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**The OXY-U'WA Case –Colombia**  
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In April 1995, the Colombian newspaper *El Nuevo Siglo* reported that U'wa Indians were threatening to commit mass suicide. They would do so, some leaders said, if the oil company Occidental de Colombia (OXY) carried through with its plans for oil exploration in the Samore Block, which included U'wa lands. Numerous accounts followed in Colombian papers; there was also a September 1997 piece in *The Guardian* (London) and, the following month, in the *New York Times*. The U'wa, each wrote, would leap to their death from a 1,400 foot cliff because, for a variety of reasons, oil production would destroy the world as they knew it. National and international interest in and support for the U'wa situation grew exponentially. OXY, and its international, financial partner Shell Oil, halted all work in the Samore Block, and sought to open discussions with the U'wa and other critics of the proposed work. The Colombian Ministry of Mines and Energy and the national oil company, Ecopetrol (another "partner" in the Samore Block), were weighing different issues with regard to Colombia's future. Without increased oil production, Colombia would shift, by the year 2005, from being Latin America's 3<sup>rd</sup> largest exporter of oil to a net importer, and thus precipitate a national economic crisis. Other ministries and directorates, particularly the National Ombudsman and the National Directorate for Indigenous Affairs (DGAI) argued in support of the U'wa's rights. The national Indian organization, ONIC, while strongly supporting the U'wa, also argued that DGAI was, in general, an unnecessary paternalistic anachronism.

Consequently, the U'wa situation was elevated to a public arena within which the various stakeholders worked to:

- 1) Test Colombia's progressive but largely untested 1991 constitution, with regard to such indigenous rights as informed consent, consultation, and territories.
- 2) Reconcile group human rights with those of national economic priorities.
- 3) Define more precisely the roles of various government ministries

- 4) Expand the political space occupied by Colombia's national Indian organization.
- 5) Review the role of international oil companies operating in Colombia
- 6) Debate the influence and power of the ELN guerilla group active in the area

This complex array of interests and actors, however, led largely to increasing levels of acrimonious public debate and produced an impasse among the principal stakeholders. Given the importance of the case, insofar as it affected the rights of indigenous people as well as the national economy, and in view of the difficulties encountered in holding productive discussions among the parties involved, the Ministry of Foreign Relations deemed it necessary to seek outside help in finding options and making recommendations to resolve the conflict.<sup>1</sup> This paper reviews that process and, in doing so, suggests that a focus on common property rights can serve as a means to approach the management of broader, more complex conflicts, in Colombian and similar areas.

### **The Samore Case: A Brief Summary**

The U'wa are an indigenous group (pop: ca.5,000) who live in the Northeast of Colombia. Occidental de Colombia (an affiliate of the US-based Occidental Oil and Gas and the "Operator" within the Block) began procedures in 1992 to obtain the necessary licenses from the State of Colombia needed to carry out exploration and exploitation of petroleum in an area which included a protected zone, a reservation and the traditional lands of the U'wa people. The company, along with Shell Oil and Gas, was working under a "Contract of Association" or "Partnership Contract" with the Colombian national oil company Ecopetrol in the Samore Block, in the northeastern section of the country. On February 3, 1995, the Ministry of the Environment, subsequent to a review of the social and environmental impact and the process of community consultation, issued the formal license authorizing exploratory oil-drilling operations.

Following the granting of an environmental license by the Ministry of the Environment, government offices, such as the Department for Indigenous Affairs (DGA) and the Office of the Ombudsman (Defensoria del Pueblo) began receiving complaints from the U'wa people about the operations carried out and plans for further drilling on what they considered to be their ancestral lands.

The Ombudsman, acting on behalf of the U'wa people, opted to file a legal motion with the High Court of Bogota in favor of the U'wa people and against OXY and the Ministry of the Environment for having granted the environmental license. The Ombudsman cited the rights and duties of indigenous groups as contained in the laws, and in the Constitution of Colombia in particular. The report stressed that the U'wa people had not been properly consulted prior to the operations and that this was a requirement in the legal steps toward obtaining the environmental license. In brief, the primary focus of most

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<sup>1</sup> Some text in this paper is drawn directly from the Organization of American States/Harvard University report *Observaciones y Recomendaciones sobre el caso del Bloque Samore*. The author of this paper is one of principle authors of that report. In this draft, sections drawn directly from the author's report are not indicated. In any published work, however, these sections will be distinguished.

government agencies and support groups has rested on the process of community consultation. The “right” to informed consent is included in the Colombian Constitution and is likewise guaranteed by Colombia’s ratification of ILO Convention #169.

The situation then became even more complicated. The Supreme Court of Justice of Colombia ruled that the 'prior consultation' which OXY said it had carried out was invalid. Shortly, thereafter the Council of State affirmed the opposite. OXY, it stated, did have a license to enter the territory and had indeed complied with the requirement of prior consultation.

Despite the Council of State's ruling, the Ministry of Mines and Energy and OXY indicated that they would begin talks with U'wa representatives with a view to re-opening the dialogue or consultation with the indigenous community. They also stated that they would discontinue prospecting operations until the conflict was resolved.

Following steps taken by the Government of Colombia, a meeting was held on April 21 in the Office of the President and attended by representatives of the U'wa community, the Ministries of Mines and Energy, the Interior and the Environment. Representatives from the Ministries promised to pursue the process of reconciliation with the U'wa community, to listen to their arguments on plans for the exploitation of oil in the Samore Block and take the steps necessary to make a new meeting possible. The next meeting took place in Chuscal in U'wa territory on May 29 and 30, with the participation of three ministers and the leaders of the U'wa indigenous community. This meeting, like those that preceded it, began as series of presentations, devolved into a debate, and thus continued the impasse.

BackgroundSo, in May 1997, through the Ministry of Foreign Affairs, the Government of Colombia called upon the OAS General Secretariat to enlist the participation of Harvard University to undertake an on-site investigation into the conflict. In response, the General Secretariat, through its Unit for the Promotion of Democracy (UPD), sent a joint team called the OAS/Harvard Project on Colombia, consisting of experts in international law, indigenous rights, and the analysis and prevention of inter-ethnic conflict. It was made up of researchers from the *Unit for the Promotion of Democracy* (UPD) and the *Program on Nonviolent Sanctions and Cultural Survival* (PONSACS) from Harvard University's Weatherhead Center for International Affairs.

Many issues worked their way into this complex debate. Several dominated. This paper works to demonstrate how efforts to clarify and formally define the issue of indigenous “common property” or “territory” may prove to be an effective means through which this on-going conflict can be addressed and subsequently managed.

### **PONSACS, Conflict Management and Common Property**

The *Program on Nonviolent Sanctions and Cultural Survival* (PONSACS) focuses primarily on applied research into conflicts involving ethnic minorities, indigenous peoples, and others who occupy similar structural positions within a particular country or region. Emphasis lies in understanding interests, perceptions and needs of these generally weaker, or disadvantaged, stakeholder groups,. The Program tests and suggests broad strategies and specific tools that are or can be utilized by such groups to alter asymmetry as they confront threats or take advantage of opportunities presented by national and

international groups, institutions, governments and/or economic forces. At the same time, the program's research tools permit evaluation and framing and framing of local conflicts within the larger national, regional and global social, economic, and political context.

### **Conflict Management and Common Property**

Some means of conflict management -- formal or informal -- exists in most, successfully-managed common property regimes. Social mechanisms range from systems that can regularly attend to appropriator disputes to others that can be convened to restructure inappropriate, poorly functioning, or unacceptable management systems. In each case the purpose is to resolve a dispute or problem, improve or redefine the rules, and thus to permit continued use of the resource. However, the ability to do this presumes some set of functioning and thus mutually acceptable "working relations" among the stakeholders.

PONSACS is currently involved in several cases where, as in the case of the Samore Block, debates between stakeholders over common property rights and access to resources have not responded to any of the key stakeholders' initial efforts toward "resolution." In each case the issues, stakes, and implications are large: the stakeholders cannot be expected to respond to any rushed efforts toward resolution.

The conflicts, however, are also exacerbated, if not caused, by strong structural asymmetry and thus weak or at least questionable "working relations." These power differences alone do not explain a stalemate that, by definition, assumes a desire to advance. But in such situations and in light of the varied, and poorly understood, needs and concerns of some stakeholders, the Program initially focuses on research and analysis, rather than moving toward a search for a negotiated solution, or similarly inspired intervention. The research outlined here first asks: "What is needed to produce good "working relations?" In view of a crowded and self-defined multi-stakeholder stage we also ask: "Between whom?" and " With regard to what?"

To illustrate, much of the research in Latin America suggests that the ability of "weaker" stakeholders – in this case Indians -- to engage traditionally "stronger" actors – in this case the national government and an international oil companies-- over a period of time, provides them with a fulcrum from which they hope to catapult themselves into larger, on-going debates over human rights, access to natural resources, and their status within civil society. Maintaining the leverage, therefore, is one of their goals. Yet, if they do not move forward on some actions, they will be regarded as intransigent and thus weaken their ability to remain within the arena.

The case clearly illustrates a current dilemma. Emerging international and national legal standards support the needs and rights of minorities and indigenous peoples. Yet many of these prescribed rights remain untested or contested in local settings. Thus, while the case involves a single conflict in a single country, the underlying issues reflect and foreshadow regional land and natural resource disputes. Similar cases already exist and others will surface quickly and frequently as governments 1) progressively ratify ILO #169, 2) continue to encourage international private sector investment, 3) both Hemispheres enter into the proposed "Free Trade in the Americas" in 2002. Thus, while advancing its own research priorities, The Program, by responding to a request for assistance by the General

Secretariat of the OAS helped to advance the work of the Unit for the Promotion of Democracy (UPD) while also informing the work of the OAS's somewhat more autonomous Inter-American Human Rights Commission.

This paper, however, reviews the Program's research methods through the lens of the on-going applied research project focused on such asymmetry with regard to the Samore Block. It draws on methods from anthropology, the development and practice of international law, and the expanded role of multi-state organizations in the management of intra-state conflicts.

### **Structural Asymmetry and the U'wa-Oxy Dispute**

The OXY-U'wa dispute, at first glance, is a simple, indeed "classic," case. The most visible actors are a small, isolated indigenous group, the U'WA (generally known as the Tunebo). They have been pitted against two large international oil companies working through a "contract of association" with Ecopetrol, the Colombian National Oil Company. Occidental de Colombia, the "operator," is a subsidiary of US-based Occidental Oil and Gas. The "partner" was, until February 1998, Shell de Colombia, a subsidiary of the Royal Dutch Shell Oil and Gas (Holland and the UK), the world's largest publicly held company and one troubled by accusations of environmental and human rights abuses.

Though quite complex, the critical themes of the Samore conflict can be broken down into two broad areas – 1) community consultation and, 2) indigenous rights to territories. Both are linked to Colombia's progressive, but often unclear and untested, 1991 Constitution. This paper briefly reviews some of the problems of community consultation. That issue, though clearly important to the indigenous groups and their organizations, has been the principle focus of most non-indigenous observers, particularly government officials and agencies. Indigenous territories, however, have largely been the concern of the U'wa and ONIC

### **Approaching the Conflict**

Given the difficulty of establishing any sort of mutually acceptable agreement, or even creating an open dialogue, the recommendations of the OAS/Harvard research group, in part, focused on issues and concerns that, we felt, were shared by the key parties. Discussion of these shared concerns, reformulated as "shared problems," could serve, we suggested, to bring the parties together in some form of joint problem solving process, and thus provide an opening where none existed to date.

Efforts to seek some sort of common ground upon which the principal stakeholders could begin to confront their joint problems, focused largely on themes related to: 1) the consultation process, and 2) unresolved issues of common property. Initially, the research stressed the consultative process, a major concern of most national and international observers and a key issue for the indigenous stakeholders. Later, however, indigenous "territories," a form of common property, clearly became the primary

expressed concern of these key stakeholders. Land rights thus became a “joint problem” which, as we note later, could draw both parties toward effective dialogue in the future.

Moreover, and directly related to the general interests of the IASCP, the issue of indigenous territories has currently become a form of common property that, though hotly disputed in many countries, is recognized in international law. In the Colombian case, by focusing on this property rights debate we may be able to create the sort of forum needed for establishing the “working relations” essential for defining and subsequently managing a wide number of current and future conflicts related to the land and its resources.

### **The Initial Recommendations**

Drawing on interviews and other research related to the most dramatic aspects of the conflict – the U’wa’s argument that oil production would destroy the world as they knew it – the researchers linked this to the oil companies’ expressed interest in obtaining a better understanding of the U’wa. The report’s primary recommendation, and the logic behind it, was stated as follows.

### **Important Cultural Differences**

As was noted while the Project was underway, significant cultural differences divided the parties even prior to the conflict and these continue to be the main obstacles to a solution. Most of the U’wa people were well aware of oil production activities in the Cano Limon area and a large number of them had worked at the production site or in related areas. Nonetheless, as plans and activities for oil exploration got underway in the Samore Block, a conflict developed between local groups and the oil companies, with each side having its own way of 'looking at things'. As a result, they became embroiled in a dispute, which later assumed even greater proportions.

Like other prolonged disputes over the use of land and its resources, the claims of the respective parties arise from radically different perceptions, with the result that their relations remain overshadowed by their mutual lack of understanding and entrenched positions. However, the case of the U’wa people is an extreme example of this. The differences in perception are visible in such basic notions as the nature of the world and knowledge as well as in day to day relations between groups and ideas on the meaning of human interaction.

The U’wa indigenous organizations, the oil companies and the government of Colombia acknowledge that these general differences exist. However, apart from public declarations, there has been very little indication that the oil companies would refrain from going into U’wa territory or that the companies and most of the government agencies have acquired sufficient understanding of U’wa culture to allow them in the

future to come to an agreement on the essential elements of the conflict. Similarly, the indigenous groups have shown that they have a very limited knowledge of the priorities and the basic needs of the oil industry and the national economy, an inadequate understanding of the specific methods used in oil production within the Samore Block and its present and future implications. In this regard, the U'wa and the leadership of the National Indigenous Organization continue to register deep concern and uncertainty about the wider impact of oil production on their culture.

... the views and corresponding values of the oil companies and government agencies are based on perceptions of geological formation and consequent physical structure, surface and subsoil. Indigenous people, on the other hand, place the emphasis on the spiritual creation of the Universe -- on notions of Heaven and Hell--- as well as the land surface. Their corresponding values therefore center around the need to maintain the fragile balance established in the beginning between the two levels. These ideas-- which vary between sectors but are shared by members of the same sector-- demonstrate one aspect of the prevailing cultural differences.

Consequently, the report recommended the following first step.

**A statement from the oil companies promising to suspend the implementation of plans for the drilling or exploitation of petroleum within the Samore Block as an initial step towards creating better conditions for possible renewal of oil production activities within the Block.**

This commitment to suspend activities is a vital step towards defusing the atmosphere of conflict among the parties involved and to start creating the conditions for mutual understanding. The commitment shall be made immediately and unconditionally.

Ironically, while the international press and burgeoning support groups for the U'wa continued to focus on these "cultural" issues, the formal response by the U'wa and ONIC themselves was focused more on land issues. ONIC's formal response to the OAS/Harvard report stated:

Among the causes of the conflict surrounding the Samore Block and the indigenous communities in general with the Colombia government, one can legitimately find the sorts of cultural differences noted in the OAS/Harvard report. However, in this as in many other cases the indigenous communities are confronting a case in which one has to recognize the fundamentally economic interests of the petroleum companies. One has to see that oil activities in Indian lands run up against the inalienable property rights of the indigenous communities.

ONIC then argued that argued that the case reflected Colombia's fundamental failure to recognize the multiethnic nature of the Colombian nation. Presenting the conflict solely in cultural terms, they stated, avoids the fundamental problem between the Indians and the Colombian government. This concerned the extent and the formal existence of indigenous rights in opposition to economic interests. The went to argue that "there is have no doubt that petroleum interests have motivated the National Agrarian Reform Agency (INCORA) to hold back its work to increase the size of the U'wa's resguardo, and to formally convert the status of their reserve, items that are clearly stated and emphasized in Law 160 of 1993 and official government policy since the beginning of the 1990s.

They go on to review how the government has avoided titling Indian lands in other areas as result of oil and mineral interests. They add that such interests have been given priority even when legal titles exist. They state that they will not be deceived by the government's true reasons for failing to demarcate the ancestral lands of the indigenous peoples.

The same general argument was incorporated into a 16 February 1998 formal letter to the OAS from the U'wa and ONIC. While they supported the report's recommendation regarding recognition of land rights, they indicated that it should have been emphasized even more strongly and thus supported the U'wa's efforts to establish a "resguardo unico," or "U'wa territory." This, they added, would clarify the U'wa land issue and also establish an essential precedent for the creation of other territories recognized by the 1991 Constitution.

In brief, the indigenous statements shifted the primary emphasis away from strong cultural differences toward the second recommendation of the OAS/Harvard report. This reads as follows.

### **Formalization of the process to extend the U'wa protected zone**

Although the concept of indigenous territories separate and apart from the protected zone or reservation does exist and serves to affirm the right of indigenous peoples to own land, it is quite clear that the formalization of ownership of the protected zone would help them to feel more secure and clearer as to their rights. On the basis of a study carried out by a technical team by the Javeriana society which supports their claim, the U'wa have requested an extension of their protected zone. The study has been handed over to INCORA and its validity appears to be above question. Nevertheless, several factors have created a perception that the U'wa request for an extension of the protected zone has been stalled as a means of exerting pressure on them. It is important that these perceptions be dispelled so that the question of the extension of the protected zone may be examined without prejudice to any oil exploration operations.



The basis for that recommendation was detailed in the report.

### **Uncertainty regarding the extent of the territorial rights of the U'wa**

The uncertainty and confusion which exist in relation to the territorial rights of the U'wa is a factor which complicates the case before us. Within the larger Samore Block, there are U'wa lands designated as protected zones and indigenous reservations. The problem is not with these lands, but with areas outside the protected zone and reservation, but still inside the Block.

The current legal framework in Colombia provides for the concept of indigenous territory, including rights based on traditional, indigenous patterns of use and settlement in a geographical area beyond the protected zone and reservations. The territorial rights of the U'wa outside the protected zone and reservation may include the rights of possession or ownership, similar to those to which they are entitled in the protected zone; rights of access to natural resources not used exclusively by themselves, in accordance with their traditional practices and their power of jurisdiction over the territory.

The U'wa and their allies have provided proof of their territorial rights outside of the protected zone and the reservation. In addition, they have sought to have the protected zone within the Samore Block extended. However, the geographical limits of the territory of the U'wa within the Block have not been officially determined and no decision has been taken on expanding the protected zone. As long as the ownership of the land in the Samore Block remains unclear, it will be difficult to continue with any industrial exploitation of natural resources within the Block.

### **Land Rights**

In Colombia, and by contrast to the international community, land and natural resources have consistently been one of the primary expressed concerns of most actors. Unresolved “territorial” and other land rights issues dominated much of the discussion, spawned national legal debates, and stalled negotiation. All land **use** decisions are subsequent to the Colombian government’s formal clarification of land **rights**. Briefly, Colombian law has formally established and implemented laws regarding rights to indigenous *resguardo* and *reserva* lands. However, the issue of broader territorial claims, though recognized in principle by the 1991 Colombian constitution and that government’s ratification of international agreements (ILO Convention #169), remain unresolved in practice. The conflict is, for many indigenous peoples, a test case for Colombia’s progressive 1991 constitution.

## **Territories**

Indigenous "territories" in areas like the Amazon, unlike exclusive title to individual plots or single-community land titles, directly expand the national political arena. Territories, like the indigenous organizations themselves, serve as tools for pushing political levers as well as for defining land and its tenure regime. The success of the latter, in many cases, is a result of the former.

In a "territory," access --understood as passage, residence, zonation, resource appropriation, extractive practices, royalties and similar social markers of possession-- are open to negotiation and thus do not necessarily exclude any form of agreement or limit activities. On the contrary, the legal mechanisms which follow formal "territorial" recognition might include: 1) private/community land titling; 2) granting of easements for commercial activity; 3) the creation of a reserve or protected zone and/or; 4) the establishment of a cooperative management regime.

These uses and subsequent management privileges illustrate the outcome of negotiations and decisions. In many ways, for the Indian organizations, the process of negotiating as equals is as important as the object of negotiation.

## **Towards Parity**

Recognition of territories is a first step toward broad institutionalization of common property rights and use. Initial negotiation -- acceptance of rights-- improves the "working relations" between the indigenous federations and State. Indigenous organizations now argue that acceptable "working relations" assume a degree of political balance which often, or as yet, does not exist. This will require considerable change in the currently asymmetrical order which governs their relations with other claimants or potential stakeholders (e.g. the state, colonists, private enterprise, and often, environmental organizations). The territorial debates are thus a means toward more balanced working relationships. They move the political process toward parity.

Indigenous organizations, by raising the level of debate to issues such as territories, express a relatively new and sophisticated level of socio-political analysis. They illustrate an effort to alter the balance of their larger debate with the dominant non-indigenous society. Through this they work to reconfigure their ethnic boundaries. Land and resource rights, though only partial expressions of increasingly broad demand for self-determination and respect, are currently one of the principle themes in that discourse.

## **U'wa Territories**

The uncertainty and confusion surrounding the territorial rights of the U'wa is the case and, in large part, explains the indigenous response. Within the Samore Block, there are U'wa lands designated as protected zones and indigenous reservations. The problem is not with these lands, but with areas outside the protected zone and reservation, but still inside the Block.

The current Colombian legal framework recognizes the concept of indigenous territory, including rights based on traditional, indigenous patterns of use and settlement in a geographical area beyond the protected zone and reservations. The territorial rights of the U'wa outside the protected zone and reservation may include the rights of possession or ownership, similar to those to which they are entitled in the protected zone; rights of access to natural resources not used exclusively by themselves, in accordance with their traditional practices and their power of jurisdiction over the territory.

The U'wa, working in collaboration with researchers at Bogota's Universidad Javiriana developed a map which includes the maximal territorial claim of the U'wa. They and their allies provided evidence of U'wa territorial rights outside of the protected zone and the reservation. In addition, they have sought to have the protected zone within the Samore Block extended. However, the geographical limits of the territory of the U'wa within the Block have not been officially determined and no decision has been taken on expanding the protected zone. As long as the rights to the land in the Samore Block remains unclear, it will be difficult to continue with any industrial exploitation of its natural resources.

The indigenous emphasis is significant. As of this writing it provides the most approachable "problem" that confronts both OXY and the U'wa. OXY, company representatives recently stated, hope to drill a test well soon. The projected site for that well lies *outside* the maximal territorial claim of the U'wa, as indicated by the map prepared by the Javiriana University. Informally, ONIC leaders indicated that, if such a well were to be drilled outside that area, it was not a major concern on their part. However, through proposed by the U'wa and accepted by OXY that "line" remains informal and unofficial until INCORA, as the authorized government agency, acts.

All parties agree that that the territorial issue of the U'wa must be respected. However, it has been complicated because, once recognized, the U'wa territory would set a precedent for the country. From ONIC's standpoint it becomes critical to press of this issue. However, government agencies, particularly the Ministry of Mines and Energy and Ecopetrol, argue that much of the land in Colombia that could contain oil below it is, or could be, claimed as part of some Indian territory. A series of scenarios like Samore, they state, could significantly affect national development. Thus, while the U'wa and OXY now "share a problem" the ability to seek its resolution does not currently lie in their hands.

In brief, there is interest on the part of OXY, the U'wa and ONIC to formally define and establish the limits of U'wa territory. Each group could pressure the appropriate government agencies with a similar message. If successful this would help advance their immediate and also break a common, Latin American regional pattern in which the government is supposed to act but simply does not. Consequently, the international company is perceived as a policy maker that it is not, and becomes a target for change that it cannot implement. This case is critical therefore, for the U'wa, Colombia, and, for the entire Upper Amazonian region, where this pattern of avoidance and inactivity by government agencies is widespread.

## Summary

There are three key points to the indigenous response. One is that it focuses not on OXY but on the government, where the legal responsibility actually lies. The second lies in their emphasis on the resolution of land rights. The third is that the issue of land rights, or rather failure to recognize them, is not limited to the U'wa case but is presented as a national problem. This significantly shifts the level of the debate away from the more mystical cross-cultural distinctions to the sorts of land issues that pervade much of the Americas.