desafíos que la materialidad ecológica de los cursos de agua internacionales supone para la soberanía nacional *de jure*. De este modo, la cuenca hidrográfica transfronteriza ha devenido una figura heurística útil, un tropo espacial al que la ciudadanía salvadoreña ha recurrido para sustanciar sus reclamos de soberanía sobre las aguas del Río Lempa que El Salvador comparte con las naciones pro-minería de Guatemala y Honduras – reclamos que han sido imbuidos de una ética del cuidado que hunde sus raíces en la política de la guerra y la moralidad católica.

Spanish keywords: soberanía; cuenca hidrográfica; minería; cuidado; política; juridificación

⁷³Andrea Ballester, ‘Capacity as Aggregation: Promises, Water and a Form of Collective Care in Northeast Brazil’, *Cambridge Journal of Anthropology*, 35: 1 (2017), p. 32.

Portuguese abstract

Por mais de uma década, movimentos de base e organizações não governamentais (ONGs) salvadorenhas promoveram inovações jurídicas para proteger as fontes hídricas desse país de atividades industriais com potencial poluente, como é o caso da mineração. Inicialmente, redigiram proibições à atividade mineradora, com o intuito de impedir uma trajetória extrativista, adotada pelos países vizinhos. Posteriormente, ampliaram sua ação, elaborando uma proposta preliminar de um tratado de águas transfronteiriças que abordasse os desafios representados pela materialidade ecológica dos cursos de água internacionais no que tange à soberania de direito em âmbito nacional. Assim, a bacia hidrográfica transfronteiriça tornou-se uma figura heurística útil, um tropo espacial ao qual recorreram os salvadorenhas para fundamentar suas reivindicações de soberania sobre as águas do Rio Lempa, compartilhadas entre El Salvador, de um lado, e Guatemala e Honduras, países pró-mineração, do outro. São reivindicações imbuídas de uma ética do cuidado enraizada na política de guerra e na moralidade católica.

Portuguese keywords: soberania; bacia hidrográfica; mineração; cuidado; política; juridificação