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Contentious Consultations: Black Communities, Corporate Experts, and the Constitutional Court in Colombia's Coal Region

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ORIGINAL RESEARCH

Contentious consultations: Black communities, corporate experts, and the constitutional court in Colombia's coal region

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Abstract
Across the Global South, corporations and governments are displacing Indigenous and Afro-descendant groups in the name of development and economic advancement. International norms guarantee these communities the right to consultation over extractive projects that impact their traditional territories. Ethnic rights laws create spaces for communities to hold corporations accountable for their suffering; the same laws can also allow corporations to co-opt the process. Using a case study from Colombia, I argue that two Black communities filed a petition to seek reparations for a wide range of harms caused by mining yet found themselves on trial over whether they were really a community at all. Corporate officials positioned themselves as the experts on community identity and history and used the communities' lack of collectivity to discredit the communities' ethnic rights claims. This article brings together anthropological literature on the social life of corporations and scholarly critiques of ethnic rights laws to illustrate that when communities engage ethnic rights laws, they also undergo new processes of community formation in their interactions with corporations, courts, and international institutions.

Keywords Prior consultation · Corporations · Latin America · Extractive industries · Black communities

On a visit to Chancleta in 2016, Milagros Pinto handed me a cup of coffee as we chatted in the cool shade of her patio, a relief from the suffocating heat. A tailings pit from the Cerrejón coal mine loomed over her home (seen in Fig. 1). Chancleta and Patilla, neighboring Afro-descendant settlements in northeastern Colombia, lay

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Fig. 1 A traditional earth home with a corrugated metal roof in Chancleta, taken in 2016. The hill behind the homes is the mine tailings pit. Photo by author

between two active coal pits and a mine tailings site within the Cerrejón coal complex. Milagros' neighbors joined us to chat about their plans to move in the new year. The women passed out more cups of hot sweetened black coffee as we talked. After years of negotiation, the communities had just signed an agreement with the Cerrejón Coal Company to relocate.

The women pointed to their small gardens, chickens, and goats, lamenting that they would not be able to move their animals or plants with them. Milagros was disappointed in the outcomes of a court-ordered consultation between her community and the Cerrejón Coal Company: "They were talking about a resettlement because the [Constitutional Court] ruling said to resettle people. So, that's what we want: a resettlement for every person so we can be a collective *pueblo*[1] (Interview with author, Dec 23, 2016)." The women had wanted to secure new lands and new homes but left the consultation with only a cash payment.

Milagros and her neighbors were among 48 families from Chancleta and Patilla that filed a *tutela*—a petition for protection of their rights—with Colombia's Constitutional Court against the Cerrejón Coal Company in 2015. They claimed that the company had violated their rights to a healthy environment, had disregarded their rights to prior consultation as Afro-Colombian communities, and had forced a resettlement model on them that was against their culture and identity. In Chancleta and Patilla's petition, the Constitutional Court sided with the communities and ordered Cerrejón and the Ministry of the Interior to hold a prior consultation, a measure

[1] Translates to both people and town.

adopted into Colombian law from the International Labor Organization's Indigenous and Tribal Peoples Convention 169 of 1989 (ILO 169).[2]

Scholars have documented the limitations of prior consultation to protect Indigenous lands or stop mining projects because these laws tend to favor corporate and state interests in acquiring land (Flemmer and Schilling-Vacaflor 2016; Larsen 2020; Larsen and Gilbert 2020; Marchegiani et al. 2020; Perreault 2015; Zaremberg and Wong 2018). In this article, I show that prior consultation both creates spaces for communities to hold corporations accountable for their suffering and for corporations to co-opt the process. I argue that Chancleta and Patilla filed a prior consultation to seek reparations for a historical harms caused by mining yet found themselves on trial over whether they were really a community at all. Corporate officials positioned themselves as the experts on community identity and history to discredit Chancleta and Patilla's claims as a Black community. The company sought to limit its legal liability and resolve the legal process in a cost-effective and time-saving manner while maintaining the façade that it is a socially responsible corporation. Rather than act as a collective process, this consultation became an individualizing and divisive experience for the plaintiffs.

There is significant literature on the social life of corporations (Benson and Kirsch 2010; Golub 2014; Larsen 2017; Kirsch 2014; Rajak 2014; Welker et al. 2011) and on the implementation of ethnic rights laws (Dunlap 2018; Loperena 2016; Perreault 2015), but the link between these two bodies of literature is underexplored. Bringing these bodies of scholarship together, I ask how overlapping ethnic rights laws both create spaces for corporations to co-opt legal processes and for communities to seek reparations for past, present, and future harms. I show the complications Chancleta and Patilla residents faced in forming a legible community and how Cerrejón intervened in community formation.

The first section of this article sets out the theoretical framework focusing on how ethnic rights laws reshape the relationships between communities and corporations. The following section delves into the communities' long history of negotiating their dispossession with the Cerrejón company and how the adoption of resettlement standards divided and individualized compensation measures. Next, I frame prior consultation as a last resort for 48 families that did not resettle. The fourth section outlines the overlapping legal regimes involved in the case and the often-confusing interpretations of the court order. In the remaining sections, I analyze how Cerrejón officials worked to discredit the prior consultation and position themselves as experts on community identity and history. I also show the multiple ways that community members used the consultation to voice their grievances against both the company and the state.

This article is based on my ongoing fieldwork La Guajira, Colombia as well as my analysis of legal documents. I observed the prior consultation in 2016 and 2017, and conducted follow-up visits and interviews with lawyers, community members,

[2] The Constitutional Court reviewed the *tutela*, filed as Sentence 256/15, and decided on it in 2016. Four judges agreed with the prior consultation order and one dissented (Corte Constitucional de Colombia 2016).

and Cerrejón officials. I use both real names and pseudonyms, depending on the preference of the person in question.

Contesting corporate power and remaking community

Chancleta and Patilla residents found new ways to contest Cerrejón by drawing on ethnic rights laws. They also discovered that the corporation oversaw their access to those rights. I bring together two main bodies of literature: ethnographic work on corporate power and studies of ethnic rights laws. I focus on two main points of connection between these literatures: how overlapping legal regimes both open and close spaces for communities to negotiate with corporations and how companies position themselves as arbitrators of ethnic rights law. These overlapping literatures reveal how ethnic rights reshape communities as they interact with international legal bodies, corporations, and state institutions.

ILO 169 has been in place for more than three decades. Recent comprehensive articles and special issues have addressed the legacy of ILO 169 finding it retains the potential for mediating environmental conflicts between Indigenous communities and private investors, yet its interpretation and implementation are often weak and uneven, leading to community land loss and environmental degradation (Larsen 2020; Larsen and Gilbert 2020; Marchegiani et al. 2020). Colombia adopted ethnic community rights into its 1991 Constitution, drawing on ILO 169. Law 21 of 1991 lays out a framework for prior consultation. In 1993, the government passed The Law of Black Communities (Law 70), which recognized Afro-Colombians as a distinct ethnic group with rights to ancestral territory. A recent comprehensive study of Law 70 implementation points to the gains made in protecting and recognizing Afro-descendant territory but notes weaknesses in granting communities autonomy and the often clientelistic relationship between the private sector and the Colombian government which has weakened implementation (Castillo et al. 2021). An ethnography of corporate–community relationships reveals why Afro-Colombian communities continue to choose prior consultation despite its limitations and how corporations exploit legal ambiguity to intervene in consultations.

Indigenous rights laws can become a coercive mechanism for states to seize territory and force communities into agreements to legitimize development projects and extractive industries (Dunlap 2018; Loperena 2016). Consultations often become a checklist rather than an examination of the substantive issues faced by communities living in impacted zones (Milne and Mahanty 2019). Yet, these substantive issues resurface during negotiations as communities demand forms of justice that correct these power imbalances (Rodríguez-Garavito 2011). Ethnic rights laws opened a space for Chancleta and Patilla to seek reparations for historical injustices. At the same time, overlapping laws and policies limited the types of claims they could make. For example, the Colombian Constitutional Court used prior consultation to cover a variety of community and individual grievances including water shortages, environmental harms, and population resettlement, yet prior consultation was an inadequate mechanism for reparations. By delegitimizing Chancleta and Patilla's rights to seek prior consultation, Cerrejón officials dismissed the communities'

substantive claims as well. Legal bodies can create a false dichotomy between individual and collective rights that suggests claiming individual rights is a betrayal of the collective (Speed 2006). In this case, there is no reason that Chancleta and Patilla could seek both collective reparations for harm done and individual solutions to their pending resettlement, but the corporation manipulated their legal claims to put the individual and collective in conflict.

Scholars have argued that the ILO is a vehicle of capitalist accumulation, making its foray into Indigenous rights a way to accumulate land and labor, and force Indigenous peoples into capitalist relations (Goodale 2016; Standing 2008). Transnational organizations such as the World Bank, The United Nations, and the International Labor Organization pass norms to uphold ethnic communities' rights, yet those same organizations threaten the autonomy of governments who interpret those laws in ways that threaten the spread of extractive capitalism. Lawsuits and sanctions disincentivize state institutions from enforcing court orders on behalf of communities. For example, The World Bank's International Centre for Settlement of Investment Disputes allows corporations to sue states that block or limit their projects, a constant source of worry for Colombian state officials. Cerrejón's shareholders have sued the Colombian government over Constitutional Court decisions that suspend their operations. Most recently, the shareholders sued in 2021 over an order that blocked the expansion of one of the Cerrejón pits (Delgado 2021).

The Cerrejón corporation has enormous power in the Guajira region. Communities rely on the limited forms of compensation they can derive from legal battles and settlements with the company. Cerrejón's compensation schemes cannot compare with the real damages done by coal mining and are often used to silence community opposition to projects (Gilbert et al. 2021). Cerrejón has become a major player in environmental governance in La Guajira (Carmona and Jaramillo 2020) and company officials have worked to frame environmentally damaging projects as inevitable (Jaramillo and Carmona 2022). The company also has an enormous power to regulate social life as thousands of local people depend on Cerrejón for basic services and development aid (Banks 2017). This article expands this scholarship by showing how Cerrejón's policy and development interventions create the conditions for company officials to interfere in community formation yet position themselves as neutral mediators of Colombian law.

This ethnographic account contributes to understanding the power of corporations over social life. Corporations use corporate oxymorons, like "sustainable mining" and "safe cigarettes" to neutralize the harm they create, making their power seem inevitable (Benson and Kirsch 2010; Foster 2010; Orock 2013). By becoming socially responsible, corporations have created immense social and cultural power. Corporations authentic their power and deny the harms they create by controlling historical narratives to justify their right to operate (Fortun 2010; Rajak 2014). In this case, the company did not just create a historical self-narrative; it also positioned itself as an expert on community history. I analyze how corporate officials used that expertise to intervene in processes of ethnic community formation, shaping not just community–corporate relationships but also intra-community bonds and identities.

Fig. 2 Eneida and her daughter prepare lunch at the roadside restaurant. Photo by author

In resource frontier regions, local people often experience the state as distant and neglectful, while a corporation offers development and patronage (Li 2014; Tsing 2003). These regions are often "social minefields" "characterized by the features of enclave, extractive economies, which include grossly unequal power relations between companies and communities, and a limited state presence" as well as the always looming possibility of violence (Rodríguez-Garavito 2011, 267). Corporate patronage makes companies durable by making their operations legitimate but also opens the door to critique and contestation (Welker 2014). Here, I show that the communities attempted to use a prior consultation as a vehicle to resolve poverty, state abandonment, and community suffering, all of which they blamed on the company. These state-corporate power arrangements are not state abandonment, but a careful form of neoliberal statecraft that encourages corporate investment in local development through tax incentives and investment opportunities (Banks 2017; Kirsch 2010; Welker 2014). In contemporary extractive projects then, it is not the total absence of state power that leaves corporate power unchecked, but rather intentionally crafted regulations (Larsen 2017). In Colombia, under both Alvaro Uribe's (2002–2010) and Juan Manuel Santos' (2010–2018) presidencies, the government labeled mining a "locomotive" of the economy and encouraged these forms of corporate patronage to make up for state austerity and inefficient local governments. In this article, I show how the interaction between international norms and national laws legitimized Cerrejón's role as a legal mediator despite the company being the defendant in the case. In the next section, I show how Cerrejón became an authority on community well-being long before the prior consultation.

Table 1 Timeline of the displacement, resettlement, and consultation processes

Year(s)	Events
1984	Cerrejón begins operations
1985	Company forcibly displaces Manantial, one of the five Las Tunas communities
1990s	Company begins buying lands in Tabaco, Roche, Chancleta, and Patilla (the other four Las Tunas communities) as part of expansion
2001	Company expropriates Tabaco. Glencore, AngloAmerican, and BHP become shareholders
2007	Cerrejón Company begins resettlement negotiations with Chancleta, Patilla, and Roche using IFC standards
2012	Initial resettlement agreement signed by Chancleta, Patilla, and Cerrejón. Families who signed agreement begin to move to company-built resettlement
2015	48 families who did not sign agreement file a petition to demand prior consultation
2016	Court decides in communities favor and consultation begins in July
2017	Prior consultation closes and families begin to leave Chancleta and Patilla

A history of dispossession and division

On my frequent trips to Chancleta and Patilla, I visited Eneida Barbosa de Diez who owned a restaurant and store at the edge of Patilla (seen in Fig. 2). She served Cerrejón workers hearty lunches of goat stew with kidney beans and rice, and homemade mango juice in upcycled Coca-Cola bottles. Eneida was born in the neighboring community of Roche and moved to Patilla after her family lost their land in Roche in 1999. She had family land claims in Patilla via her aunts, uncles, and cousins. She also had a farm in Patilla on a plot rented from the company. While I was conducting fieldwork in 2017, the company repeatedly tried to evict her. As Eneida faced multiple displacements, her community identity transformed as she found herself not considered a "real" resident of Patilla despite having family ties and residency there. Her story reflects how a history of displacement and enclosure narrowed the definition of who belonged to Chancleta and Patilla.

Five related communities share common ancestry in the Cerrejón impact zone: Chancleta, Patilla, Roche, Tabaco, and Manantial[3] descended from the Las Tunas black settlement, near present-day Barrancas (Arregocés Pérez et al. 2015). The founders of Las Tunas were enslaved Africans who came from the port city of Riohacha, where they escaped and followed the Ranchería River south during the eighteenth and nineteenth centuries. These escaped slaves also founded the town of Calabacito (the name means little Calabash tree), which today is the town of Albania (Pérez 2007). The availability of land in the valleys of La Guajira allowed these communities freedom and protection.

The five Las Tunas communities grew over time but remained in the same rural site sharing school buildings and a health post. Families practiced subsistence agriculture, hunting, fishing, and gathering. They also traded and sold their crops and animals for income. Residents also worked on larger farms in the region and

[3] There are more than five Afro-descendant communites in the impact zone all together. These are the five that descended from Las Tunas.

engaged in other wage work. Their way of life dramatically changed in the 1980s when Carbacol and Intercor began operating the Cerrejón mine. (See Table 1 below for a timeline of displacement, resettlement, and consultation processes.)

The Cerrejón Coal Company operates one of the largest open-pit coal mines in the world, occupying 69,000 ha and exporting approximately 30 metric tons of coal per year (Cerrejón Corporation Ltd. 2020). The operation began in the 1980s as a joint venture between Intercor, a subsidiary of Exxon, and Carbocol, which belonged to the Colombian government. When mining companies arrived in the 1980s, their operations cut communities off from grazing lands, forests, and water sources.

The companies employed three main strategies to secure the land needed for the operation: buying titled land, enclosing the concession areas, and expropriating residents. Much of the land occupied by the Las Tunas communities was part of the Comunidad de Cerrejón, an immense land cooperative titled to absentee owners who retained the subsoil rights in a corrupt and illegal land deal made in the nineteenth century (Zabaleta Arias and Peláez 1997). Most Las Tunas residents had generational claims to their land, but no official titles. This situation meant that if a company approached them to sell, they were often only compensated for the value of the improvements they made to the land, not the value of the land itself. In 1985, the consortium filed an expropriation order and forcibly displaced residents of Manantial. As a result, many residents agreed to leave for small compensation packages throughout the 1980s and 1990s as they feared expropriation. As their neighbors left, the remaining Las Tunas residents were enclosed by the mine as it expanded into those lands. In these early land deals, local people had few options but to sign the deals offered by the Intercor–Carbacol consortium (Chomsky et al. 2007).

Adoption of resettlement standards

In 2001, Cerrejón expropriated Tabaco, the largest Las Tunas community. The remaining Las Tunas communities were left without a school or health center. This expropriation occurred as the Colombian government sold its participation in Cerrejón as part of neoliberal privatization policies. Exxon also sold its shares, making Glencore, BHP, and AngloAmerican the new shareholders. In 2007, a group of activists in La Guajira coordinated with international activists to file OECD complaints in Australia against BHP Billiton and in Switzerland against Glencore (then Xstrata).[4] The attorneys who filed the complaints argued that by violently displacing Tabaco, the shareholders had violated the OECD guidelines that require companies improve local capacity and human capital in areas impacted by their operations.[5] The

[4] Australian lawyer Ralph Bleechmore was the first to file an OECD complaint. The Colombian plaintiffs included José Julio Pérez from Tabaco, lawyer Armando Pérez, and the communities of Patilla, Chancleta, Roche, Tamaquito II, and Los Remedios.

[5] Technically, Carbocol–Intercor expropriated Tabaco, but the three shareholding companies inherited the legal responsibility for the displacement when they purchased the Cerrejón concessions.

Table 2 A recreation of the impact matrix used to decide compensation

Criteria	Category	Points
Place of birth	Native to community	4
	Non-native	0
Actual residence	Living in community full time	4
	Not living in community full time	0
Years living in community	Born here	4
	More than 10	3
	5–9	2
	1–4	1
Type of household	Independent household	4
	Dependent	0
Improvement to land	Improvement and possession of land plot	4
	None	0
Economic impact of relocating	Yes	4
	No	0

attorneys used evidence from Tabaco to demonstrate the need for collective resettlement and reparations for future displacements (Bleechmore 2007).

In response to the OECD complaint, Cerrejón adopted IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement, a norm widely used in private and World Bank–funded projects that involve the involuntary displacement of people living in the area of project influence. Performance Standard 5 mandates that project investors pay for housing replacement, livelihood replacements, and land compensation, as well as make specical considerations for vulnerable populations to ensure that resettled people live in equal or (ideally) better conditions than they lived before displacement (International Finance Corporation 2012a).

Some of resettlement are granted collectively to the community such as community infrastructure and service provision. Other benefits such as livelihood replacements and compensation payments are decided at the household level. IFC resettlement standards use impact matrixes (see Table 2) to calculate what impacts communities will face because of resettlement and what type of compensation is appropriate for those impacts (International Finance Corporation 2002, 2012b). Cerrejón hired the contracting firm Antioquia Presente to conduct a census in Chancleta and Patilla in 2007. From these surveys, Cerrejón's resettlement team generated categories for compensation: native status, actively living in the site or elsewhere, economic dependency on land, and improvements made to the land.

By using IFC standards, Cerrejón intervened in community formation. Under this impact matrix, some families were deemed non-relocatable to the new settlement. Some families (like Eneida's) had relocated from other Las Tunas communities or other parts of Colombia's coastal region, making them "non-native." Cerrejón's official position was that these families were trying to take advantage of the company by relocating to Chancleta and Patilla in order to be part of the resettlement deal. Two of the households were Indigenous Wayúu families, a fact that also later complicated the designation of

Black community during the prior consultation (Corte Constitucional de Colombia 2016). Some families were denied relocation because they did not live in Chancleta and Patilla full time but maintained lands there. Families particularly objected to this designation because they had to leave Chancleta and Patilla to send their children to school beyond primary school and because the decades-long process of the mine enclosing their lands had forced them to find work in urban areas (Banks 2020).

This impact matrix also spurred divisions and jealousy between residents. Cerrejón officials "socialized the matrix" among residents, asking them to verify each other's native status and which families lived full time in the settlements. Each family could only declare land in one community. Samuel Arregocés, an Afro-descendant leader from Tabaco with family lands in Chancleta, described how these matrixes fomented divisions in his interview with the Constitutional Court investing the prior consultation petition in 2016:

> I'll summarize for you what the multinational has done not just in this community, but also in other communities. It has fractured the community in two. How so? Cerrejón arrives, they are the judges, and they contract a little dog to do an evaluation to decide who is relocatable and who is not. Therefore, my family did not count as eligible, the same happened with other families. So, they categorize us as "new households" even though we are natives and have acquired rights. They closed the census before we could negotiate. Today, the community is divided between relocatable and non-relocatable (Corte Constitucional de Colombia 2016, 60).

Samuel told the magistrates how the impact matrix reduced who counted in the communities, creating divisions between those who were eligible for relocation and those who were not. He also criticized Cerrejón's complete control over the situation, showing that company officials were the ones "judging" who belonged to the communities.

To justify this position, Cerrejón officials demonstrated their expertise in community history and identity. Cerrejón's head of resettlement programs Juan Carlos García told court magistrates:

> One finds it a bit curious that basically all the community members that already resettled have identity cards from the Barrancas municipality but all the ones here, or at least the majority, [the plaintiffs] have an identity card from Ariguaní, Magdalena. This shows that there has been a population migration to seek the benefits generated by resettlement.
> We do have an easy answer to the problem, but the answer cannot be that we give them what we give to relocatable residents because that would basically be ignoring the facts and treating people who are essentially unequal, and whom the community itself has not recognized as part of this territorial group, as equal (Corte Constitucional de Colombia 2016, 74).

García presented the use of the impact matrix as fair and impartial. Furthermore, he argued that community members agreed with the characterization, at least initially. García positioned himself as an expert on communities' history allowing him to question the credibility of witnesses like Samuel Arregocés.

The first resettlement agreement

In 2012, Cerrejón finalized a resettlement with two-thirds of the households in Chancleta and Patilla. The company built a peri-urban site to relocate 84 families and signed an agreement with an additional 9 families who decided to not move to the resettlement site (Cerrejón Corporation Ltd. 2017). This agreement excluded 48 other families who stayed in Chancleta and Patilla.

The families who resettled struggled to adapt to their new peri-urban site. They faced water shortages because the infrastructure built by Cerrejón did not provide sufficient water for household consumption nor for use in agriculture (Corte Constitucional de Colombia 2016). Families were left without adequate land for subsistence agriculture and did not find alternative employment, leaving them impoverished. Moving from a rural area to a peri-urban neighborhood also transformed their cultural and social ties, leaving residents feeling disconnected from their roots (Banks 2020).

The families that resettled were generally dissatisfied and those that remained in the old sites wanted an alternative to this form of resettlement. Resettlement created new categories of residents: resettled, non-resettled but legible for resettlement, illegible for resettlement, and legible but choosing individual compensation. This process encouraged each household to seek individual rather than collective solutions. The families who did not sign agreements in 2012 chose a collective legal route that brought new challenges and new possibilities.

Prior consultation as a last resort

When residents filed a *tutela* in 2015, they were one of many communities in La Guajira making legal claims against the company. When mining companies first displaced communities in 1985, there was no law to protect Afro-descendant territories. In the early 2000s, claiming ethnic community rights became a way for communities in the Cerrejón impact zone to contest their displacement. During my fieldwork from 2013 to 2023, I observed the proliferation of such lawsuits from other Las Tunas communities and from Indigenous communities fighting to stop the company's diversion of water sources (Banks 2017). Because Colombia has a powerful constitutional court system, these legal claims open new possibilities for communities to contest Cerrejón's presence and bring the state into their negotiations. Over the last decade, there has been a growing awareness of such laws through workshops with NGOs, partnerships with lawyers eager to represent the plaintiffs, and contact with other communities who have filed these lawsuits. Prior consultations are often a last resort after negotiating directly with the company or filing claims with state institutions fails. These processes also offer communities a way to reimagine themselves and organize around a collective identity and history.

The 48 families who initiated the prior consultation in 2015 were holdouts from the 2012 resettlement agreement. They represented two main groups: "non-relocatable" recent migrants and "relocatable" families who refused to sign the 2012 agreement because they relied on farming income. Wilman Palmezano, one of the leaders of the community council, fell into the latter category; his family had herds of cattle

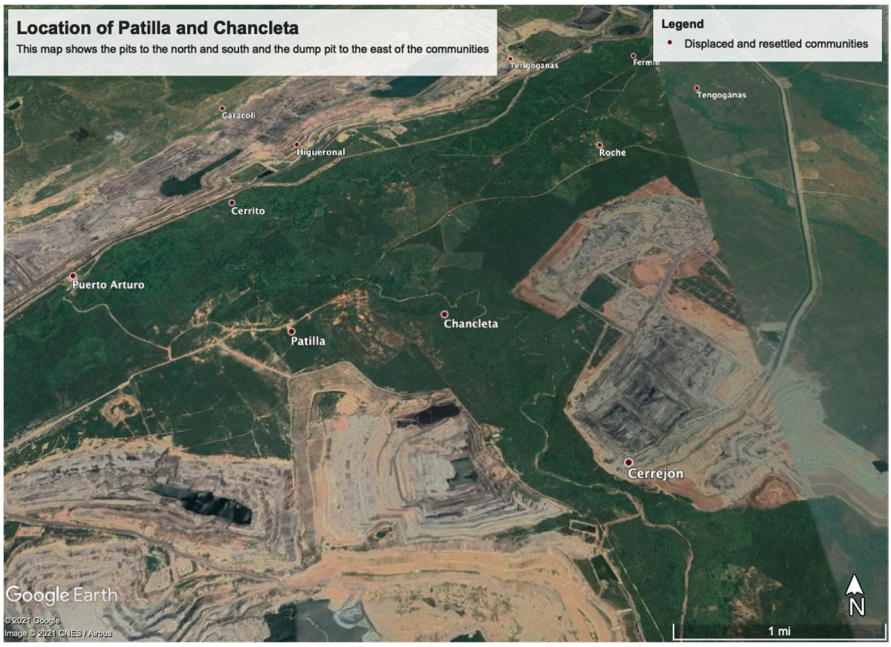

Fig. 3 A satellite image showing the pits to the south, north, and east of the communities Google Earth, public domain

and goats that provided a steady income. Milagros Pinto, whose story opened the chapter, fell into the first category because she was a "non-native"; she migrated in 1997 after paramilitaries forcibly displaced her community in the Magdalena province.

I visited Marisela Vargas one afternoon to learn about her fears over moving from a rural area to an urban one. She entered the prior consultation with the expectation of receiving new land to raise her livestock. In 2016, Vargas still had dozens of goats in her herd, and her son had 200 goats. She had family in the resettlements built by Cerrejón, and all of them had given up herding and agriculture. Marisela did not want to move to an urban area but staying in Chancleta was impossible. As the pit closed in, Marisela's animals were losing grazing land. She had already lost a herd of cattle after they wandered across the mine's fences. Workers seized cattle in the operations and ended up sending them to auction without paying Marisela. Chancleta and Patilla could not stop their displacement using the prior consultation because state environmental and health authorities had already ordered resettlement. The Google Earth image below (Fig. 3) shows how mining operations surrounded the communities.

Marisela, like many others, hoped the prior consultation would allow families to negotiate collective rural lands as compensation to continue or even expand

their agriculture and ranching. Other families were happy to use the consultation to seek individual compensation. Their diverse interpretations of reparations made positioning themselves as a legible ethnic collective under Colombian law challenging.

Residents of the Las Tunas communities had spent years petitioning government offices for help either to prevent their displacement or receive compensation for their lost lands. Carlos Torres, an attorney who observed the prior consultation and advised the community, described this deep distrust of authority:

> These are communities that have historically been abandoned, and very likely have had contact with business, social, and political leaders who have not resolved their problems. When I arrived in the community, the common denominator I found was a high level of distrust of everything and of the Cerrejón Company, against which they have made complaints, many times due to their history of unfair treatment. They perceive this corporation as a huge monster to which everyone succumbs; anyone can be bought by Cerrejón. (Interview with author, Jan 16, 2017)

The expert made two important points. First, there was a long history of communities filing complaints with different human rights and legal institutions to ask for state intervention in their relationship with Cerrejón. These petitions had yielded few results. Second, people perceived the company as the dominant actor in their lives. By the mid-2000s, residents of Chancleta and Patilla relied on the company to provide water, electricity, and school transportation. During a visit to Patilla, Don Ramón Pérez captured this dependence, stating, "Here, in La Guajira, the mine is above the state."

The *tutela* filed by these 48 families in 2015 was a last attempt to force the company to negotiate with them over these historical losses and to give all families living in the site equal consideration. In the *tutela*, they claimed that the resettlement agreement did not consider their vocation and identity as Afro-descendant peoples. They objected to the peri-urban location of the new settlement, which did not honor their vocations as farmers. They also complained of the years of environmental damage they had suffered.

Before taking their petition to the constitutional court, judges in lower courts dismissed the complaint based on a lack of evidence that all plaintiffs had the same rights and that the *tutela* did not pass the "immediacy" requirement given that the company had been operating for more than ten years when the plaintiffs filed the petition (Corte Constitucional de Colombia 2016, 9). Effectively, these lower courts saw the plaintiffs' problems as individual and not collective. In the next section, I address how despite differences and divisions, Chancleta and Patilla residents attempted to form a coherent community to demand collective rights, and the complications they faced measuring up to the legal requirements to be considered a Black community.

Table 3 The laws and norms governing the consultation

Law	Type	Description	Application in this case
ILO 169 of 1989	International agreement	Colombia is a signatory. Defines the language for the 1991 Constitution, Law 21, and Law 70.	Defines language for prior consultation in Colombian laws.
1991 Constitution	Constitutional law	Colombia recognizes Indigenous and Afro-descendant peoples as ethnic groups with consultation rights.	Sets the basis for the constitutional court decision, and laws 21 and 70.
Law 21 of 1991: Law of Prior Consultation	Constitutional law	Colombia ratifies prior consultation as part of implementing new constitution	Application of this law in both Indigenous and Afro-descendant communities gives court 15 years of jurisprudence to draw on when deciding on this *tutela.*
Law 70 of 1993: Law of Black Communities	Constitutional law	Colombia recognizes Black communities on the Pacific Coast as a distinct ethnic group with territorial rights.	Law 70 mentions Colombia's Pacific Coast Black communities, but the Constitutional Court interprets laws as giving rights to other rural Black communities in previous cases, establishing jurisprudence. Magistrates recognize that requirements for Black community definition are too narrow, and they recognize Chancleta and Patilla on basis of self-identification.
The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007	International agreement	Colombia is a signatory and adopts ideas about free, prior, and informed consent into prior consultation applications.	Offers stronger protections than ILO 169. Magistrates consider the need for free, prior, and informed consent for Afro-Colombian communities, giving Chancleta and Patilla a stronger argument that Cerrejón violated their rights
IFC Resettlement Standards	International guidelines	In line with World Bank Group's policy on Involuntary Resettlement (OD 4.30), these standards outline the process for resettlement.	Becomes default mechanism to resolve prior consultation because the consultation focuses on resettlement rather than on the wider harms claimed by the communities in their *tutela.*

Overlapping legal regimes

In Chancleta and Patilla's prior consultation, competing legal and policy regimes both opened and closed spaces for communities to raise concerns and contest corporate power. IFC resettlement standards, Colombian Constitutional Law, ILO 169, and other legal frameworks that apply to this case all have measures to protect communities, yet how they define "community" often conflicts with how people on the ground experience community (see Table 3 below for a summary of these overlapping laws.) Colombian constitutional law defines ethnic communities as having collective territories and being organized in traditional community councils. These frameworks create an expectation that all community members share a common ancestry and history, and that they make collective decisions. Although Chancleta and Patilla previously held a collective territory, at the time of the prior consultation, many of the plaintiffs were not part of the Las Tunas families who had a generational claim to the original settlements.

The Constitutional Court magistrates considered a wide variety of legal grievances that they attempted to resolve by ordering a prior consultation. The sentence described:

> In this order, the first legal problem that is posed to the Eighth Review Chamber consists of resolving whether the Cerrejón Coal Company violats the fundamental right to prior consultation and to recognition and subsistence as an Afro-descendant people of the plaintiffs, members of the Black Afro-descendant Community Council of Chancleta…. Likewise to determine if this denial generates the possible violation of the fundamental rights to the environment, to life in decent conditions, to health and privacy, by [the communities] continuing to be exposed to the contamination generated by an open-cast coal mine. (Corte Constitucional de Colombia 2016, 220)

To answer this question, magistrates first considered whether Cerrejón violated the right to prior consultation and if the communities could be considered Black communities under Colombian law. Below, I outline the competing legal regimes that opened a space for plaintiffs to organize as a Black community but also opened a space for the corporation to deny community rights. I also show how the court's use of community was at times ambiguous, which led to conflicting interpretations of individual versus collective rights.

Ethnic rights laws

Colombia has one of the strongest constitutional frameworks for prior consultation in the world and a legal framework that recognizes rural Afro-descendant communities' land rights. However, in practice, the application of these laws is inconsistent (Castillo et al. 2021; Vega 2014). Despite the communities winning their constitutional court petition and undertaking a consultation monitored by state institutions,

company officials used involuntary resettlement standards set by the IFC to dominate the process.[6] To justify their use of IFC standards, Cerrejón officials undermined the communities' credibility as an ethnic group.

Decades of global Indigenous activism led the International Labor Organization (ILO) to adopt prior consultation to preserve Indigenous lands from extractive industry and development projects. The ILO's Indigenous and Tribal Peoples Convention 169 of 1989 (ILO 169) established Indigenous people's rights to consult over any legislative or administrative decisions that impact their traditionally held lands before the project can begin (International Labor Organization 1989, article 6). The United National Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007 established free, prior and informed consent (FPIC) to ensure the full participation of Indigenous peoples in the planning and implementation of development projects that impact them. Article 10 states: "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" (The United Nations 2007, 11). Colombia recognized the right to prior consultation for Indigenous communities in its 1991 Constitution and adopted prior consultation as defined by ILO 169 via Law 20 of 1991. The government recognized the same rights for Black communities in Law 70 of 1993, the Law of Black Communities. Since 2011, Colombia's Constitutional Court has interpreted prior consolation as FPIC, which in theory gives communities full participation and decision-making power (Vega 2014). The court considered this jurisprudence in Chancleta and Patilla's case, acknowledging that the state and the company had violated communities' rights to FPIC.

Following the rise of the Indigenous movement in Colombia in the 1970s, Black Colombians on the Pacific coast organized to defend the forest lands they inhabited from extractive development projects cumulating in Law 70 of 1993, the Law of Black Communities (Asher 2009; Escobar 2008). Over the last two decades, Law 70 has brought visibility to Afro-Colombian populations and titled their collective lands (Castillo et al. 2021). While the original law only mentions the Pacific coast, Afro-descendant communities in the interior and the Caribbean coast have also organized as Black communities and petitioned for protection, with varying degrees of success (Ng'weno 2007; Villa and Villa 2011).

The Law of Black Communities (Law 70 of 1993) stipulates how Black communities must organize: "To receive collective property of the allotted lands, each community will form a community council as a form of internal administration, the requirements of which will be determined by the regulations issued by the National Government" (Congreso Colombiano 1993, Article 5). Articles 6 and 7 of Law 70 of 1993 specifically state that Black communities must hold collective lands, and cannot live in urban areas, recognized Indigenous reservations, or

[6] The IFC does mention the need to respect free, prior, and informed consent in Standard 7 of these guidelines. However, this recognition is not legally binding, and in this case, Cerrejón's use of the standards was voluntary.

national parkland. To access Law 70, Afro-Colombians have rearticulated their historical memories and identities, wedding them both to an African past and to territories in Colombia (Restrepo 2004).

Court, community, and company interpretations

The Constitutional Court's sentence acknowledged that not all families in Chancleta and Patilla shared the same history, but nonetheless ordered a prior consultation with "the community of Black Afro-descendants from the corregimientos of Chancleta and Patilla in the municipality of Barrancas, La Guajira, including the two Wayúu families identified in the present sentence and that live in the referenced community" (Corte Constitucional de Colombia 2016, 265). Order 7 of the sentence convened the municipal government, the Ministry of Housing and Territory, and CorpoGuajira to participate in "a specific plan for resettlement of the Patilla in Chancleta hamlets in the municipality of Barrancas, La Guajira to which the plaintiffs are entitled with their legal and constitutional competencies" (Corte Constitucional de Colombia 2016, 267). The court recognized Chancleta and Parilla residents as having collective rights, but also stated that each plaintiff should be treated with their own "legal and constitutional competencies." This ambiguity over whether the consultation should be individual or collective opened the door for the corporation to reduce the prior consultation to an IFC resettlement plan by recognizing the different histories of each family. The court reduced the substantive and historical harms faced by Chancleta and Patilla to issues that could be resolved by prior consultation. It further reduced the prior consultation to serve as a resettlement negotiation.

Throughout the prior consultation, Chancleta and Patilla residents articulated their sense of being Black communities in relationship not to a long ago African past or descendants of Maroons, but as people abandoned by the state and victimized by a corporation. Wilman Palmezano, leader of the Chancleta community council, told the magistrates in his pre-sentence interview about the sustained loss of territory, blaming the state for allowing a company to dispossess the communities:

> I want to tell you that we want you to protect us because we feel alone. Today, you see a lot of government organizations here, but that's because you invited them here. We have been alone without accompaniment. Not even the mayor's office has accompanied us. So, we do not want them to violate our rights that they have violated all our lives. They have taken the water away from us, they have taken food away from us, they have taken everything from us. So here, we resist because God is great, and we are with him, and he is with us. We could have died here but the territory gives us an advantage… The majority do not work, do not have employment, cannot make a dignified living. So, what do we do? We hunt, we fish. And at many times, Cerrejón has taken that

away from us too, they have tried to put a price on it (Corte Constitucional de Colombia 2016, 54).

Wilman addressed the court magistrates as stand-ins for the Colombian state. Wilman argued that people in Chancleta and Patilla had a history of surviving from the land and resisting in their territory. He criticized the government for abandoning the communities and allowing a corporation to take their lands. Wilman pointed out that the corporation was governing their access to life necessities and hoped to use the prior consultation to renegotiate this relationship by asking the state to intervene.

Cerrejón officials delegitimized communities' ethnic claims to manage criticism against the company. They manipulated the communities' complex history to impose a strict standard of community belonging and territorial holding. Juan Carlos Forero, the company anthropologist, produced a report on Roche, a community with the same origin story as Chancleta and Patilla, calling it a *campesino* (peasant) community with Black roots but concluding it was not a true Black community as defined by Law 70. Forero made the same argument when I met with him in person: the people of Roche, Chancleta, and Patilla were mixed race and did not have collective territory, so they were not true Black communities. Cerrejón officials used the controversial Comunidad de Cerrejón private title to dismiss the communities' territorial claims even though many Chancleta and Patilla families' ancestors had settled those areas in the eighteenth and nineteenth centuries when they escaped slavery (Arregocés Pérez et al. 2015).

In 2016, Juan Carlos García, a lawyer who headed Cerrejón's resettlement team at the time, attempted to have the prior consultation charges dismissed when the Constitutional Court conducted its initial investigation on the grounds that the communities did not have collective territory nor a collective vocation and thus should not count as ethnic communities. In an interview with Constitutional Court magistrates, he said: "On the question of negritude, yes, it is possible here and there, it's obvious that there is a distinct Black race but there is no collective territory, and the individuality is reflected in this legal demand where they are being asked to be treated as individuals, not as a collective" (Corte Constitucional de Colombia 2016, 76). García acknowledged that people from Chancleta and Patilla were racially Black, but argued they were not a collective ethnic group. By shifting the focus to the authenticity of Chancleta and Patilla's ethnic claims, he obscured his own role in creating community divisions by the previous use of impact matrixes.

The court magistrates summarized this disagreement between the company and the community in the sentence:

> [The plaintiffs] believe that they are being subjected to living in undignified conditions and enduring the pollution that is generated in the area…. Additionally, the plaintiffs make up the Chancleta Ancestral Black Community Council, legally registered with the Municipal Mayor's Office of Barrancas, La Guajira. For this reason, they demand that the sued company recognize their Afro-descendant origin within the resettlement project and allow them to discuss their cultural and historical heritage… Due to the foregoing, they consider that their fundamental rights to a healthy environment, privacy, life, and health have been violated due to environmental contamination due to the

> emission of carbon particles generated by open-pit coal exploitation and due to non-compliance by the named company to carry out the resettlement process for their families without taking into account their ethnic identity as a Black community (Corte Constitucional de Colombia 2016, 6).

The Constitutional Court magistrates acknowledged a wide variety of grievances including environmental health concerns, the failure of past resettlements, privacy violations, and ethnic rights violations. By reducing the mechanism to resolve these grievances to prior consultation, the court narrowed the ways that Chancleta and Patilla could seek reparations. Furthermore, as interpreted, the prior consultation focused only on resettlement compensation, which did not address the historical grievances related to the environment or the violation of privacy. In their response to the *tutela*, company officials claimed they could not "recognize an Afro-descendant identity or any other ethnic characterization since the petitioners do not form a community" (Cerrejón Corporation Ltd. 2017, 152). The company used the diversity of plaintiffs' origins and their pre-existing divisions to cast Chancleta and Patilla as undeserving of these rights in the first place.

Cerrejón officials did not need to discredit communities to continue the company's operations because the state had already ordered the communities to resettle (Social Capital Group 2010). By contesting the communities' claims for prior consultation, the company officials justified using the IFC impact matrix once again to resolve the complaints rather than grappling with the substantive conflicts that prompted the communities to file the *tutela*. They sought a time-saving and cost-effective solution that limited the company's legal and social liability. In the following section, I show how the communities expressed collective interests but were offered individual solutions.

Corporate co-optation of the consultation

The physical setup of consultation meetings made it clear that the company oversaw the legal process, even though community members had initiated it. The first meeting took place in a cinema with auditorium seating. The Ministry of Interior and Cerrejón officials played the role of experts lecturing upfront. Community members struggled to participate since they had to look forward to the officials giving PowerPoint presentations. The use of physical space in these meetings limited resident participation in decision-making to a final vote on the company's proposals. Several community residents chose to participate by standing up and raising their voices to interrupt the presentation; they were abruptly shushed by Cerrejón officials. Prior consultation is an "invited space" in which the government creates a place for communities to participate but does not allow them to shape the rules of the negotiation (Flemmer and Schilling-Vacaflor 2016). Here, corporate officials set the rules. From the very beginning of the consutlation, they insisted on using the impact matrix to negotiate each household's compensation instead of treating the community as a collective. A physical resettlement was not even an option. Instead, officials insisted that each family would receive financial compensation that matched their categorization in the matrix.

One of the first conflicts over Cerrejón's rules arose over which community members could be part of the consultation. Carlos Franco,[7] head of Cerrejón's social standards department, opened the first consultation meeting by stating that the prior consultation would only be for the 48 families named in the sentence, excluding the 93 families who had signed the 2012 resettlement agreement. Julia Hernández, a young woman from the Chancleta resettlement interrupted the meeting, saying that the resettled people had been abandoned by the state too, and were suffering in a failed resettlement without water or land. Some of the 93 families who had resettled wanted to engage in a prior consultation to seek reparations for the failures of resettlement. They too had been denied a prior consultation in the original negotiations. Community leaders Wilman Palmezano and Ruben Araujo, and their lawyer Campo López argued that any person from Chancleta and Patilla should have the right to be part of the consultation because Cerrejón had violated every resident's rights. Franco responded that the Constitutional Court never suspended the expansion project, so Palmezano and Araujo had two choices: agree to move forward with only the 48 families named in the sentence or delay the process with additional lawsuits. By treating residents' concerns as unreasonable, Cerrejón's legal team reinforced that Chancleta and Patilla residents were undeserving of this prior consultation in the first place. They also used the threat of extending the negotiation period to limit who could participate.

Community members expressed their frustrations with the process outside of the invited space. During the first meeting, there was a blackout, leaving us in total darkness inside the cinema. We filed out, using our cell phones as flashlights. In the foyer, it was easier for community members to speak among themselves. Don Pedro Ramírez, a man in his seventies who had the lean sinewy body of someone accustomed to physical labor, explained that he did not want the pension offered to senior residents in the resettlement agreement; he was not too old to work and so he wanted new land and for someone to help him with the work. Remedios Pérez Uriana, an Indigenous Wayúu woman who had migrated to the Afro-descendant community in 2000, told me that her adult daughter was not recognized as an individual household in the 2012 impact matrix, which would reduce their overall compensation and not allow them to buy a new house or land.[8] Both Remedios and Don Pedro believed they were entitled to reparations that would allow them to continue living as rural people with agricultural vocations. They wanted to move to a place where they could expand their landholdings and allow the next generation to settle and rebuild there.

[7] Before arriving at Cerrejón, Carlos Franco worked in the human rights office under President Alvaro Uribe. Before that, he was part of the left-wing guerilla group the Popular Liberation Army (Ejército Popular de Liberación, EPL).

[8] Remedios' history also shows the difficulties in being read as a coherent Black community in the prior consultation because she was both Indigenous and a recent migrant to the settlements. The Constitutional Court acknowledged the presence of two Wayúu families among the plaintiffs and held that as Indigenous peoples, they had the right to prior consultation as well.

Table 4 Actors involved in the consultation and their roles

Actor name	Description
Cerrejón	The Colombian coal company, at the time owned by BHP Billiton, Anglo American, and Glencore
Chancleta and Patilla	The two communities involved in the prior consultation; more than half of residents resettled before the consultation and were thus not part of the legal action
Roche, Tabaco, and Manantial	Other Afro-descendant communities that share kinship ties and common territories with Chancleta and Patilla; Cerrejón displaced and/or resettled these families before the 2016 consultation
The Ministry of the Interior	The state institution that oversees prior consultation processes
The Constitutional Court	The state institution that hears ethnic rights cases and orders prior consultation
Wilman Palmezano	The president of the Chancleta and Patilla Community Council
Ruben Araujo	The vice-president of the Chancleta and Patilla Community Council and representative of the two Indigenous families in the process
Campo Elia López	The communities' lawyer who filed the action for protection and accompanied the consultation process
Carlos Franco	Head of Cerrejón's social standards department
Juan Carlos García	Lawyer and head of Cerrejón's resettlement department
Juan Carlos Forero	Anthropologist and part of Cerrejón's resettlement department

The Constitutional Court took a strong stance to protect the communities. However, in practice, state institutions were complicit in allowing a company to monopolize this legal process. While many state representatives attended the meeting, they were mainly observers. Not even once did I witness a state representative intervene when Cerrejón officials dominated the discussions with their PowerPoint presentations and their team of lawyers. The Ministry of the Interior oversaw compliance with the laws and court orders. Various municipal, regional, and national entities set representatives including the National Authority of Environmental Licenses (ANLA), the regional environmental authority (CorpoGuajira), the mayor's office, and the public prosecutors' office (see Table 4). Often, state representatives did not even show up to the meetings. In the end, their job seemed to be to record the events and guarantee the implementation of the final agreement. The state effectively outsourced the implementation and mediation of the *tutela* to the company despite the company being the defendant. This example reflects a pattern of states outsourcing community well-being to corporations in resource frontiers (Foster 2010; Li 2014).

Questioning community

Despite having won their petition against the company, Chancleta and Patilla found themselves on trial over the authenticity of their ethnic community claims. Company officials accepted that the residents were racially Black but denied that they were an ethnic community. The communities' claims were complicated because they had already lost their territory and they were made up of migrants from various

regions of Colombia. However, the 48 families did form and register themselves as the Community Council of Chancleta and Patilla, filing their paperwork with the municipal office to make it official before filing the *tutela*.

Despite the internal divisions, there was multiple moment in which the communities demonstrated a collective sentiment during the prior consultation. In July 2016, community members participated in a workshop to design a resettlement plan. The mediator from the Ministry of the Interior asked each extended family to sit together and come up with a list of what was most important to them in resettlement. After the brainstorming session, each family presented their ideas. Common themes ran through each family's presentation. They identified negative impacts as the loss of their agricultural vocations and territory, and the "tearing of the social fabric" as people moved out of the community. Many of the speakers had family in the existing Patilla and Chancleta resettlements and mentioned that they did not want to follow the same path to peri-urban resettlement. One man said that the families in their consultation wanted to "live well" which meant "more than just a nice house." This speaker continued to explain how if the residents planned the resettlement carefully, Chancleta and Patilla would become an example for future resettled communities.

Carlos Franco responded by interrogating the validity of the impacts identified by community members. He questioned whether they had ever lived off the land, stating that they knew their lands were smaller than they were claiming. He said, "It's good to have aspirations, we all should have aspirations. But we must be realistic about what we deserve." (from recording by author, July 19, 2016). Campo López reminded Franco that Chancleta and Patilla were productive lands in the 1980s but had already weathered over 30 years of reduced land and contamination because of mining. Wilman Palmezano reminded Franco that Cerrejón had obligated people to sell their lands and move away before they could organize as an Afro-descendant community. Company officials exploited the communities' dependency on Cerrejón to position themselves as experts on what plaintiffs "deserved" while distracting from the company's history of dispossessing communities.

From the beginning of the prior consultation, company officials insisted on using a similar impact matrix as the 2012 resettlement agreement to come up with compensation packages (see Table 2). Cerrejón's team of experts defended their control of the prior consultation and their push for individual compensation rather than collective resettlement by discrediting the communities' identity claims. Cerrejón officials relied on this dominant ideology to dismiss Chancleta and Patilla's status as a Black community by arguing they did not belong to a distinct ethnic group and did not hold territory. This strategy allowed the officials to deny that the company had ever violated the communities' rights in the original resettlement negotiations. By claiming they were just "following the law," they portrayed themselves as neutral mediators rather than as representatives of a company with a vested interest in avoiding legal liability and negative public relations.

In one meeting in the Barrancas cinema, Cerrejón officials went over the impact matrix categories. They read out how each family would be categorized for compensation. Suddenly, Britta Lopez stood up to yell at her neighbor Mayerly Claros who was claiming to be a "native" of Chancleta. Britta called Mayerly a liar, because she was not

from Chancleta, she was from Maicao. Mayerly grew so agitated that she rose from her seat and began running down the auditorium steps to physically confront her accuser. Three men stood up to block her path and calm her down. They firmly, but gently, put their arms up to keep her from running down the steps. This physical confrontation was a direct result of using impact matrixes to decide who belonged to the community. Cerrejón officials referred to these public conflicts as proof that the community was not collective.

Yet, the prior consultation also opened a space for communities to contest Cerrejón and to organize as a collective. Court magistrates supported communities' self-identification and acknowledged their sustained loss of territory due to mining. In the ruling, magistrates admitted that Chancleta and Patilla were not an easily legible ethnic group because they lacked a collective territory. However, they accepted the communities' identity claims based on their self-identification, on an oral history project conducted by the NGO Cinep (Arregocés Pérez et al. 2015) and their registration of the community council. They also recognized the complexities of the communities' Blackness:

> The Afro-descendant population living in Colombian territory is the result of a diaspora and of colonial trauma; under a process of political re-vindication the Black people of the Guajira department reimagine themselves as a dispersed Black community to make their identity visible. However, the diaspora, a characteristic of their history as a Black community, becomes a limitation at the time of re-claiming their identity, because the hegemonic imaginary validates an ethnic community exclusively in relation to a demarcated territory bound with nature. This situation deepens with the expansion of mining in their territory (Corte Constitucional de Colombia 2016, 224)

The court decided that Black communities could simultaneously be a racial diaspora and an ethnic group. In some previous rulings (Ng'weno 2007; Machado et al. 2017), the state did not recognize communities' as ethnically Black because of their lack of collective territory. In other rulings, such as the emblematic case of La Toma in 2010, the court recognized a flexible definition of Black community without having a collective land title (Corte Constitucional de Colombia 2010). In the case of Chancleta and Patilla, the court recognized that the communities likely did have collective territory, but that their territory had been lost to the mine. In addition, they recognized that a collective land title was an unfair burden to place on Black communities to "prove" their legal status, and thus accepted the communities' self-identification as evidence. The magistrates recognized the harms mining and the extractive model had done to the communities. However, the ruling did not give the Ministry of the Interior or any other attending state institution specific instructions on how to repair this situation.

Prior consultation outcomes

By the end of the process, it was clear that Cerrejón officials were managing the consultation and state institutions were mainly bystanders. In November 2016, the final consultation meeting took place on Wilman Palmezano's patio, which his family had painstakingly fenced in with cactus plants. Children ran around the yard.

When dogs and chickens appeared, people shooed them away. Families arrived early but waited almost an hour for Cerrejón officials. No one from the Ministry of the Interior, the state government, or the municipal government observed that day. Carlos Franco made a point that the Human Rights Ombudsman's Office was supposed to send a representative, but no one arrived.

Franco gave a presentation. Company officials used an impact matrix to assign each family a category between A and D (see Table 1). Category A families received more than 30 times more money than Category D families. Category A and B families would receive enough money to buy a new home or perhaps a small land plot. Most families were in Category C or Category D, and their compensation would only cover moving costs, a few years' rent in a new place, or a down payment on a house in town if they could secure a loan. Cerrejón representatives spent over three hours reviewing the cases of 25 families who objected to their categorization in the impact matrix. Franco reminded the families that "we all want progress, we have to work for it and teach our children to work for it" (recording by author, Nov 17, 2016). He reprimanded the families who tried to claim they should be in a higher impact category. He said he had worked so hard preparing the compensation packages that he had missed watching the Baseball World Series.

All but two families signed individual agreements with Cerrejón for compensation, agreeing to relocate without resettlement or land. Cerrejón was in the process of expanding the Patilla pit (see Fig. 3),[9] which lay to one side of the community, as well as continuing to use the tailings pits on the other side. The mine was quite literally closing in on them. If families signed the agreement by the January 2017 deadline, Cerrejón would throw in a bonus—20% of their compensation—to cover the lawyer's commissions for the settlement. For those that did not sign by January, they would have to pay the lawyer's share from their settlement package, losing 20% of their compensation. Some families I spoke with told me they planned to hire a new lawyer to re-negotiate but would have to pay both lawyers' commissions out of their settlements. Community residents were dependent on Cerrejón to pay for the costs of fulfilling the court order they had brought against the company. A company, not the state, mediated the fulfillment of their ethnic rights.

Residents I spoke with expressed a combination of apathy and desperation to explain why they signed the agreements. They had to move, so receiving compensation was better than nothing. Most were skeptical that they could seek a better deal or demand a physical resettlement. Those that refused the settlement objected to their categorization under the impact matrix and wanted to renegotiate for a better deal. Many, including Wilman Palmezano, signed reluctantly. They had hoped to rebuild as a community and seek new lands, but it became clear during the negotiation that they would not achieve that.

When I returned to the Guajira in 2018, I met Wilman Palmezano at a family party. I asked him how families were adapting to the move. He told me he might have to open a new case against the company because the families had not received

[9] Cerrejón often names pits after the community displaced from the area. There are also pits named after the communities of Tabaco and Oregenal.

their full payment. Families received a portion of their settlement before moving but had to come up with a *plan de vida* (life plan) to receive the rest of the settlement money, which the company put into a trust. The concept of a *plan de vida* comes from indigenous groups in Colombia's southwest region and was ratified as part of the 1991 Constitution (Bastian 1999; "Los Planes de Vida 2019). An Indigenous community or organization creates a plan de vida to manage state funds for development projects in a way that respects Indigenous culture and autonomy ("Los Planes de Vida 2019). The Ministry of the Interior requires the community to come up with these plans as part of prior consultation. Wilman told me that families were still waiting for the rest of their settlement money because they did not have an approved plan. Given that the prior consultation had focused on individual settlements rather than rebuilding the community, it was almost impossible to create a collective *plan de vida*. The prior consultation left residents more divided than before and the *plan de vida* rule punished them for not being united.

In an interview with Carlos Franco in 2017, I asked him what he thought about the outcomes of the consultation. He responded: "I believe this was an unfortunate situation. The constitutional court intended to protect ethnic communities, but not all the people who lived in Patilla and Chancleta had the same relationship with the territory. Some of them arrived in 2014, 2015, and 2016, but they were all under the protection of their recognition as an Afro community." (Interview with author, April 12, 2017). According to Carlos Franco, the state had done a disservice to the community by not properly studying the people of Chancleta or Patilla. It was up to Cerrejón officials to enforce ethnic rights laws and decide who should and should not count as a Black community member.

Carlos Franco explained this problem to me as evidence that he and other Cerrejón officials were doing more for the community that the state: "The state abandoned the consultation. So, we were in a very serious situation because the survival of the community depended on what was negotiated with the company. Yes, the consultation was between the company and the community. But the other party was supposed to be the state. The one that guarantees the rights of the community is the state" (interview with author, April 12, 2017). The state allowed Cerrejón to define the terms of debate, which allowed the company officials to prove that Cerrejón has never really violated ethnic rights in the first place.

Conclusion

During the prior consultation, community members established a space to contest their long history of dispossession at the hands of the company. They voiced their grievances about community divisions and the loss of territory. They imagined a future where they could return to rural livelihoods. They also contested their abandonment at the hands of the state and sought reparations for this past injustice. The outcomes of the legal process confined their path forward to individual compensation. Ultimately, the company positioned itself as the arbitrator of ethnic rights law and as an expert on community histories. While communities consistently contested

the company's interpretations of law and history, they had little choice in the end but to accept the compensation deal.

When communities engage ethnic rights laws, they also undergo new processes of community formation in their interactions with corporations, courts, and international institutions. By claiming ethnic community status, Chancleta and Patilla residents transformed themselves into a collective legal body, but their experiences of division and their diverse personal histories complicated this claim. These outcomes show that multiple actors including the IFC, ILO, the UN, companies, and states have policies that claim to protect community rights and interests. Yet, who belongs to a community and what a community means remain deeply complex. If these entities only protect perfectly homogenous and unified communities, they ignore the messy on-the-ground realities of community formation. Moreover, these actors present themselves as neutral parties when they have profound impacts on the process of community formation.

When communities, corporations, and courts interact through legal cases, they redefine what it means to be an ethnic community. As people impacted by extractive and development projects organize as ethnic communities, they also open themselves to scrutiny and criticism that distracts from their experiences of dispossession and exclusion. Corporations play an enormous role in community formation and in mediating community rights. While ethnic rights laws remain an important source for communities to organize for a just future, if the application of those laws continues to empower corporations, there can be few real gains in halting the seizure of communities' land and destroying their way of life. As the problems in Chancleta and Patilla show, prior consultation cannot resolve historical problems that require reparation. Legal systems should hold corporations accountable for these harms rather than allow them to define and implement communities' rights.

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Declarations

Conflict of interest The author declares no competing interest.

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