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Introducing Multidisciplinary Perspectives to the Adjudication of Indigenous Rights

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This special issue focuses on adjudication of indigenous peoples' rights. In the last decades, indigenous peoples' engagement with litigation has become a global phenomenon, with more and more indigenous communities engaging with court processes to get their rights recognised. Although for a long time litigation was mainly concentrated in post-colonial settlers' societies such as Canada, Australia and New Zealand, the last few years have witnessed a notable increase in indigenous peoples' recourse to courts across the globe. This is part of the larger 'process of juridification' of indigenous peoples' politics, and the increased legal adjudication of indigenous claims.[1]

The changes are not only in the numbers of cases of litigation, but also relates to the cross-fertilisation in the arguments put forward in these cases (by both parties and the courts themselves). As noted by the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), many national courts have refereed and relied on international norms in their litigation, notably the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] Furthermore, and relatedly, there is an increasing development of a transnational, global jurisprudence on indigenous peoples' rights, with courts increasingly citing cases across jurisdictions.

Most of these cases concern indigenous peoples' rights to land and natural resources, and more particularly their rights to consultation and consent. This increase in litigation is the sad reflection of the mounting pressure that is put on indigenous peoples' territories, with a view to exploit natural resources, often going hand in hand with 'land grabbing'.[3] Last year has been one of the most violent years against land rights defenders, including indigenous peoples who were murdered for their engagement in protecting their lands and territories.[4] In reaction many indigenous communities and supportive non-governmental organisations (NGOs) have taken recourse to adjudication.

Litigation usually comes after long years of unsuccessful negotiations, bad faith on the part of the authorities, and often direct violations of indigenous peoples' rights by corporations or investors. As a consequence, indigenous communities turn to litigation as a last resort to assert their rights and obtain remedies. It is within such context of increasing recourse to adjudication and litigation that this special edition places itself.

1 Scope of the Special Edition

While it appears that litigation comes often as last resort, when all other means of protests and resistance have been used, it is important to highlight the manifold kinds of impacts of this litigation, that go beyond the material remedies sought in the form of land title and monetary compensation. The special edition of the journal also places itself within a time of reflection on the (actual) impact of litigation, as it discusses both the different possible types of impacts of litigation and the limitations, challenges and potential pitfalls of litigation.

While the special issue stands on itself, several interesting links can be made with the findings of a recent study commissioned by the Open Society Justice Initiative on the impact of strategic litigation regarding indigenous peoples' land rights (OSJI study).[5] The following discussion of the OSJI report and the different ways in which this special issue relates to the report enable us to locate the special issue in the broader literature on indigenous rights, while providing an extra platform for the OSJI report.

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1. *See* S. Kirsch, 'The Juridification of Indigenous Politics', in J. Eckert, B. Donahoe, C. Strümpell & Z. Biner (eds.), *Law against the State: Ethnographic Forays into Law's Transformations* (Cambridge: Cambridge University Press, 2012); K.A. Carpenter and A.R. Riley, 'Indigenous Peoples and the Jurisgenerative Moment in Human Rights', *California Law Review* 102 (2014), at 173.
2. Report of the Expert Mechanism on the Rights of Indigenous Peoples: Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned – 2007-2017, UN Doc. A/HRC/36/56 (7 August 2017) .
3. *See* J. Gilbert, 'Land Grabbing, Investors, and Indigenous Peoples: New Legal Strategies for an Old Practice?', 51(3) *Community Development Journal* 350 (2016), at 350-66; S. Smis, D. Cambou & G. Ngende. 'The Question of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources', 35 *Loyola of Los Angeles International and Comparative Law Review* (2012), at 493.
4. Seie Global Witness, 'Defenders of the Earth: Global Killings of Land and Environmental Defenders in 2016' (Global Witness, 2017), available at: <https://www.globalwitness.org/en/campaigns/environmental-activists/defenders-earth>.
5. J. Gilbert, 'Strategic Litigation Impacts: Indigenous Peoples' Land Rights' (Open Society Justice Initiative, April 2017), available at: <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-indigenous-peoples-land-rights>. *See* further infra for a summary of some of the principal findings of the OSJI report.

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While highlighting that litigation on land rights is now a global phenomenon, the OSJI study focused on the situation in Malaysia, Kenya and Paraguay, countries which have witnessed a significant level of litigation on land rights. The study highlights the obstacles of litigation to secure the land rights of indigenous peoples, inter alia due to the burden of proof required by courts and the resistance of the dominant social and political climate. The latter also results in judgments in favour of indigenous peoples not being implemented.

Importantly, the OSJI study identifies and distinguishes different types of impact, which may explain why indigenous peoples continue to turn to litigation notwithstanding the aforementioned drawbacks and challenges. The most obvious impact concerns material outcomes (both direct – related to restitution, and indirect – financial compensation and thus access to socio-economic rights). In addition, there are also immaterial impacts, related to a change in attitudes, both among the indigenous peoples and external stakeholders. A third type of impact pertains to ensuing legal and policy changes. In terms of legal changes, this points to the power of courts to develop the law through their interpretation and application of the law in concrete cases and to the importance of non-state actors as instigators of cases.[6]

To some extent these impacts pertain to the communities engaging in litigation themselves, but to some extent the impacts go further. Litigation is indeed seen to have an empowering impact on the indigenous peoples themselves, who become more aware of their rights. In addition, the (successful) litigation experience by a particular community may have ripple effects: it may inspire other communities to engage in litigation, also due to the change in attitudes of other relevant stakeholders, while the legal reasoning of one (international) court may also be persuasive for another faced with a similar case. Furthermore, also among the judiciary shifts in attitudes towards indigenous peoples can be noted, which in turn can translate into the aforementioned ripple effects.

In some respects the articles in this special issue 'continue' the research focus in the OSJI report,[7] while in others, the special issue adds layers of analysis to those in the OSJI report, ultimately furthering the goal of the OSJI report to get a 360° perspective on the adjudication of indigenous (land) rights.

In line with the OSJI report and the range of effects of litigation that it highlights in its main findings, several articles in the special issue have extensive attention for the role of courts in the shaping of the law, both nationally and transnationally, courts shaping the law through interpretation. Furthermore, the current special issue builds and adds to some of the main findings of the OSJI report, namely:[8]

1. In most situations, legal pleadings on behalf of indigenous peoples did not begin as 'strategic litigation' per se. Previously inchoate or discrete litigation efforts were typically made more 'strategic' over time by being deployed together with other advocacy tools, generating progressive jurisprudence that could benefit others. It was not until the cases reached a higher court (either nationally or internationally) that they were viewed as possible vehicles for social change beyond the interests of individual claimants.
2. There is usually a lack of implementation, but the OSJI study highlights that even if implementation was absent, winning a case proved to be significant at all three levels of impact. The positive rulings put potent political tools into the hands of the indigenous communities that they probably could not have wielded had they not brought suit. … the fact of a win in court prompted positive feelings of empowerment, rights awareness, and self-advocacy (non-material impacts). Sometimes, a win inspired other communities to file, generating more broad-based pressure on the courts to address systemic rights violations. …
3. … litigation promoted a new interpretation of the law to counteract the lack of land rights recognition. … the judiciary interpreted the existing legal framework in ways that enhanced the integration of indigenous customary land rights. …
4. … strategic litigation substantially improved rights awareness and of legal empowerment among concerned communities. The way the communities organised, and the degree to which they were united (or not) played crucial roles in affecting whether cases were successful, and whether positive judgments were ultimately implemented.
5. Strategic litigation influenced attitudes and behaviour toward indigenous peoples' right of land among external stakeholders as well. For example, it prompted civil society organisations and donors to lend the community their support, leading to the development of joint post-litigation advocacy strategies among mainstream civil society actors who might not have engaged with indigenous peoples previously and provision of development funds.

All these findings and conclusions are verified by the articles compiled in this special edition. At the same time this special edition takes a broader approach to litigation to examine to what extent implementation, or lack of it, carries any impact on the choice to go to court. Indeed, the articles in this special issue are trying to 'locate' the use of litigation among the other strategies used by the concerned communities. Furthermore, the special issue adds layers to the analysis in the OSJI report, in terms of countries covered, multidisciplinary perspectives included, the in-depth analysis of questions

6. *See also* K. Henrard, *Revisiting the Role of Non-State Actors and International Courts in the Making of International (Customary) Law: General Considerations and the Case of Indigenous Peoples Land Rights*, Leuven Centre for Global Governance Studies WP 196, December 2017.
7. Interestingly, several of the authors in this special issue were part of the contributors to the Report.
8. OSJI Report, at 5-7.

of mapping and cartography and the attention for the range of actors involved in the adjudication processes.

2 Structure and Approaches of the Special Edition

The special issue adopts a multidisciplinary approach, which is felt necessary to properly answer the many complex questions that indigenous peoples' rights trigger. Indeed questions about the burden of proof, the scope of the relevant (fundamental) rights, the determination of adequate remedies (and the related measurement of damages) cannot be properly answered from one particular disciplinary perspective only. A multidisciplinary approach enables the problems and hardships of indigenous peoples to be more suitably captured, which in turn benefits the just adjudication of their claims, and ultimately also the impact on the ground of judgments in favour of indigenous peoples. For example, one of the articles in this special issue focuses on legal geography: showing how through adjudication and implementation an interrelation is produced between law and space. Another addition concerns the attention for an essential prerequisite to litigating indigenous land rights, more particularly mapping and cartography.

Second, the special issue also acknowledges the value of including practitioners, so as to take their rich, accumulated experience through their involvement with actual cases into account. The special issue furthermore highlights the role of NGOs and more generally the necessary collaboration between NGOs and local communities to support and enhance community-led litigation strategies.

The special issue takes off with two articles focusing on the 'preliminary' questions of obtaining sufficient proof in order to get to court.

In the first article, Jérémie Gilbert and Ben Begbie-Clench analyse how indigenous peoples usually face a very high level of proof, as courts and tribunals are usually putting the burden on the indigenous claimants to prove their rights. As they examined, this is often very challenging for indigenous peoples who are lacking formal and official land titles. Based on their experience with supporting litigation in Namibia and Uganda, they explore how community mapping has become an important element of the litigation strategy. In doing so they examine the value of these community mapping exercise, not only for their legal value in the court cases, but also as a tool for legal empowerment and knowledge sharing.

Building on the importance of cartography and mapping, Kristen Anker's article explores how Aboriginal communities in Canada have managed to challenge the traditional and conservative approach to legal evidence using their own cultural maps to mark their ancestral territories. In doing so she offers a very compelling analysis on the role of cartography to challenge the governmental dominant assumptions about 'empty' land and the narrative of 'efficient' and agricultural use of the territories. Using historical and contemporary cases of litigation, the article highlights the importance of recognising the value of aboriginal peoples' own perceptions of land and natural resources, notably advocating for the use and recognition of Aboriginal art as an evidence of land titles. The article highlights how indigenous peoples' approaches to land and natural resources are, and how these connections are expressed in their arts, including songs, performance and oral traditions, which all represent an expression of indigenous customary laws that are still not properly respected and integrated by the domain legal systems.

The special issue then turns to three articles focusing on the impact of the jurisprudence of international courts, while taking on board additional perspectives, either in terms of disciplinary perspectives and/or having special regard to the range of actors that are involved and influence the adjudication processes.

Fergus Mackay, who as a lawyer has supported indigenous peoples in several cases before the inter-American Court of Human Rights (IACtHR), closely analyses the case of the Kaliña and Lokono peoples against Surinam, a case triggered by the (impact of) mining and logging operations, as well as the establishment of nature reserves, and individual titles on the territory of the peoples concerned. Fergus Mackay starts by highlighting the findings by the IACtHR of numerous violations of the American Convention on Human Rights, all of which can be related to the lack of recognition of indigenous peoples as legal persons (capable of holding collective property titles) and the lack of effective remedies for the protection of collective property rights.

Fergus Mackay goes on to develop several arguments with a strong legal flavour. He highlights the mutual interplay of various fields of public international law when he underscores the extent to which the court draws on international environmental law and the UN Guiding Principles on Business and Human Rights, while clarifying the rights of indigenous peoples (in relation to environmentally protected areas). Most of all though, he highlights the cross-fertilisation and related blurring of the lines between soft and hard law, when he focuses in his analysis on the extent to which the Inter-American Court uses UNDRIP to guide its interpretation of the American Convention on Human Rights. The weight of a UN Declaration, which is not legally binding, gets substantially stronger when it guides the interpretation of a legally binding instrument. However, the court does not only develop the interpretation of the latter convention, it also further shapes the interpretation of the UN Declaration, by clarifying the provisions of the Declaration and adding detail. A red thread throughout Mackay's analysis is the recognition of the significant role of (the IACtHR and other) international courts in the shaping of international law. In turn, this speaks to the importance of strategic litigation as a means of further developing indigenous rights standards.

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Joel Correia's article continues the focus on the inter-American human rights system, but shifts emphasis to the way in which the national courts struggle to translate the judgments of the Inter-American Court into changes in the law on the ground, more particularly focusing on three cases in Paraguay. The reflection on the after-effects of adjudication follows the perspective of legal geography, an interdisciplinary approach that investigates the mutual constitution of law and space with keen attention to how that relationship shapes the limits and possibilities for social justice. This article thus further expands the multidisciplinary perspectives gathered in this special issue.

Joel Correia highlights the importance of not stopping at the analysis of promising judgments by (international) courts but also to consider the actual implementation (or lack thereof) on the ground, as the latter also fundamentally impacts victims' lives, and the effective enjoyment of their rights while influencing the actual relation between space and law.

Joel discusses three cases brought by indigenous peoples in relation to their ancestral lands before the IACtHR, all of which were successful in the sense that this court found multiple violations of indigenous peoples' rights in relation to their ancestral lands. These three cases reveal how a legal framework that is positive at first sight, and promises a strong protection of indigenous 'land rights', is de facto frustrated by historical and structural factors related to different understandings, different notions, different importance attached to 'territory'. The more economic (rational use) perspective adopted by the state contrasts with the more 'identity-infused' notion of territory that prevails for indigenous peoples. The former understanding goes hand in hand with land having been sold to private foreign investors, and the disproportionate politico-economic power of the agro-export industry, both ultimately frustrating the indigenous peoples' special relationship with their ancestral lands. This dynamics also negatively impacts Paraguay's timely or effective compliance with the rulings of the IACtHR, thus confirming and exacerbating the marginalisation of the indigenous communities concerned.

The third article zooming in on the jurisprudence of international courts turns to the African human rights system. Lucy Claridge, one of the leading lawyers in the case of Kenya's Ogiek indigenous people, highlights in her article the importance that the engagement with litigation has created in terms of legal empowerment of the community concerned, thus adding a socio-legal perspective. She starts her account with painting the history of dispossession and marginalisation of the Ogiek, who have been routinely subjected to forced evictions from their ancestral land in the Mau Forest without consultation or compensation, thus being prevented from practising their traditional hunter-gatherer way of life. Following unsuccessful national litigation efforts, the Ogiek, supported by an international NGO, brought a case before the African human rights system.

Claridge discusses extensively the claims by the Ogiek, the government's response and ultimately the reasoning and findings of the African Court on Human and Peoples' Rights. Strikingly, the court in its first case on indigenous peoples, found in relation to the Ogiek's forced evictions of their ancestral lands multiple violations of the African Charter on Human and Peoples' Rights, not only of the right to property (Article 14), the right not to be discriminated against (Article 2) and the freedom to worship (Article 8), but also the right to their own culture (Article 17), the right to freely dispose of their wealth and natural resources (Article 21), and their right to development (Article 22).

Claridge goes on to underscore how the case, and the proof that needed to be collected and submitted, also provided an opportunity for community engagement and legal empowerment: the Ogiek have become more aware of their human rights and also united in their joint struggle. In this respect her account of this specific case supports the main findings in the OSJI report.

Her article is also a testimony of the necessary collaboration between NGOs, lawyers and local partners to support and enhance community-led litigation strategies, as the former ensure close consultations of the indigenous peoples throughout the litigation process.

In their article concerning the situation in Malaysia, Yogeswaran Subramaniam and Colin Nicholas highlight how courts have been instrumental in recognising indigenous peoples' land rights. Across Malaysia, including in Sabah and Sarawak, indigenous peoples have suffered from forced displacement and serious loss of access to their land and natural resources notably due to a lack of legal recognition of their fundamental rights to land in the national legal system. This has pushed many communities to seeking legal remedies using courts. The two authors have been involved in many of these cases supporting indigenous peoples' legal arguments in front of the courts. In their article they share their experience with the courts, highlighting the steps forward but also the drawbacks created by litigation. In doing so, they engaged in a comparative analysis on the limitations offered by the legal pronouncements of courts based solely on common-law principles of aboriginal and native title. As in Malaysia recourse to international law is extremely limited, the common-law doctrine that has emerged from Australia and Canada has been used as the main source of legal recognition of indigenous peoples' customary land rights. However, as the two authors, activists and legal advocates argue in their article, there are some serious limitations to such approach. From this perspective, this article about the legal situation in Malaysia is not only relevant in the context of Malaysia, but for many indigenous peoples who are also relying on common-law approach to indigenous peoples' land rights.

The special edition includes a conversation, or a series of interviews, with two prominent advocates and litigators on indigenous peoples' rights. Based on a series of questions on the role and place of litigation, Beatriz Barreiro Carril asks Gordon Bennet about his involvement

in cases of litigation, notably in Botswana, to support indigenous peoples' land rights. The interview provides some enlightening statements from Gordon, who has worked for more than 30 years in the defence of indigenous peoples' rights as a lawyer. This is followed by an interview with Stephen Corry who has been the director of the NGO Survival International for many years, in his interview Stephen highlights the complexity, the challenges, but also the prospects, of supporting litigation as a tool in pushing for changes.

Finally, in a powerful afterword, Stuart Kirsch, an anthropologist who has been involved in many cases of litigation to support indigenous peoples' rights, offers some overall analysis on the interaction between indigenous peoples, lawyers, civil society organisations and judges. He highlights many of the shortcomings that are inherent in the formal process of litigation, and the drawbacks that are created by the lack of understanding and cultural connections between the different actors involved. The afterword also highlights how litigation can offer a positive platform to challenge the dominant legal systems, and support future changes.

It is hoped that the special issue will thus contribute to the emerging reflection on the potential role that courts and tribunals can play to support the rights of indigenous peoples.

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"Mapping for Rights": Indigenous Peoples, Litigation and Legal Empowerment

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Abstract

In the process of adjudication and litigation, indigenous peoples are usually facing a very complex and demanding process to prove their rights to their lands and ancestral territories. Courts and tribunals usually impose a very complex and onerous burden of proof on the indigenous plaintiffs to prove their rights over their ancestral territories. To prove their rights indigenous peoples often have to develop map of their territories to prove their economic, cultural, and spiritual connections to their territories. This article reflects on the role played by the mapping of indigenous territories in supporting indigenous peoples' land claims. It analyses the importance of mapping within the process of litigation, but also its the impact beyond the courtroom.

1 Introduction

Indigenous peoples are generally subjected to complex legal processes, which usually impose an onerous burden on the indigenous plaintiffs to prove their rights. In most processes of litigation, indigenous peoples face a very high level of proof, as courts have put the burden on the indigenous claimants to prove their rights. In practice, this means that before going to court, indigenous peoples and their legal teams have to develop a process of documenting their customary land tenure. For this purpose, many techniques and long-term strategies need to be developed and put in place by the communities, their legal teams and supporting Non-Governmental Organisations (NGOs) to surmount the challenges of proving land tenure. This often includes mapping of their territories to prove their economic, cultural and spiritual connections to those territories. Mapping has become one of the main methods of proving land rights entitlements. Mapping of indigenous territories is not a new phenomenon as there is evidence of traditional and historical mapping.[1] However, mapping has recently become much more politicised as global competition for land increases, notably becoming an important element in proving land rights before the courts.

In this context, it is important to understand and analyse how such mapping is developed, used and received. This article examines this phenomenon in order to understand its importance within the process of litigation and to analyse the impact of such mapping on the communities concerned beyond the courtroom. By looking at some specific situations, this article wishes to reflect on the role played by the mapping of indigenous territories in supporting indigenous peoples' land claims. For this purpose, the first section examines the role of mapping as a tool to support evidence of land rights for indigenous peoples. It analyses how courts have usually established a complex burden of proof on indigenous communities, who have to prove a continuous and traditional land usage. Based on this overview, the second section focuses on the development of new technologies to support direct and participatory mapping from the communities. The third section offers an analysis of the impact that mapping can have in terms of the legal empowerment and capacity building of the communities engaging with participatory mapping.

1.1 The 'Burden of Proof': Proving Historical, Continuous and Traditional Land Usage

Indigenous peoples are often faced with a very high burden of proof as, rarely possessing formal land titles, indigenous peoples have to prove that they have historical and cultural attachment to their territories. Courts have usually required that indigenous peoples need to demonstrate evidence of a '*continuous*' and '*traditional*' attachment to their territories. These notions of 'continuous' and 'traditional' have been central to the common law doctrine on aboriginal rights.[2] Canadian and Australian courts have particularly insisted on the need for aboriginal and indigenous claimants to prove a traditional and continuous occupation of their land. This issue has been an important element of the jurisprudence of some of the common law jurisdictions during the 1970s-1990s.[3] Landmark rulings from Canada, Aus-

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1. *See* H. Brody, *Maps and Dreams. Indians and the British Columbia Frontier* (London: Faber and Faber) (2002); G. Lewis & D. Woodward (eds.), *The History of Cartography. Vol. 2, Book 3: Cartography in the Traditional African, American, Arctic, Australian, and Pacific Societies* (Chicago/London: University of Chicago Press) (1998), at 639; J. Fox, K. Suryanata & P. Hershock (eds.), *Mapping Communities. Ethics, Values, Practice* (Honolulu: East-West Center) (2005).

2. For a detailed and critical analysis, *see* P. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press) (2011).

3. See K. McNeil, 'Aboriginal Title and the Supreme Court: What's Happening', 69 *Saskatchewan Law Review* 281 (2006); M.A. Stephenson & S. Ratnapala, *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law* (Brisbane: University of Queensland Press) (1993).

tralia and New Zealand were based on the central importance of recognising that colonisation, and the post-colonial legal systems, have not extinguished indigenous peoples' land rights. These rights are based on their own customary laws, which have 'survived' colonisation and therefore need to be recognised and protected by States. Indigenous claimants have to prove 'continuity' and the maintenance of 'traditional' usage of the land. These demands come with some coercion for indigenous peoples who have to prove their so-called 'traditional' land usage. Looking at the context of Australia, Wolfe refers to such processes as 'repressive authenticity', where aboriginal people are forced to prove their 'authentic' traditional ways of using the land to get the right to use their own territories.[4] Likewise, looking at the situations faced by several indigenous communities in Asia and the Pacific, Murray Li highlights how they have to use an idiom of traditional custom to have the right to use the resources located on their own territories.[5] Engel refers to this process as 'strategic essentialism'.[6] This process of 'authenticity' also goes against the international human rights-based approach to cultural rights, which has supported a non-frozen rights approach to the meaning of 'traditions' and 'authenticity', instead of supporting modernity and adaption to contemporary conditions.[7]

Despite such issues, the demand by courts on indigenous peoples to prove their historical, cultural and traditional land usage has become a common ground across the globe and shares similarities with the post-colonial concept of Aboriginal or Native Title.[8] Indeed, many communities are facing the same issue of having to 'demonstrate' their right to land on the basis of their actual possession coupled with the claim that their land rights have survived colonisation and therefore should be recognised and enforced by post-colonial courts. This has been the case in jurisdictions across Africa and Asia, as courts have usually adopted a similar approach of putting the burden of the proof of traditional and historical occupation on the indigenous claimants.[9] For example, in a case in Malaysia one of the judges stated: 'If the present generation can prove that they are practicing customs which historians described as having been practiced 200 years ago, then that is sufficient proof that such native customary rights had been practiced 200 years ago.'[10] Similar approaches emerge from Latin and Central America, where indigenous peoples also face a high burden of proof to demonstrate their cultural and ancestral entitlement to their lands.[11] While there are fewer cases emerging from Europe, several cases, notably from Scandinavian countries, have also relied on the need for indigenous peoples to prove their 'immemorial land usage'.[12] Overall, it seems that most legal systems across the globe put the onus of the proof on indigenous peoples to demonstrate their rights to their ancestral territories and their 'traditional' land usage.

One of the challenges for many indigenous communities is to get their rights to land recognised under a dominant Western legal system.[13] Most legal systems have adopted Western approaches to adjudication relying on formal and written evidence, whereas often indigenous peoples' customs, traditions and land laws are oral and not formally written. Moreover, most indigenous tenure systems rely on the notion of space-sharing and non-exclusivity, something that is not recognised under the dominant civil and common law legal systems. The notion of land sharing runs counter to the dominant interpretation of property rights, which is usually based on exclusivity.[14] The hegemonic model of property is based on a right to ownership, which is individual and exclusive.[15] This notion of exclusivity is usually not found in indigenous peoples' traditional approach to land usage, which is usually based on collective and shared usage of the land. Scoones speaks of 'fuzzy access rights', which are characterised by multiple overlapping and flexible rights and overlapping claims.[16] These 'fuzzy access rights' constitute a 'complex set of overlapping

4. P. Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell) (1999).
5. T. Murray Li, 'Indigeneity, Capitalism and the Management of Dispossession' 51(3) *Current Anthropology* 385 (2010).
6. *See* K. Engel, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press) (2010), 10.
7. *See* M. Scheinin, 'The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land', in T.S. Orlin & M. Scheinin (eds.), *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Turku: Institute for Human Rights) (2000); J. Gilbert, *Indigenous Peoples' Land Rights under International Law* (Leiden, Boston, and Tokyo: Brill) (2016).
8. J. Gilbert, 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title', 56(3) *International & Comparative Law Quarterly* 583-611 (2007).
9. *See* G. Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois', 111(442) *African Affairs* 24-45 (2011); S. R. Aiken & C. H. Leigh, Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia', 45(4) *Modern Asian Studies* 825-75 (2011); J Gilbert, Litigating Indigenous Peoples' Rights in Africa: Potentials, challenges and limitations', 66 *International and Comparative Law Quarterly* 657 (2017).
10. *Nor Nyawai* HC [2001] 6 MLJ.
11. *See* C.R. Hale, 'Activist Research v. Cultural Critique: Indigenous Land Rights and the Contradictions of Politically Engaged Anthropology', 21(1) *Cultural Anthropology* 96-120 (2006); M. Chapin, 'Indigenous Land Use Mapping in Central America', 98 *Yale School of Forestry & Environment Studies Bulletin* 195-209 (1995).
12. *See* Ø. Ravna, 'The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land', in N. Bankes & T. Koivurova (eds.), *The Proposed Nordic Saami Convention National and International Dimensions of Indigenous Property Rights* (Portland: Hart Publishing) (2013).
13. *See* Murray (2010), above n. 5, at 385.
14. *See* R.C. Ellickson, 'Property in Land', 102 *Yale Law Journal* 1315-1400 (1993); H. De Soto, 'Law and Property Outside the West: A Few New Ideas About Fighting Poverty', 29(2) *Forum for Development Studies* 349-61 (2002).
15. *See* J. Tully, 'Aboriginal Property and Western Theory: Recovering a Middle Ground', 11(2) *Social Philosophy and Policy* 153-80 (1994).
16. I. Scoones, 'New Directions in Pastoral Development in Africa', in I. Scoones (ed.), *Living with Uncertainty: New Directions in Pastoral Development in Africa* (London: Intermediate Technology Publications) (1994).

rights that are continuously contested and renegotiated'.[17]

The burden of proof is even higher for societies who are relying on a nomadic or transhumant use of the land. National land laws, land tenure systems and property rights regimes usually do not recognise a nomadic ownership of the land. The specificities of nomadic or transhumant land rights, which often involve informal collective land sharing usages, are rarely recognised as constituting proof of any rights to the land.[18] In most societies, there is an assumption that nomads have no right to the land because they are never in a fixed area.[19] For example, Biesbrouck, an anthropologist working with the Bagyéli hunter-gathering communities in Cameroon, describes the Bagyéli as incorporated within the agriculturalist Bantu land tenure arrangements while also using their very specific system of tenure.[20] The land tenure system varies depending on whether the Bagyéli are within a territory dominated by the Bantu or whether they are in a territory where these rules do not apply. Interestingly, the two systems appear not to be in conflict and quite complementary. As highlighted by Kenrick and Kidd, this system relies heavily on good relationships, as 'their rights are not based on exclusively owned property but flow from good relations; their focus is on maintaining good relations rather than firm boundaries.'[21] The demand on such communities to prove a 'continuous' and 'exclusive' land usage in order to prove their rights to their land is highly problematic and does not reflect the reality of indigenous land tenure systems.

Overall, opting for litigation for the recognition of their land rights usually means that indigenous peoples have to produce evidence of their continuous and traditional usage of the lands, often having to show an exclusive right over these lands. This could be an overwhelming and also disturbing process for many indigenous communities whose customary land tenure systems are often based on customs and interrelationships between groups, with boundary agreements that rely on shared knowledge and rights over resources, rather than the construction of fences. Seeking to provide evidence based on their own customary and traditional terms, many indigenous peoples have started to map their own territories to bring evidence of their own land usage to the courts.

1.2 Participatory Mapping, Data Collection and the Courts

The use of maps as evidence of land occupation, ancestral ties to a territory and traditional land usages has increasingly become an important vehicle to prove land rights. Mapping is often essential since in most situations the courts are located far from the concerned lands, and as judges would not have access to or direct knowledge of the territories concerned they would have to rely on maps. Maps could provide essential information to support the legal claims and also challenge some of the arguments that authorities might advance against indigenous peoples. For example, in the landmark case of the Awas Tigni community against Nicaragua, which was examined by the Inter-American Court of Human Rights, the government of Nicaragua challenged the claim made by the community over their ancestral territory. The lawyers for the government of Nicaragua stated: 'The only proof in support of the supposed ancestral occupation of these lands that they claim is a document constructed solely on the basis of oral testimonies of the interested parties, a study that has no documented source, no archeological evidence, not even testimonies of the neighboring communities.'[22] In such contexts, the mapping of territories can offer some important elements to support indigenous peoples, notably allowing for the inclusion of traditional and cultural mapping of land usage.

Historically, mapping has predominately been an instrument of colonisation and administrative control. As famously stated by Harley, 'As much as guns and warships, maps have been the weapons of imperialism.'[23] However, this has changed as mapping has become an instrument for local communities to challenge the dominant narrative on land usage and possession.[24] Mapping is used by indigenous peoples as a method of documenting land use and occupancy for the purpose of negotiating land and resource rights.[25] The goal of community mapping is to record hunting, fishing, trapping and gathering patterns as well as important cultural and religious sites. Hence, increasingly, maps and mapping technologies have also played an important role in supporting evidence of land rights in litigation.

The translation of cultural, spiritual and other significant traditional attachments to a territory is not always a straight-forward process. A variety of mapping technol-

17. *Ibid*.
18. *See* J. Gilbert, *Nomadic Peoples and Human Rights* (London: Routledge) (2014).
19. However, *see* recent exceptions made by courts in Norway, *see* Ø. Ravna, 'The Process of Identifying Land Rights in Parts of Northern Norway: Does the Finnmark Act Prescribe an Adequate Procedure within the National Law?', 3 *The Yearbook of Polar Law* 423-53 (2011).
20. J. Berg & K. Biesbrouck, *The Social Dimension of Rainforest Management in Cameroon: Issues for Co-management* (Kribi, Cameroon: Tropenbos–Cameroon Programme) (2000), 29.
21. J. Kenrick & C. Kidd, *Land Rights and the Forest Peoples of Africa - Overview: Analysis & Content* (Moreton-in-Marsh: Forest Peoples programme) (2009), 17.
22. Corte Interamericano de Derechos Humanos, Caso Comunidad Mayagna (Sumo) Awas Tingni. Transcripcion de la audiencia publicasobre el Fondo, celebrada los dias 16, 17 y 18 de noviembre de 2000, en la sede de la Corte, 232, as cited and translated in Hale (2006), above n. 11, at 96-120.
23. J. B. Harley, 'Maps, Knowledge, and Power', in D. Cosgrove & S. Daniels (eds.), *The Iconography of Landscape: Essays on the Symbolic Representation, Design and Use of Past Environments* (Cambridge: Cambridge University Press) (1988), 282.
24. For a review and history of mapping, see M. Chapin, Z. Lamb & B. Threlkeld, 'Mapping Indigenous Lands', 34 *Annual Review Anthropology* 619-38 (2005).
25. I. Hirt, 'Cartographies autochtones. Éléments pour une analyse critique', 38(2) *L'Espace géographique* 171-86 (2009).

ogies and approaches exist. They vary from highly participatory approaches involving sketch maps to more technical efforts with geographic information systems (GIS), the Global Positioning System (GPS) and remote sensing. The technology is supported and enhanced by the participation of the communities with mapping combining participatory techniques with the increasingly available technologies. As noted by Godden and Tehan, 'The technology "decodes" the type of relationship with land and resources that are recognized and afforded legal protection.'[26] However, one danger is the fact that mapping technology is often led by materialistic approaches to land usage. Rundstrom has a very critical analysis on the impact of technology used for mapping, noting that 'the Western or European-derived system for gathering and using geographical information is in numerous ways incompatible with corresponding systems developed by indigenous peoples of the Americas … GIS technology, when applied cross-culturally, is essentially a tool for epistemological assimilation, and as such, is the newest link in a long chain of attempts by Western societies to subsume or destroy indigenous cultures.'[27]

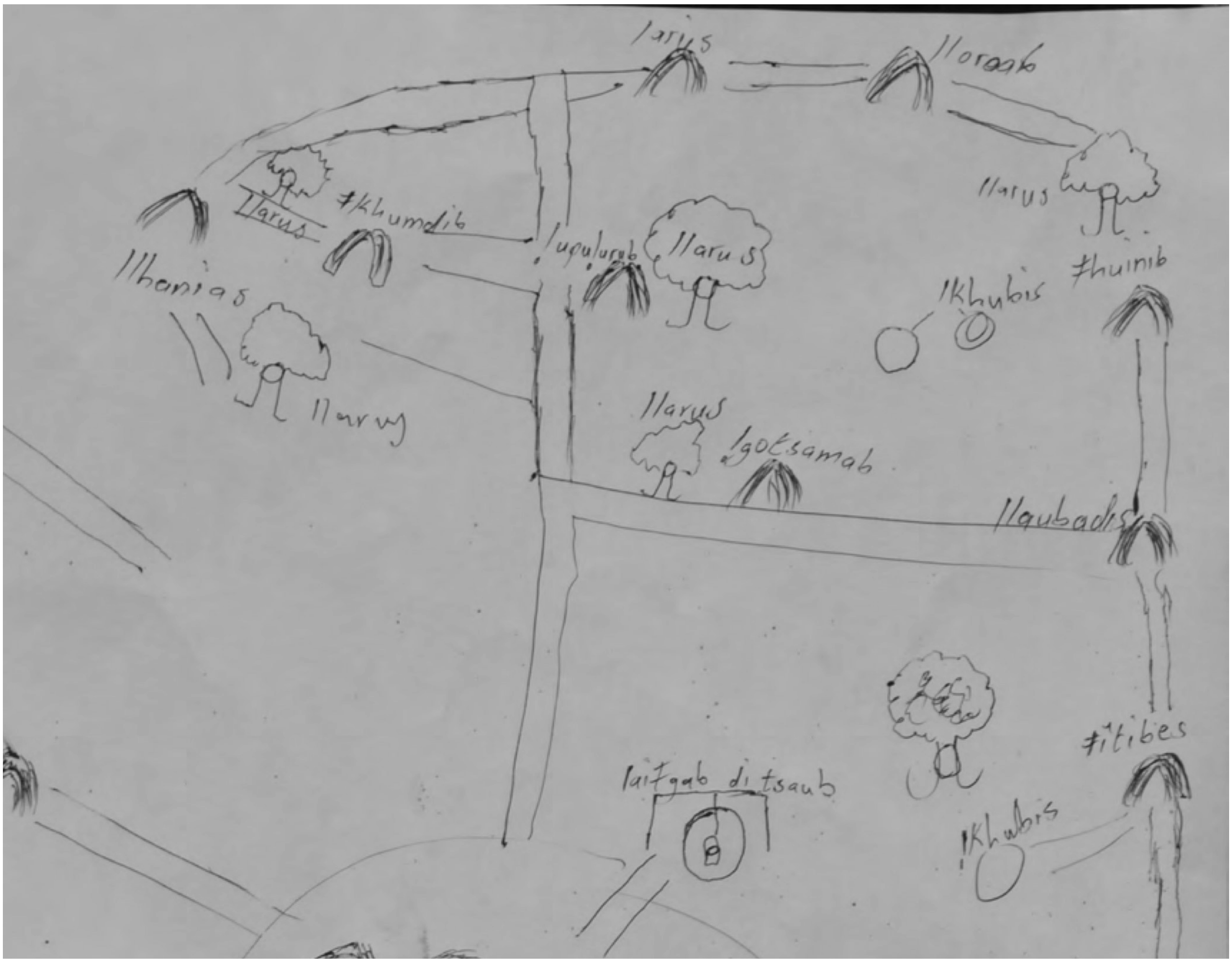
The answer to these dangers has been an increased focus on participation in mapping, allowing communities to directly create their own maps rather than rely on surveyors and specialised technicians. Mapping has moved from a traditionally high technology and specialised field to a much more accessible and participatory approach where communities themselves can play a role. There are many names for such mapping techniques – 'participatory land use mapping', 'participatory resource mapping', 'community mapping' or 'ancestral domain delimitation'. All these refer to the idea of direct involvement of the communities concerned. The use of less technologically demanding approaches to mapping such as participatory three-dimensional modelling or even community sketch maps on paper has also improved participation for communities. In recent years, spatial information technologies have become more accessible in design, utility, availability and in terms of prices, making them much more accessible to indigenous communities. While historically the use of many technologies remained out of reach of resource-poor groups, the proliferation of affordable electronic devices over the last two decades has increased the availability of mobile phones, computing and other devices to many previously technologically underserved communities. Many indigenous groups have experienced the technology 'leapfrog' phenomenon, having never previously received fixed line telecommunications but now having access via mobile networks to voice and data communication.[28] Mobile phones, in particular, are well suited to use by indigenous groups, given oral communication traditions, often residing away from wired infrastructure, movement and with the accessibility of prepaid systems for people with low or no income.[29] Similarly, the advent of portable and affordable GPS integration in mobile phones and of low-cost handheld GPS modules is also well suited for indigenous peoples, in terms of documenting traditional knowledge and territories.

This combination of communications and mapping technologies, growing in use while not yet ubiquitous, has been implemented with great success in a range of projects with indigenous peoples, from the digital documentation by mobile phone of traditional knowledge by Penans in Malaysia[30] to use of GPS tracking devices by Sami for monitoring reindeer herds.[31] The innovative use of this technology to provide evidence for land and natural resource related to litigation regarding indigenous peoples has a long-standing history. At the time when the US Department of Defense's GPS system became fully operational in 1995, the Earth Island Institute (EII) Borneo Project conducted a sketch mapping exercise of Kayan peoples' resource use, partially in response to incursions by logging companies within Kayan territories. The simple sketch maps were then used to guide participants with early portable GPS units, then costing US$3800 each, to collect coordinates and produce an accurate map of Kayan traditional knowledge and resource utilisation for use in future legal challenges.[32]

This type of community-level mapping approach has become extremely relevant in the context of litigation and is all the more accessible through lower-cost, user-friendly technology. Below is an example of a series of sketch maps completed by a San community living within their traditional territory in north-central Namibia in 2015. The area was largely designated for agricultural projects under Namibia's pre-independence South African government, hence sowing disagreement over tenure rights. The maps were drawn with pen and paper through discussions between youth and elders of the community, documenting places of importance in the vicinity of the settlement. These included cultural sites,

26. L. Godden & M. Tehan, *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (New York: Routledge) (2010), 6.
27. R. Rundstrom, 'GIS, Indigenous Peoples, and Epistemological Diversity', 22 *Cartography and Geographic Information Systems* 45-57, at 45 (1995).
28. L. Dyson, 'Framing the Indigenous Mobile Revolution', in E. Dyson, M. Hendriks & S. Grant (eds.), *Indigenous People and Mobile Technologies: Routledge Studies in New Media and Cyberculture* (New York: Routledge) (2016).
29. F. Brady, L. Dyson & T. Asela, 'Indigenous Adoption of Mobile Phones and Oral Culture', in F. Sudweeks, H. Hrachovec & C. Ess (eds.), *Proceedings Cultural Attitudes Towards Communication and Technology* (Australia: Murdoch University) (2008), 384-98.
30. T. Zaman, N. Kulathuramaiyer & A. Yeo, 'eToro: Appropriating ICTs for the Management of Penans' Indigenous Botanical Knowledge', in E. Dyson, M. Hendriks & S. Grant (eds.), *Indigenous People and Mobile Technologies: Routledge Studies in New Media and Cyberculture* (London: Routledge) (2016).
31. L. Hind, G. Jørgensen, L. Aanensen & I. Hansen, The Cultural Impact of Electronic Devices in Reindeer Husbandry, 9(28) *Bioforsk TEMA* (2014).
32. J. Lamb & M. Belcher, 'Mapping the Pathways to Survival', 10(4) *Earth Island Journal* 9 (1995).

Figure 1 An extract of a map depicting walking routes, trees that hold rain water and waterholes, with each hut indicating a day's walk



landmarks and natural resources used currently and in the past, and the traditional names of these features.

These sketch maps were used as guidance for walks around the area with a group of elders and youth. A portable GPS unit was used to record coordinates at the features depicted on the sketch maps, with the use of the GPS facilitated by a researcher at the request of a local NGO working with the community. This enabled the features described by the elders to be plotted on existing maps and Google Earth. In terms of intergenerational knowledge transfer, the process of making the map was valuable, and the map itself can be used as evidence in future tenure challenges regarding the extent of the community's territory and also to illustrate the community's cultural connection with the land.

While mapping methodologies have changed little at the community level over the past decades, the application and implementation of data has significantly changed. With the advent of readily available mobile technology and Internet access, data can be collated at scale. A number of international NGOs now present data collected by indigenous groups and their partner organisations online, as part of larger data sets to illustrate trends in tenure, conservation and extractive industries. A regional example of this is the Rainforest Foundation UK's Mapping for Rights project, an online platform for indigenous communities in the Congo Basin.[33] The platform brings together the participatory mapping of communities with data from conservation projects, extractive industry concessions, infrastructure and administrative boundaries, to present a holistic illustration of activities in and around indigenous lands. At an international level, the *LandMark Map* project is a large-scale data collation of information and maps regarding land held and used by indigenous peoples and local communities, allowing comparison of national and regional tenure systems, and estimations of proportional tenure systems across large areas or by country.[34] Hence, overall there is no doubt that the technology for mapping has become much more accessible and that it has allowed a much greater level of participatory engagement of many communities with the processes of mapping their lands and territories. Notably, such community map data can now be now be easily collated into larger officially recognised data collections.

Recently developed and more accessible technology regarding mapping, and notably the collection and digi-

33. *See* <http://mappingforrights.org> (last visited 17 January 2018).
34. *See* <http://landmarkmap.org> (last visited 17 January 2018).

tal recording of data, has greatly helped to enhance the value of community mapping. However, caution is still necessary when it comes to the use of these community maps in litigation processes. While, in general, courts have been receiving and accepting these maps as part of the evidence brought by the communities concerned, there is no guarantee of the acceptance of community maps as evidence in court. Courts can easily challenge the veracity of the maps offered by the communities. For example, in land cases in Sarawak in Malaysia, courts have rejected maps developed by the communities for not being prepared by official surveyors.[35] This is only an illustration that the legal value of the community maps could always be challenged by national courts when judges revert to more dominant governmental sources for evidence. From this perspective, the use of community mapping as evidence of land rights is always a bit of a gamble, despite the enormous efforts exerted by the communities to provide reliable and accurate maps of their traditional and cultural land usage. In a study of the effects of land litigation on indigenous peoples in Malaysia, Kenya and Paraguay, communities were asked about their views on the impact of these mapping projects, knowing that these might not always lead to judicial remedies.[36] What came out strongly from the communities concerned was that despite the legal 'gamble' that mapping might constitute since courts might reject the maps, the communities felt empowered by the evidence gathering process put in place for the mapping of their territory.

1.3 Mapping as Capacity Building and Legal Empowerment

The engagement of communities with mapping, to be able to present their historical, cultural, social, religious and spiritual connections with their ancestral territories into a formal legal language (the process of evidence gathering), can also become a contributing factor to the empowerment of the communities. The long-term engagement in litigation on land rights forces the communities to engage in a process of documentation and mapping of their relationship with their territories. As such, litigation results in the documentation of the community history as part of the litigation process. The impact of such mapping goes beyond the courtroom. Participatory mapping can play an important role in supporting local capacity, empowering communities, facilitating communication, breaking down entrenched power structures, and fostering community intergenerational participation.[37] In this process, communities have the opportunity to collectively gather evidence about their interaction with their ancestral land, including cultural, social and economic aspects of this interaction, and have this previously oral cultural heritage digitally recorded. It also allows communities to incorporate their customary and traditional approaches to the meaning of land rights and record their traditional land usage based on their own approaches and customs, sometimes challenging official maps. The process of mapping and evidence gathering particularly invites communities to actively engage in a deeply cultural, social and historical analysis of their relationship within their territories.[38] This process has an impact on the organisational capacity of the communities to claim back their own land.

This community engagement in materially shaping their historical and cultural attachment to their lands can have significant impacts on the intergenerational and gender relationships with the communities. Elders and younger generations get to work together on documents that would support evidence of the community ancestral connection with their lands. A good illustration of such intergenerational impact comes from the situation faced by the Batwa in Uganda.[39] The Batwa are currently engaged in a legal battle to reclaim their rights to live on their ancestral territories from where they have been expelled following the creation of national parks. Owing to the historical elements of their case, and since their removal has taken place over a long period, from the 1920s until the 1990s, many of the members of the community had never 'legally' lived on their ancestral territories.[40] Hence, the decision was made to record evidence from the eldest community members who had lived on the lands concerned and had faced the eviction. Based on such testimony, they have created three-dimensional models of both Bwindi and Mgahinga national parks that depict their social, spiritual and cultural sites within the forest. The case is to be examined by the Constitutional Court of Uganda and, whichever way the court may rule, it is certain that the process of recording the elders' knowledge has been an important factor in supporting intergenerational learning about the use of the forest and its importance in Batwa's cosmology.[41] Many of these elders will likely pass away before any decision is reached by the legal system, but their involvement has played a significant role in reviving and recording the Batwa's traditional usage of the forests.

This illustration was also evidenced in a multi-country research project on the impact of litigation conducted by the Open Society Justice Initiative, which demonstrated the positive impact that documentation of land custom-

35. *See* M. Cooke, 'Maps and Counter-Maps: Globalised Imaginings and Local Realities of Sarawak's Plantation Agriculture', 34(2) *Journal of Southeast Asian Studies* 265-84 (2003); Aiken & Leigh (2011), above n. 9, at 825-75.
36. J. Gilbert, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights* (Open Society Justice Initiative, April 2017), available at: <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-indigenous-peoples-land-rights> (last visited 17 January 2018)
37. *See Ibid*.
38. *See* I. Hirt, 'Mapping Dreams/Dreaming Maps: Bridging Indigenous and Western Geographical Knowledge', 47(2) *Cartographica: The International Journal for Geographic Information and Geovisualization* 105-20 (2012).
39. *See* J. Lewis, *The Batwa Pygmies of the Great Lakes Region* (London: Minority Rights Group) (2000); J. Woodburn, 'Indigenous Discrimination: The Ideological Basis for Local Discrimination Against Hunter-Gatherer Minorities in Sub-Saharan Africa', 20(2) *Ethical and Racial Studies* 345-61 (1997).
40. The Batwa's ancestral territory covers several areas of the Bwindi Impenetrable National Park, Mgahinga Gorilla National Park and Echuya Central Forest Reserve.
41. To read more on this case, *see* Gilbert (2017), above n. 9, at 657.

ary usage had on intergenerational and gender relationships within the communities concerned.[42] The processes of evidence gathering also had an impact on the role and place of women, especially in patriarchal societies, providing a space for articulating and recording their connection with the territories concerned. These processes of evidence gathering and mapping increase and support not only the communities' own sense of historical identity, but also their legal empowerment. Mapping can greatly contribute to the overall sense of legal empowerment and capacity building of the communities. The whole process can greatly contribute to cultural regeneration, to serve either as evidence to the court proceedings or as a platform for the community to record their land usage, the importance of sites in terms of cultural heritage and spirituality. This increased social cohesion also has effects to increase political mobilisation. Indigenous groups are frequently considered socially and politically subordinate to majority groups and generally have low levels of political participation and influence. In this regard, mapping may also be considered a form of participation and 'an alternative to "orthodox" political participation'.[43] Arguably, litigation, especially by class or group, allows plaintiffs to meaningfully participate in decision-making within democratic frameworks,[44] therefore exercising self-determination through the courts. From this perspective, litigation can provide a platform to strengthen a form of democratic participation for indigenous peoples who usually feel very marginalised and discriminated by the public authorities of the state. The maps used by the communities invite these legal institutions to accept and examine indigenous peoples' own approaches to the use of the land and territories.

Engaging with mapping requires efficient decision-making structures within a community. Hence, the engagement with mapping can also have an impact on the communities' decision-making processes. Traditional processes may face pressure to adjust to the very demanding time-bound process of litigation.[45] However, while there is no doubt that litigation can bring changes and pressures upon the whole and individual members of communities, the overall process of litigation can also be one that strengthens community cohesion, representation, identity, pride and confidence. It is important to recall that evidence and knowledge of procedures must be complemented by confidence, flow of information and social relations both within and between groups in order to bring about a successful land claim.[46] Mapping can play an important role in this context. Most, if not all, indigenous communities experience a level of continuing erosion of traditional values, livelihoods and cultural practices, not to mention access to land and resources. Processes such as mapping, where it is community-led and participatory, can be a source of increasing cohesion within communities experiencing these cultural and social fractures. Furthermore, creation and ownership of a map itself can be a point of pride for the community, and increase respect and serve as a negotiating tool with local authorities, private entities and international organisations, through the documentation of information and creation of a tangible group output from the community. The mapping itself may become a focal point for discussion, and often in cases dealing with land and natural resources, a vehicle to motivate and even carry the transmission of traditional knowledge through evidence collection activities, peaking interest and cultural pride. From this perspective, it is important to look at mapping outside its purely procedural and legal impact.

2 Conclusion

Partly because of the high burden of proof put on indigenous communities to prove their 'entitlement' to their ancestral territories, evidence gathering and mapping have become central elements of any adjudication of indigenous land claim. The use of participatory maps has become viewed as a panacea to record traditional and customary land usage. This mapping is important as part of the adjudication effort, but its impact goes well beyond the courtroom. As noted in this article, there is no guarantee and evidence that courts and judges would accept community maps as evidence. However, as highlighted, evidence gathering and documenting customary tenure is not only important to bring evidence to the courts, but also plays a significant role in community empowerment and historical and cultural recordings. Evidence gathering and the documentation of customary land usage can create a powerful process through which communities improve their awareness of land and resource management. It can also contribute to the development of new pathways for community resource management and encourage environmental conservation. Mapping can contribute to legal empowerment, not only through evidence collection but also through the development of confidence, transmission of traditional knowledge and increased social cohesion within indigenous communities.

However, it should also be kept in mind that litigation imposed on indigenous peoples is often the result of the state's failure to protect or recognise the land rights and self-determination of indigenous peoples. Hence, mapping and evidence gathering alone might not significantly challenge the dominant formalistic tone of the legal process. But what appears from the connection between the onerous burden of proof and community mapping is that long-term litigation on land rights forces the communities to engage in a process of documenting their relationship with their territories. As such, the litigation

42. Gilbert (2017), above n. 36.
43. J. Grossman & A. Sarat, 'Litigation in the Federal Courts: A Comparative Perspective', 9(2) *Law & Society Review* 321-46 (1975).
44. S. Lawrence, 'Justice, Democracy, Litigation, and Political Participation', 72(3) *Social Science Quarterly* 464-77 (September 1991).
45. Gilbert (2017), above n. 36.
46. L. Cotula & P. Mathieu (eds.), *Legal Empower in Practice: Using Legal Tools To Secure Land Rights In Africa* (London: IIED) (2008).

process results in the documentation of the community history during its course. It becomes a sizeable contributing factor to support the cultural regeneration, intergenerational transmission of traditional knowledge and cultural pride of the communities. Furthermore, maps can be an important negotiation tool between indigenous communities and other land claimants or authorities, as a tangible group output from the community and a demonstration of confidence and cohesion.

This article does not aim to promote the value of maps as a ready-made solution to prove land rights for communities. Nor does it argue that mapping is a simple or linear process. Rather, the goal is to contribute to a larger debate on the values and potential pitfalls of 'mapping for rights', bearing in mind that community mapping has emerged as part of a demand for 'formal' evidence of land usage by the legal system. From this perspective, there is some risk of further formalising boundaries and land usages, coupled with the risk of hastening inevitable economic interests in mapped natural resources. Another important element that merits further investigation concerns the expectation that the community should describe their usage of land. This may risk divulging traditional knowledge not typically shared with the outside world, for example cultural taboos or community resources. And lastly, but importantly in the context of this special edition, one larger question that requires further research and analysis is the extent to which courts and judges are able to receive and accept community maps as legal evidence. Overall, mapping and evidence gathering on land rights is part of a very complex and ongoing multifaceted process rather than a single linear one with a clear, obtainable goal that can be captured on a map. Historically, maps were used to promote the widespread assumption that indigenous territories were in fact open unclaimed lands belonging to the state. From an instrument of colonisation and land alienation, maps are becoming a more supportive instrument to reclaim land seized by those administrative powers. There is still a long way to go before evidence of indigenous land rights, through corrected maps and oral histories, are rightfully recognised and acknowledged. Moreover, courts must adapt to recognise land rights in forms that are not grounded in the colonial legacies and agricultural livelihoods that have shaped many boundaries and land laws. However, by pushing indigenous peoples to prove their land rights, in their own way the courts are motivating a process that could lead to redesigning the old colonial maps to restore indigenous territories.

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Aboriginal Title and Alternative Cartographies

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Abstract

Indigenous claims have challenged a number of orthodoxies within state legal systems, one of them being the kinds of proof that can be admissible. In Canada, the focus has been on the admissibility and weight of oral traditions and histories. However, these novel forms are usually taken as alternative means of proving a set of facts that are not in themselves "cultural", for example, the occupation by a group of people of an area of land that constitutes Aboriginal title. On this view, maps are a neutral technology for representing culturally different interests within those areas. Through Indigenous land use studies, claimants have been able to deploy the powerful symbolic capital of cartography to challenge dominant assumptions about "empty" land and the kinds of uses to which it can be put. There is a risk, though, that Indigenous understandings of land are captured or misrepresented by this technology, and that what appears neutral is in fact deeply implicated in the colonial project and occidental ideas of property. This paper will explore the possibilities for an alternative cartography suggested by digital technologies, by Indigenous artists, and by maps beyond the visual order.

> *The social history of maps, unlike that of literature, art, or music, appears to have few genuinely popular, alternative, or subversive modes of expression. Maps are preeminently a language of power, not of protest.*
> *—Brian Harley*[1]

> *The train has left the station; if we're not part of the mapping process, we're in trouble. A better map is one that I am part of, not as an object, but as a subject of my own future.*
> *—Alais Ole-Morindat*[2]

Indigenous claims have challenged a number of orthodoxies within state legal systems, one of them being the kinds of proof admissible in establishing facts on which claims are based. In Canada, contention has focussed on the admissibility and weight of oral traditions and histories,[3] which include songs and music, dance, regalia and wampum.[4] However, these novel forms are usually taken as alternative means of proving a set of facts that are not in themselves 'cultural', for example the occupation by a group of people of an area of land that would establish Aboriginal title.[5] On this view, culturally specific interests within those areas might exist, but they are simply manifestations of familiar and basic categories – occupation, area – that can be represented in a relatively unproblematic fashion by neutral technologies such as maps. Nevertheless, the existence of underlying or universal 'natural' entities has come into question with the so-called ontological turn in anthropology and elsewhere,[6] while a generation of critical geographers has proceeded to demythologise the representational neutrality of maps.[7]

Maps have been a crucial tool in the recognition and administration of modern Indigenous claims to land.[8] Through cartographic studies of their land use, or maps of toponyms, for example, claimants have been able to deploy the powerful symbolic capital of cartography to challenge – in a form of "counter-mapping"[9] – dominant assumptions about 'empty' land, the uses to which it can be put and the values attached to it. There is a risk, though, that Indigenous understandings of land are reductively captured or misrepresented by this technology and that what appears as a neutral record of interests in land is in fact deeply implicated in the colonial project, occidental ideas of property and a disenchanted, instrumentalist attitude to the non-human world. Can maps, as one of the master's tools, ever dismantle the

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1. B. Harley, 'Maps, Knowledge and Power', in P. Laxton (ed.), *The New Nature of Maps: Essays in the History of Cartography* (2001), at 79.
2. Commentary on Community Mapping, Video and Photo Voice Panel, CICADA Conference, October 23-27, 2015 <http://cicada.world/events/conference-2015/> (last visited 15 January 2018).
3. *See* B. Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press) (2011).
4. J. Cruikshank. 'Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in Delgamuukw v BC', *95* BC Studies *25, at 34-35* (1992); *A.J. Ray*, Telling It to the Judge: Taking Native History to Court *(Montreal and Kingston: McGill-Queen's Press) (2011), at 113-19; G. Christie, 'The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum', 16* Supreme Court Law Review *285 (2002)*.
5. Aboriginal title (sometimes native, customary or Indian title) is a proprietary right to land usually based on pre-colonial use or occupation by Indigenous peoples and recognised by the colonial legal orders. In Canada, many treaties were made historically which were considered by colonial authorities to cede Aboriginal title, leaving only some regions open to contemporary title claims.
6. E. Kohn, 'Anthropology of Ontologies', 44 *Annual Review of Anthropology* 311 (2015); M. Blaser, 'Ontology and Indigeneity: On the Political Ontology of Heterogeneous Assemblages', 21(1) *Cultural Geographies* 49 (2014).
7. *See* Harley, above n. 1; M. Monmonier, *How to Lie with Maps* (Chicago: University of Chicago Press) (1991); D. Wood, *The Power of Maps* (New York: Guilford Press) (1992).
8. A. Reilly, 'Cartography and Native Title', 27 *Journal of Australian Studies* 1 (2003); M. Chapin, Z. Lamb & B. Threlkeld, 'Mapping Indigenous Lands', 34 *Annual Review of Anthropology* 619 (2005).
9. This term was coined by N. Peluso, 'Whose Woods Are These? Counter-mapping Forest Territories in Kalimantan, Indonesia', 27 *Antipode* 383 (1995).

house of colonialism?[10] The answer is a nuanced 'yes and no', but the use of maps by Indigenous peoples in legal claims or procedures shows us that instrument, purpose and user are engaged in a subtle dance and that law both shapes, and is shaped by, that movement. This article will first address, in Section 1, the role of maps in the history of colonialism in North America, as well as, in Section 2, the ways in which Indigenous peoples have used conventional cartography in land claims to challenge the veracity of the standard map, and in order to purvey their own truths. It will then, in Section 3, explore the possibility for alternative cartographies suggested by the deployment of advances in information technology, by Indigenous artists and by maps beyond the visual order. While counter-mapping has the potential to shift certain legal habits of mind, the overall context of land claims overdetermines the assimilative and colonial effect of cartographic practices.

1 Cartography, Colonialism and Indigenous Claims

Jean Beaudrillard famously declared that the map precedes and engenders the territory, reversing the supposition that territories simply exist and that maps map them.[11] In the great land grab undertaken by the colonial powers of Europe in modern and pre-modern eras, lands were claimed on paper before they were ever occupied.[12] The Euclidian planes of the map of the world allowed Pope Alexander Paul, in the late 15th century, to notionally – and legally – partition 'infidel lands' in South America for distribution between rivals Portugal and Spain at the stroke of a pen;[13] the map's visually blank spaces helped make it possible to imagine 'undiscovered' lands as unoccupied or empty *terrae nullius*;[14] and latitude and longitude allow even unknown places to be given a fixed position relative to Greenwich, England, the heart of a colonial empire, and made commensurate with other places on a universal grid. Maps necessarily distort reality in order to be practicable – through scale, projection, symbolism, cut-off and selection – but in doing so, they constitute territories in specific ways.[15]

The advent of the bureaucratic modern state consolidated the tendency of records and artefacts to substitute for the real because of the roles they play in centralised decision-making. Maps have been a crucial material technology and practice both of jurisdiction and of property.[16] As mentioned, it was the competing colonial claims to exclusive jurisdiction in overseas territories – particularly in relation to trade monopolies – that saw the first robust political mobilisation of maps.[17] Domestically, they also became an instrument for managing the affairs of government: the map renders the land *legible* through its reduction of the world to boundaries and surface areas, profitable tree species or types of land use, recording only what the state deems valuable. This stripped back frame of reference in turn permits greater forms of control. As James Scott notes of 19th-century forestry regimes in Europe, legible forests – those inventoried for saleable wood for the purposes of fiscal projection, for example – led to the next step of producing 'simplified' forests that were more profitable and easier to assess.[18] The law of property, as another example, has been affected by a gradual process of 'dephysicalisation'[19] wherein what happens on the ground barely has an impact on the state of legal rights; in land title systems such as the Torrens system, what is on the face of the register is guaranteed to constitute the rights over any given parcel of land. The registered cadastral map *is* the property.[20] Thus, aspects of social life are noticed, managed and produced through bureaucratic technologies and measurement.

The constitutive power of maps is particularly marked in the history of colonisation, and their role in it has been well documented in the literature.[21] Colonial offi-

10. D. Rocheleau, 'Maps as Power Tools: Locating Communities in Space or Situating Peoples and Ecologies in Place', in P. Brosius, A. Lowenhaupt Tsing & C. Zerner (eds.), *Communities and Conservation: Histories and Politics of Community-based Natural Resource Management* (Walnut Creek: Altamira Press) (2005), pp. 327-62.
11. J. Baudrillard, *Simulacra and Simulations* (Michigan: University of Michigan Press) (1997), at 1.
12. Harley, above n. 1, at 57.
13. R. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press) (1990), at 80; P. Steinberg, 'Lines of Division, Lines of Connection: Stewardship in the World Ocean', 89 *Geographical Review* 254 (1999), at 255-8.
14. P. Carter, *The Road to Botany Bay: An Exploration of Landscape and History* (Chicago: The University of Chicago Press) (1987), S. Ryan, *The Cartographic Eye: How Explorers Saw Australia* (Cambridge: Cambridge University Press) (1996).
15. These cartographic 'white lies' are now well-known in critical geography: *see* Monmonier, above n. 7.
16. S. Dorsett and S. McVeigh, *Jurisdiction* (Abingdon: Routledge) (2012), at 63; R. Kain and E. Baigent, *The Cadastral Map in the Service of the State: A History of Property Mapping* (Chicago: University of Chicago Press) (1992).
17. J. Branch, The Cartographic State: *Maps*, Territory, and the Origins of Sovereignty (Cambridge: Cambridge University Press) (2013); M. Biggs, 'Putting the State on the Map: Cartography, Territory, and European State Formation', 41 CSSH 374 (1999).
18. J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press) (1999), at 18.
19. K. Vandevelde, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property', 29 *Buffalo Law Review* 325 (1980).
20. A. Pottage, 'The Measure of Land', 57 *Modern Law Review* 361 (1994).
21. B. Harley, 'Rereading the Maps of the Columbian Encounter', 82 *Annals of the Association of American Geographers* 522 (1992); S. Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Belknap Press of Harvard University Press) (2005); K. Brealey, '"Mapping Them Out": Euro-Canadian Cartography and the Appropriation of the Nuxalk and Ts'ilhqot'in First Nations Territories, 1793-1916', 39 *Canadian Association of Geographers* 140 (1995); G. Byrnes, *Boundary Markers: Land Surveying and the Colonisation of New Zealand* (Wellington: Bridget Williams Books) (2001); T.B. Mar, 'Carving Wilderness: Queensland's National Parks and the Unsettling of Emptied Lands, 1890–1910', in T.B. Mar and P. Edmonds (eds.), *Making Settler Colonial Space: Perspectives on Race, Place and Identity*

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cials enacted the powerful mythology of empty land by moving Indigenous peoples off their hunting territories and onto limited reserves. Land surveys shaped decision-making by treaty commissioners and other administrators as to the size and placement of reserves. As Cole Harris notes in the case of British Columbia, the ubiquitous maps 'enabled the commissioners to locate their decisions in abstract geometrical space devoid of content except that which their own data collections and predilections inclined them to place there. They provided a measurable, transportable and archivable record, the minimalism of which tended to undermine Native claims.'[22] Of course, colonialism was not simply effected through forms of representation, and the dispossession of Indigenous peoples took place at the sharp end of a whole machinery of colonial power – weapons, warships, troops[23] and the more indirect but equally devastating diseases and decimation of big game like bison.[24] Nevertheless, maps played a key role in these 'theatres of power'.[25] In the itinerant 19th- and early-20th-century treaty and land commissions, maps were part of formidable ritual display: red-coated police,[26] commissioners in suits behind tables, documents bearing seals in front of them and all kinds of maps.[27] More than being purely symbolic, maps were also an efficacious technology. They allowed officials and civilians alike to navigate spaces that were new to them, to use the information to control territory and to distribute land to settlers through provincial titling systems;[28] 'they enabled a bureaucracy, essentially without local knowledge, to make decisions about localities.'[29]

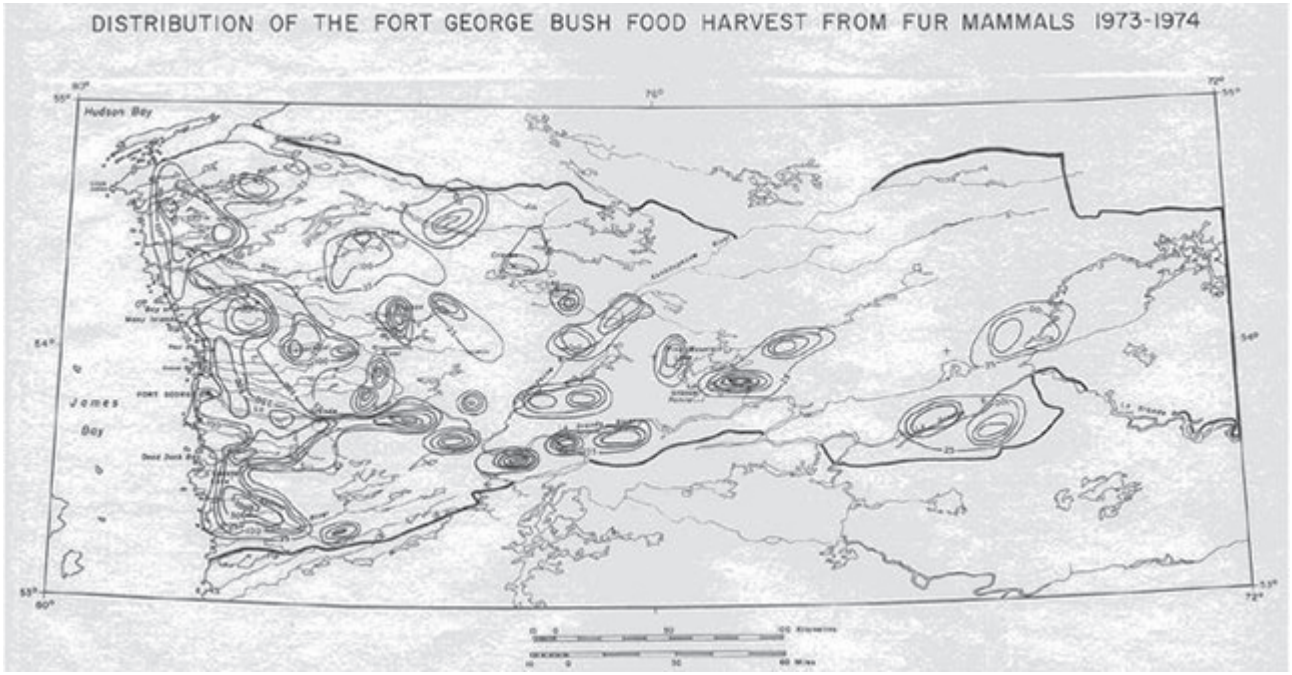
Out of necessity, Indigenous peoples also relied on European-made maps to resist colonial assumptions of ownership of their territories or claim land – for example when negotiating the size and placement of reserve lands,[30] or to monitor the implementation of treaties.[31] However, tribal representatives also frequently spoke their assertions in terms of ancestral and lived local knowledge, of the land as support and sustenance or simply of belonging. A Tlingit chief stated in 1915 that he was unable to point out places on a map that he would like included in the future reserve, but knew how big his land was 'because it belongs to me. … We give the names to the places around here and those old names come from our old forefathers'.[32] Chief Gosnell of the Nass River informed the McKenna-McBride commissioners that his people 'were practically born amongst these trees… we use this [land] for a working ground both to support our children and also our old men'.[33] But while the adoption of cartographic artefacts was undoubtedly a constraining and alien form of representation for many Indigenous peoples, the production of colonial maps themselves was often heavily reliant on the local geographical expertise of Indigenous guides and so constituted a hybrid of European and Indigenous knowledges.[34] That expertise was itself traditionally represented in alternative cartographic forms, like the representations of Ojibwa (Anishnabe) migration routes inscribed on birchbark scrolls,[35] or the performative artefacts of songs, stories and rituals.[36]

Widespread use of conventional cartography by North American Indigenous peoples in the 20th century was spurred by increasing assertions of land rights, sovereignty and self-determination, and by government regimes for their recognition. This began in a systematic way with the US Indian Claims Commission from 1946,[37] and in Canada and Alaska, in the 1970s with the instigation of planning for several mega-projects such as hydro-electricity schemes or oil and gas pipelines. The earliest court cases in Canada to consider inherent rights did not rest on detailed proof of land use or tenure and so did not require complex maps – for example in the Nisga'a litigation begun in 1967, plaintiffs sought a declaration of broad legal principle that their title to land existed at common law without having been extinguish-

(Basingstoke: Palgrave) (2010); J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press) (2000), at 125-47.

22. C. Harris, *Making Native Space: Colonialism, Reserves and Resistance in British Columbia* (Vancouver: University of British Columbia Press) (2002), at 235.
23. C. Harris, 'How Did Colonialism Dispossess? Comments from an Edge of Empire', 94 *Annals of the Association of American Geographers* 165, at 166-7 (2004).
24. J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-making in Canada* (Toronto: University of Toronto Press) (2009), at 124, 150.
25. Harris, above n. 22, at 231.
26. Miller, above n. 24, at 159.
27. Harris, above n. 22, at 231.
28. S. Hornsby and H. Stege, *Surveyors of Empire: Samuel Holland, JFW Des Barres and the Making of the Atlantic Neptune* (Montreal: McGill-Queen's University Press) (2011).
29. Harris, above n. 23, at 176.
30. Brealey, above n. 21, at 153.
31. In 1884, for example, Treaty 6 chiefs from Saskatchewan demanded that the Minister provide them with maps of their reserve 'that [they] may not be robbed of it': A.J. Ray, J.R. Miller & F. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen's University Press) (2000), at 199.
32. Cited in Harris, above n. 23, at 233.
33. Cited in Harris, above n. 23, at 234.
34. D. Bernstein, 'Negotiating Nation: Native Participation in the Cartographic Construction of the Trans-Mississippi West', 48 *Environment and Planning A* 626, at 627 (2016); D. Turnbull, 'Mapping Encounters and (En)countering Maps: A Critical Examination of Cartographic Resistance', 11 *Knowledge and Society* 15, at 40 (1998); Harley, above n. 1; B. Mundy, *The Mapping of New Spain: Indigenous Cartography and the Maps of the Relaciones Geográphicas* (Chicago: University of Chicago Press) (1996).
35. *See* Figure 6. European explorers were sometimes surprised by the accuracy and detail of maps produced by their Indigenous informants: *see* R. Rundstrom, 'A Cultural Interpretation of Inuit Map Accuracy', 80 *American Geographical Society* 155 (1990).
36. M. Warhus, *Another America: Native American Maps and the History of Our Land* (New York: St. Martin's Press) (1997), at 3; D. Woodward and G.M. Lewis, *Cartography in the Traditional African, American, Arctic, Australian, and Pacific Societies* (Chicago : University of Chicago Press) (1998); G. Eades, *Maps and Memes: Redrawing Culture, Place, and Identity in Indigenous Communities* (Montreal and Kingston: McGill-Queen's University Press) (2015).
37. *See* A.J. Ray, 'Native History on Trial: Confessions of an Expert Witness', 84 *Canadian Historical Review* 253, at 256 (2003) and I. Sutton, 'Cartographic Review of Indian Land Tenure and Territoriality: A Schematic Approach', 26 *American Indian Culture and Research Journal* 63, at 76 (2002).

Figure 1 *Distribution map of Cree food harvesting from M. Weinstein, What the Land Provides: An Examination of the Fort George Subsistence Economy and the Possible Consequences on It of the James Bay Hydroelectric Project (Montreal: Grand Council of the Crees) (1976), reproduced in Bryan and Wood, n. 45, at 65.*



ed.[38] The map accompanying the Nisga'a claim in *Calder* v. *B.C.*[39] indicated simply the outline of the territory for which the declaration was sought, based on the metes and bounds description of a 1913 Nisga'a petition.[40] Likewise, the Federal government's comprehensive land claims policy, launched in 1973 following the recognition by the Court in the Nisga'a litigation that Aboriginal title formed part of the common law in Canada, required at that stage only basic information about the claimant group, and approximate descriptions of boundaries.[41]

In general, though, the use of litigation as a strategy necessitated the production of maps that would meet the rigorous evidentiary demands of the courts. When the Crees of James Bay (*Eeyou Istchee*) filed for an injunction in 1972 against the planned hydroelectric project in Northern Quebec, for instance, they had to provide detailed evidence of the specific ways in which the development would impact on their rights.[42] To show this, Eeyou witnesses were each asked to mark out hunting and trapping territories on a map of the province and to enumerate answers to quantitative questions about species hunted, reliance on traditional foods and access to traplines (family hunting territories).[43] Such answers required witnesses to think in alien terms about their land – through numbers, statistics and hypotheticals (which some simply refused to do).[44] Nevertheless, the Cree began negotiating with the Quebec government in 1974 and engaged in an intensive mapping project. Because of the prevailing assumption that they had abandoned their traditional way of life, their maps focussed less on delimiting an area of occupation, and more on documenting hunting and harvesting practices, and quantifying amounts of food produced (Figure 1).[45]

The legal landscape since then has only expanded the place and importance of maps in the interactions between Indigenous peoples and the state. The consolidation, following *Calder*, of a jurisprudence of Aboriginal title based on exclusive occupation – to be detailed in the next part – requires documentation of the regular use of, capacity to control or strong presence throughout the territory claimed.[46] In 1990, the Federal government revised its claims policy so as to place more stringent evidentiary conditions on accepting claims, including 'a documented statement … that [the group] has traditionally used and occupied the territory in question … a description of the extent and location of such land use and occupancy … together with a map outlining

38. The Crown's admission of Nisga'a occupation of the Nass Valley since 'time immemorial' also forwent the need for lengthy and detailed land-based evidence. 'Frank Calder and Thomas Berger: A Conversation', in H. Foster, H. Raven & J. Webber, *Let Right be Done: Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (Vancouver: UBC Press) (2007), at 43-47. Earlier cases largely concerned treaty rights and focussed on textual interpretation rather than land use: *see R.* v. *White and Bob*, [1965] SCR vi, 52 DLR (2d) 481; *Sikyea* v. *The Queen*, [1964] SCR 642, (1964), 43 DLR (2d) 150.
39. *Calder* v. *A-G British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.
40. Brealey, above n. 21, at 71.
41. *Ibid*., at 73.
42. *Kanatewat* v. *The James Bay Development Corporation*, [1975] 1 S.C.R. 48; (1974), 41 D.L.R. (3d) 1.
43. H. Carlson, *Home Is the Hunter: The James Bay Cree and Their Land* (Vancouver: UBC Press) (2007), at 212-20.
44. *Ibid*., at 216-17.
45. J. Bryan and D. Wood, *Weaponizing Maps: Indigenous Peoples and Counterinsurgency in the Americas* (New York: Guilford Press) (2015), at 66.
46. *See Delgamuukw* v. *British Columbia*, [1997] 3 SCR 1010, at 144, 155 and *Tsilhqot'in Nation* v. *British Columbia*, [2014] 2 SCR 256, 2014 SCC 44, at 33-38.

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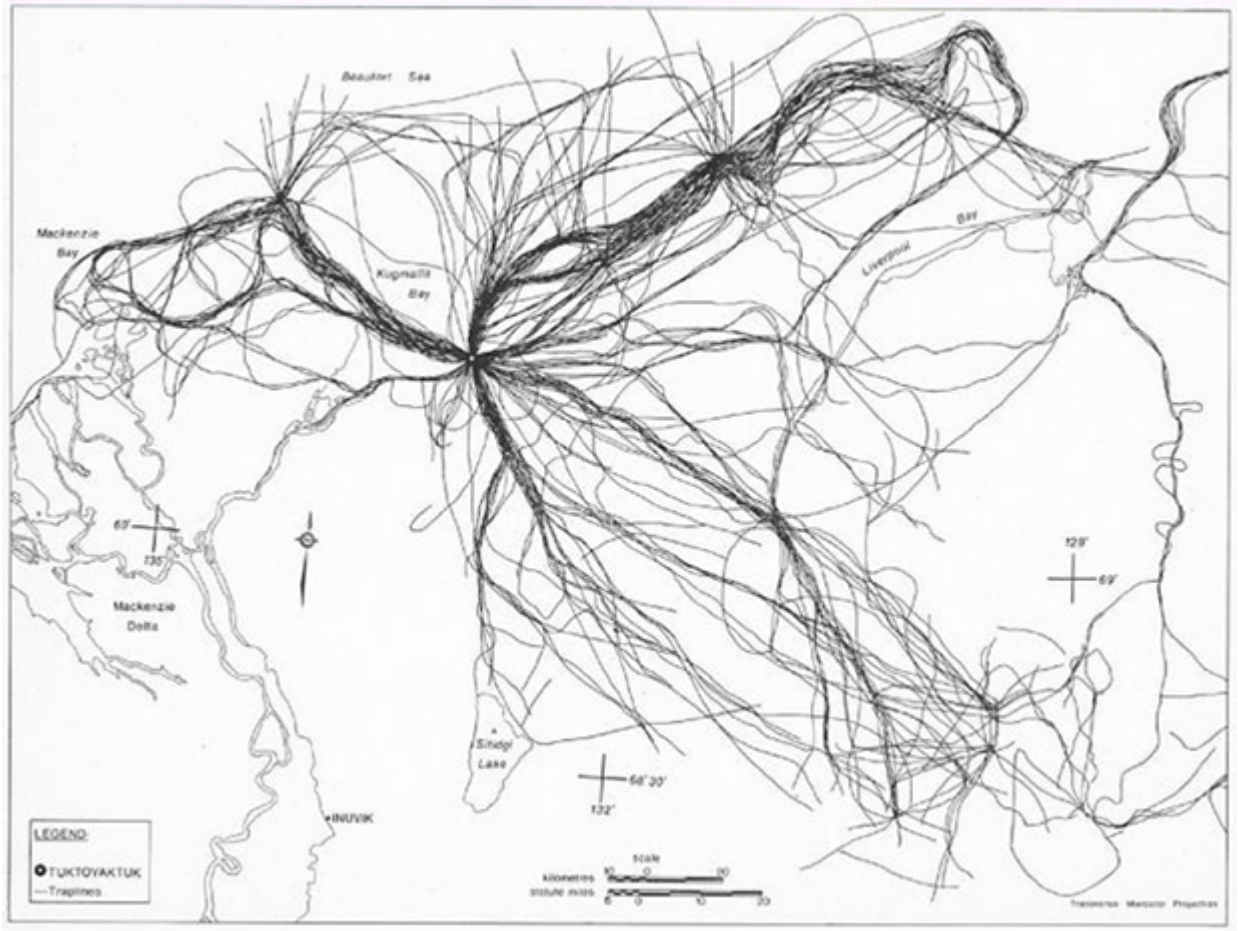
approximate boundaries… the names of bands, tribes or communities … the claimants' linguistic and cultural affiliation and approximate population figures for the claimant group'.[47] The vast majority of Indigenous groups (around 130) have pursued these negotiated settlements of their claims, rather than litigate them. Finally, the proliferation of environmental, and land and resource management regimes also requires the collection and analysis of large amounts of data relating to Indigenous interests even in areas where Aboriginal title is considered by Canadian law to have been extinguished by treaty. More recent developments in Aboriginal rights jurisprudence have formalised a 'duty to consult' wherever proposed governmental actions – such as building a road or issuing a forestry permit – will impact on Aboriginal rights like hunting or fishing.[48] Broadly, as David Natcher notes, maps increasingly serve 'to articulate visually the conflict that exists, or may exist, between Aboriginal land use patterns and resource development initiatives.'[49]

In parallel, conventional cartographic methods have been adapted to both the particularities of Indigenous territorial relations and the exigencies of state processes. In addition to the James Bay Cree study, the first large-scale mapping projects in the 1970s were a comprehensive survey of Inuit land use and occupancy, completed in anticipation of a land claim,[50] and Dene work depicting their knowledge of the land done for the inquiry into the potential impacts of the Mackenzie Valley Pipeline.[51] Peter Usher notes that cartographical innovations in these latter projects were, first, the use of individual 'biographical mapping' that charted the subsistence activities of individuals through time and space as paths on the map, collated to produce a visual summary of intensity and geographical extent of use by a community as a whole (Figure 2), and, second, the recording of people's understanding of the land in terms of ecological knowledge, sites with sacred, ceremonial or narrative significance, quarries, fish traps and place names.[52] From the 1980s, emerging geographical information systems (GIS) technologies were becoming more reliable and more readily available.[53] Land-use and occupancy research, which collects data relating to a particular activity (name of person, time, activity, location), can be indexed to a point or polygon on the map and readily collated and analysed. With portable global positioning systems (GPS), precise locations are readily logged by community members or researchers while out on the land. Digitised land use studies can produce a quantified snap-shot of the territory, useful to state agencies who want to be able to quickly assess the impact of a development project or the amount of compensation to be paid.[54]

The capacity of these maps to represent Indigenous interests in the powerful, objective language of technology, and to assert jurisdiction and thus counter-map an intervention in the colonial mythology of Indigenous absence, has been celebrated.[55] Moreover, there is a sober realism in statements such as the one by Maasai leader Alais Ole-Morindat in the epigraph that it is better to map oneself than to be inevitably mapped by others. I will offer a critique of the specific visual and technological limitations of maps in Part 2. However, it is also important to note that while Indigenous peoples *can* participate effectively in mapping projects, and can develop alternative cartographies driven and shaped by their own 'theories of being,'[56] laws and political projects, there are multiple and entrenched factors pitched against meaningful participation.[57] Indigenous communities in Canada are struggling with the trauma of compounded injustices over centuries that have often left them with debilitating levels of poverty, disease, addiction, and violence.[58] Historically, in addition to forced relocations and the radical change in ways of life that this often wrought, the *Indian Act* ['the Act'] explicitly prohibited cultural and spiritual practices, and undermined existing forms of governance.[59] It fractured communities by requiring women who married out of their band to leave and denying 'Indian' rights under the Act to individuals with fewer than two Indian grandparents.[60] It vested ultimate ownership of even remaining reserved lands in the Crown.[61] Residential schools policies forced or persuaded families to send their children to boarding schools where they often suf-

47. Prime Minister Brian Mulroney in a 25 September 1990 speech to the House of Commons, cited in Brealey, above n. 21, at 92.
48. D. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing) (2009).
49. D. Natcher, 'Land Use Research and the Duty to Consult: A Misrepresentation of the Aboriginal Landscape', 18 *Land Use Policy* 113 (2001).
50. M. Freeman, 'Looking Back – and Looking Ahead – 35 Years After the Inuit Land Use and Occupancy Project', 55 *Canadian Geographer* 20 (2011).
51. F. Duerden and R. Kuhn, 'The Application of Geographic Information Systems by First Nations and Government in Northern Canada', 33 *Cartographica* 49 (1996).
52. P. Usher, 'Environment, Race and Nation Reconsidered: Reflections on Aboriginal Land Claims in Canada', 47 *Canadian Geographer* 365 (2003). Note the use of participant observation in these methods that date back to the work of Franz Boas in the early 20th century: Chapin et al., above n. 8, at 621.
53. Duerden and Kuhn, above n. 51.
54. Natcher, above n. 49.
55. B. Nietschmann, 'Defending the Miskito Reefs with Maps and GPS: Mapping with Sail, Scuba and Satellite', 18 *Cultural Survival Quarterly* 34, at 37 (1995); T. Harris and D. Weiner, 'Empowerment, Marginalization and "Community-integrated" GIS', 25 *Cartography & Geographic Information Systems* 67 (1998).
56. A. Ole-Morindat, cited in 'Community Mapping and Landscape Modelling' Centre for Indigenous Conservation and Development Alternatives <www.cicada.world/research/themes/community-mapping> (last visited 21 December 2017).
57. For an extended analysis of 'capacity deficit' due to social suffering in the context of land claims, *see* S. Irlbacher-Fox, *Finding Dahshaa: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (Vancouver: University of British Columbia) (2009).
58. T. Alfred, 'Colonialism and State Dependency', 5 *Journal of Aboriginal Health* 42 (2009).
59. K. Pettipas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press) (1994).
60. P. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Vancouver: Purich Publishing) (2011), at 28-42.
61. *See* s.18 *Indian Act* RSC 1985, c.I-5.

Figure 2 *Inuit map biography from M. Freeman (ed.), Inuit Land Use and Occupancy Project Report, Vol. 1: Land Use and Occupancy (Ottawa: Department of Indian and Northern Affairs) (1976), at 231, reproduced in Bryan and Wood, n. 45, at 62.*



fered physical and sexual abuse, were prohibited from speaking their language, and had difficulties maintaining contact with their relatives or integrating back into their communities.[62]

In the face of this suffering, there are often very few individuals in Indigenous communities who are able to develop the expertise required to become cartographers, and communities inevitably rely on an industry of outside experts. The scene painted by Colin Samson of meetings to prepare maps for the comprehensive claim of the Innu of Labrador – of largely passive Innu 'participants' and babbling specialists from the south with their panoply of maps, bullet points, and laser pointers, their quick ripostes to every concern about the inaccuracies of the maps, and constant reminders of the hard facts of what the state will and will not accept – is unfortunately not atypical.[63] The experts may now be nominally hired by the Innu, but the scene is reminiscent of earlier ones where maps were clearly instruments of colonial power. Further, and as the following part will explain, the processes themselves in which Indigenous interests may be represented – whether in litigation to establish Aboriginal title under the common law, negotiations to reach a Comprehensive Land Claim Agreement or a myriad of administrative mechanisms – are loaded in favour of the Crown and in many ways continuous with colonial policies of dispossession and assimilation.[64]

2 *Sui Generis* Aboriginal Title, 'Other' Evidence and Different Concepts of Property

We will now turn to the more technical aspects of both Aboriginal title jurisprudence and cartography, since the role that maps currently play in Indigenous claims in Canada is partly shaped by the way that the concept of Aboriginal title has developed, and in particular, by its focus on European proprietary concepts such as exclusive possession that correspond so neatly to the visual geometry of conventional maps. The earliest claims of

62. Truth and Reconciliation Commission of Canada, *Summary of the Final Report: Honouring the Truth, Reconciling for the Future* (2015) <www.trc.ca> (last visited 21 December 2017).

63. C. Samson, *A Way of Life That Does Not Exist: Canada and the Extinguishment of the Innu* (New York: Verso Books) (2003), at 65-72.

64. *See* for example G. Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press) (2014).

Aboriginal title put before the courts on behalf of Indigenous plaintiffs in Canada pulled together two centuries of British imperial common law relating to the acquisition of new territory by the Crown, colonial policy and practice such as treaty-making and the 'Marshall decisions' on Indian title by the US Supreme Court from the early 1800s.[65] At its simplest, this doctrine was that the right claimed derived from Aboriginal – that is to say, precolonial – occupation of land, and was proprietary in nature.[66] The idea that long physical possession could be the root of title was deeply familiar to common lawyers.[67] However, when the Gitxsan and Wet'suet'en brought the *Delgamuukw* case in 1987 and framed their title as grounded in their own jurisdiction, a second source was accepted by the Supreme Court of Canada: Aboriginal laws and customs providing a connection of the claimants to the territory claimed.[68] This articulation of a dual source – common law and Aboriginal law – for title means it is *sui generis*, or unique, and opens the way for distinctive content for the rights, distinctive means of proof and distinctive forms of representation.[69] Precolonial occupation has become the foundation of contemporary Aboriginal title in Canada, as well as of the alternative political route of negotiating comprehensive claims under Federal policy. However, the perverse function of Indian title historically was to permit, at least from the perspective of colonial authorities, the formal extinguishment of that title by agreement.[70] This pattern largely continues through the land claims process in Canada today, since government policy is to offer recognition of extensive rights in only a small proportion of the total claim area in exchange for the surrender of rights over – and thus the certainty of state access to – the remainder of the territory.[71] Further, the recognition of a proprietary right held by Indigenous peoples by Chief Justice Marshall was accompanied by a declaration that their sovereignty was diminished, that they were 'domestic dependent nations' subject to the authority of the United States.[72] This same hierarchy persists in Canadian jurisprudence in the susceptibility of Aboriginal rights to be infringed by government action,[73] the prospect of which calls for the visualisation of impact, damage and disturbance to Indigenous interests through maps. The recognition of Indigenous rights is at once an affirmation of their 'infinite violability.'[74]

The *sui generis* character of Aboriginal title means that its content is neither a facsimile of fee simple ownership in the common law, nor simply reflective of forms of ownership under Indigenous legal orders, but must be understood by reference to both perspectives.[75] For example, one element of colonial policy from the 17th century and Indian title historically was the inability of Indigenous peoples to alienate it to any parties but the Crown. With the purpose of ensuring governmental monopoly over the market in Indian title and protecting Indigenous peoples from unscrupulous settlers, it was justified from a common law perspective because the land title of English subjects was of conceptual necessity derivative from Crown grant.[76] However, in *Delgamuukw*, Chief Justice Lamer speculates that the inalienability of Aboriginal title lands also reflects the degree to which lands are more than a fungible commodity to Indigenous communities who have a special relationship with land that arises over long occupation and use.[77] In terms of proof, the courts are instructed to be conscious of 'the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records.'[78] Following the elaboration of a *sui generis* title in *Delgamuukw*, Chief Justice Lamer then held that Aboriginal laws and customs – such as those regarding tenure, land use or trespass – are relevant as an alternative way to prove prior exclusive occupation.[79] Consequently, the evidentiary challenge is conceptual as well as simply pragmatic: oral traditions may be accepted as proof of the truth of factual statements relevant to land holdings contrary to the evidentiary rule against 'hearsay';[80] but these traditions themselves typically fuse ceremony or performative practices, what judges often refer to as 'mythology,' and historical fact. Adopting flexible laws of evidence as part of the reconciliatory bridging of Aboriginal and non-Aboriginal cultures, and the attempt to give equal weight to both perspectives,[81] then, often struggles with some foundational epistemological categories.

65. For a comprehensive overview of the development of the doctrine of Aboriginal title across jurisdictions, *see* P. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press) (2011), and for this point, at 77, 117.
66. *Guerin* v. *The Queen*, [1984] 2 SCR 335; McHugh, above n. 65, at 70.
67. K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press) (1989), at 73; B. Slattery, 'Understanding Aboriginal Rights', 66 *Canadian Bar Review* 727 (1987).
68. *Delgamuukw* v. *British Columbia*, [1997] 3 SCR 1010, at 126.
69. The alternative source in the 'relationship between common law and pre-existing systems of aboriginal law', *Delgamuukw*, above n. 68, at 114, also builds on definition of Aboriginal rights more generally in *R.* v. *Van Der Peet*, [1996] 2 SCR 507 [*Van Der Peet*], which sources rights both in prior occupation, and in the prior social organisation and distinctive cultures of Aboriginal peoples on the land, at 74.
70. *See* Banner, above n. 21.
71. C. Samson, 'Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims', 31 *Canadian Journal of Law & Society* 87 (2016).
72. *Johnson* v. *McIntosh* 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation* v. *Georgia* 30 U.S. (5 Pet.) 1 (1831).
73. The test for infringement was developed in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.
74. I am grateful to one of the anonymous reviewers for this poignant phrase.
75. *Delgamuukw*, above n. 68, at 112.
76. This is one of the modern hold-overs of the feudal system of land tenure in England: McHugh, above n. 65, at 111.
77. *Delgamuukw*, above n. 68, at 129. Among the critical commentary on the paternalism of this principle in the present day, *see* K. McNeil, 'Self-government and the Inalienability of Aboriginal Title', 47 *McGill Law Journal* 473 (2002).
78. *Van Der Peet*, above n. 69, at 80.
79. *Delgamuukw*, above n. 68, at 157.
80. Such statements can usually readily be comprehended within two standard exceptions to hearsay, as declarations by deceased persons relating either to community acknowledgement of public rights ('reputation') or as declarations of family genealogy and history ('pedigree').
81. *Delgamuukw*, above n. 68, at 81.

As many critics have pointed out, this reconciliatory exchange is decidedly lop-sided.[82] State sovereignty and jurisdiction is assumed; the Crown does not have to base its cadastre or territorial maps on ethnographic interviews mined for travel routes and food weights. Doctrinally, the effort to give weight to Indigenous perspectives is explicitly limited to what is cognisable to the common law. For instance, only customary associations with land that resemble exclusive occupation will give rise to Aboriginal title as that characteristic is taken as a 'core notion' of title *per se*. In the *R.* v. *Bernard* litigation, Mi'kmaq elder Keptin Steven Augustine submitted in evidence that the fundamental principle guiding Mi'kmaq tenure was the obligation to share the land, rather than to exclude others. The trial judge suggested that this attitude – although founded in Indigenous legal orders – would be fatal to establishing Aboriginal title.[83]
More contentious, and prevalent, in litigation has been the issue of what kinds of acts, or what degree of usage will constitute 'occupation.' The common law has long developed a context-sensitive test for possession: acts indicating intention to possess and demonstrating actual control in an urban neighbourhood, for instance, are more intense than for a sunken shipwreck.[84] In *Delgamuukw*, CJ Lamer provides an indicative list of activities that will assist in proving exclusive occupation, including: construction of dwellings, cultivation and enclosure of fields and 'regular use of definite tracts' for exploiting resources.[85] In the *Marshall* and *Bernard* Supreme Court decision, his statement was taken to require 'intensive' rather than 'proximate' use of specific sites,[86] and in the *Tsilhqot'in* litigation that followed, there emerged in argument a distinction between a 'postage stamp' understanding of occupation in which Aboriginal title would attach only to a patchwork of specific isolated sites, and the 'territorial claim' which would encompass a continuous territory incorporating these sites as connected from an Indigenous perspective.[87] The Supreme Court accepted the territorial claim, stating that the common law's contextual approach includes not only the kind of land but also the way of life of the claimant group and the manner, within their legal systems, that possession might be constituted.[88] It is not contemplated, however, that possession and exclusion, let alone the kind of land that can be mapped, may not figure in or be comprehensible within the legal system in question.
Thus, while different forms of evidence have – with difficulty – been accepted for the purpose of proving historical occupation, the basic premise that Aboriginal title of necessity involves a discrete group of people 'filling up', through their occupation, a bounded, territorial space and is therefore inherently 'mappable' is taken for granted. More deeply, there is an assumption that the land being subjected to title is actually constituted by its mappable qualities: that it is coterminous with Euclidean space, and that the qualities of measurable surface area, perimeter and relative position, the logic of numbers, by which land is known and made meaningful as property are simply facts that inhere in the land.[89] Cartesian spaces can be divided and subdivided by means of boundaries; they are *a priori* commensurable and interchangeable, properties that facilitate the idea of land as the object of infinite capitalist exchange.[90] As the following examples show, the presumptions operating in Aboriginal title regimes and the broader range of legal and political forums in which Indigenous people are producing maps have created difficulties for representing Indigenous political organisation and relations to place, specifically because of the reductionist and static qualities of conventional maps.

2.1 Boundaries

Boundaries are a basic element of any land claim as an expression of the geographic extent of the claim, but drawing them is often a contentious practice, particularly *between* neighbouring Indigenous groups. This is partly because boundaries on the ground imply boundaries between people, whereas there are likely to be complex kinship and ancestral connections between people who now live in specific locations and identify with specific First Nations, Métis or Inuit communities. It is also partly because, historically, there were areas of overlapping use, and boundaries were left deliberately vague or were simply unimportant unless they were contested.[91] The difficulty with mapping boundaries may also be conceptual. While space and place may well be differentiated, the borders between them may be

82. *See* for instance, J. Borrows, 'The Trickster: Integral to a Distinctive Culture', 8 *Constitutional Forum* 27 (1997); R. Barsh and J.Y. Henderson, 'The Supreme Court's *Van Der Peet* Trilogy: Naïve Imperialism and Ropes of Sand', 42 *McGill Law Journal* 993 (1996-1997); Coulthard, above n. 64.
83. *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (QL). One reason for an unwillingness to compromise on the need to establish exclusive occupation may be that the remedies available to holders of Aboriginal title as a recognisable right in the land are themselves matched to the right to exclude others, and, in *Bernard*, the courts wanted to foreclose the possibility of recognising Indigenous exclusive possession over large parts of the Maritime provinces. *See* S. Imai, 'Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes', 41 *Osgoode Hall Law Journal* 587 (2003), at 600.
84. In cases such as *The Tubantia*, [1924] P 78, [1924] All ER 615.
85. *Delgamuukw*, above n. 68, at 149.
86. *R.* v. *Marshall; R.* v. *Bernard*, [2005] 2 SCR 220, 2005 SCC 43.
87. *Tsilhqot'in Nation* v. *British Columbia*, [2014] 2 SCR 256, 2014 SCC 44. *See* J. Woodward, P. Hutchings & L.A. Baker, 'Rejection of the "Postage Stamp" Approach to Aboriginal Title: The Tsilhqot'in Nation Decision', *Report Prepared for the Continuing Legal Education Society of British Columbia* (2008).
88. *Tsilhqot'in*, above n. 87, at 41.
89. H. Verran, 'Re-Imagining Land Ownership in Australia', 1 *Postcolonial Studies* 237 (1998); Reilly, above n. 8; K. Anker, 'The Truth in Painting: Cultural Artefacts as Proof of Native Title', 9 *Law Text Culture* 91 (2005).
90. N. Blomley, 'Landscapes of Property', 32(3) *Law & Society Review* 567, at 575 (1998).
91. Although the fact that they were asserted in the face of infringing activities means that boundaries – even strict ones – did exist in some regions in Canada, as Sylvie Vincent argues, based on the history of what would now be called blockades in Quebec during the fur trade era: '"Chevauchements" Territoriaux: Ou Comment l'Ignorance du Droit Coutumier Algonquien Permet de Créer de Faux Problèmes', 46 *Recherches Amerindiennes au Québec* 91 (2016).

continually shifting and indeterminate or contingent,[92] or the boundary itself may be important as a point of crossing over or connection, rather than of exclusion.[93]

For example, as Paul Nadasdy describes social organisation amongst peoples in the Yukon in northern Canada prior to the intrusion of colonial structures, small hunting groups with flexible membership would travel an annual subsistence 'round' over large distances, their composition changing with the availability of resources, social tensions, marriage and trading relations.[94] While ethnographers were able to identify distinct language groupings, these were not geographical divisions; nor were they primary for the people themselves, who had their own complex and cross-cutting systems for identifying people that were relative to the 'vantage points in time and space of both the classifier and the classified.'[95] The concentration of populations around trading posts, and then from the 1940s, the administrative division of people into 'bands' under the Indian Act associated with a specific reserve have shaped the contemporary political structure of current-day First Nation groups in the Yukon who have signed off on land claim agreements covering 'traditional territories'. Left by outside governments to determine claim areas themselves, the fourteen Yukon bands drew up territorial boundaries based on different criteria – some inclusive of all historical use and occupancy of members and their ancestors, others more restrictive – producing a regional land claim map with considerable overlap between territories. Under the agreements, boundaries delimit the jurisdiction of resource management boards and governing councils, and Federal policy has required First Nations to resolve any overlap before certain provisions of the agreement will apply, so as to avoid conflict – to draw 'boundaries among kin'.[96] And as Nadasdy observes, these territorial maps model an ethno-nationalism and form of governance – a previously unthinkable 'us and them' – that is now adopted by many people in the Yukon.[97]

In his discussion of boundaries within the Hul'qumi'num Treaty Group in British Columbia, Brian Thom highlights that the boundary mapping problem exists because the discontinuous territories that Cartesian borders presuppose are inconsistent with the way that 'territorial relationships [for Coast Salish peoples] are underwritten by a relational epistemology' – that is, relationships are themselves a way of knowing the world.[98] Instead of numbers and measured qualities, Coast Salish know the land through the mediation of stories about transformer beings who created features of the landscape, and whose spirits continue to be encountered in these places, and through the kinship-based systems of use, sharing and reciprocity that they reinforce. Individuals experience territories not as 'spaces' but rather as storied itineraries that people travel for trade, visiting kin, partaking in ceremonies and festivals as well as harvesting.[99] Like Nadasdy, Thom observes that bounded territories in land claims tend to elevate tribal bureaucrats and centralised governments ahead of these pervasive kin networks that were once responsible for decisions about resource use and access.[100]

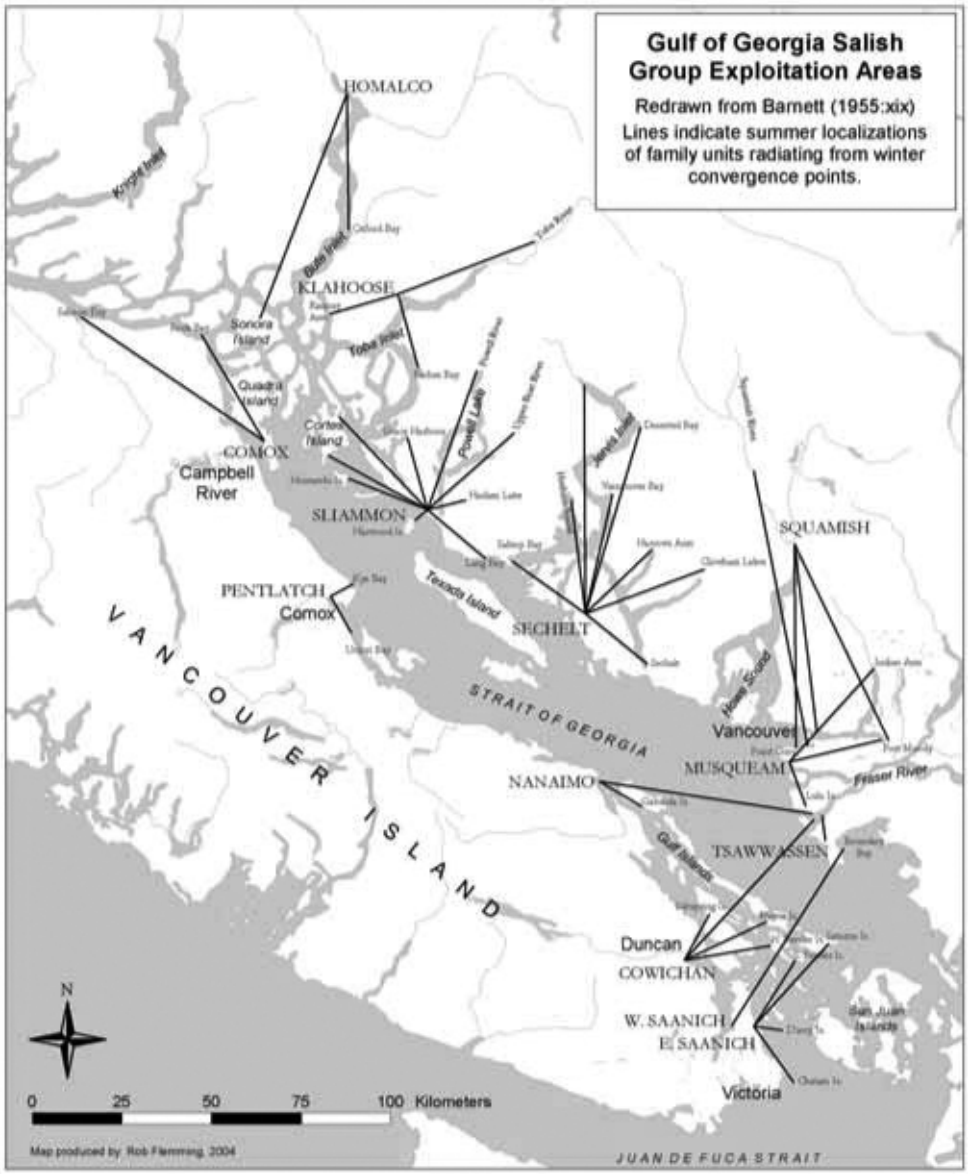
But even within these relational, non-Euclidian networks, the principle of sharing has limits for those who overstay their welcome or fail to observe the appropriate protocols, particularly in times of scarcity.[101] Further, there is a dilemma in the colonial context if Indigenous place relations are seen as boundary-less, and, by implication, property-less. To address this, Thom suggests a 'radical' cartography that attempts to represent 'relational epistemology of kin, travel, descent and sharing'[102] in place of singular, polygonal representations of territory that tend to exacerbate tensions between groups in negotiations. Plotting movement between winter villages and summer camps might, for example, render a map resembling the radial spokes of an airline map (Figure 3). In its iconography, this strategy resembles the Inuit biographical maps mentioned above. Accumulated lines do give the sense of density around sites most frequently used. Nevertheless, the line is a thin creature at best, and it leaves the 'false impression that the white spaces between the nodes of activity are empty, culture-less places.'[103]

2.2 Reification and Simplification

The paradox of boundaries is thus one example of land-based phenomena and experiences that are difficult to translate into a cartographic format. The concern can be raised more generally that maps misrepresent Indigenous relations to land because they are reductive and objectifying: conventional cartographic signs have a hard time representing contingency and relationality, movement and multiplicity. For example, a map that approximates hunting use by plotting moose kill sites misses out on recording infinitely more complex and holistic understandings of the life cycle of moose, their broader role in the ecosystem and their cultural significance to hunters.[104] Nor can it capture future patterns,

92. R. Howitt, 'Frontiers, Borders, Edges: Liminal Challenges to the Hegemony of Exclusion', 39 *Australian Geographical Studies* 233-45, at 239 (2001).
93. In the Australian context, *see* N. Williams, 'A Boundary Is to Cross: Observations on Yolngu Boundaries and Permission', in N. Williams and E. Hunn (eds.), *Resource Managers: North American and Australian Hunter Gatherers* (Boulder: Westview Press) (1982).
94. P. Nadasdy, 'Boundaries among Kin: Sovereignty, the Modern Treaty Process, and the Rise of Ethno-Territorial Nationalism among Yukon First Nations', 54 *Comparative Studies in History and Society* 499 (2012).
95. Citing ethnographer Catherine McClellan, Nadasdy, above n. 94, at 508.
96. *Ibid*., at 512.
97. *Ibid*., at 523.
98. B. Thom, 'The Paradox of Boundaries in Coast Salish Territories', 16 *Cultural Geographies* 179, at 179 (2009).
99. *Ibid*., at 186.
100. *Ibid*., at 182.
101. *Ibid*., at 186
102. *Ibid*., at 197.
103. *Ibid*., at 199.
104. T. McIlwraith and R. Cormier, 'Making Place for Space: Site-specific Land Use and Occupancy Studies in the Context of the Supreme Court of Canada's Tsilhqot'in Decision', 188 *BC Studies* 35, at 41.

Figure 3 Salish Group Exploitation Areas redrawn from Barnett (1955) in Thom, n. 98, at 198.



because hunters follow animals and animal migrations might change.[105] Although some of the early land use studies had included a rich array of information, including place-commentaries and photos, the mainstream appropriation of TUS as an inventory of land use has been criticised for omitting the breadth of place-based practice and knowledge.[106]

Time is a crucial dimension that has been bracketed out of conventional static maps, whether as it pertains to experiential aspects of place and space through things that happen, to associated narratives in which events are temporally linked or even to relatively simple changes that happen over time, such as the fluctuation of land use activities or amounts of food harvested. When Keptin Augustine, the Mi'kmaq witness in the *Bernard* case, spoke to a class of law students about Mi'kmaki (Mi'maq territory), he accompanied his telling of the Mi'kmaq creation story with an account of his people's movements from summer camps at the mouths of rivers to winter hunting grounds in the tributary watersheds, and with traces of the movement on a chalk board, in the approximate visual style of a biography approach. He finished with a diagram that looked rather like a tree; and indeed, he emphasised this analogy by likening the movement of people to the flow of sap up and down the trunk and branches of a tree with the seasons. Not only was this map uninterested in boundaries, but it was crucially about a time-based flux.

The kinds of abstractions I have discussed are not specific to maps, but are, as anthropologist Tim Ingold argues, symptomatic of a feature of modern thought that he calls inversion, in which life is reduced to things that are in, but not of, the world.[107] Land, the environment, fields and forests, buildings and rooms become, in modern thought, vessels – geographical spaces – for contain-

105. Samson, above n. 63, at 77.

106. McIlwraith and Cormier, above n. 104, at 36; N. Markey, 'Data "Gathering Dust": An Analysis of Traditional Use Studies Conducted within Aboriginal Communities in British Columbia', Masters Thesis, Simon Fraser University (2001), at 9.

107. T. Ingold, 'Against Space: Place, Movement, Knowledge', in P. Kirby, *Boundless Worlds: An Anthropological Approach to Movement* (Oxford: Berghahn Books) (2009), at 29.

ing life rather than part of the process of living. The focus on 'occupation' in property law, then, rather than inhabitation or dwelling, is one symptom of this logic. But while we live in places, not space, places are not the isolated sites or destinations that appear in the visual vocabulary of maps. Experientially, places are known through movements that connect them. For inhabitants of places, things do not exist, but occur over time; we might even say that knowledge and cognition are a matter of pathways.[108] It is inversion that turns them into discrete and atemporal facts.[109] As the extraction of people from the world, this feature of modern thought has its phenomenological correlative in disenchantment, that movement in which the modern sciences narrowed our field of perception, reducing nature to a de-sacralised, mechanised world that can be mastered by scientific means.[110]

In sum, conventional cartography uses a symbolic economy that historically erased Indigenous presence on the land (ironically in many cases using Indigenous trails, guides or informants to help them do so). Maps traffic in an aesthetic of empty spaces waiting to be filled by European discoveries or the implementation of their legal orders, and thus collude with the legal doctrine of a fictional *terra nullius*. That visual metaphor remains powerful and unacknowledged. While the Supreme Court decision in *Delgamuukw* rejected much of the trial judge's prejudicial assessment of the plaintiffs' evidence of their laws and tenure systems as unjustly devaluing what is unique about Aboriginal rights,[111] his repeated invocation of the territory claimed as a 'vast emptiness' slips beneath our cognitive radar.[112] This view – literally produced for the judge via aerial views in a helicopter as if to match the bird's eye view-from-nowhere of the map – can be contrasted with Gitxsan representation of their land as a bountiful, full box.[113]

As powerful a tool as counter-mapping has been to reverse the presumption of emptiness, the kind of presence that can be expressed in conventional maps is itself limited, within cartographic vernacular, to dots, lines and polygons, qualified by colour, text, number or other symbol. Map aesthetics are also consonant with the archetype of modern capitalist property. Land is a surface area divided by boundary lines that are necessary to the concept of exclusion, and to distinguishing 'mine' from 'yours.'[114] The bird's eye view constitutes a divide between the observer and the external world in a fantasy of domination that constitutes the conditions for ownership, or erases the very act of seeing by making these qualities of the land seem objectively there, while the homogeneity of the surfaces facilitates the idea of endless exchange.

Thus, even when mapping techniques attempt to express lived places – such as through recording use sites – rather than spaces, they are rendered as isolated points, mere locations in a void. The biographical trail maps perhaps come the closest to visualising time-based movement through territory, but they, too fight against the perceived thinness of the line. Is it that, as Margaret Wickens Pearce asks rhetorically, 'Western mapping practices are antithetical to expressions of place in some fundamental way such that place can only be expressed by turning away to other expressive forms …?'[115] The following section will canvas some alternative cartographies deployed by Indigenous peoples that, in different ways, alter, challenge or subvert the visual conventions of cadastral-type maps through new technologies, alternative aesthetic forms and even non-representational practices.

3 Alternative Cartographies

The distortions and simplifications that conventional maps make to produce a flat, usable map from a round, three-dimensional and complex Earth are necessary but not innocent; they have also become largely invisible to us. Within critical cartography, the basic dimensions of standard maps – scale, projection and symbolism – have been rethought in ways that confound these assumptions about what the world 'looks' like. For instance, the world map with which most of us are familiar is based on the Mercator projection with north upmost. Designed to facilitate maritime navigation in 1569, it keeps meridian lines parallel in flattening the globe, but enlarges the areas of landmasses towards the north and south poles, thus portraying Europe and North America as more prominent geographically.[116] Its most famous alternative, the Peters projection, abandons the rectilinear projection but keeps the relative area of landmasses, thus reducing the prominence of Europe and North America.[117]

With the advent of a global Indigenous counter-mapping movement, other kinds of critiques and alternative techniques have emerged. For instance, Inuit mapping

108. D. Turnbull, 'Maps, Narratives and Trails: Performativity, Hodology and Distributed Knowledges in Complex Adaptive Systems – an Approach to Emergent Mapping', 45(2) *Geographical Research* 140 (2007).
109. Ingold, above n. 107, at 29.
110. M. Berman, *The Reenchantment of the World* (London: Cornell University Press) (1981).
111. *Delgamuukw*, above n. 68, at 93-106.
112. See discussion in M. McCrossan, 'Contaminating and Collapsing Indigenous Space: Judicial Narratives of Canadian Territoriality', 5 *Setter Colonial Studies* 20, at 25 (2014).
113. R. Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press) (2005).
114. Note that although conventional accounts of the exclusive aspect of liberal property rights rely on this geographical trope, an alternative account of 'exclusivity' relates to the primacy of the owner as the person who is able to set an agenda for the thing: L. Katz, 'Exclusion and Exclusivity in Property Law', 58 *University of Toronto Law Journal* 275 (2008).
115. M.W. Pearce, 'Framing the Days: Place and Narrative in Cartography', 35 *Geography and Geographic Information Science* 17 (2008).
116. M. Monmonier, *Rhumb Lines and Map Wars: A Social History of the Mercator Projection* (Chicago: University of Chicago Press) (2004), at 1-3.
117. <www.oxfordcartographers.com/our-maps/peters-projection-map/> (last visited 15 January 2018). But see Mark Monmonier on the simplistic claims of Peters that his map was an antidote to the Eurocentric Mercator: Monmonier, above n. 116, at 145-7.

projects, in which sea-ice areas are crucial, question the conventional division between land and water, and its focus on mapping in detail only the former. They necessarily represent a surface – ice – which is impermanent and only seasonally present.[118] Some of the innovation in 'coding' information into maps can be attributed to the development of community-based or participatory mapping, where decisions on design are being made by the communities to whom the maps pertain, rather than solely by professional cartographers.[119] The development of critical cartographic competencies – technical know-how with respect to the tools of cartography married with an understanding of their contingency and significance – in Indigenous communities has been an essential component of Indigenous struggles through counter-mapping.[120] The variety of alternative cartographies range from sophisticated use of innovative technologies, to drawing on traditional aesthetics and practices in developing alternative visualisations of land, to what might be called non-representational maps.

3.1 Alternative Technologies: Digital Mapping and GIS

The use of digital mapping technologies, or cybercartography, has revolutionised cartography in three ways. First, it is possible to store vast amounts of information associated with points on a map, through hyperlinked or layered data, by using interactive interfaces with moveable scales that allow different-sized phenomena to appear when the surface of the map is zoomed in or out, and through 3D and virtual reality projections. These can include multimedia such as photos, videos and audio recordings (and potentially, with advances in virtual reality, smell and touch, too).[121] Second, map production and use have been somewhat democratised: with relatively affordable GPS units that can pinpoint the coordinates of a physical location on the ground; ubiquitous digital maps such as Google Earth or Microsoft Virtual Earth allow users to select and determine map formats, as well as, in Web 2.0, to geo-tag places with their own data. Third, continuous data inputs and remote sensors permit digital maps to show real-time changes such as temperature or ice-thickness.[122]

The sheer quantity of data that can be digitally associated with location points means that maps are able to represent a more complex sense of place to their audience. Conventional Traditional Use mapping recorded three basic data points: who (participant name), what (type of activity) and where (spatial feature). A larger data packet can, for instance, contain information about repeat use that may have been omitted from use studies to make a cleaner map, but that can now indicate the importance of certain sites, as well as a more nuanced assessment of the likely impact of potential disturbances; time-related data within the packet can help make this same projection into the future.[123] More complex information, such as how sites are connected to each other, which families or clans participate in particular activities, how the knowledge or practice has been learnt and ecological assessments of the quality and quantity of resources available, can also be captured.[124] Multiple layers of data can thus be easily accessed from the same map.

But digital technologies could lend themselves to a more powerful shift in cartographic thinking than merely 'capturing' more and more complex information about places. Critically, multimedia – drawings, photos of sites or 3D renderings, audio recordings or videos of people telling myths, stories or personal anecdotes and experiences, or texts – can help bring non-quantifiable human emotional and experiential aspects of place into the map. The human, time-based and experiential elements can end up working against the positivist assumption of a real, ascertainable world being represented. Crucially, recordings and texts (when read) are themselves time-based experiences for the reader, watcher and listener.

One particularly striking example of an Indigenous mapping project that adopts a 'performative' or processual approach is the *Cybercartographic Atlas of Indigenous Perspectives and Knowledge of the Great Lakes Region*.[125] Using software called Nunaliit,[126] the Atlas' processes are 'living' in that the open database allows partner communities to continue to contribute geographical knowledge on an ongoing basis, including via remotely sensed live data, while its readers can access interactive, multimedia modules relating to specific places. In general, the modular structure makes it easier for small uncoordinated groups to contribute content. For example, one module in the 'Culture' section of the Atlas tracks a story of Nenboozhoo (the Anishnabe trickster), and the creation of Mindemoya Island, with an interactive map of the journey undertaken in the story. At each stop on the map, one can listen to a sec-

118. *See* the Inuit Sea-Ice Use and Occupancy Project: <www.uaf.edu/anthro/iassa/ipyisip.htm. (last visited 29 September 2017); I. Krupnik, C. Aporta, S. Gearheard, G.J. Laidler, L. Kielsen Holm (eds.), *SIKU: Knowing Our Ice. Documenting Inuit Sea Ice Knowledge and Use* (London: Springer) (2010).

119. A 'second wave' of Indigenous mapping in which Bernard Nietschmann's work with the Toleda Maya was a catalyst: Toledo Maya Cultural Council and Toledo Acaldes Association, *Maya Atlas: The Struggle to Preserve Maya Land in Southern Belize* (California: North Atlantic Books) (1997), at 140.

120. J. Johnson, R.P. Louis & A.H. Pramono, 'Facing the Future: Encouraging Critical Cartographic Literacies in Indigenous Communities', 4 *ACME: An International E-Journal for Critical Geographies* 80 (2006).

121. M.W. Pearce and R.P. Louis, 'Mapping Indigenous Depth of Place', 32 *American Indian Culture and Research Journal* 107, at 123 (2008).

122. *See* for instance, <www.fourmilab.ch/cgi-bin/uncgi/Earth/action?opt=-p> (last visited 29 September 2017).

123. R. Olson, J. Hackett & S. DeRoy, 'Mapping the Digital Terrain: Towards Indigenous Geographic Information and Spatial Data Quality Indicators for Indigenous Knowledge and Traditional Land-Use Data Collection', 53 *The Cartographic Journal* 348, at 351 (2016).

124. *Ibid*.

125. The Great Lakes region straddles the US and Canada, encompasses Lakes Superior, Michigan, Huron, Erie and Ontario, and is the homelands of the Iroquois, Algonquin and other Indigenous peoples. *See* S. Cacquard, S. Pyne, H. Igloliorte, K. Mierins, A. Hayes & D.R. Fraser Taylor, 'A "Living Atlas" for Geospatial Story-telling: The Cybercartographic Atlas of Indigenous Perspectives and Knowledge of the Great Lakes Region', 44 *Cartographica* 83 (2009).

126. *See* <http://nunaliit.org> (last visited 28 September 2017).

Figure 4 *Screenshot: Living Cybercartographic Atlas of Indigenous Perspectives and Knowledge <http://atlas.gcrc.carleton.ca/glsl/culture/nenabush_story/nenabush_story.xml.html> (accessed 15 January 2018).*

tion of the story recorded in Anishnabemowin, read the transcript in Anishnabemowin and English and see a photograph of the location (Figure 4).[127]

A similar blend of oral histories or traditions and geographical locations is informing mapping projects on Vancouver Island, this time supported by the Google Earth platform. Through their Outreach program, Google Earth has offered cultural mapping training to over 400 Indigenous individuals since 2007.[128] Anthropologist Brian Thom works with Hul'qumi'num elders, travelling around to key sites, recording stories and plotting them with a GPS on a customised Google Earth map.[129] Indigenous youth from the Hul'qumi'num communities have also been provided with video cameras to speak with elders with the potential to geo-tag aspects of their interviews on the online map.[130] In a parallel project in the Kamchatka region in Russia, Thom and his mapping team have used the satellite 3D imagery view in Google Earth to 'virtually fly through the landscape' with their interviewees so as to prompt recollections of those places.[131] One final innovation used by Thom is a combination of an app that records 360° images of sites, together with a cheap attachment for smartphones (some made of cardboard, literally called the Cardboard Virtual Reality Viewer) that renders the images in 3D by introducing a parallax between each eye, thus approaching a surround virtual reality experience for visiting sites.[132]

As these more complex maps are becoming increasingly deployed in interactions with outside governments, the courts or resource industry proponents, their utility lies in their capacity to show, with great visual impact and almost instantaneously, the presence of Indigenous peoples on the land and the rich layers of their knowledge, history and use that the different data recorded represent. To do this effectively, Indigenous counter-mapping has to tread a fine line between being able to represent their differently-configured interests and being legible to those on the other side of the table. As Dallas Hunt and Shaun Stevenson warn, the very strategies used to resist dominant mapping techniques may also circumscribe the kinds of interventions that are possible, and in some cases even re-inscribe elements of settler colonial cartography.[133] For all its complex informational layers, when the map on the computer is the focus of communication, negotiation and decision-making, it

127. *See* <http://atlas.gcrc.carleton.ca/glsl/culture/nenabush_story/nenabush_story.xml.html> (last visited 28 September 2017).
128. J. Hunter, 'Oral History Goes Digital as Google Helps Map Ancestral Lands', *Globe and Mail* (July 11, 2014). *See also*, C. Summerhayes, *Google Earth: Outreach and Activism* (2015).
129. *See* project description here: <www.uvic.ca/socialsciences/anthropology/people/faculty/thom.php> (last visited 28 September 2017).
130. Hunter, above n. 128.
131. B. Thom, B. Colombi & T. Degai, 'Bringing Indigenous Kamchatka to Google Earth: Collaborative Digital Mapping with the Itelmen Peoples', 15 *Sibirica* 1, at 17 (2016).
132. B. Thom, personal communication, 12 October 2015.
133. D. Hunt and S. Stevenson, 'Decolonizing Geographies of Power: Indigenous Digital Counter-Mapping Practices on Turtle Island', 7 *Settler Colonial Studies* 372 (2017).

displaces and diminishes the very experiential knowledge that it claims to represent. As Samson puts it, maps doubly dispossess Indigenous peoples by facilitating extinguishment of their Aboriginal title and by supplanting 'secrets, visions, experience, stories and memories by two-dimensional abstractions.'[134] Counter-mapping is thus a specific instance of the larger paradox in the politics of recognition in which the extent to which claims based on the distinctness of one party – here, different forms of property – are successful depend on their being rendered in terms of what is familiar to the other.[135] At the same time, as Alais Ole-Morindat spells out, not participating in the mapping process is untenable.

Two caveats to the problem of recognition might also be added. One is that despite the power imbalance involved in the recognition process, either writ large or in the specific case of cartography, it should not be assumed that the terms of recognition are themselves static. Indigenous interventions in these discourses of power can and do initiate critical shifts in the way terms like property are understood. The second caveat is that we ought not to assume that representations like maps, or verbal descriptions in proprietary terms, can do all the work. Indeed, one of the risks is that when governments and resource industry proponents see the issue as one of having sufficient information about land use in order to calculate impacts, they tend to want to use maps to supplant the direct involvement of Indigenous participants. Specific elements of local knowledge then get taken both out of local context and out of local control.[136] Indeed, some argue that the benefits of the practice of 'participatory mapping' is that it shifts attention from the map as an object per se, and, as Björn Sletto writes, to the process of mapping as a 'space of engagement where social and spatial relations are reconfigured, and where representations of these relations will take a multitude of forms.'[137] In Indigenous research methodologies, place itself may be considered a participant in the mapping process.[138] Some communities, recognising the risk of losing control or having their privacy invaded, have consciously kept their maps for themselves, and produced them for their own purposes.[139]

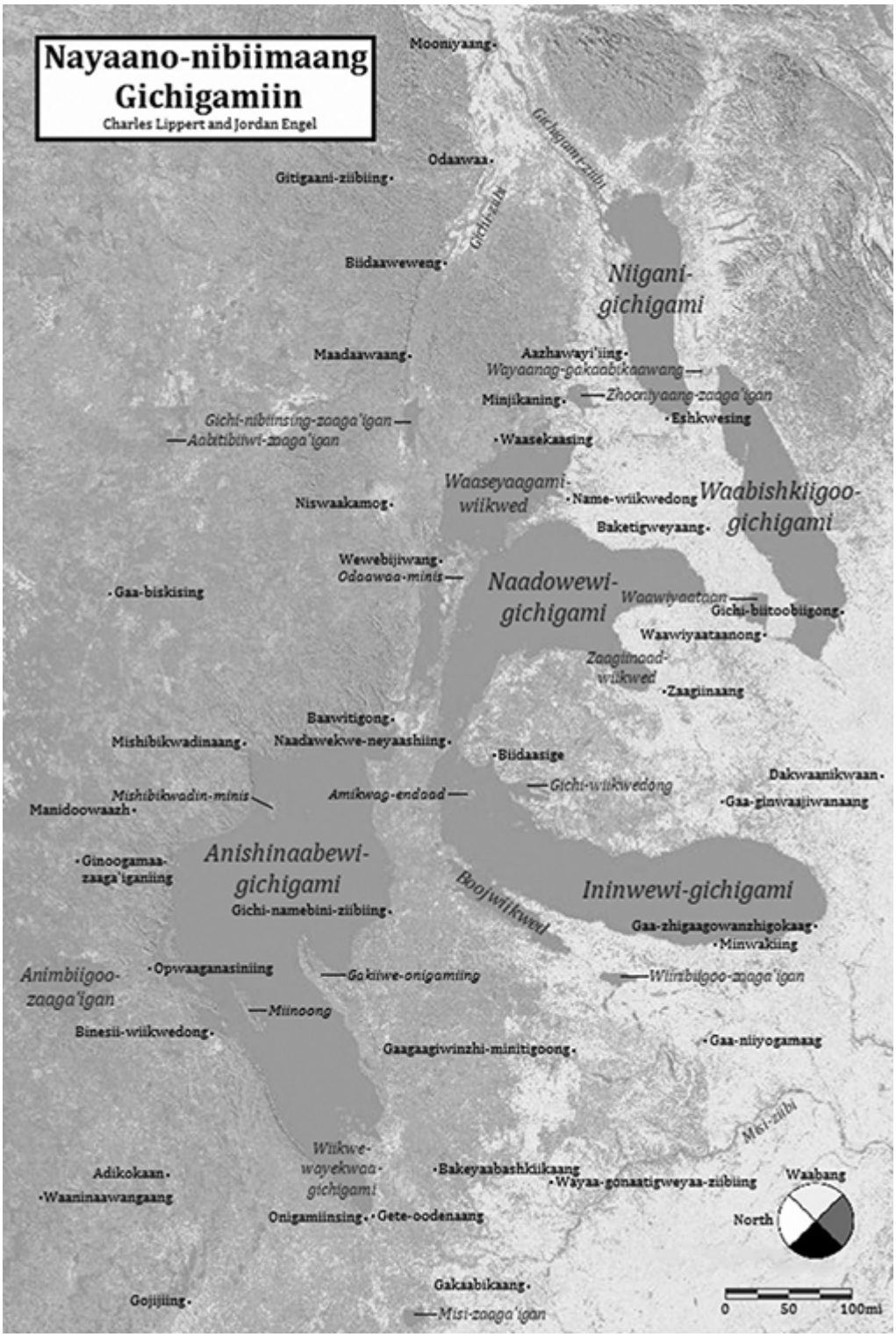
3.2 Alternative Aesthetics

If GIS introduce technological possibilities for adding to the dimensions in which maps operate and improving their capacities to represent more complex relationships with place, low-tech options also provide alternatives, some of which have been mentioned above: removing 'familiar' land marks such as national or provincial borders, roads and modern towns, highlighting alternative places for their cultural significance, plotting use trajectories rather than boundaries, and renaming sites with their Indigenous toponyms (see for example Figure 5). While the cartographic techniques remain the same – and all these innovations use the standard base map that is readily readable by state officials and others – the exchange of the expected with the unfamiliar is destabilising. For instance, reinscribing Indigenous toponyms is not simply the replacement of one name with another, but the utilisation of different naming conventions, and in particular, ones which often reference a relationship with the land from the perspective of the person moving around in it. Gwilym Eades describes James Bay Cree toponyms as often containing information about the place itself, drawn from activities performed at the site, history, mythology or geological features.[140] Thomas Thornton observes that amongst the Tlingit, '[s]o evocative are Indigenous place names, a speaker who has never even been to a particular site may be able to sense – visually, morally and in other ways – its features and significance.'[141]

This 'person-in-place' perspective can also influence some of the other parameters of cartographic representation, such as scale and projection. A cultural orientation towards the rising sun – such as in the 'Eastern Door' of the metaphoric Haudenosaunee longhouse, guarded by the Kanien'kéha (Mohawk) Nation, or in the four directions of the 'medicine wheel' common to plains peoples in which East is the direction of beginnings[142] – might lead to placing East to the 'top' of the map from the perspective of the reader.[143] An alternative orientation organises the map in terms of the direction of travel, as for the traditional Algonquin birchbark maps mentioned earlier, which depicted migration routes by arranging elements of the route – rivers, lakes and portages – along a linear axis of forward movement rather than according to cardinal directions (Figure 6). In this case, the utility of the map to the person-in-place drives the importance of sequential and linear positioning of major features of the routes. Similar pragmatic concerns give rise to other formats such as the Inuit maps representing bays and inlets along the coast of Greenland, which are carved from small lumps of drift-

134. Samson, above n. 63, at 86.
135. *See* K. Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Surrey: Ashgate Publishing) (2014), at 27-62.
136. Natcher, above n. 49, at 118.
137. B. Sletto, 'Indigenous Rights, Insurgent Cartographies, and the Promise of Participatory Mapping', *LLILAS Portal* 12, at 14 (2012).
138. J. Johnston and S. Larsen, 'Introduction: A Deeper Sense of Place', in J. Johnston and S. Larsen (eds.), *A Deeper Sense of Place: Stories and Journeys of Collaboration in Indigenous Research* (Corvallis: Oregon State University) (2013), at 10.
139. *See* comments from Dene mapper Phoebe Nahanni cited in Bryan and Wood, above n. 45, at 69.
140. Eades, above n. 36, at 54-58.
141. T. Thornton, *Haa Léelk'w Hás Aaní Saax'ú: Our Grandparents' Names on the Land* (Juneau: Sealaska Heritage Institute) (2012), at xii-xiii. *See also* K. Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque: University of New Mexico Press) (1996), at 103.
142. L. Pitawanakwat, 'Ojibwe/Powawatomi (Anishinabe) Teaching' <www.fourdirectionsteachings.com/transcripts/ojibwe.pdf> (last visited 20 September 2017).
143. Observation attributed to Jordan Engels, cartographer and founder of the project *Decolonial Atlas*: Alysa Landry, 'Lies Your Maps Tell You: Reclaim Native Lands', *Indian Country Today* (29 May 2015).

Figure 5 *Nayanno-nibiimaang Gichigamiin (The Great Lakes) in Anishinaabemowin (Ojibwe), with north to the left, by Charles Lippert and Jordan Engel https://decolonialatlas.wordpress.com/2015/04/14/the-great-lakes-in-ojibwe-v2/ (accessed 11 January 2018).*



wood, and so are both portable and buoyant, and can be read in the dark.[144]

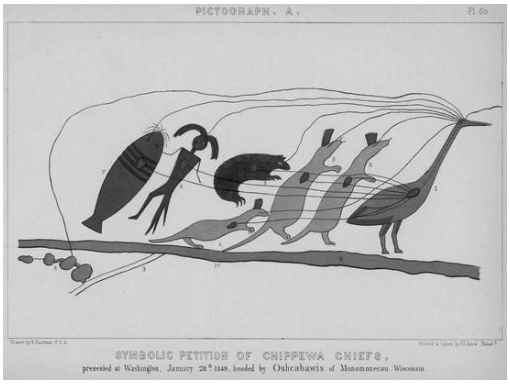
The distinctive aesthetics of embodied relationships to place emerge more forcefully when maps shade into art. In Mischif (Métis) artist Christi Belcourt's series 'Land and Water', she plays with some of the above conventions.[145] In *Goodland*, she reproduces two versions of a colonial era map, in which the original labels of one ('Lake Ontario', 'Part of Canada') are swapped for 'Onitariio' and 'Stolen Land'. A sardonic 'legend' contrasts symbolic significance in the two maps, for instance, where tree icons equate to a dollar sign for the first map and 'lungs of the earth' for the second. But there are

144. 'Inuit Cartography' *Decolonial Atlas* <https://decolonialatlas.wordpress.com/2016/04/12/inuit-cartography/> (last visited 20 September 2017).

145. *See*: <http://christibelcourt.com/water/> (last visited 20 September 2017).

Figure 6 *Red Sky's Ojibwa Migration Chart, original on 2.6 m birchbark scroll held by Glenbow museum, Alberta, drawing by B. Nemeth in Dewdney, Sacred Scrolls (1975).*

Figure 7 *Chippewa Symbolic Petition, copy in H. R. Schoolcraft, Historical and Statistical Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States (Part 1) (1851), plate 60.*



also more subtle ways in which the series of paintings explores that which 'cannot be found on today's maps'.[146] An elongated canvas, *Looking West* resembles the linear arrangement of bodies of water in Anishnabe migration charts. Each lake (in white) is ringed with blue, then black, dark red and beige, a contour style echoing the Ojibway Woodland school of painting that makes the lakes appear to thrum with energy. Other visual techniques – swirling lines of bright dots in what appear to be the sky and its reflections in the water in *View* or in the lake around *Manitoulin*, or the electrified nerve-like traces in *Returning the Copper* – similarly render the crackling vibrancy of these places, or produce a sense of being immersed in them. Not only do these paintings constitute maps or representations of land and water as they are experienced by living people in place, but those places are seemingly alive. A more literal connection between people and place can be seen in the 'Symbolic Petition' carried by Ojibwa leader Oshcabawis in 1849 to Washington in which the *dodem* (totemic) figures of the Crane, Catfish, Bear and Marten are connected by lines – from their hearts and eyes to the heart and eye of the Crane as their representative, and from its eye to the lakes that were the subject of the petition (Figure 7).[147]

3.3 Alternative Laws?

To date (and to my knowledge), none of these alternative map forms have been used in legal proceedings or in negotiations in Canada *as a map*. Would it make any difference if they were? In Australia, one high-profile painted canvas – the *Ngurrara Canvas II* that depicts key sites on the land in their spiritual as well as physical relation to one another – was presented as a map during preliminary hearings before the Native Title Tribunal. In keeping with a distinctive Australian Desert style of painting, the complex 'organic' geometry of lines and circles both suggests and destabilises the feeling of an aerial view, while the saturated colours on an oversize canvas (10 by 8 metres) engulf the viewer *in* the landscape.[148] Although, ultimately, the claimants were still required to submit a conventional map of their claim area, framing the painting as a 'map of country', as I have argued elsewhere, puts into relief the fact that all land titles are a 'complex of habits of vision, practices with respect to the world and the methods of representation that link the two.'[149] Viewers can let themselves be affected by the contrast between the fullness of the paintings or their visible connections between people and place, and the vacant asceticism of the standard map. The aesthetics of the *Ngurrara Canvas* speaks to a different type of relationship with the land, a different way of knowing it and thus a different form of property 'entitlement'.

And yet, non-conventional maps have featured as proof in land claims in Canada if we take maps more broadly as representations of peoples' relation with place. As Mark Warhus writes of traditional Native American map making generally, visual maps were always a transitory illustration, and 'secondary to the oral "picture" or experience' of a multi-dimensional landscape.[150] While visual maps are one performance or expression of place,

146. 'Mapping Roots: Perspectives on Land and Water in Ontario' <http://christibelcourt.com/Gallery/gallerySERIESmrPage1.html> (last visited 20 September 2017).

147. R. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective* (Madison: Wisconsin Academy of Sciences, Arts, and Letters, 1991) (1991), at 51.

148. *See*: <www.nma.gov.au/exhibitions/ngurrara_the_great_sandy_desert_canvas_/home> (last visited 4 January 2018).

149. Anker, above n. 135, at 157.

150. Warhus, above n. 36, at 3.

so are dances, songs, stories, crests and even dreams.[151] For example, the records of the succession of house territories contained in the Gitxsan *adaawk* recited in connection with crests and songs, and presented as evidence of Aboriginal title in *Delgamuukw*, also serve as mental maps of the territory of each house.[152] In that case, the trial judge famously protested that 'It's not going to do any good to sing to me. I have a tin ear.'[153] In the wake of the *Van Der Peet* case discussed above, judges are now directed to take on board Aboriginal perspectives on evidence, which potentially includes songs and art as alternative cartographies. But perhaps it is inevitable that most of us who are not trained to hear and read such maps have tin ears (and eyes). We have many things to learn and unlearn before this will change.

Of the many things that the mainstream Canadian legal system still has not confronted in its encounter with and 'recognition' of Indigenous legal traditions is the assumption that anything that matters can be written down, in propositional words and phrases, or on a scientific map. First, this does not notice that behind or within the oral traditions that form part of the evidence are protocols, laws about who can speak about or show what, when, to whom and in what way.[154] Second, it denies the performative element both of law, and of cartography. All knowledge is made by being and moving somewhere with our bodies.[155] While in this text I have concentrated on arguing this in the context of cartography, the same is true of law.[156] But the model of legal recognition at play in Aboriginal title is *at best* one where Indigenous law can be ascertained empirically and produced descriptively.[157] Just like maps, forms of Indigenous law like the *adaawk* are treated as artefacts that can be tested for their veracity and accuracy as depictions of past practices (or rejected as mythology), rather than themselves practices embedded within legal institutions.[158]

4 Conclusion

Cartographers like to cite Bernard Nietschmann for his assertion that just as more Indigenous territory was lost by maps than by guns, 'more Indigenous territory can be reclaimed by [using] maps [to represent traditional use and occupancy] than by guns'.[159] Undoubtedly, maps are an important part of the capacity to visualise Indigenous presence that – in many settler colonies – was effectively undermined during its long-term erasure in national imaginaries through policies of removal and assimilation, through actual genocide and through a discourse of *terra nullius*. Maps also facilitate land claims in a more technical sense by fulfilling requirements for demarcating a claim area and identifying the facts that substantiate the claim. Yet, as I have shown, the very question of what can be represented in this format – and I paraphrased Nietschmann to pinpoint what his original quote circumnavigates – is compromised because conventional cartography is part of the same mode of living and structures of power as the proprietary relations that it is so apt for expressing.

Further, contemporary Indigenous maps are produced in a political climate in which it is government protocols that require those maps for negotiations over land and resources, governments (or their corporate delegates) who often fund and control the parameters of mapping processes and government policies that direct its agents to ignore Indigenous cartographic representations – such as of their sovereignty or jurisdiction – when they are incompatible with the interests of the state.[160] In keeping with those who see Aboriginal rights, the land claims process and policies like reconciliation as a continuation or obfuscation of, not a remedy for, colonialism,[161] the visual economy of maps is then key to policies that prioritise privatising Indigenous lands, facilitating resource extraction and drawing Indigenous peoples into a modern capitalist economy while maintaining the centrality of state power.

If Brian Harley is right that, compared to literature, art and music, there are few genuinely popular, alternative or subversive modes of mapping because it is principally a language of power,[162] then it shares something with law. At least in their dominant form, both attempt to exclude other maps and other law, maps on the grounds of scientific objectivity and law on the grounds of state sovereignty and legal monism.[163] In both cases, the effect of Indigenous interventions may not necessarily be to counter colonial or state power with protest – which, while sometimes crucial, falls within the same currency – but to engage the fuller forms of being that literature, art and music entail.

151. H. Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre) (1981).
152. Daly, above n. 113, at 251.
153. J.E. Chamberlain, 'Close Encounters of the First Kind', in J. Lutz (ed.), *Myth and Memory: Stories of Indigenous-European Contact* (Vancouver: University of British Columbia Press) (2007), at 25.
154. V. Napoleon, '*Delgamuukw*: A Legal Straightjacket for Oral Histories?', 20 *Canadian Journal of Law & Society* 123, at 126 (2005).
155. Turnbull, above n. 108, at 142.
156. *See* B. Hibbits, 'Making Motions: The Embodiment of Law in Gestures', 6 *Journal of Contemporary Legal Issues* 51 (1995).
157. K. Anker, 'Law, Culture and Fact in Indigenous Claims: Legal Pluralism as a Problem of Recognition', in René Provost (ed.), *Centaur Jurisprudence* (Cambridge: Cambridge University Press) (2016).
158. Napoleon, above n. 154, at 154.
159. Nietschmann, above n. 55, at 37 (1995).
160. *See* Bryan and Wood, above n. 45; McIlwraith and Cormier, above n. 104, at 36.
161. Coulthard, above n. 64; T. Alfred, 'Restitution is the Real Pathway to Reconciliation', in G. Younging, J. Dewar & M. DeGagné (eds.), *Response, Responsibility, and Renewal Canada's Truth and Reconciliation Journey* (Ottawa: Aboriginal Healing Foundation) (2009); S. Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis: University of Minnesota Press) (2017).
162. Harley, above n. 1.
163. *See* B. de Sousa Santos, 'Law. A Map of Misreading: Towards a Postmodern Conception of Law', 14 *Journal of Law & Society* 279 (1987).

The Case of the *Kaliña and Lokono Peoples* v. *Suriname* and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement

Fergus MacKay

Abstract

The judgment of the Inter-American Court of Human Rights in the case of Kaliña and Lokono Peoples v. Suriname is noteworthy for a number of reasons. Particularly important is the Court's repeated citation and incorporation of various provisions of the 2007 United Nations Declaration on the Rights of Indigenous Peoples into its interpretation of the American Convention on Human Rights. This aids in greater understanding of the normative value of the Declaration's provisions, particularly when coupled with the dramatic increase in affirmations of that instrument by UN treaty bodies, Special Procedures and others. The Court's analysis also adds detail and further content to the bare architecture of the Declaration's general principles and further contributes to the crystallisation of the discrete, although still evolving, body of law upholding indigenous peoples' rights. Uptake of the Court's jurisprudence by domestic tribunals further contributes to this state of dynamic interplay between sources and different fields of law.

1 Introduction

On 28 January 2016, the Inter-American Court of Human Rights (the Court) issued its judgment in the case of the *Kaliña and Lokono Peoples* v. *Suriname*.[1] This case was first submitted to the Inter-American Commission on Human Rights (IACHR) in January 2007 by eight indigenous peoples' communities, collectively comprising the Kaliña and Lokono peoples of the Lower Marowijne River. The IACHR adopted a decision on the merits in July 2013 and, following Suriname's non-compliance with its recommended remedial measures, transmitted the case to the Court in January 2014.[2] In its judgment, the Court held Suriname responsible for violations of the right to juridical personality, the right to collective property, political rights, and the right to judicial protection, rights all guaranteed under the American Convention on Human Rights (ACHR).[3]

The Court found that it was 'an undisputed fact that the laws of Suriname do not recognize the possibility that the indigenous peoples may be constituted as legal persons and, consequently, they lack standing to hold collective property titles'.[4] It further found that Suriname's laws do not provide any legal remedies for the protection of their collective property rights.[5] These conclusions largely restated the findings in its *Moiwana Village* v. *Suriname* and *Saramaka People* v. *Suriname* judgments.[6] The Court further determined that a series of activities – bauxite mining, the acquisition of lands by third parties and the maintenance of nature reserves – had resulted in additional violations. The Court's corresponding orders, wholly or partially, respond to the reparations requested by the Kaliña and Lokono and include a number of significant measures.

The Court, for example, ordered guarantees of non-repetition, requiring that Suriname adopts legislative and other measures to recognise the rights of *all* indigenous and tribal peoples subject to its jurisdiction, measures not initially requested by the complainants.[7] Normally, such guarantees are employed to address structural issues affecting human rights beyond those of the named victims.[8] In this regard, the structural nature of the defects in Suriname law and practice were repeatedly highlighted by the IACHR and the Kaliña and Loko-

1. *Kaliña and Lokono Peoples* v. *Suriname*, IACTHR (2015) Series C, No. 309 (hereinafter *Kaliña and Lokono Peoples*).
2. *Kaliña and Lokono Peoples* v. *Suriname*, IACHR, Case 12.639, Report No. 79/13 (2013), available at: <www.oas.org/en/iachr/decisions/court/12639FondoEn.pdf>.
3. *Kaliña and Lokono Peoples*, above n. 1, at 305.
4. *Id.* at 50. *See also* UN Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, A/HRC/24/50 (2013), at 20 (stating that '… the right to self-determination requires recognition of the legal standing of indigenous peoples as collectives, and of their representative institutions, to seek redress in appropriate forums. Moreover, in these cases, remedies must be collective').
5. *Id.*, at 249 and 268.
6. *Moiwana Village* v. *Suriname*, IACTHR (2005) Series C, No. 124; *Saramaka People* v. *Suriname*, IACTHR (2007) Series C, No. 172 (hereinafter *Saramaka People*).
7. *Kaliña and Lokono Peoples*, above n. 1, at 305.
8. *See e.g.* D.J. Schonsteiner, 'Dissuasive Measures and the "Society as a Whole:" A Working Theory of Reparations in the Inter-American Court of Human Rights', 23 *American University International Law Review* 127, 148-9 (2007).

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no in the proceedings before the Court.[9] These issues likewise featured heavily in the 2015 review of Suriname by the UN Committee on the Elimination of Racial Discrimination.[10] The Court was also well aware of Suriname's protracted non-compliance with its prior judgments in *Moiwana Village* and *Saramaka People*, and its concerns in this regard were sharpened by Suriname's failure to persuade the Court that it had any intention of complying.[11] The former UN Special Rapporteur on the Rights of Indigenous Peoples (UNSRIP) concluded that this lack of compliance constitutes a 'prolonged condition of international illegality'.[12] In this light, the Court provided a simple explanation for the guarantees of non-repetition:

> [i]n cases such as this one, in which repeated violations of the human rights of indigenous and tribal peoples have been committed, the guarantees of non-repetition acquire greater relevance as a measure of reparation, so that similar acts are not repeated and also to contribute to prevention.[13]

The judgment also favourably clarifies or advances jurisprudence in some respects. Its treatment of the rights of indigenous peoples in relation to environmental protected areas, and associated international environmental law, is especially noteworthy. This had a major influence on two recent reports on these issues submitted to the UN Human Rights Council.[14] The same is true for its repeated citation of the 2007 UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP), in some cases reading its provisions into its interpretation of the ACHR and reinforcing the view that various UNDRIP provisions restate existing law.[15] Likewise, the Court's references to the UN *Guiding Principles on Business and Human Rights*[16] are considered by some to have potentially enhanced the development of standards in relation to the private sector.[17] One commentator, for instance, concludes that the Court's decision 'is an encouraging sign that the UNGPs might yet become more meaningful and less voluntary, and have a life beyond the "soft law" nursery which raised them'.[18]

Expert testimony was an important part of the evidence presented to the Court and clearly influenced some of its rulings.[19] In cases involving indigenous peoples, anthropologists or historians are often called to give evidence about the specific situation of the claimants, and their testimony is typically cited to support the Court's factual findings[20] and, sometimes, reparations.[21] The Court may also allow or request testimony from experts on particular legal issues and it normally does so when confronted with issues for the first time or in a new context, or where more detailed consideration appears warranted. In *Kaliña and Lokono*, two experts testified about issues of law. Victoria Tauli-Corpuz, the UNSRIP, testified, inter alia, about the interrelations between human rights and international environmental

9. 'IACHR Takes Case involving *Kaliña and Lokono Peoples* v. *Suriname* to the Inter-American Court', *IACHR Press Release*, 4 February 2014 (explaining that there exists 'a structural problem area involving a lack of recognition in domestic law of the juridical personality and right to collective property…'), available at: <www.oas.org/en/iachr/media_center/PReleases/2014/009.asp>.
10. CERD/C/SUR/CO/13-15, (2015), at 21 (observing that indigenous and tribal peoples suffer from 'Structural Discrimination') and; at 22 (recommending that Suriname take 'all necessary special measures to address the existing structural discrimination faced by indigenous and tribal peoples…').
11. *Video of Hearing*, Kaliña and Lokono Peoples, 4 February 2015, at 1:55 *et seq*., available at: <https://vimeo.com/album/3247192/video/118766033>, (where Judge García Sayán, 'echoed' by Judge Roberto Caldas, stated that: 'I must confess my frustration at not finding any response on the part of the State which would allow me to be optimistic that the decisions … in this case are going to be fulfilled because whatever the Court decides is ultimately going to be left to the State to implement, and we are going to have a problem which is very similar to what we saw seven years ago with regard to *Saramaka*'. He sought assurances from Suriname so that the Court 'will actually have firm reason to believe that the State's statements are not simply a collection of assertions that are not grounded in reality…').
12. *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, A/HRC/18/35/Add.7 (2011), at 11.
13. *Kaliña and Lokono Peoples*, above n. 1, at 300.
14. *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples*, A/71/229 (2016); and *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/34/49 (2017). Agreeing with the Court, the Rapporteurs, at 28 and 59, respectively, underscore that respect for indigenous peoples' rights 'should be seen as complementary, rather than contradictory, to environmental protection'.
15. *See e.g*. M. Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples', 58 *International and Comparative Law Quarterly* 957, at 966 (2009) (explaining that 'the strong relationship between the content of the Declaration and existing law should be recognized. The fact that the Declaration contains provisions that refer to rights and principles already recognized, or emerging, in the realm of international human rights, and, more specifically, within the indigenous rights regime, represents a first important indication of the legal significance of the instrument').
16. *Kaliña and Lokono Peoples*, above n. 1, at 224 (citing UN *Guiding Principles on Business and Human Rights*, Principle 1); and 225 (citing UN Doc. A/HRC/17/31, 18, concerning human rights due diligence by a business enterprise and stating that this 'indicates that businesses must respect the human rights of … indigenous and tribal peoples, and pay special attention when such rights are violated').
17. A. Gonza, 'Integrating Business and Human Rights in the Inter-American Human Rights System', 1 *Business and Human Rights Journal* 357 (2016); and A. Mondragón, 'Corporate Impunity for Human Rights Violations in the Americas: The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice', 57 *Harvard International Law Journal* 53, at 56 (2016) (explaining that '[t]his is the first case in which the Court "takes note" of the Guiding Principles on Business and Human Rights,' and, however, correctly observing that the Court has not used 'opportunities to develop specific state duties with regard to corporations acting in their jurisdiction. The recent judgment of the I/A Court in [*Kaliña and Lokono Peoples*] illustrates this lack of analysis').
18. C. Esdaile, 'Whilst We Wait for a Binding Treaty, Court Endorses UN Guiding Principles', *Lexology*, 7 March 2016, available at: <https://www.lexology.com/library/detail.aspx?g=7ec1f0fb-405e-4e1d-b7c9-94add086884a>.
19. *See e.g. Kaliña and Lokono Peoples*, above n. 1, at 174-5.
20. *See* R. Price, *Rainforest Warriors: Human Rights on Trial* (2011) (providing an extensive analysis of *Saramaka People* v. *Suriname* from the perspective of an anthropologist expert witness); and S. Kirsch, *Engaged Anthropology: Politics Beyond the Text* (2018), Ch. 7 (discussing his role as an expert witness, by affidavit, in *Kaliña and Lokono Peoples*, above n. 1).
21. *See e.g*. G. Citroni and K. Quintana, 'Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights', in F. Lenzini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (2008).

law. Jérémie Gilbert testified, inter alia, about restitution of lands, including in the context of environmental conservation. In their oral testimony, both experts highlighted various provisions of the UNDRIP.

This article looks primarily at how the Court's judgment in *Kaliña and Lokono* references or otherwise incorporates provisions of the UNDRIP. This includes an analysis of the extent to which the Court's reasoning and rulings track or diverge from the standards set therein. It concludes that there is substantial convergence: an unsurprising conclusion in some ways considering that the UNDRIP itself was the result of a process that mostly memorialised existing and emerging indigenous rights norms, including as derived from the Court's jurisprudence. Nonetheless, there is evidence that the UNDRIP itself is influencing the further development of standards in the inter-American system – and beyond, for example, given the influence of the Court's jurisprudence in the African system[22] – blurring the distinction between 'soft' and 'binding' law, and intensifying the interrelationship between indigenous rights in universal and regional human rights law.[23] This also illustrates, inter alia, the importance of strategic litigation as a means of further developing indigenous rights standards, including by elaborating on and amplifying UNDRIP provisions and their application.[24] The latter may become even more relevant given the expansion of the mandate of the UN Expert Mechanism on the Rights of Indigenous Peoples: 'to achieve the ends of the Declaration through the promotion, protection and fulfilment of the rights of indigenous peoples;' and to '[p]repare an annual study on the status on the rights of indigenous peoples worldwide in the achievement of the ends of the Declaration…'.[25]

2 Kaliña and Lokono Peoples and UNDRIP

2.1 Citation, Coherence and Incorporation

In its 2007 *Saramaka People* judgment, the Court was the first international human rights tribunal to specifically cite the UNDRIP,[26] a move welcomed shortly thereafter by the UN Permanent Forum on Indigenous Issues.[27] While it has done so to some extent in other cases since then, most notably *Sarayaku* v. *Ecuador*,[28] in *Kaliña and Lokono Peoples* it extensively references, tracks and even incorporates provisions of the UNDRIP into its interpretation of state obligations in the ACHR.[29] This attention may be attributed in part to widespread reference to the UNDRIP and interrelated law in pleadings submitted by the Kaliña and Lokono and the expert testimony rendered before the Court, whereas arguments submitted in prior cases focused especially on ILO Convention No. 169, an instrument in force for all but one of the respondent states. Irrespective, the Court's reliance on the UNDRIP fortifies already persuasive arguments about the legal stature of many of its provisions – in part based on their coherence with interpretations of binding instruments – and further concretises the body of law confirming and protecting indigenous peoples' rights.[30] The same may be said for the (too numerous to cite here) explosion of references to and endorsements of the UNDRIP by UN treaty bodies and Special Procedures of the Human Rights Council.[31] Some of them even call on states to 'comply' with the UNDRIP and incorporate it into domestic law,[32] including, in one instance, Suriname.[33] The majority view holds that the UNDRIP in toto is, at a bare minimum, an authoritative 'guide' by which to

22. *See e.g. Endorois Welfare Council* v. *Kenya*, African Commission on Human and Peoples' Rights, No. 276/2003 (2010) (extensively citing *Saramaka People*).
23. *See e.g.* M. Barelli, 'The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights', 32 *Human Rights Quarterly* 951 (2010).
24. *See also* C. Baldwin and C. Morel, 'Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation', in S. Allen and A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011).
25. Human Rights Council, A/HRC/33/L.25, 26 September 2016, at 1 and 2(a).
26. *Saramaka People*, above n. 22, at 131 (quoting UNDRIP, Art. 32(2)). *See also* L. Rodriguez-Pinero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement', in S. Allen and A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011) (reviewing the influence of the UNDRIP, including in its draft form, in the inter-American system).
27. 'Permanent Forum Hails General Assembly Adoption of Indigenous Rights Declaration', available at: <www.un.org/News/Press/docs/2008/hr4953.doc.htm>.
28. *See e.g. Kichwa Indigenous People of Sarayaku* v. *Ecuador*, IACTHR (2012) Series C, No. 245, 201, 215 and 217 (hereinafter *Sarayaku*).
29. *See e.g. Kaliña and Lokono Peoples*, above n. 1, at 139 (citing and quoting UNDRIP, Art. 26); 180 (quoting Arts. 18, 25 and 29 and citing Art. 23); 202 (quoting Arts. 18, and 32(2)); 221 (citing Art. 32(3)); 231 (citing Art. 12); 251(3) (citing the fifth preambular paragraph and Art. 2); 251(5) (citing Arts. 27 and 33(2)); 296 citing UNDRIP, Art. 29); *Partially Dissenting Opinion of Judge Alberto Pérez Pérez* (citing Arts. 18 and 32); and *Joint Concurring Opinion of Judges Humberto Antonio Sierra Porto and Eduardo Ferrer MacGregor Poisot* (citing Arts. 18, 29 and 32).
30. *See e.g.* M. Åhrén, *Indigenous Peoples' Status in the International Legal System* (2016), 103-7.
31. *See e.g.* F. MacKay (ed.), *Indigenous Peoples and United Nations Human Rights Bodies: A Compilation of UN Treaty Body Jurisprudence, Special Procedures of the Human Rights Council, and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples*, Vols. VI-VII (covering the years 2013-16), available at: <https://www.forestpeoples.org/en/legal-human-rights-human-rights-mechanisms-un-human-rights-system-guides-human-rights-mechanisms>.
32. *See e.g.* E/C.12/UGA/CO/1 (2015), at 13 (recommending that Uganda includes 'recognition of indigenous peoples in the Constitution in line with the [UNDRIP]'); CRC/C/GAB/CO/2 (2016), at 61(a) (calling on Gabon to '[a]dopt a law for the protection of indigenous people based on the [UNDRIP]'); and CEDAW/C/BOL/CO/5-6 (2015), at 25(c) (recommending that Bolivia '[e]nsure[s] that indigenous women have access to education in compliance with the criteria enshrined in the [UNDRIP]').
33. CERD/C/SUR/CO/13-15, above n. 10, at 24 (reiterating 'its recommendation concerning the drawing up of a framework law on the rights of indigenous and tribal peoples', and 'that this framework law comply with the provisions of the United Nations Declaration on the Rights of Indigenous Peoples').

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interpret state obligations under various human rights instruments.[34]

The preceding is most clearly illustrated in the Court's treatment of property and participation rights pursuant to Articles 21 and 23 of the ACHR, respectively, in *Kaliña and Lokono Peoples*. The Court's reparations orders are also instructive. In its judgment, the Court reiterated its findings in *Saramaka People* that 'the domestic laws of Suriname do not recognize the [indigenous peoples'] right to communal property…',[35] and that this right must be read together with the right to self-determination.[36] The Court concluded that 'the Kaliña and Lokono are protected by international human rights law which guarantees the right to the collective territory …; [and] the State has the obligation to adopt special measures to recognize, respect, protect and guarantee' this right.[37] Referring to its prior jurisprudence,[38] it explained, inter alia, that the state must: 'ensure the effective ownership of the indigenous peoples and refrain from taking steps that could lead to State agents, or third parties acting with their acquiescence or tolerance, adversely affecting the existence, value, use or enjoyment of their territory'; 'ensure the right of the indigenous peoples to control and to own their territory without any type of outside interference by third parties'; and 'ensure the right of the indigenous and tribal peoples to control and to use their territory and natural resources'.[39]

The Court first emphasised the 'control' aspect of indigenous *property* rights[40] in *Saramaka People*,[41] relating it to the territorial/resource sovereignty aspect of the right to self-determination.[42] It includes various aspects of self-government,[43] including indigenous peoples' rights to internally regulate and manage territory and to freely determine and enjoy their own social, cultural and economic development, all through their own institutions and procedures.[44] UNDRIP, Article 26(2), also recognises this right, providing in pertinent part that 'Indigenous peoples have the right to own, use, develop and control' their traditional lands, territories and resources. Note in this context also that in *Chitay Nech*, the Court observed that the direct representation of indigenous peoples, through their mandated representatives and institutions, is 'a necessary prerequisite' for the exercise of their right to self-determination…'.[45]

The Court further explained in *Kaliña and Lokono Peoples* that, 'based on the principle of legal certainty', indigenous peoples' land rights 'must be formalized by the adoption of the administrative and legislative measures required to create an effective mechanism for delimitation, demarcation and the granting of titles that

34. *See e.g.* CERD/C/USA/CO/6 (2008), at 29 (recommending that the USA employs the UNDRIP 'as a guide to interpret [its'] … obligations … relating to indigenous peoples'); and Committee on the Rights of the Child, General Recommendation No. 11, *Indigenous Children and their Rights under the Convention* (2009), 82.
35. *Kaliña and Lokono Peoples*, above n. 1, at 122.
36. *Id*. (further explaining that by virtue of the right to self-determination, indigenous peoples may 'freely pursue their economic, social and cultural development' and may 'freely dispose of their natural wealth and resources' to ensure that they are not 'deprived of [their] own means of subsistence;') and, at 123, (that this 'supports an interpretation of Article 21 of the American Convention that requires recognition of the right of the members of indigenous and tribal peoples to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied'). *See also* P. Macklem, *The Sovereignty of Human Rights* (2015), at 48 (explaining that 'indigenous peoples have rights of internal self-determination, which entitle them to extensive protection associated with their identities, cultures, territories, and forms of governance').
37. *Id*., at 125.
38. *Id*., at 131-2.
39. *Id*., at 132 (citing *Mayagna (Sumo) Awas Tingni Community Case* v. *Nicaragua*, IACTHR (2001) Series C, No. 79; *Saramaka People*, above n. 22; and *Sarayaku*, above n. 28) (footnotes omitted).
40. The IACHR and the Court have previously equated control over territory with indigenous peoples' survival, development and the pursuit of their aspirations. *Mary and Carrie Dann* v. *United States of America*, IACHR (2002), Case 11.140, Report 75/02, at 128 (observing that 'continued utilization of traditional collective systems for the control and use of territory are in many instances essential to … the survival of indigenous peoples'); and *Yakye Axa* v. *Paraguay*, IACTHR (2005) Series C, No. 125, at 146 (observing that 'indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations').
41. *Saramaka People*, above n. 22, at 115 (observing that Suriname's 'legal framework … does not guarantee the right to effectively control their territory without outside interference'); and, at 194 (ordering that recognition of the Saramaka people's 'right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system'); *Saramaka People* v. *Suriname*, IACTHR (2008) Series C, No. 185, 48-50; *accord Apirana Mahuika et al*. v. *New Zealand*, (Communication No. 547/1993), CCPR/C/70/D/547/1993 (2000), at 9.7 (explaining that a conjunctive reading of Arts. 1 and 27 of the Covenant implies that indigenous peoples have a right to enjoy 'effective possession' of and 'effective control' over natural resources).
42. Since 2013, the Committee on Economic, Social and Cultural Rights routinely addresses indigenous territorial and associated rights under Art. 1 of the Covenant. *See e.g.* E/C.12/PRY/CO/4 (2015), at 6 (expressing concern that Paraguay 'has not yet legally recognized the right of indigenous peoples to dispose freely of their natural wealth and resources or put in place an effective mechanism to enable them to claim their ancestral lands (art. 1)'). Identical or similar language is found in 2015-16 reviews of Chile, Thailand, Uganda, Venezuela, Guyana, Kenya, Namibia, Canada, Honduras, Sweden, and Costa Rica.
43. *Kaliña and Lokono Peoples*, above n. 1, at 124. *See also Kuna Indigenous Peoples of Madungandi and Embera Indigenous People of Bayano* v. *Panama*, IACHR (2012), Case 12.354, Report 125/12, at 259 (attributing positive value to the establishment of a legal mechanism for recognition of collective property rights and stating that 'it understands that the mechanism cannot exclude rights of indigenous peoples that are associated mainly with the right to self-government according to their traditional uses and customs…').
44. *See e.g.* UNDRIP, Arts. 3, 4, 5, 20(1), 23, 26(2) and 32(1).
45. *Chitay Nech* v. *Guatemala*, IACTHR (2010) Series C, No. 212, at 113 (also observing, at 115, that indigenous leaders 'exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as the right of the community to be represented. In this sense, the violation of the first reverberates in the damage of the other right'). *See also* CERD/C/CRI/CO/19-22 (2015), at 25 (expressing concern that local government bodies in Costa Rica 'have supplanted indigenous peoples' own institutions in their relations with the State…;' and recommending 'that indigenous peoples' authorities and representative institutions be recognized in a manner consistent with their right to self-determination in matters relating to their internal and local affairs').

recognizes these rights in the practice'.[46] It elaborated again, stating that indigenous peoples' right to property 'includes full guarantees over the territories they have traditionally owned, occupied and used in order to ensure their particular way of life, and their subsistence, traditions, culture, and development as peoples'.[47]

The language 'full guarantees over the territories they have traditionally owned, occupied and used', should be understood in the following way. Citing, tracking the structure of, and expounding on the general principles employed in the UNDRIP,[48] the Court ruled that the state is obligated to:[49]

1. delimit the territory traditionally owned by the Kaliña and Lokono,[50] which, 'in turn, implies establishing borders and boundaries, as well as its size'.[51] The term 'traditionally owned' should be understood in relation to their traditional tenure system and related customary laws, which must be respected;[52] as must their 'distinctive spiritual relationship' with their 'lands, territories, waters and coastal seas and other resources'[53] and, more broadly, the profound relationship between indigenous lands and cultural identity and integrity;[54]
2. those areas of territory traditionally owned which are currently possessed by them automatically become subject to their ownership, control and other rights;[55]
3. those areas within the delimited territory not currently possessed (*e.g.* in the possession of a third party, nature reserves or concessions), but nonetheless subject to the Kaliña and Lokono's property rights and associated guarantees, require formal assessment[56] – a weighing and balancing of rights or interests by the state[57] – to determine if they should be returned to the Kaliña and Lokono (restitution) or whether an alternative remedy is required (*e.g.* compensation, benefit sharing, provision of alternative lands, or revocation of concessions);[58] and
4. the state must legally recognise, demarcate and title the full extent of the lands, territory and resources[59] that result from this process, in which the indigenous peoples must participate, and further guarantee the Kaliña and Lokono the 'full and equal exercise'[60] of their right to these lands, and their effective control over and use and enjoyment[61] of the same.[62]

UNDRIP was again employed explicitly by the Court in relation to the political participation rights guaranteed by Article 23 of the ACHR.[63] In particular, it directly read Article 18 of the UNDRIP into its interpretation of Article 23, collectivising the right as it applies to indigenous peoples in the process. Noting the relationship with collective property rights, the Court ruled that the state must establish mechanisms for effective participation: '[t]his is not only a matter of public interest, but

46. *Kaliña and Lokono Peoples*, above n. 1, at 133.
47. *Id.*, at 139.
48. *Id.*, footnote 178, where the Court cites UNDRIP, Art. 26, and states that 'Similarly, [that article] recognizes the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, as well as the right to own, use, develop and control these lands; thus, States must give legal recognition and protection to these lands, respecting the customs, traditions and land tenure systems of the indigenous peoples concerned'. *See also Yakye Axa* v. *Paraguay*, IACTHR (2006) Series C, No. 142, at 34 (containing a similar process).
49. *Id.*, at 125 ('the State has the obligation to adopt special measures to recognize, respect, protect and guarantee … the right to communal ownership of this territory').
50. UNDRIP, Art. 26(1), providing that 'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'.
51. *Yakye Axa* v. *Paraguay*, above n. 48, at 34.
52. *Mayagna (Sumo) Awas Tingni*, above n. 39, 164 ('the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores').
53. UNDRIP, Art. 25; accord *Kaliña and Lokono Peoples*, above n. 1, 124; and *Saramaka People*, above n. 22, at 95.
54. *See e.g. Rio Negro Massacres* v. *Guatemala*, IACTHR (2012), Series C, No. 250, at 160 (where the Court explained that it 'has already indicated that the special relationship of the indigenous peoples with their ancestral lands is not merely because they constitute their main means of subsistence, but also because they are an integral part of their cosmovision, religious beliefs and, consequently, their cultural identity or integrity, which is a fundamental and collect right of the indigenous communities that must be respected…') (footnotes omitted).
55. UNDRIP, Art. 26(2), providing that 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources **that they possess** by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired' (emphasis added).
56. *Id.*, Art. 27 ('States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process').
57. *Kaliña and Lokono Peoples*, above n. 1, at 155 (where the Court holds that this involves assessing, on a case by case basis, 'the legality, necessity, proportionality and attainment of a legitimate objective in a democratic society … in order to restrict the right to property, on the one hand, or the right to traditional lands, on the other, without the restriction of the latter preventing the survival of the members of the indigenous communities as a people').
58. UNDRIP, Art. 28 (providing that '(1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. (2) Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress').
59. *See e.g. Sarayaku*, above n. 28, at 148 (stating that 'the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory').
60. *Id.*, at 171.
61. *Kaliña and Lokono Peoples*, above n. 1, at 136. *See also Kuna and Emberá Indigenous Peoples* v. *Panama*. IACTHR (2014) Series C, No. 284, at 142 (stating that 'by granting these lands to indigenous peoples, the State acquires the duty of ensuring the effective enjoyment of the right to property').
62. UNDRIP, Art. 26(3), providing that 'States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'.
63. Art. 23 of the ACHR provides, in pertinent, part that '[e]very citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs…'.

also forms part of the exercise of [indigenous peoples'] right to take part in any decision-making on matters that affect their interests, in accordance with their own procedures and institutions…'.[64] This was applied in relation to the exploitation of resources and conservation of the environment via nature reserves.[65] It should be noted that this is not the first occasion that the Court has read so-called soft law into its interpretation of the ACHR's guarantees. In *Moiwana Village*, for instance, the Court essentially read many of the UN *Guiding Principles on Internal Displacement*[66] into its interpretation of state obligations under Article 22 of the ACHR (on freedom of movement)[67]

With respect to the nature reserves in the territory of the *Kaliña and Lokono*, the Court further ruled that it is necessary to:

> recognize the right of the indigenous peoples to use their own institutions and representatives to manage, administer and protect their traditional territories … [and;] seek agreements between the respective communities and the conservation agencies that establish the management, the commitments, the responsibilities, and the purposes of the area….[68]

The Court also cited UNDRIP, Article 12, to hold that, in the nature reserves, states should 'accede to [indigenous peoples'] traditional health system and other sociocultural functions, and preserve their way of life, customs and language, as well as to accede to, maintain and protect their religious and cultural sites'.[69] Additionally, traditional practices that 'contribute to the sustainable care and protection of the environment should be maintained, protected and promoted;' it is, therefore, 'pertinent to support the indigenous peoples' knowledge, institutions, practices, strategies and management plans related to conservation'.[70] This is consistent with UNDRIP, Article 29(1), which provides, in part, that indigenous peoples have a right to conservation and protection of the environment and the productive capacity of their lands, and states 'shall establish and implement assistance programmes' to support the same.

Locating indigenous participation rights in Article 23 of ACHR is not new in the inter-American human rights system.[71] Nonetheless, two of the judges considered that *Kaliña and Lokono Peoples* represented an innovation in its case law in this respect, even if, to observers at least, the significance is not readily apparent.[72] Previously, the Court had only narrowly applied that article to indigenous participation (in Nicaragua's electoral system and, on an individual basis, to the forced disappearance of a prominent indigenous leader in Guatemala),[73] and it had explicitly refused to apply it to indigenous land-related issues on one prior occasion.[74] Instead, the Court has repeatedly grounded participation rights in the right to property, a right that is subject to an express and broad subordination clause when the state asserts a public interest.[75] It mitigated this somewhat in *Saramaka People* and its progeny[76] by requiring, inter alia, effective participation, and consent in some circumstances, in relation to proposed subordinations under Article 21, so it is unlikely that this explains where the innovation lies.[77] Article 23, on the other hand, allows for the regulation, not subordination, of political rights on specified grounds, which do not include the public interest as such.[78] This may be one reason why Judge Pérez Pérez deemed it to have a 'very different meaning and content' from the participation rights under Article 21.[79]

64. *Kaliña and Lokono Peoples*, above n. 1, at 203. UNDRIP, Art. 18 provides that 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'.
65. *Id*., at 196 (quoting UNDRIP, Art. 18, and ruling that 'the participation of the indigenous communities in the conservation of the environment is not only a matter of public interest, but also part of the exercise of their right as indigenous peoples "to participate in decision-making in matters which would affect their rights, […] in accordance with their own procedures and […] institutions"').
66. E/CN.4/1998/53/Add.2 (1998).
67. *Moiwana Village* v. *Suriname*, above n. 6, at 111 (holding that the many of the *Guiding Principles* 'illuminate the reach and content of Article 22 … in the context of forced displacement' and emphasizing that 'States are under a particular obligation to protect against the displacement of indigenous peoples … and other groups with a special dependency on and attachment to their lands').
68. *Kaliña and Lokono Peoples*, above n. 1, at footnote 230.
69. *Id*., at footnote 231 (also citing Decisions adopted by the Conference of the Parties to the Convention on Biological Diversity at its twelfth meeting, *e.g*. Decision XII/12, 8-9). *See also Sarayaku*, above n. 28, at 146-7 (highlighting the relationship between land rights and 'traditional medicinal systems and other socio-cultural functions').
70. *Id*.
71. *See e.g*. IACHR, *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (1997).
72. *Joint Concurring Opinion, Sierra Porto and Ferrer Mac-Gregor Poisot*, above n. 29, at 21 (observing that the reference to Art. 23 and the right to effective participation more generally constitute 'developments in the Court's case law…').
73. *Yatama* v. *Nicaragua*, IACTHR (2005) Series C, No. 127; and *Chitay Nech* v. *Guatemala*, above n. 45.
74. *Sarayaku*, above n. 28, at 230 (declining to address an alleged violation of Art. 23 on the basis that 'the facts have been sufficiently analyzed and the violations conceptualized … in the terms of Article 21 of the Convention…').
75. Art. 21 provides, in part, that '1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law'.
76. *See* T. Antkowiak, 'Rights, Resources and Rhetoric: Indigenous Peoples and the Inter-American Court', 35 *University of Pennsylvania Journal of International Law* 113 (2013) (commenting on, inter alia, the limitations of the right to property as a guarantee for the complex of indigenous rights addressed by the Court, particularly in light of the wide powers to limit property rights, and concluding that, while the Court has attempted to mitigate this by creating special safeguards for indigenous lands and resources, these safeguards have proved to be inadequate).
77. *Saramaka People*, above n. 22, at 129-34.
78. Art. 23(2) provides that 'The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings'.
79. *Partially Dissenting Opinion of Judge Pérez Pérez*, above n. 29, at 20(g).

A more likely explanation, however, lies in both the Court's prior case law and its adaptation in *Kaliña and Lokono*. First, in *Yakye Axa*, the Court held that respect for indigenous peoples' rights is a vitally important – and countervailing – public interest in its own right.[80] In *Kaliña and Lokono*, it went a step further, ruling that effective participation by indigenous peoples in decision-making is itself integral to establishing the legitimacy of a public interest declaration as well as a right that must be respected in general.[81] It is important to note that this line of analysis is not confined only to international human rights bodies.[82] For example, the Canadian Supreme Court observed in relation to lack of consultation around the granting of oil and gas permits that a 'project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest'.[83] It would appear, therefore, that the Court is holding that states must ensure indigenous participation and fully account for the separate and countervailing public interest of respecting indigenous peoples' rights from the outset, and as part of determining the public interest per se, and the failure to do so may invalidate any asserted public interest justification.

Second, locating participation rights in Article 23 broadens their scope and they would apply not only in relation to activities that may affect or subordinate property rights, but to any vested right. This builds on *Sarayaku*, where the Court made clear that participation rights extend beyond matters that only affect indigenous lands; they also adhere to rights essential to their 'survival as a people', and the state must 'ensure that the rights of indigenous peoples are not ignored in any other activity or agreement reached with private individuals, or in the context of decisions of the public authorities that would affect their rights and interests'.[84] This includes the adoption of legislation, in which case indigenous peoples 'must be consulted in advance during all stages of the process of producing the legislation, and these consultations must not be restricted to proposals'.[85] This is partly consistent with UNDRIP, Article 19, but omits its reference to consultation 'in order to obtain their free, prior and informed consent' prior to adopting and implementing legislative or administrative measures. Grounding participation rights in Article 23 would thus appear to be a more generalised approach. It is consistent with UNDRIP, Article 18, read into ACHR, Article 23, by the Court, while the effective participation safeguard retained in Article 21 reflects the heightened attention required when indigenous lands and resources may be affected, as provided by UNDRIP, Article 32(2).[86]

Last but not least, the Court's progressive jurisprudence on reparations in the indigenous context deserves mention. In general, the remedies ordered by the Court display an unprecedented sensitivity to indigenous peoples' perspectives and a willingness to creatively interpret the ACHR to protect the collective rights of indigenous peoples.[87] This includes the collective dimension of harm suffered, both moral and material,[88] and corresponding measures of redress.[89] It also includes the identification of the victim(s) in collective terms; for instance, in the case under discussion, the Court 'considers the Kaliña and Lokono peoples and their members to be the injured party'.[90] Article 40 of the UNDRIP provides in this regard that indigenous people have the right to 'effective remedies for all infringements of their individual and collective rights', which shall 'give due consideration to the[ir] customs, traditions, rules and legal systems…'. This general provision is complemented by specific reparations language found in various other articles (*e.g.* Articles 8, 12, 13 and 28). As noted above in the context of ACHR, Articles 21 and 23, the Court's approach to reparations is both consonant with the UNDRIP and adds significant flesh to the bare bones of its principles.

Prefacing its extensive reparations orders,[91] the Court explained in *Kaliña and Lokono Peoples* that 'reparation should help strengthen the cultural identity' of the indigenous peoples, 'guaranteeing the control of their own institutions, cultures, traditions and territories in order to contribute to their development in keeping with their life projects, and present and future needs'.[92] Consequently, 'the measures of reparation granted should provide effective mechanisms, in keeping with their specific ethnic perspective, that permit them to define their priorities as regards their development and evolution as a people'.[93] It also quoted UNDRIP, Arti-

80. *Yakye Axa* v. *Paraguay*, above n. 40, at 148; *accord Kaliña and Lokono Peoples*, above n. 1, at 196.
81. *Kaliña and Lokono Peoples*, above n. 1, 196. *See also Garífuna Community of Punta Piedra* v. *Honduras*, IACTHR (2015) Series C, No. 304, 168-73 (finding violations of property and participation rights in connection with the establishment of a protected area).
82. *See e.g. Endorois Welfare Council* v. *Kenya*, above n. 22, at 212 (observing that 'the 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property').
83. *Clyde River (Hamlet)* v. *Petroleum Geo-Services* [2017] SCC 40, at 70.
84. *Sarayaku*, above n. 28, at 167.
85. *Id*., at 181.
86. *See also Kaliña and Lokono Peoples*, above n. 1, at 305(d) (ordering the State to establish effective mechanisms to guarantee effective participation … in any project, investment, nature reserve or activity that could have an impact on their territory').
87. The Court, for instance, has repeatedly recognized the 'importance of taking into account certain aspects of the customs of the indigenous peoples of the Americas for purposes of application of the American Convention on Human Rights'. *See e.g. Bamaca Velasquez* v. *Guatemala*, IACTHR (2000) Series C, No 70, at 81; *Mayagna (Sumo) Awas Tingni* v. *Nicaragua*, above n. 39, at 149; *Aloeboetoe et al*. v. *Suriname*, IACTHR (1993) Series C, No 15, at 62; and *Yakye Axa* v. *Paraguay*, above n. 48, at 63.
88. *See e.g. Plan de Sánchez Massacre* v. *Guatemala*, IACTHR (2004) Series C, No 105, at 86 (observing that the proven facts demonstrated that the Achí Mayan people's identity and values were seriously affected and, therefore, 'a significant component of the remedy should be reparations to the communities as a whole'); and *Moiwana Village* v. *Suriname*, above n. 6, at 201 (explaining that reparations 'have special significance … given the extreme gravity of the facts and the collective nature of the damages suffered').
89. *See e.g.* Citroni and Quintana, above n. 21, at 319.
90. *Kaliña and Lokono Peoples*, above n. 1, at 273.
91. *Id*., 273-316.
92. *Id*., at 272.
93. *Id*.

cle 29(1), in its order requiring the establishment of a 'development fund'.[94] This development fund is to serve

> … as compensation for the pecuniary and non-pecuniary damage suffered by the Kaliña and Lokono, including 'harm to extremely representative values … that have an impact on their cultural identity and on the cultural heritage to be transmitted to future generations….[95]

In the same vein, in *Saramaka People*, the Court identified the absence of effective domestic remedies as a key factor in awarding the Saramaka compensation for moral damages. It stated that the evidence demonstrates

> … the suffering and distress that the members of the Saramaka people have endured as a result of the long and ongoing struggle for the legal recognition of their right to the territory they have traditionally used and occupied for centuries … as well as their frustration with a domestic legal system that does not protect them against violations of said right … all of which constitutes a denigration of their basic cultural and spiritual values.[96]

Likewise, in *Moiwana Village*, the Court identified the community's forced displacement and prolonged separation from its traditional lands as one of the three bases for finding that Suriname had violated the right to mental and moral integrity (ACHR, Article 5).[97] This figured prominently in the Court's determination of moral and material damages,[98] and the Court presumed material harm, inter alia, because 'their ability to practice their customary means of subsistence and livelihood has been drastically limited'.[99]

2.2 Concerns and Divergence: Survival and Consent

The IACHR and IACTHR's jurisprudence[100] affirms that indigenous lands are fundamental to indigenous peoples' cultural integrity and survival.[101] This jurisprudence additionally holds that certain restrictions on or interferences with their property and associated rights may be either 'impermissible'[102] or subject to indigenous peoples' free, prior and informed consent, irrespective of any asserted public interest.[103] The same is also the case, inter alia, in the jurisprudence of the Human Rights Committee.[104]

These considerations often provoke strong, negative reactions from states, which assert that this grants indigenous peoples a right to halt national development projects or even, as Suriname protested in *Kaliña and Lokono*, to undermine the democratic will of the people of the state. Nonetheless, the Court and other authorities have recognised that majorities cannot simply override the rights of minorities and indigenous peoples, even if they do so via legislation that enjoys widespread public support. For example, in *Gelman* v. *Uruguay* – concerning a broadly supported 'amnesty' law – the Court explained that 'the protection of human rights constitutes an impassable limit to the rule of the majority…'.[105] There is also recognition of the majoritarian biases inherent in the public interest doctrine.[106]

This basic limit is repeatedly referenced in the Court's indigenous jurisprudence, which explicates that state-initiated or authorised projects and investments[107] 'cannot negate the very survival of the members of the indigenous and tribal peoples'.[108] In *Saramaka* and progeny,[109] the term 'survival' is defined to mean indig-

94. *Id*., at 296.
95. *Id*., at 295.
96. *Saramaka People*, above n. 22, at 200.
97. *Moiwana Village* v. *Suriname*, above n. 6, at 101, 102-3.
98. *See also Sawhoyamaxa Indigenous Community* v. *Paraguay*, IACTHR (2006), Series C, No. 146 (on the relevance of territorial rights to immaterial damages).
99. *Moiwana Village* v. *Suriname*, above n. 6, at 186-7.
100. *See e.g. Xákmok Kásek Indigenous Community* v. *Paraguay*, IACTHR (2010) Series C, No. 214, at 157; and IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II., Doc. 47/15 (2015).
101. *See e.g. Sarayaku*, above n. 28, at 146 (explaining that 'the protection of the territories … also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle. This connection between territory and natural resources … is necessary for their physical and cultural survival and the development and continuation of their worldview…'); and *Río Negro Massacres* v. *Guatemala*, above n. 54, at 177 (stating that its consistent case law on indigenous matters 'has recognized that the relationship of the indigenous peoples with the land is essential for maintaining their cultural structures and for their ethnic and material survival…').
102. *Saramaka People*, above n. 22, at 128 (the State may restrict the Saramakas' right to use and enjoy lands and resources 'only when such restriction complies with the aforementioned requirements and, additionally, when it does not deny their survival as a tribal people').
103. *Id*., 134.
104. *See e.g.* CCPR/CO/69/AUS (2000), at 10-11; *accord*, *Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada*, A/45/40, vol. 2 (1990); *Apirana Mahuika*, above n. 41; and *Angela Poma Poma* v. *Peru*, CCPR/C/95/D/1457/2006 (2009).
105. IACTHR (2011) Series C, No. 221, at 239.
106. *See e.g.* CERD/C/IDN/CO/3 (2007), at 17 (observing that the rights of indigenous peoples have been compromised 'due to the interpretations adopted by the State party of national interest, modernization and economic and social development;' and recommending that Indonesia ensure that these concepts 'are defined in a participatory way, … and are not used as a justification to override the rights of indigenous peoples'); and *Report of the Special Rapporteur in the Field of Cultural Rights*, A/70/279 (2015), 44 (referring to UNDRIP, Art. 46(2) – containing the grounds for limitations on rights – and concluding that such 'limitations can be problematic, however, if they are justified by reference to the interest of a mainstream society that otherwise does not recognize indigenous interests. In such cases, limitations can be misused to the detriment of indigenous communities').
107. *Saramaka People*, above n. 22, footnote 127 (defining 'development or investment plan' to mean 'any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions').
108. *Id*. at 128; *accord Angela Poma Poma* v. *Peru*, above n. 104, at 7.6 (States parties 'must respect the principle of proportionality so as not to endanger the very survival of the community and its members').
109. *See e.g. Garífuna Community of Punta Piedra* v. *Honduras*, above n. 81, 167. *See also Río Negro Massacres* v. *Guatemala*, above n. 54, at 160; *Moiwana Village* v. *Suriname*, above n. 6, at 101, 102-3 (observing that: 'in order for the culture to preserve its very identity and integrity, [indigenous and tribal peoples] … must maintain a fluid and multi-

enous and tribal peoples' 'ability to "preserve, protect and guarantee the special relationship that they have with their territory", so that "they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected"'.[110] Additionally, the Court has ruled that states must assess the 'cumulative impact of existing and proposed projects' because this allows for 'a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival of indigenous or tribal people'.[111]
The Court's above-stated jurisprudence is largely consistent with UNDRIP, Article 8, which, in connection with the right 'not to be subjected to forced assimilation or destruction of their culture', provides that states shall effectively prevent and provide redress for: '(a) Any action which has the aim or effect of depriving [indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities; [and] (b) [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources…'. Other provisions are also directly implicated (*e.g.* UNDRIP, Articles 11–13, 20, 23–25, 31, and 32(1)). As many interventions on indigenous lands also involve constructive removal from the land – as opposed to relocation via a formal process – Article 10 is also relevant, requiring that no relocation shall take place without free, prior and informed consent. Likewise, the UN Special Rapporteur on adequate housing identified UNDRIP, Article 7,[112] as a 'rich source for understanding the right to life and the right to adequate housing in international human rights law'.[113] She further observed that the 'development and application of these rights has the potential to enhance the understanding of the social dimensions of the right to life and the interplay between the collective and individual dimensions of that right; it may also prompt a response to violations of rights to lands, territories or resources'.[114] Unfortunately, no further explanation was provided about this premise or the interplay between the collective and individual dimensions of the right.

As a more general point, these and other standards recognise that effective guarantees for indigenous peoples' traditionally owned territories, including the right to control internal affairs and participate in external activities affecting them through their own institutions, underpin indigenous peoples' identity, integrity and survival. There is therefore a complex of interdependent human rights[115] converging on and inherent to indigenous peoples' various relationships with their traditional lands and territories as well as their interrelated status as self-determining entities, all of which necessitates a high standard of affirmative protection.[116]
These issues were very relevant in *Kaliña and Lokono* given the scale and cumulative impact of the nature reserves, mining and logging operations, and individual titles, which cumulatively affect the vast majority of their territory. The Kaliña and Lokono peoples are severely restricted in and, in some cases, denied their ability to preserve their relationships with their territory and to maintain their traditional way of life in the vast majority thereof. This even extends to the core residential areas of their villages, which have been issued to and fenced-off by third parties for use as vacation homes!
In its judgment, the Court determined that the proven violations had resulted in 'harm to extremely representative values of the [Kaliña and Lokono] … that have an impact on their cultural identity and on the cultural heritage to be transmitted to future generations'.[117] It observed more specifically that 'the extraction of bauxite … resulted in serious damage to the environment and to the natural resources necessary for [their] survival and development',[118] and 'the negative effects have continued over time, thus affecting the traditional territory and the means of survival of the members of these peoples'.[119] During the Court's on-site visit in August 2015 it saw for itself that 'the [mined] area had clearly been

dimensional relationship with their ancestral lands'); and *Yakye Axa* v. *Paraguay*, above n. 40, at 146, (where the Court observes that 'indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations').

110. *Saramaka People*, above n. 22, 129-34 and; *Saramaka People* v. *Suriname*, above n. 41, at 37.
111. *Saramaka People*, above n. 22, at 41.
112. UNDRIP, Art. 7, reads: '1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group'.
113. *Adequate Housing as a Component of the Right to an Adequate Standard of Living and on the Right to Non-Discrimination in this Context*, A/71/310 (2016), at 56.
114. *Id*.
115. *See* H. Quane, 'A Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous Peoples', 25 *Harvard Human Rights Journal* 49, at 51 (2012) (analysing United Nations' treaty body practice 'concerning the rights of indigenous peoples, which suggest[s] a further dimension to the interdependence and indivisibility of human rights. These developments suggest that human rights are interdependent and indivisible not only in terms of mutual reinforcement and equal importance, but also in terms of the actual *content* of these rights') (footnote omitted). *See also e.g. Xákmok Kásek* v. *Paraguay*, above n. 100, at 263, and *Río Negro Massacres* v. *Guatemala*, above n. 54, at 143-44 (both relating territorial rights to the rights of the child).
116. *See inter alia Maya Indigenous Communities and their Members* v. *Belize*, IACHR, Case 12.053 (2003), 111-19, 141; CCPR/CO/69/AUS (2000), 10-11; and; G. Handl, 'Indigenous Peoples' Subsistence Lifestyle as an Environmental Valuation Problem', in M. Bowman and A. Boyle (eds.), *Environmental Damage in International and Comparative Law. Problems of Definition and Valuation* (2002), at 95 (asserting 'there can be little room for doubt that there exists today a general consensus among states that [indigenous peoples'] cultural identity … warrants affirmative protective measures by states, and that such measures be extended to all those elements of the natural environment whose preservation or protection is essential for the groups' survival as culturally distinct peoples and communities').
117. *Kaliña and Lokono peoples*, above n. 1, at 295.
118. *Id*., at 217
119. *Id*., at 222.

damaged and the landscape altered radically'.[120] It ruled in this respect that the state had violated the victims' rights to collective property, cultural identity[121] and participation in public matters.[122] Note in this regard that, in *Sarayaku*, the Court observed that respect for the right to consultation of indigenous peoples 'is precisely recognition of their rights to their own culture or cultural identity … which must be assured, in particular, in a pluralistic, multicultural and democratic society'.[123]

Leaving aside the equation of recognition of rights to culture or to cultural identity with the right to consultation, not the least as the latter would not seem, by itself, to ensure the substantive guarantees inherent in said rights, the Court could have found that the proven acts and omissions do, as a matter of fact and law, 'negate the very survival' of the Kaliña and Lokono, and therefore, that the impugned activities were impermissible. It could have plausibly done so in relation to the bauxite mining alone based on its factual findings. Cumulatively, the facts of the case strongly support finding that the activities in question do threaten, and likely also negate, the Kaliña and Lokono's 'ability to "preserve, protect and guarantee the special relationship that they have with their territory", so that "they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected"', the ultimate purpose of the protections specified by the Court.

However, despite being extensively briefed by the Kaliña and Lokono, these issues are not analysed or otherwise adequately addressed in the judgment. The Court, for example, could have concluded that the activity or activities did not rise to the requisite level (*e.g.* finding that serious and enduring damage to natural resources necessary for survival and development and inter-generational harm to the cultural identity of the Kaliña and Lokono does not pass the threshold), but this point was not explicitly addressed. The redress provided for the serious pecuniary and non-pecuniary damages, taken together with the Court's reasoning and other orders, may allow some conclusions to be drawn implicitly, but this provides very little assistance to states or indigenous peoples about the parameters within which rights should be recognised, respected and protected or how projects and investments should be assessed and permitted. This is all the more disturbing given the hotly contested nature of many of these issues.

> Patrick Macklem has correctly observed in this regard that the more specific the descriptions international law offers of what changes are needed in domestic law, the more the intervention translates relatively abstract international human and indigenous rights into concrete legal entitlements cognizable to the domestic legal order in question in a programmatic way….[124]

The Court's approach in *Kaliña and Lokono* not only fails in this test, it also risks relegating the Court's self-designated ultimate purpose (ensuring survival as defined above) for the various protective measures to little more than rhetoric. The same may also be said for equating rights protection with consultation or participation but not analysing or requiring consent; the latter, assuming it is implemented properly, being a fundamentally more effective means by which indigenous peoples can protect the substantive guarantees that are usually threatened by extractive, conservation and other projects.

Moreover, this equation of rights protection with consultation generally leads the Court to emphasise procedural guarantees at the expense of fully contemplating and ruling on substantive guarantees and violations thereof. This is especially troubling as consultation processes are often deeply flawed and, if they happen at all, the inequality of arms between states, corporations and indigenous peoples is conspicuous and often debilitating. This focus also does little to prevent future violations as the various judgments tend to revolve around state compliance with procedures, rather than, as Macklem observes above, providing specific analysis of rights in a way that makes them cognisable to the domestic legal order and authorities 'in a programmatic way'. It also results in an undue emphasis on permissible restrictions to rights, rather than focusing on the content of those rights, which brings to mind Yash Gai's comment that 'rights are struggling to stay afloat in the sea of exceptions (and alas not always succeeding!)'.[125]

Turning to consent, in *Saramaka*, the Court held that the effective participation standard includes consent when a large-scale project or projects, separately or cumulatively, 'would have a major impact' on traditional

120. *Id*., at 220.

121. *Sarayaku*, above n. 28, at 217 (explaining that 'the right to cultural identity is a fundamental right – and one of a collective nature – of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society. This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization').

122. *Kaliña and Lokono peoples*, above n. 1, at 198 (finding these violations to have been caused 'mainly by preventing their effective participation, and the access to part of their traditional territory and natural resources, in the Galibi and Wane Kreek nature reserves, as well as by failing to guarantee, effectively, the traditional territory of the communities that has been affected by the environmental degradation within the WKNR'). *See also Sarayaku*, above n. 28, at 218-20, at 220 (where the Court 'considers that the failure to consult the Sarayaku People affected their cultural identity, since there is no doubt that the intervention in and destruction of their cultural heritage entailed a significant lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great concern, sadness and suffering among them').

123. *Id*., at 159.

124. Paper by Professor Patrick Macklem, UN Seminar on Access to Justice, *cited in Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, A/HRC/24/50 (2013), at 18, footnote 19.

125. Y. Ghai, 'The Kenyan Bill of Rights: Theory and Practice', in P. Alston (ed.), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999), at 197.

territory.[126] Nonetheless, in *Kaliña and Lokono*, the Court maintains its post-*Saramaka* trend of minimising or omitting any discussion of the consent requirement, emphasising only the (albeit considerably strengthened) consultation aspects of effective participation.[127] In its 2013 decision on the merits in *Kaliña and Lokono*, the IACHR observed that the mining operations at issue certainly triggered the consent requirement.[128] The Court's verification of the scale and impact of these operations should have prompted it to assess, or at least acknowledge, consent, even if it then relied on the lack of consultation as reason for not analysing its applicability.[129] It not only failed to do so, it even omitted the word 'consent' when quoting Article 32(2) of the UNDRIP in the relevant section of the judgment.[130]

This is troubling to the say the least in light of the repeated affirmation of consent – as an attribute of indigenous peoples' right to self-determination – by UN treaty bodies and others. Ironic also, given that the Committee on Economic, Social and Cultural Rights routinely cites consent as being required under Article 1 of the Covenant[131] and the Court has twice held that it cannot interpret the rights guaranteed to indigenous peoples by the ACHR to a lesser extent than is recognised in that same Covenant.[132] Yet, this is precisely what it did in *Kaliña and Lokono*.

3 Conclusion

The contemporary indigenous rights framework has come into being via three main processes, all within the context of highly effective advocacy by indigenous peoples at the international (and, in some cases, domestic) level. First, the interpretation of existing international human rights norms in a way that is more responsive to indigenous characteristics and needs. Second, the promulgation of specific international instruments, wholly or partially, addressing indigenous rights, and within different fields of international law; and third, litigation before international courts and quasi-judicial bodies.[133] The above discussion of *Kaliña and Lokono Peoples* and the UNDRIP indicates that these are not discrete categories, but, instead, operate in a dynamic state of interplay and, often, mutual reinforcement. This also affirms that the UNDRIP is only one, albeit very important, bright light in the firmament that 'stretches well beyond international legal regimes and into State and indigenous forums alike'.[134]

The Court is a leading actor in this process, as is the IACHR, which first addresses and then brings cases to the Court. Its judgments have incorporated, inter alia, important elements of self-determination, including as (inter)related with issues of legal personality and rights to collective territory; some attributes of the right to self-government via recognition of the right to control territory and respect for indigenous institutions and juridical and other procedures; effective participation in external decision-making, including, in principle at least, consent (itself an attribute of self-determination); and ground-breaking collective reparations, including detailed norms on restitution of lands, that strive to be highly attuned to indigenous realities and concerns. While it has a tendency to essentialise indigenous culture and rights, often over emphasising its perception of 'traditional', its detailed reasoning and associated orders are remarkable.[135] The same may also be said for the Court's consistent recognition of indigenous customary law and its insistence that States respect indigenous peoples' 'customs, traditions and land tenure systems'.[136] This recognition of indigenous customary law 'has afforded greater protection of indigenous property rights, which are essential to self-determination, self-governance, and continued cultural existence'.[137]

While only touched on above, *Kaliña and Lokono* also illustrates how indigenous rights litigation may – and often should – encompass different fields of international law, always with the aim of harmonising them with human rights guarantees. The Court, for instance,

126. *Saramaka People*, above n. 22, at 134, 137 and 147.
127. *Sarayaku*, above n. 28, at 177 (stating that it was unnecessary to assess the consent requirement because the State had failed to consult); *accord Garifuna Community of Triunfo de la Cruz* v. *Honduras*, IACTHR (2015) Series C, No. 305, *Garífuna Punta Piedra Community* v. *Honduras*, above n. 81.
128. *Kaliña and Lokono Peoples* v *Suriname*, IACHR, Case 12.639, above n. 3, at 155 (concluding that the bauxite mining in this case 'is precisely the type of activity that the Inter-American Court has stated should be subject to consultations and consent of the affected indigenous peoples. In Saramaka, the Court stated that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their No consultation or consent of this type was conducted or obtained in connection with the authorization of bauxite mining operations inside the Wane Kreek Reserve').
129. *Sarayaku*, above n. 28, 180 and footnote 237.
130. *Kaliña and Lokono Peoples*, above n. 1, at 202.
131. *See e.g.* E/C.12/PRY/CO/4, above n. 42, at 6 (citing Art. 1, and recommending that Paraguay adopts 'the legislative and administrative measures needed to ensure that free, prior and informed consent is obtained from indigenous peoples in relation to decisions that may directly affect the exercise of their economic, social and cultural rights'); and E/C.12/AUS/CO/5 (2017), at 16(e) (citing Art. 1, and recommending that Australia ensure that 'free, prior and informed consent is incorporated in the Native Title Act 1993 and in other legislation as appropriate, and is fully implemented in practice');
132. *Saramaka People*, above n. 22, 93; *Kaliña and Lokono Peoples*, above n. 1, 122 and, at 124 (stating that 'in this case, the right to property protected by Article 21 of the [ACHR], and interpreted in light of the rights recognized in Article 1 common to the two Covenants, … which cannot be restricted when interpreting the American Convention…').
133. *See e.g.* R. Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (2011).
134. K. Carpenter and A. Riley, 'Indigenous Peoples and the Jurisgenerative Moment in Human Rights', 102 *California Law Review* 173 (2014), at 175.
135. *See e.g.* Price, above n. 20, at 237-40, at 238 (observing 'a disturbing essentialist leaning in some of the Court's reasoning;' and pointing out 'the fundamental tension that exists between ideas that undergird relevant aspects of international human rights law and current ideas in anthropology').
136. *Kaliña and Lokono Peoples*, above n. 1, 139, footnote 178 (citing and paraphrasing UNDRIP, Art. 26).
137. Carpenter and Riley, above n. 134, at 207. *See also* B. Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (2014) (addressing these issues in detail).

extensively cites international environmental law, reading provisions of the Convention on Biological Diversity (CBD) into its interpretation of the ACHR,[138] and stresses, as a general proposition, that 'the rights of the indigenous peoples and international environmental laws should be understood as complementary, rather than exclusionary, rights'.[139] It is important to note that, although the CBD purports to guarantee some indigenous rights, there is no corresponding enforcement mechanism. The Court's ruling provides an opportunity to enforce some CDB provisions through the lens of the ACHR.

One area where much greater attention is required is the intersection between indigenous rights and trade, investment and private sector operations.[140] Even though many of the cases resolved by the IACHR and the Court have involved private sector entities, especially in the extractives sector, the role and potential liability of the private sector has yet to be addressed. *Kaliña and Lokono Peoples* has generated some interest with respect to the UN *Guiding Principles on Business and Human Rights* and this may be further developed in future cases. However, other possible avenues also require attention and strategic action.

In the first place, states have previously invoked bilateral and other investment or trade agreements to reject increased regulation of transnational corporations operating on indigenous lands. Yet, the Court clearly held in *Sawhoyamaxa* that such agreements are subordinate to the ACHR, calling into question the legality of range of prior expropriations of indigenous lands as well as the activities now taking place on those lands.[141] This is also highly significant as the majority of loan agreements between states and international financial institutions (*e.g.* the World Bank Group) are classified as bilateral treaties, and some of the projects carried out pursuant to those agreements have had and continue to have severe, negative human rights impacts on indigenous peoples. Also, while not referenced by the Court in *Sawhoyamaxa*, it is important to recall that Article 36 of the Charter of the OAS provides that 'Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and *to the international treaties and agreements* to which said countries are parties….' It would seem logical that the Court would accord the same primacy to the ACHR in this context also, and this may provide a way of seeking to further regulate the human rights conduct of both private sector entities and host states.

Finally, it is trite to observe that there is a serious implementation gap in human rights law. This is also the case for compliance with the Court's judgments. While further litigation is unlikely to address this perennial problem, the Court's jurisprudence is nonetheless slowly and surely having an impact on domestic tribunals and legislatures. The Constitutional Court of Colombia, for example, routinely cites the Court as authority, including in cases brought by indigenous peoples. Likewise, the Caribbean Court of Justice accorded great weight to the IACHR and Court's jurisprudence in its landmark 2015 judgment in *Maya Leaders Alliance* v. *A.G. Belize*. This judgment, which cited the UNDRIP and a range of other international standards, upheld Maya customary land tenure rights as constitutionally protected property.[142] In doing so, the CCJ stressed that this was demanded by the concept of the *rule of law*, which 'encompasses the international obligations of the State to recognize and protect the rights of indigenous people'.[143] It also emphatically declared that, today, it is 'beyond dispute that international law recognizes and protects the rights of indigenous peoples'.[144] Times have changed!

138. *Kaliña and Lokono Peoples*, above n. 1, at 177 (quoting and incorporating Arts. 8(j) and 10(c) of the CBD).
139. *Id*., 173.
140. *See e.g. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples*, A/70/301 (2015).
141. *Sawhoyamaxa Indigenous Community* v. *Paraguay*, above n. 98, at 140 (rejecting the argument that some of the lands in question were protected from expropriation by a trade agreement with Germany; making clear that such agreements must always be interpreted consistently with the ACHR's guarantees and could not be invoked as grounds for non-compliance with those guarantees (*i.e.* the restitution of indigenous lands).
142. *See also New Zealand Māori Council et al* v. *A.G. et al*, [2013] NZSC 6 (where the New Zealand Supreme Court relied on the UNDRIP in construing the scope of Māori rights to freshwater and geothermal resources).
143. *Maya Leaders Alliance* v. *A.G. Belize*, [2015] CCJ 15 (AJ), at 52.
144. *Id*., at 53.

Adjudication and Its Aftereffects in Three Inter-American Court Cases Brought against Paraguay: Indigenous Land Rights

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Abstract

This paper examines three Inter-American Court (IACtHR) cases on behalf of the Enxet-Sur and Sanapana claims for communal territory in Paraguay. I argue that while the adjudication of the cases was successful, the aftereffects of adjudication have produced new legal geographies that threaten to undermine the advances made by adjudication. Structured in five parts, the paper begins with an overview of the opportunities and challenges to Indigenous rights in Paraguay followed by a detailed discussion of the adjudication of the Yakye Axa, Sawhoyamaxa, and Xákmok Kásek cases. Next, I draw from extensive ethnographic research investigating these cases in Paraguay to consider how implementation actually takes place and with what effects on the three claimant communities. The paper encourages a discussion between geographers and legal scholars, suggesting that adjudication only leads to greater social justice if it is coupled with effective and meaningful implementation.

1 Introduction

Developments in international law have created important legal protections for Indigenous peoples' rights to land and territory since the 1980s.[1] Discord between international and domestic law[2] and the actions of state governments to implement the law,[3] however, compromise the de facto territorial rights of many Indigenous peoples across the Americas.[4] The Inter-American Court of Human Rights (hereafter IACtHR) has been a primary vehicle to advance jurisprudence in support of Indigenous land rights.[5] Nevertheless, examining the adjudication of cases before the IACtHR and implementation of its judgments underscores the challenges of ensuring de facto Indigenous rights. Implementing the IACtHR and Inter-American Commission on Human Rights (hereafter IACHR) recommendations have proven challenging across jurisdictions and cases.[6]

This article discusses the adjudication of three IACtHR cases in Paraguay and offers a brief reflection on the aftereffects of adjudication from the perspective of legal geography. The cases at the heart of this article concern Enxet-Sur and Sanapana Indigenous peoples and their land claims in Paraguay's Chaco region: *Yakye Axa Indigenous Community* v. *Paraguay 2005*, *Sawhoyamaxa Indigenous Community* v. *Paraguay 2006*, and *Xákmok Kásek Indigenous Community* v. *Paraguay 2010*.

The Yakye Axa, Sawhoyamaxa and Xákmok Kásek communities were each dispossessed of their respective territories by the expansion of the cattle ranching industry between 1890 and 1950. Each community petitioned the Paraguayan state for land within its ancestral territories pursuant to legal instruments adopted by the Paraguayan state in the 1980s–1990s. Despite legal entitlement to communal property guaranteed in Paraguayan law, state officials failed to adjudicate the three claims in a timely or adequate manner, subsequently violating human rights in each community.[7] With legal counsel from the nongovernmental organisation *Tierraviva a Los Pueblos Indígenas del Chaco* (hereafter Tierraviva), each community eventually petitioned the Inter-American

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1. J. Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (2016).
2. Problems implementing the International Labor Organization Convention 169 on Indigenous and Tribal Peoples after ratification illustrate this. *See, e.g.* A. Yupsanis, 'ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview', 79 *Nordic Journal of International Law* 433 (2010). *See also* R. Provost and C. Sheppard, *Dialogues on Human Rights and Legal Pluralism* (2013).
3. J. Schneider, 'Should Supervision be Unlinked from the General Assembly of the Organization of American States?', 5(1/2) *Inter-American and European Human Rights Journal* (2012).
4. R. Sieder, 'Indigenous Peoples' Rights and the Law in Latin America', in C. Lennox and D. Short (eds.), *Handbook of Indigenous Peoples' Rights* 414 (2016).
5. A. Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards', 24 *International Journal on Minority and Group Rights* (2017).
6. F.G. Isa, 'The Decision by the Inter-American Court of Human Rights on the Awas Tingni vs. Nicaragua Case (2001): The Implementation Gap', 8 *The Age of Human Rights Journal* (2017); A. Meijknecht, B. Rombouts & J. Asarfi, 'The implementation of IACtHR judgments concerning land rights in Suriname: Saramaka People V. Suriname and Subsequent Cases', available at: <https://pure.uvt.nl/portal/en/publications/the-implementation-of-iacthr-judgments-concerning-land-rights-in-suriname--saramaka-people-v-suriname-and-subsequent-cases(cfb1d14d-de42-4bbb-a7d5-4a6e9a1d095f).html> (last visited 15 January 2018).
7. The judgments can be read in their entirety by a simple search on Inter-American Court website 'jurisprudence finder', available at: <www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=en> (last visited 30 September 2017).

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System for arbitration. The IACtHR issued three separate judgments on the cases in 2005, 2006 and 2010, which found Paraguay guilty of numerous human rights violations.[8] I discuss the cases in greater detail in the following pages.

The adjudication of each community's case was successful—the IACtHR ruled in favour of the claimant communities. Nevertheless, the aftereffects of adjudication have been mixed. The IACtHR judgments themselves serve as an important form of restitution for each community by validating their claims at the international level,[9] mandating material and symbolic reparations for the victims,[10] and functioning as political tools claimant community members and their allies use as leverage in efforts to force the state to comply with the IACtHR. But while adjudication may be successful in the courtroom, the aftereffects of adjudication can exacerbate Indigenous dispossession and marginalisation[11] if judgments are not carefully implemented in a timely manner. To illustrate this point, I first draw from the IACtHR judgments themselves to sketch the adjudication process, then follow that with a brief discussion of some aftereffects of adjudication by highlighting examples from the implementation process to date.

If implementation problems were unique to one IACtHR ruling, perhaps that could be explained as an anomaly. Yet the problems persist across all the Paraguayan cases and extant scholarship suggests that implementation is almost always resisted by state governments.[12] A recent Open Society Justice Initiative study[13] supports this point and illustrates that land restitution has also been challenging in cases across Kenya and Malaysia.

Implementation delays and problems in Paraguay undermine the jurisprudential advances wrought by the successful adjudication of the cases. Thus, I use a legal geography approach[14] to consider how adjudication and implementation of Indigenous land claims illustrates iterative relationships between space and law with profound implications on the possibilities of justice for claimant communities.[15] I therefore contribute a synthesis and analysis of the Yakye Axa, Sawhoyamaxa, and Xákmok Kásek cases in Paraguay to advocate for post-adjudication practices that support Indigenous communities struggling for land rights amidst human rights violations.

Explicitly focusing on courtroom deliberations and resultant jurisprudence can occlude the intended and unintended de facto aftereffects of adjudication for plaintiffs. Moreover, a strict binary view of implementation (i.e. if it happened or not) negates a consideration of how adjudication impacts victims' lives after judgments have been issued. Perhaps an anecdote is necessary to illustrate my point. At a recent meeting with prominent human rights lawyers, I was questioned about the implementation of the cases discussed in this article. I replied that the Paraguayan state purchased land for the Yakye Axa community in 2012 but that the community cannot access that land because no public access road exists. The person who questioned me replied, and I paraphrase, 'implementation had occurred, which is good'. However, the point is not 'that implementation occurred' but that implementation can exacerbate marginalisation, undermine a community's rights and create new forms of trauma if not done carefully through meaningful consultation with Indigenous victims of human rights abuse. Hence, this article asks: how did the adjudication of the three Paraguayan IACtHR cases and their aftereffects shape the rights of Enxet-Sur and Sanapana claimant communities? Moreover, what might these dynamics say about adjudicating for Indigenous land rights via the IACtHR beyond Paraguay?

The IACtHR plays an important role in international efforts to pressure states to grant collective territorial rights to Indigenous communities.[16] The impact of the IACtHR on Indigenous rights is little studied outside of critical legal studies. Studies by Wainwright and Bryan,[17] Bryan,[18] Hale,[19] Medina,[20] Correia[21] are notable exceptions. On the other hand, legal scholars have contributed numerous analyses of the advances and limitations of Indigenous rights jurisprudence produced by

8. *Ibid*.
9. This comment is based on 45 qualitative interviews conducted by author with claimant community members between May 2015 and July 2016.
10. For a full accounting of the reparations refer to the Merits, Reparations, and Costs of each case, above at n. 7.
11. J. Correia, 'Life in the Gap: Indigeneity, Dispossession, and Land Rights in the Paraguayan Chaco' (Ph.D. thesis on file at the University of Colorado Boulder).
12. United Nations Human Rights Council, 'Report of the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Mr. Rodolfo Stavenhagen: Human rights and Indigenous issues' (2006), at 209 (emphasis added); C.R. Garavito and C. Kauffman, 'De las órdenes a la práctica: análisis y estrategias para el cumplimiento de las decisiones del Sistema interamericano de derechos humanos', in M. Rojas (ed.), *Desafíos del sistema interamericano de derechos humanos: Nuevos tiempos, viejos* retos 276 (2015); OSJI (Open Society Justice Initiative), *Strategic Litigation Impacts on Indigenous Land Rights* (2017).
13. *Ibid*., at 2.
14. For an excellent overview, *see* L. Bennett and A. Layard, 'Legal Geography: Becoming Spatial Detectives', 406 *Geography Compass*, at 407-12. I discuss legal geography in more detail at 15.
15. Correia (2017), above n. 11.
16. *See, e.g*. A. Stocks, ,Too Much for Too Few: Problems of Indigenous Land Rights in Latin America', 34 *Annual Review of Anthropology* 85 (2005); J.M. Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples', 27(1) *Wisconsin International Law Journal* 51 (2009); Gilbert (2016), above n. 1, at 1; OSJI, above n. 12, at 2.
17. J. Wainwright and J. Bryan, 'Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize', 16 *Cultural Geographies* 153 (2009).
18. J. Bryan, 'Map or Be Mapped: Land, Race, and Rights in Eastern Nicaragua' (PhD thesis on file at the University of California Berkeley).
19. C. Hale, 'Resistencia para que? Territory, Autonomy and Neoliberal Entanglements in the "Empty Spaces" of Central America', 40(2) *Economy and Society* 184 (2011).
20. L.K. Medina, 'The Production of Indigenous Land Rights: Judicial Decisions Across National, Regional, and Global Scales', 39 *PoLAR: Political and Legal Anthropology Review* 139 (2016).
21. Correia, above n. 11, at 2.

the IACtHR[22] and technical accounting of the implementation process.[23] These two approaches to investigating how the IACtHR shapes social justice for Indigenous peoples are rarely in conversation in existing literature.[24]

This article encourages a closer conversation between critical social scientists and legal scholars who are investigating and evaluating the IACtHR and its role in supporting Indigenous rights. For that purpose, I turn to legal geography, which is an interdisciplinary approach dedicated to investigating the mutual constitution of law and space with keen attention to how that relationship shapes the limits and possibilities for social justice.[25] Legal geography is a unique intellectual space that brings legal scholars and geographers together to think through new ways of understanding how law shapes space and society while considering what the implications of space and society are on the law.[26]

1.1 Methods and Case Study Selection

Since 2013, I have been working with Enxet-Sur and Sanapana peoples from Yakye Axa, Sawhoyamaxa, and Xákmok Kásek to understand their struggles better and share critical analyses of the cases. Therefore, this article is informed by 16 months of total field research in Paraguay that includes extensive participant observation based on months living in each community and accompanying many aspects of their legal and political struggles. Tierraviva has also been fundamental in facilitating this research and informing my understanding of the cases and their work with each claimant community. My archival research and over 150 semi-structured and conversational interviews with affected claimant community members, state officials, cattle ranchers and Tierraviva also inform my analysis.[27] However, this article is not an ethnography of the cases. Instead, I draw from a textual analysis of the IACtHR judgments themselves to provide a unique synthesis of the cases and complement that with insights from interviews and participant observation.

Following efforts to decolonise human geography scholarship and address the uneven power relations that much academic research entails,[28] I do not claim universal knowledge about the Enxet-Sur or Sanapana struggles, daily life or legal cases. Instead, I recognise that my position as a non-Indigenous male working from a university in the United States places me in a particular privileged position from which I share a partial, but informed, perspective of these cases.[29] This article should not be read as an exhaustive account of the IACtHR cases in Paraguay, but as part of a broader conversation about the politics of the IACtHR and adjudication of Indigenous land rights.[30]

I selected the Yakye Axa, Sawhoyamaxa and Xákmok Kásek cases because they advance Indigenous rights jurisprudence,[31] yet to my knowledge no other scholars have conducted extensive field-based research on the lived experience of the aftereffects of adjudication in these Paraguayan cases before the IACtHR. The three cases comprise more than one-quarter of the total cases the IACtHR has adjudicated concerning Indigenous land rights to date. Together, the cases collectively illustrate the immense challenges to implementing IACtHR judgments in favour of Indigenous communities across the Americas, yet also show how IACtHR judgments can create important political tools to support Indigenous struggles for land rights.

1.2 Article Organisation

The article is organised into five parts. First, I provide general context to outline some major opportunities and challenges for Indigenous rights in Paraguay. Next, I sketch the proceedings of the three cases to synthesise and chart the domestic remedies, process before the Inter-American System, and pertinent American Convention articles. The following section draws from legal geography and considers how different conceptions of land, territory and property shape the Enxet-Sur and Sanapana cases. The fourth section briefly examines

22. S.J Anaya and C. Grossman, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples', 19(1) *Arizona Journal of International and Comparative Law* 1 (2002); *see also*, J.M. Pasqualucci, above n. 16, at 3; J. Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land', 10(18) *Sur* 115 (2013); C. Grossman, 'Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System', 8(3) *Human Rights Brief* 2 (2002).
23. T.M. Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court', 35(1) *University of Pennsylvania Journal of International Law* 113 (2013); T.M. Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', 25(1) *Duke Journal of Comparative and International Law* 1 (2014); Garavito and Kauffman (2015), above n. 12, at 2.
24. Wainwright and Bryan (2009), above n. 17, at 3; Hale (2011), above n. 19, at 3; Medina (2016), above n. 20, at 3; and Gilbert (2016), above n. 1, at 1; Correia (2017), above n. 11 at 2 are notable exceptions.
25. I. Braverman, N. Blomley, D. Delaney & A. Kedar, *The Expanding Spaces of Law: A Timely Legal Geography* (2014).
26. A. Philippopoulos-Mihalopoulous, 'Law's Spatial Turn: Geography, Justice, and a Certain Fear of Space', 7(2) *Law, Culture and the Humanities* 187 (2011).
27. I also conducted research as a part of an Open Society Justice Initiative investigation a which also informs this paper; see, OSJI (2017), above n. 12, at 2.
28. P. Noxolo, 'Introduction: Decolonising Geographical Knowledge in a Colonized and Re-Colonising Postcolonial World', 49(3) *Area* 317 (2017).
29. D. Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', 14(3) *Feminist Studies* 575 (1988).
30. Pasqualucci (2009), above n. 16, at 3; Antkowiak (2013), above n. 23, at 3, Antkowiak (2014), above n. 23, at 3; T.M. Antkowiak, 'Social, Economic, and Cultural Rights: The Inter-American Court at a Crossroads', in Y. Haeck, O. Ruiz-Chiriboga & C. Burbano-Herrera (eds.), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* 259 (2015); S. Vannuccini, 'Member States' Compliance with the Inter-American Court of Human Rights' Judgments and Orders Requiring Non-Pecuniary Reparations', 7 *Inter-American and European Human Rights Journal* 255; Garavito and Kauffman (2015), above n. 12, at 2.
31. M. Melo, 'Recent Advances in the Justiciability of Indigenous Rights in the Inter-American System of Human Rights', 3(4) *Sur Revista Internacional de Direitos Humanos* (2006); F. MacKay, 'Indigenous Peoples' Rights and the Jurisprudence of the Inter-American Human Rights System', in T. Sikor and J. Stahl (eds.), *Forests and People: Property, Governance, and Human Rights* 33 (2011); A. Fodella, 'Indigenous Peoples, the Environment, and International Jurisprudence', in N. Boschiero, T. Scovazzi, C. Pitea & C. Ragni (eds.), *International Courts and the Development of International Law* 349 (2013).

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some aftereffects of adjudication. The article concludes with discussion of the implications of the tensions between adjudication and implementation for Indigenous social justice.

2 New Opportunities for Land Rights: Paraguay's 'Multicultural Turn'

During the 1980s through mid-1990s, multicultural reforms swept Latin American countries that had historically oppressed the Indigenous peoples who live in those countries.[32] Paraguay joined the 'multicultural turn' with the adoption of Law 904/81 in 1981. Domestic Indigenous rights law, however, was quite limited until Dictator Alfredo Stroessner was deposed from power in 1989. The political rupture that came in the wake of Stroessner's 34-year rule created an opportunity to usher in democratic reforms and take a concerted step towards creating a multicultural state by extending new rights to Indigenous peoples.[33]

Yakye Axa, Sawhoyamaxa and Xákmok Kásek utilised newfound multicultural rights to advance their land claims cases, which evolved with the adoption of different legal mechanisms between 1981 and 1993. The legal basis for the Yakye Axa, Sawhoyamaxa and Xákmok Kásek cases, therefore, rests on three principal elements of Paraguayan law that comprise the cornerstone of its Indigenous rights framework: Law 904/81, Article 64 of the National Constitution, and Law 234/93.

Known as the 'Indigenous Communities Statute', Paraguay adopted Law 904/81 in 1981. The Law was the first to outline a host of rights for Indigenous communities in Paraguay, of which communal property rights and the process to request land from the state are central to the discussion in this article. Rather than rehearse the intricacies of the law,[34] I only cover aspects of the law necessary to understanding the Yakye Axa, Sawhoyamaxa and Xákmok Kásek cases and how they were advanced to the Inter-American System. First, 904/81 created the National Institute for the Indigenous (INDI), which adjudicates issues of Indigenous affairs in Paraguay. Designating community leaders, issuing legal personhood and facilitating Indigenous land claims that correlate with privately held property (as opposed to public land)[35] are the INDI responsibilities that most closely pertain to the three cases in question.

The Paraguayan state adopted two other legal reforms that significantly advanced the available legal mechanisms to support Indigenous rights in the early 1990s. Following the fall of Dictator Stroessner, Paraguay adopted a new National Constitution in 1992. While Chapter 5 is dedicated to Indigenous rights, Article 64 codifies Indigenous land rights:

> Indigenous peoples have right to communal ownership of land in extension and quality sufficient for the preservation and development of their particular forms of life. The state will provide them gratuitously with these lands… The removal or transfer from their habitat [sic] without their express consent is prohibited.

Despite the legal advances the 1992 Constitution made to protect Indigenous rights, the Constitution does little to clarify or change the process by which Indigenous communities can claim land, relying instead on Law 904/81. Paraguayan legal experts suggest there is a discord between the rights outlined in the Constitution and the ability of Law 904/81 to serve as a procedural vehicle to ensure those rights.[36] In addition to the 1992 Constitution, Paraguay adopted Law 234/93 in 1993 to ratify the International Labour Organisation (ILO) Convention 169 as domestic law, which further strengthens de jure Indigenous land rights. The efforts to create and adopt Indigenous rights law and policy led analysts to report in the early 2000s that Paraguay has a 'superior [Indigenous rights] legal framework'.[37]

2.1 Challenges to Indigenous Land Rights in Paraguay

Despite the legal advances to ensure the de jure rights of Indigenous peoples in Paraguay, there are significant historical and structural factors that limit de facto Indigenous rights[38] and shape the Yakye Axa, Sawhoyamaxa and Xákmok Kásek cases. The Paraguayan Chaco was colonised by non-Indigenous peoples in the late nineteenth to mid-twentieth century.[39] The Paraguayan

32. R. Seider, *Multiculturalism in Latin America: Indigenous Rights, Diversity, and Democracy* (2002); R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (2003); S.J. Anaya, *Indigenous Peoples in International Law*, 2nd edition (2004); Gilbert (2016), above n. 1, at 1.
33. R.H. Horst, *The Stroessner Regime and Indigenous Resistance in Paraguay* (2010).
34. For analyses of Law 904/81 *see* CODEHUPY, *Situacticón de los derechos a la tierra y al territorio de los pueblos indígenas en el Paraguay* (2013); M. Blaser, *Storytelling Globalization from the Chaco and Beyond* (2010); Horst (2010), above n. 33, at 5.
35. Per Law 904/81 IBR (Institute of Rural Welfare) normally adjudicates land claims (both Indigenous and non-Indigenous) that concern properties owned by the state, whereas INDI adjudicates land claims between Indigenous peoples and private landowners.
36. CODEHUPY (2013), above n. 34, at 6.
37. R.O. Roldán, 'Models for Recognising Indigenous Land Rights in Latin America: The World Bank Environmental Department, Biodiversity Series' (2004), at 2, available at: <http://documents.worldbank.org/curated/en/608941468743178264/Models-for-recognizing-Indigenous-land-rights-in-Latin-America> (last visited 7 November 2016).
38. *See also* CODEHUPY (2013), above n. 34, at 6; V. Tauli-Corpuz, 'Report: The Situation of Indigenous Peoples in Paraguay' (2015), available at: <http://unsr.vtaulicorpuz.org/site/index.php/documents/country-reports/84-report-paraguay> (last visited 9 October 2017).
39. A.P. Leake, 'Subsistence and Land-Use Amongst Resettled Indigenous People in the Paraguayan Chaco: A Participatory Approach' (PhD thesis on file at the University of Hertfordshire); S. Kidd, 'Paraguay: The Working Conditions of the Enxet Indigenous People of the Chaco', in International Working Group on Indigenous Affairs (ed.), *Enslaved Peoples in the 1990s: Indigenous Peoples, Debt Bondage and Human*

state facilitated the early colonisation period by selling approximately 90% of its territory in the Chaco to finance debts incurred through the War of the Triple Alliance (1864–1870).[40] Subsequently, foreign investors purchased much of the Paraguayan Chaco and gradually established logging and cattle ranching estates.[41] Powell[42] showed that by the 1970s, nearly the entire region had been converted to private ownership—namely cattle ranches—that enclosed Indigenous communities and used those communities for cheap labour or indentured servitude.[43] The Yakye Axa, Sawhoyamaxa and Xákmok Kásek communities were all subject to the radical restructuring of land rights and enclosed by the boundaries of cattle ranches established in the area.[44] The concentration of land tenure in the hands of cattle ranchers has proven a central challenge to securing contemporary land rights for Indigenous peoples.

Problems of land distribution in Paraguay are extensive. Paraguay is one of the most unequal countries in Latin America, with a Gini coefficient of 0.92 for land distribution.[45] Over 70% of land suitable for agriculture is dedicated to soya bean production, whereas cattle graze on nearly 18 million hectares of land.[46] As the world's fourth largest exporter of soya and eighth exporter of beef,[47] the Paraguayan agriculture industry has fuelled some of the fastest rates of economic growth in Latin America since 2010.[48] Indeed soya and beef products comprise nearly 50% of the total value of Paraguayan exports.[49] The disproportionate political economic power of agro-export industry, however, intensifies the challenges that Indigenous peoples and landless rural communities have to access land via Law 904/81 or the Agrarian Statute, respectively.[50]

Rights, 153-181. Anti-slavery International and International Working Group on Indigenous Affairs (1997); R. Villagra-Carrón, *The Two Shamans and the Owner of the Cattle: Alterity, Storytelling and Shamanism Amongst the Angaité of the Paraguayan Chaco* (2010).

40. J. Renshaw, *The Indians of the Paraguayan Chaco: Identity and economy* (2002).
41. *Ibid*.
42. D.R. Powell, *'…y entonces llegó un inglés…': Historia de la iglesia Anglicana en el Chaco paraguayo* (volume conmemorativo de los cien años del templo de Makxawáya) (2007).
43. Kidd (1997), above n. 39, at 7.
44. Correia (2017), above n. 11, at 2.
45. A Gini score of 1 connotes 'perfect inequality'. L.A. Galeano, 'Paraguay and the Expansion of Brazilian and Argentinian Agribusiness Frontiers', 33(4) *Canadian Journal of Development Studies/Revue canadienne d'études du développement* 458 (2012).
46. A. Guereña and L.R. Villagra, *Yvy Jára: Los dueños de la tierra en Paraguay* (2016), available at: <www.quepasaenparaguay.info/wp-content/uploads/YVY-JARA_Informe_OxfamenParaguay.pdf> (last visited 10 January 2018).
47. J. Correia, 'Soy States: Resource Politics, Violent Environments and Soybean Territorialization in Paraguay' *Journal of Peasant Studies* (2017).
48. CEPALSTAT, Base de datos. *Comisión Económica para América Latina y el Caribe* (2014), available at: <http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?IdAplicacion=6&idTema=241&idIndicador=1650&idioma=e> (last visited 2 January 2014).
49. Observatory of Economic Complexity, 'Paraguay', available at: <https://atlas.media.mit.edu/en/profile/country/pry/> (last visited 20 January 2018).
50. M. Glauser, *Extranjerización del territorio Paraguayo* (2009); Correia (2017), above n. 47, at 7.

The question of land rights is not merely one of financial ability to access legal recourse. Broader bureaucratic issues and the rule of law are also important factors.[51] The country ranks in the 19th percentile for the rule of law, rated by Transparency International as 1.8 out of 7 regarding the independence of the judiciary, which places Paraguay at the 138th position among the 142 countries surveyed.[52] Corruption is also a persistent challenge that exacerbates the function of law.[53] The adjudication and implementation of each case contends with challenges created by this broader context.

3 Adjudicating the Cases: A Sketch of the Domestic Legal Proceedings, IACtHR Findings, American Convention Violations

In this section, I draw from archival research and analysis to chart the exhaustion of the domestic remedies, proceedings before the Inter-American System, and relevant articles of the American Convention (hereafter Convention) as they pertain to the three cases in question. The details show that what should have been a straightforward bureaucratic and legal process resulted in years of struggles for each community. The duration of each case was a primary concern for the IACHR and facilitated their admission to the IACtHR. While many of the factual aspects of these cases are unfortunately shared with other Indigenous communities in Paraguay[54]—e.g. socio-economic marginalisation, widespread discrimination and state neglect—Yakye Axa, Sawhoyamaxa and Xákmok Kásek all share the same legal counsel, of which some members had attended trainings at the IACHR and were well acquainted with the Inter-American System and the potential remedies it could offer. The desire of the three communities to petition the IACHR and IACtHR in search of a remedy —coupled with the skill of their legal counsel and its financial support—allowed the Enxet-Sur and Sanapana to advance their cases to the international arena.[55]

3.1 *Yakye Axa Indigenous Community* v. *Paraguay* 2005

The Yakye Axa community began its land claim in 1993, and it remains unresolved at the time of writing this article. In August of that year, the community's leaders registered with INDI and later wrote IBR to

51. K. Hetherington, *Guerilla Auditors: the Politics of Transparency in Neoliberal Paraguay* (2011).
52. Transparency International. 'Corruption by Country/Territory: Paraguay', available at: <www.transparency.org/country/#PRY> (last visited 12 September 2016).
53. *Ibid*.
54. Tauli-Corpuz (2015), above n. 38, at 6.
55. OSJI (2017), above n. 12, at 2; Correia (2017), above n. 11, at 2.

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claim their right to land within their ancestral territory pursuant to Article 64 of the 1992 Constitution. The lands claimed are part of the Yakye Axa ancestral territory and currently comprise the Loma Verde and Maroma cattle ranches, which community members had laboured on since the establishment of the ranches at the turn of the twentieth century. Yakye Axa community members attempted to reoccupy part of their ancestral territory in 1996 because IBR and INDI had failed to adjudicate the case. However, the Loma Verde landowners prevented the community from reoccupying the land. As a result, the Yakye Axa community occupies the margin of a highway in front of the ranch and the disputed lands. Due to a lack of adequate water, hunting, agricultural land, employment opportunities and state services, living conditions on the margin of the highway are extremely difficult.

INDI finally recognised the Yakye Axa community leaders in September 1996—a process that should take no more than 30 days pursuant to Law 904/81 but took more than 3 years. In March 1997, the newly recognised leaders filed a writ of *amparo* to argue that they should be allowed to access the lands they claim for subsistence purposes and stated that local landowners harass and abuse community members. However, the Civil and Commercial Trial Court dismissed the *amparo* suit on the grounds that statute of limitations had expired. In May 1997, INDI requested the Catholic University Centre for Anthropological Studies (CEADUC) investigate the community's claim and clarify what lands historically pertain to the community, which CEADUC determined encompasses 18,188 hectares. By October 1997, the Yakye Axa legal counsel requested that the Trial Court issue a precautionary measure to protect the claimed lands, which was granted in November but contested by the landowners who also rejected the CEADUC study and community's offer to purchase the land.

The Loma Verde and Maroma landowners filed a criminal complaint against Yakye Axa, in April 1998, arguing that the community has been trespassing. Community leaders sought legal personhood for the community in May 1998. Moreover, in June 1998 the community leaders asserted that the landowners were logging the property and requested the Supreme Court of Justice to mandate that the landowners halt all actions on the land.

In support of the Yakye Axa claim, IBR determined that the disputed lands are part of Yakye Axa's 'territorial habitat' and that the community's claim was warranted. Nevertheless, the landowners and community continued to struggle over the land with each filing minor claims against the other during 1999. The Supreme Court ultimately interceded and dismissed the second *amparo* claim against the landowners in July 1999. INDI nevertheless recommended that the land sale proceed and declared that Yakye Axa in a 'state of emergency' due to the gravity of the living conditions on the margin of the highway in August 1999. Between August and December of that year, the community made numerous requests to negotiate the sale of Loma Verde land, which the landowner denied. Despite earlier requests, INDI still had not recognised the community's legal personhood, and Yakye Axa leaders again requested such status in addition to the adjudication of their land claim in November 1999.

In January 2000, the community's legal counsel and the Centre for Justice and International Law, filed a petition with the IACHR that alleged Paraguay had violated Article 25 (Right to Juridical Protection) of the Convention. Meanwhile, the community continued to exhaust available domestic remedies. A Trial Court decision in August 2000 prohibited community members from entering the Loma Verde lands to gather drinking water or hunt for food and exacerbated the living conditions in Yakye Axa. After that decision, Yakye Axa requested that Congress intervene because neither INDI nor IBR had been able to resolve the land claim. Sympathetic members of Congress agreed to sponsor the expropriation and resubmitted requests that INDI recognise the community's legal status in October 2000. Nevertheless, the Chamber of Deputies Committee on Human Rights and Indigenous Affairs, as well as the Committee on Rural Welfare in November, rejected the proposed expropriation in late 2000 on the grounds that it violated the private property rights of the landowner at the time.

INDI finally approved Yakye Axa's legal status in May 2001. In August of the same year, a trial judge ordered that Yakye Axa be evicted from the margin of the highway, which an appellate court approved. For unknown reasons, state officials did not evict the community from the margin of the highway. In fact, the community still occupies the margin of the highway at the time of writing this article.

Between October 2001 and May 2002, INDI annexed 7,901 hectares of Loma Verde for Yakye Axa and the President of the Republic recognised the community's legal status. Moreover, the original *amparo* suit was reinstated to protect the land from further development and the president drafted a bill to reserve the disputed lands by the community. The Senate Committee on Agrarian Reform and Rural Welfare rejected the president's bill in June 2002 because they argued that the Loma Verde landowners rationally exploit the property and therefore it cannot be expropriated. By August of that year, a Trial Court lifted all precautionary measures that had restricted Loma Verde use of the disputed lands.

The case was adopted by the IACHR in October 2002.[56] The IACHR recommended that Paraguay take specific actions to secure the lands claimed for the community, protect those lands until they are secured, guarantee a judicial remedy for land claims, make reparations to community members and prevent the recurrence of similar violations in the future. However, by March 2003 the IACHR submitted the Yakye Axa case to the IACtHR because Paraguay failed to act on any of the IACHR recommendations. In its filing, the IACHR

56. Organization of American States, Report N. 2/02 Admissibility Petition 12.313, 27 February 2002.

argued that Paraguay was culpable for the following violations of the Convention: Article 4—Right to life; Article 8—Right to a fair trial; Article 21—Right to property; Article 25—Right to juridical protection. Each of the alleged violations was made vis-à-vis Article 1—Obligation to respect rights.

The IACtHR issued its decision on the *Yakye Axa* case in June 2005, finding Paraguay responsible for numerous violations of the Convention. Paraguay violated Article 4(1) because the state's handling of the community's land claim directly interfered with their ability to live a decent life and denied community members access to reasonable living conditions. Paraguayan state officials were cognisant that the community suffered a long-standing inability to access basic life needs such as water, food and employment, yet did little to protect livelihoods by ensuring the minimum standards of living. Paraguay violated Article 8 because relevant state institutions failed to represent the community during domestic and criminal proceedings adequately. The inability of state officials to resolve the case promptly denied the community its Right to a Fair Trial. Paraguay violated Article 21 because state officials did not recognise the cultural and spiritual value of Yakye Axa's ancestral territory.

The IACtHR argued that Paraguay had not appreciated the gravity of the land claim and ultimately maintained the community's displacement to the margin of the highway, which ensured their undue suffering. Finally, Paraguay violated Article 25 because state institutions failed to ensure the availability of adequate legal remedies or the timely resolution of the community's requests—not just for land but also legal personhood. That the land claim spanned 11 years without resolution was unreasonable, particularly because the land claim is not technically challenging or complex. The IACtHR argued that the land claim began when the community filed its initial request for legal status in 1993, as opposed to the state's suggestion that the claim did not begin until 2001. The IACtHR did not find that Paraguay had violated Article 4(1); however, due to a lack of evidence to establish culpability and cause of death.

3.2 *Sawhoyamaxa Indigenous Community* v. *Paraguay* 2006

The Sawhoyamaxa community began its land claim in 1991 and it remains unresolved at the time of writing this article. Unlike the Yakye Axa community, which was a largely unified group of people living together on the Loma Verde ranch before displacement, the Enxet-Sur people of Sawhoyamaxa were spread across numerous cattle ranches in the region. Citing Law 904/81, the Sawhoyamaxa community requested that INDI formally recognise its legal status and leaders in August 1991. At that time, the community also requested that INDI secure the return of 8,000 hectares of the community's ancestral land. The legal basis for the claim was the fact that Paraguay had sold Sawhoyamaxa land to private companies in the late 1800s without consulting or offering to compensate the community. Not long after starting their land claim, the people of Sawhoyamaxa were displaced from the Loma Porã and Maroma cattle ranches where they had long lived and laboured. After displacement from the ranches, the community established itself on the margin of the highway in front of the ranch and the claimed lands.

Between initiation of the land claim in 1991 through the end of 1993, INDI and IBR carried out administrative actions to investigate the community's claim and the viability of returning the disputed land to the community. The landowner at the time, Compañía Paraguaya de Novillos S.A. (COMPENSA), refuted the land claim by asserting legal domicile and arguing that that land was rationally exploited and restitution would be against the company's financial interest. INDI nonetheless admitted the Sawhoyamaxa petition for land restitution. Upon receiving official recognition as a legal entity in September 1993, the community expanded its land claim to 15,000 hectares in accordance with Article 64 of the 1992 Constitution. At that time, Sawhoyamaxa also requested that the state file an injunction against COMPENSA to halt all land use because the company was actively logging.

The Court of First Instance in Civil and Business Law issued a preliminary injunction and *lis pendens* against COMPENSA in February 1994 to halt all deforestation. IBR recommended that COMPENSA sell the disputed lands, and in April 1994 the National Congress Chamber of Deputies finds that the company had violated the injunction by continuing large-scale logging practices. Despite Law 904/81 prohibiting the sale of land to third parties while such land is under consideration for restitution to Indigenous communities, COMPENSA sold the land in question to Roswell and Kansol in 1995 and requested that IBR expunge the company the land claim.

Sawhoyamaxa maintained its claims to the disputed lands and requested that IBR continue negotiating for the sale of the land from Roswell and Kansol. Due to IBR delays, Sawhoyamaxa requested the case file be forwarded to INDI for adjudication pursuant to Law 904/81 after which the community's legal counsel requested the land be condemned and National Congress intervene in February 1997. In May 1997, INDI affirmed the request with resolution 138/97; later that month leaders from Sawhoyamaxa introduced a bill to the Chamber of Deputies requesting the land be transferred to the community because it has been condemned. One year later, the Chamber of Deputies Committee on Human Rights and Indigenous Affairs rejected the proposed condemnation bill, citing that the land was rationally exploited.

INDI granted legal status to the Sawhoyamaxa community in late July 1998, 7 years after the community filed its petition for such recognition. Meanwhile, Roswell and Kansol. challenged the injunctions against the company, requesting the state lift them in October 1998. In December 1998, IBR issued report 2065, arguing that the lands held by Roswell and Kansol are 'rationally exploited' and therefore the state could not expropriate

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the land. In June 1999, IBR stated it did not have the authority to adjudicate Indigenous land claims, that all such actions proceed under the supervision of INDI and transferred all Sawhoyamaxa case files to INDI.

Sawhoyamaxa pursued the expropriation with support from Senators in June 1999. The argument for expropriation was bolstered by the near-simultaneous release of the Presidential Executive Order 3789, which declared Sawhoyamaxa in 'a state of emergency' because the community had been prevented from accessing its 'traditional means of subsistence tied to [its] cultural identity'. State officials attributed the lack of land access to malnutrition and serious health problems in the community. The Senate rejected the community's second expropriation attempt in November 2000 arguing that the land could not be expropriated because it was rationally exploited.

In May 2001, following the second failed expropriation attempt, the community's legal counsel filed the initial petition to the IACHR, which was admitted in February 2003.[57] Tierraviva also requested that INDI take legal measures to protect the disputed land in June 2003. INDI later requested that the Court of First Instance in Civil and Business Law, issue a *lis pendens* and preliminary injunction against Roswell and Kansol to halt all deforestation, in late July 2003.

The IACHR issued its Report on Merits 73/04 in October 2004. The Report recommends that Paraguay take actionable measures to protect the Sawhoyamaxa property rights by demarcating the community's territorial limits and titling land according to the community's claim, pursuant to Paraguayan Law 904/81 and Article 64 of the National Constitution. Furthermore, the IACHR recommended that Paraguay ensure the land be protected from further degradation until the title is secured for the community. In addition to land restitution, the IACHR recommended that Paraguay publicly acknowledge its culpability in human rights violations against Sawhoyamaxa and make both communal and individual reparations.

The Paraguayan state failed to adopt any of the IACHR recommendations. IACHR submitted the case to the IACtHR in February 2005, alleging the following violations of the Convention: Article 4(1)—Prohibition of arbitrary deprivation of life; Article 5—Right to humane treatment; Article 8—Right to fair trial; Article 21—Right to property; Article 25—Right to juridical protection. Each of the alleged violations was made vis-à-vis Article 1(1)—Obligation of non-discrimination; Article 2—Obligation to give domestic legal effects to rights.

In its judgment on the Sawhoyamaxa case, the IACtHR found that Paraguay had violated Articles 8 and 25 vis-à-vis Articles 1(1) and 2 of the Conventions. The amount of time INDI took to recognise the Sawhoyamaxa legal personality far exceeded the statues outlined in Law 904/81. The procedure should take no more than 30 days, yet in this case took nearly 5 years, violating community's right to a fair trial. Moreover, at the time of the IACtHR judgment, the Sawhoyamaxa land claim had spanned 13 years with no meaningful action, which the IACtHR determined unreasonable in relation to Article 8 of the Convention.

It is important to note that the IACtHR argued that Paraguayan law had not considered the cultural and spiritual significance of the land for the community. Instead, the state's argumentation only considered the economic value of the land and negated Indigenous land rights as protected in Article 64 of the National Constitution and Paraguayan Law 234/93 that ratified the ILO Convention 169. The legal limits of INDI's authority to establish penalties against parties that violate Indigenous rights suggested that the proceedings to arbitrate the land were inadequate to resolve the case and ultimately contributed to the unnecessarily long bureaucratic process the community had endured. Since the state did not ensure a timely or effective means to adjudicate the claim, the IACtHR found that Paraguay violated Articles 8 and 25 of the Convention.

Paraguay violated the Right to Property (Article 21) because the state did not adhere to its laws concerning Indigenous rights to property, particularly the fact that Law 904/81 states that Indigenous communities need not have possession of their ancestral territory to claim land within that territory. Rejecting the notion of land's value is merely in relation to 'rational exploitation' or its economic/utilitarian value, the IACtHR maintained that Indigenous people have inalienable rights to their ancestral lands so long as the community can demonstrate a meaningful spiritual or material relation with the claimed lands. Therefore, the community had rights to claim the land and the state an obligation to resolve that claim; because Paraguay did not take adequate measures to do so, it violated Article 21.

The unjustifiably lengthy legal process and denial of property rights to the community created living conditions that caused unreasonable suffering and the loss of life. For these conditions, the IACtHR found that Paraguay violated Article 4(1) in relation to Articles 1(1) and 19 of the Convention. Because Paraguay did not provide means for community members to obtain birth registration or identity documents, the IACtHR found the state guilty of violating Article 3 vis-à-vis Article 1(1) of the Convention. The IACtHR did not rule on Article 5 because of its decision on Article 4(1), arguing that former be covered by the decision on the Prohibition of Arbitrary Depravation of Life.

3.3 *Xákmok Kásek Indigenous Community* v. *Paraguay* 2010

The Xákmok Kásek community began its land claim in 1986 and it remains unresolved at the time of writing this article. The Estancia Salazar cattle ranch enclosed the Xákmok Kásek lands in the early 1900s where community members lived and laboured until their displacement. Using Law 904/81 as the legal pretext, the community began its land claim by petitioning INDI for 200

57. Organization of American States, Report N. 12/03 Admissibility Petition 322/01, 20 February 2003.

hectares of land and in 1986 INDI recognised the community's legal status.

Akin to the Sawhoyamaxa and Yakye Axa cases, the Xákmok Kásek land claim proceeded slowly. In December 1990, the community requested that IBR return 6,900 hectares of land from the cattle ranch Estancia Salazar. IBR twice requested that the landowner prepare to transfer the land to the community arguing that Xákmok Kásek was legally entitled to the land and that the owners of Estancia Salazar were violating Law 904/81. The Estancia Salazar landowners refuse to sell the land, arguing that it is rationally exploited.

By late 1992, IBR determined that returning land to Xákmok Kásek be vital due to the living conditions on the ranch. Few community members had gainful employment as ranch staff, and those that were employed were routinely paid much less than their non-Indigenous counterparts. Moreover, education and medical services were insufficient. At that time, Estancia Salazar spanned over 100,000 hectares of land, and the landowners offered to sell to the community a different parcel of land in 1992. Community members initially accepted the offer, but upon visiting the property before finalising the deal they rescinded the offer because the land was inadequate for agriculture and too far from the community's territory. Pursuant to the 1992 National Constitution, the community changed its claim to encompass 20,000 hectares of land—an amount that legally corresponded to the size and composition of the community and ecological conditions in the Chaco.

The community's legal counsel requested an injunction from the Fourth Circuit Civil and Commercial Lower Court due to evidence that the landowner intended to sell the disputed land to a third party in late 1993. By June 1994, IBR transferred the case to INDI for arbitration because the community had exhausted all other administrative options to resolve the land claim. In late 1995 INDI contacted the landowner to request an official offer to sell the claimed land. The owners of Estancia Salazar refused to sell the land because they argued that doing so would undermine the economic viability of their ranching company and suggested that they not be compelled to sell the land because it was rationally exploited.

Years passed with no concrete action on the case during which time the community remained on the ranch and without its own lands. Yet, in June 1999 the community petitioned the National Congress to expropriate the disputed lands from Estancia Salazar. An expropriation bill in favour of Xákmok Kásek, and sponsored by one Senator, was later rejected based on the logic of rational exploitation that was used previously used against Yakye Axa and Sawhoyamaxa .

After the failed expropriation attempt, community members and their legal counsel decide to petition the IACHR in May 2001. The IACHR admitted the petition in February 2003. The Paraguayan state refuted the admissibility of the case and argued that Xákmok Kásek had not exhausted all domestic remedies. The IACHR rejected the state's argument, however, and found that state officials had not adequately adjudicated the land claim nor provided a viable solution to the claim in a timely or reasonable manner. Citing Article 42(6)(1) of the Convention, the IACHR exempted Xákmok Kásek from the requirement of exhausting all domestic remedies because of the undue delays caused by the state.

Despite the ongoing land claim and arbitration by the IACHR, Paraguay issued Decree 11,804 in 2008, which declared Estancia Salazar a national protected area for 5 years. The designation limited land use and allowed state officials to evict anyone occupying or using the protected land. Consequently, the Xákmok Kásek community was forced to leave Estancia Salazar and moved approximately 60 kilometres to a 1,500-hectare parcel of land another Indigenous community offered as a temporary remedy.

In July 2008, the IACHR found the Paraguayan state had endangered the community through its actions and inability to protect them from harm.[58] In relation to Articles 1(1)—Obligation of non-discrimination and 2—Domestic legal effects, the IACHR argued that Paraguay violated the following Articles of the Convention: 3—Right to legal status; 4—Right to life; 8(1)—Right to a hearing within reasonable time by a competent and independent tribunal; 19—Rights of the child; 21—Right to property; 25—Right to judicial protection. Subsequently the IACHR issued recommendations that included securing the Xákmok Kásek land claim and transferring title to the community; ensuring the community's well-being until the land claim is resolved; create a method to allow Indigenous communities to more effectively acquire ancestral land pursuant to domestic law; issue identity documents; create a program to care for children; and make pecuniary reparations for immaterial damages.

Not unlike the Yakye Axa and Sawhoyamaxa cases that preceded that of Xákmok Kásek, Paraguay did not adequately comply with the IACHR recommendations. The case was therefore submitted to the IACtHR in July 2009. The IACtHR issued its judgment in August 2010 and found that the Paraguayan state violated Articles 8(1), 21(1), 25(1) vis-à-vis Articles 1(1) and 2 of the Convention. The deprivation of land for the community without any form of appropriate remedy was the principal factor in each of these violations. The IACtHR argued that the state's inability to resolve the land claim threatened the community's cultural identity and was responsible for the suffering that community members endured throughout the years of the legal process. Additionally, the IACtHR found Paraguay guilty of violating Article 4(1) because its actions denied the community decent living conditions, particularly considering the hardships experienced living on Estancia Salazar and the trauma of forcing the community to occupy another parcel of land far from their ancestral territory.

The IACtHR also determined that the state was culpable for the deaths of 13 people because its actions direct-

58. Organization of American States, Report N. 11/03 Admissibility Petition 0326/01, 20 February 2003.

ly marginalised the community. Article 1(1) was violated because many individuals did not possess state-issued birth or death certificates due to a lack of access to those services, which also limited the IACtHR's ability to ascertain how many people died throughout this process. The Right to Physical, Mental and Moral Integrity—Article 5(1)—was violated due to land displacement, deaths, and poor living conditions the community endured as a result of the Paraguayan state's actions, or lack thereof, throughout the land claim. Arguing that children have special rights and are especially vulnerable populations, the IACtHR found that Paraguay violated Article 19. Finally, the IACtHR did not find that Paraguay had violated Article 3 of the Convention because the community did not provide adequate evidence to support this claim.

4 A Legal Geography Perspective on Adjudication of the *Enxet-Sur* and *Sanapana* Cases

For many legal geographers, there is the sense that law is everywhere in space and space is everywhere in law.[59] Investigating the relationships between law and space draws attention to the practices that link courtroom adjudication with implementation politics in specific sites.[60] Distinct legal geographies created the conditions whereby Yakye Axa, Sawhoyamaxa and Xákmok Kásek were able to petition the Inter-American System for arbitration—living on the margin of a highway as a result of the Paraguayan state's inability to resolve the cases, for example. The IACtHR judgments also shape the creation of new legal geographies.

Legal geography is concerned with the relationships between law and space.[61] Rather than a 'field' of study, legal geography is an interdisciplinary endeavour where geographers and legal scholars work to understand the iterative relations between space and law. Legal geography provides a critical analytical toolkit to understand not only how law shapes society, but also the explicitly spatial ramifications of the law.[62] Some have referred to this as the 'spatial turn' in critical legal studies.[63] For example, Law 904/81, which Yakye Axa, Sawhoyamaxa and Xákmok Kásek used to make their land claims, posits particular conceptions of socio-spatial relations: links between ancestral territory and community identity that are distinct from private property and the 'rational exploitation' of land. Moreover, Indigenous relations with space—e.g. spiritual or historical relations with specific territories versus a solely utilitarian focus on productive land—influenced the design of Law 904/81 and the rights it guarantees for Indigenous peoples.

The Yakye Axa, Sawhoyamaxa and Xákmok Kásek cases centre on land restitution and land rights. Each case was predicated on particular interpretations of three legal and geographic concepts—territory, land and private property—that intersect throughout the adjudication process and its aftereffects. Legal geography largely overlooks questions about territory[64] in favour of questions about property,[65] the effects of the law on spatial organisation and society,[66] and access to public and private space and resources. Moreover, legal scholars most frequently consider the IACtHR Indigenous land rights cases vis-à-vis their implications on communal property rights due to the law's emphasis on property as the privileged unit of governance over territory.[67] As shown in my case sketches above, the Yakye Axa, Sawhoyamaxa and Xákmok Kásek cases are struck through with different notions of land, territory and property. In the following sections, I show how each concept implicates different socio-spatial relations that ultimately impact aftereffects of adjudication.

4.1 Land, Property or Territory?

The IACtHR judgments on the Yakye Axa, Sawhoyamaxa and Xákmok Kásek cases evoke land in many ways. According to my analysis of the judgments,[68] land is most frequently discussed in two distinct ways: (1) regarding economic utility; (2) concerning Indigenous identity. The cost of the land, its productive capacity and the ramifications of returning it to the claimant communities were of central concern to all parties involved. Indeed, my presentation of the cases above showed that the 'rational use' of the disputed lands was a central element of arguments against expropriation in each case.

Why was this the case? Paraguayan Law 854/63 states that the only land eligible for expropriation is that which is not under 'rational exploitation'. Article 158 of Law 854/63 defines rational exploitation:

59. I. Stramignoni, 'Francesco's Devilish Venus: Notations on the Matter of Legal Space', 41(1) *California Western Law* Review 147 (2004).
60. *See, e.g.* D. Delaney, *The Spatial and Legal Pragmatics of World-Making: Nomospheric Investigations* (2010).
61. For comprehensive reviews of legal geography scholarship *see*, N. Blomley, D. Delaney & R.T. Ford, *The Legal Geographies Reader: Law, Power, and Space* (2001); Braverman *et al*. (2014), above n. 25, at 4.
62. *Ibid*.
63. Philippopoulos-Mihalopoulous (2011), above n. 26, at 4.
64. *See, e.g.* A. Brighenti, 'On Territory as Relationship and Law as Territory', 21(2) *Canadian Journal of Law and Society* 65 (2006); S. Ojalammi and N. Blomley, 'Dancing with Wolves: Making Legal Territory in a More-Than-Human World', 62 *Geoforum* 51 (2015).
65. N. Blomley, 'Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid', 93(1) *Annals of the American Association of Geographers* 121 (2003); N. Blomley, 'Making Private Property: Enclosure, Common Right and the Work of Hedges', 18 *Rural History* 1 (2007); N. Blomley, 'Performing Property: Making the World', 36(1) *Canadian Journal of Law and Jurisprudence*, 23-48 (2013).
66. Bennett and Layard (2015), above n. 14, at 2; D. Delaney, 'Legal Geography I: Constitutivities, Complexities, and Contingencies', *Progress in Human Geography* (2014).
67. *On property and territory, see also*, N. Blomley, 'The Territory of Property', 40(5) *Progress in Human Geography* (2015).
68. I used NVivo Qualitative Data Analysis software analyse the three Paraguayan IACtHR judgments discussed in this paper, focusing on the use and occurrence of the concepts territory, land, and property.

> It is considered that a property completes the socio-economic function of rational exploitation when it is part of an establishment that is undeniably used for agriculture, grazing, forestry, industrial or mixed-use, and where the permanent improvements represent at least the total value of the land.

In each case, private landowners and state officials utilised the logic of 'rational exploitation' to justify its resistance to expropriating land for the claimant communities. Instead, state officials consistently suggested the communities should choose other parcels of land within a broadly defined 'ancestral' territory. As shown above, the IACtHR found that the state's arguments in favour of private property rights for ranchers undermine Indigenous property rights protected by Article 64 of the National Constitution and Article 21 of the Convention.

Territory has become the basis of political claims and ongoing struggles by Indigenous peoples across Latin America since the adoption of legal frameworks defining Indigenous territorial rights,[69] with significant legal frameworks predicated on guaranteeing Indigenous peoples' rights to ancestral territories that precede the territorial form of states.[70] Territory is evoked in the ILO Convention 169, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Inter-American Declaration on the Rights of Indigenous Peoples.[71]

What is the difference between 'ancestral territory' writ large and specific sites within an extensive ancestral territory? Anthropological studies suggest Enxet-Sur and Sanapana peoples historically occupied a territory spanning 500,000 square-hectares.[72] The Paraguayan state's legal counsel used this information to suggest that each claimant community should be content to accept *any lands* within that broader territory. The state's argument negated the historical, social and cultural values of specific sites that pertain to the families that comprise the three claimant communities. Although Enxet-Sur peoples historically occupied a large territory, all sites within that territory are not of equal significance to all Enxet-Sur peoples.

The state's arguments exhibited broad generalisations that Enxet-Sur peoples should be willing to accept any parcel of land regardless of the land's significance to the particular community. The three claimant communities refuted this very logic—they were not willing to accept any parcel of land within a broader ancestral territory because not all sites bear the same significance. The names Yakye Axa, Sawhoyamaxa and Xákmok Kásek, for example, correspond to specific geographic sites on the lands each community claimed. The IACtHR judgment on the *Xákmok Kásek Indigenous Community* v. *Paraguay 2010* case illustrates my point and makes an important distinction between communal and ancestral territory:

> [W]hile the Xákmok Kásek Community refers to its ancestral *communal* territory and claims it specifically, the State refers to the *ancestral* territory of the Enxet-Lengua[73] as a whole and, on that basis, affirms that it can grant an alternate piece of land within this extensive ethnic territory.[74]

In other words, Paraguayan officials employed a notion of territory as a homogeneous space of equal import to the claimant communities, while the communities rejected that notion arguing for specific sites within those territories due to their importance for communal identity.

Legal interpretations of Indigenous rights hinge on the notion that a 'special relationship' exists between Indigenous identity and territory.[75] The language employed in the American Declaration on the Rights of Indigenous Peoples is informative. Article 15 draws a direct relationship between Indigenous peoples and their territories: 'Indigenous peoples have the right to maintain and strengthen their *distinctive* spiritual, cultural and material relationship to their lands, territories and resources to assume their responsibilities to preserve them for themselves and future generations.'[76] The ILO Convention 169 and UNDRIP also espouse notions of a distinctive, or 'special relationship', between Indigenous culture and territory. As Stavenhagen suggested,

> …[f]rom time immemorial Indigenous peoples have maintained a *special relationship* with the land, their source of livelihood and sustenance and the basis of their very existence as identifiable territorial communities. The right to own, occupy, and use land collectively is inherent to the self-conception of Indigenous peoples.[77]

The 'special relationship' to land *and* territory became a powerful tool that Yakye Axa, Sawhoyamaxa and Xákmok Kásek, respectively, employed to make their claims, as the following excerpts from the Sawhoyamaxa and Yakye Axa cases show. In response to IACtHR questions about why Sawhoyamaxa turned down offers for land other than what the community claimed, one

69. *See, e.g.* ILO Convention 169, the Paraguayan National Constitution; Gilbert (2016), above n. 1, at 1; S.J. Anaya, *International human rights and Indigenous peoples* (2009).
70. Gilbert (2016), above n. 1, at 1.
71. On the role of territory and cultural ecology in international Indigenous rights law, *see* J. Bryan, 'Where Would We Be without Them? Knowledge, Space and Power in Indigenous Politics', 41 *Futures* 24 (2009).
72. Leake, above n. 39, at 7; Villagra-Carrón, above n. 39, at 7.
73. 'Lengua' is no longer used to refer to Enxet-Sur people.
74. Inter-American Court of Human Rights, *Case of the Xákmok Kásek Indigenous Community* v. *Paraguay*, Judgment (Merits, Reparations, and Costs) 24 August 2010, at 22.
75. R. Stavenhagen, 'Making the Declaration Work', in C. Charters and R. Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* 352 (2009).
76. American Declaration on the Rights of Indigenous Peoples, at 11, emphasis mine. The 1997 Draft American Declaration on the Rights of Indigenous Peoples included language that directly evoked the 'special relationship', at Preamble Point Three.
77. Stavenhagen (2009), above n. 75, at 17.

leader of the community—Carlos Marecos-Aponte—stated:

> …the members of the Community felt fully identified with the Sawhoyamaxa lands and they could not barter 'just like that' the lands where their parents and grandparents had lived. … the lands claimed by the members of the Community were used by their ancestors to hunt. They are the best ones; the only place where there are still rainforests [sic][78] and other essential conditions for their survival, such as water. The lands claimed are of great significance for the members of the Community because they used to belong to them, and they still show traces of their grandparents. What is more, many of their ancestors are buried there.[78]

Tómas Galeano made a different, but equally important argument in his testimony before the IACtHR in the Yakye Axa case:

> For the Community, 'Yakye Axa' means the place where their ancestors lived and moved about. It is the land that belongs to them, that is, the place that is adapted to their reality as Indigenous community members. If they live in their territory, they will feel no fear, because they will be completely free; that is why they request the land and the territory, for the sake of tranquillity.[79]

Claimant community members articulated their claims by using spatial mnemonics—speech acts and evidence that tie to memories and social relationships with specific places, territories and the cultural identity of each community. Carlos and Tómas each evoke socio-spatial relations with specific areas that embody more than economic relations or views of land as merely a productive resource. That is not to say that the three claimant communities are not concerned with the productive qualities of the lands they claim. Each community seeks land where members can maintain historical relations while also charting a new future based on the community's particular interests.[80] Nevertheless, the excerpts from Carlos and Tómas, in addition to my sketch of the cases above, underscore tensions between legal conceptions of territory, land and property that influenced the adjudication of these cases and their aftereffects in Paraguay.

78. Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community* v. *Paraguay*, Judgment (Merits, Reparations, and Costs) 29 March 2006, at 9.
79. Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community* v. *Paraguay*, Judgment (Merits, Reparations, and Costs) 17 June 2005, at 16.
80. Correia (2017), above n. 11, at 2.

5 Negotiating the Aftereffects of Adjudication: Implementing the IACtHR Judgments

The IACtHR judgments bolster the de jure rights of the Enxet-Sur and Sanapana claimant communities in Paraguay and contribute jurisprudence to support Indigenous rights globally. Problems implementing the IACtHR judgments hamper the advances made by successful adjudication, however. What follows is a brief discussion of some aftereffects of adjudication that are intended to illustrate the uneven outcomes of strategic litigation. My comments are not intended to diminish the efforts of Tierraviva, the claimant communities or the Inter-American System, but to shed light on how Paraguayan state actions have exacerbated marginalisation in Yakye Axa, Sawhoyamaxa and Xákmok Kásek by negating the communities an effective or timely implementation of the IACtHR judgments.

Implementation problems are underscored by the passage of time and lack of resolution in each case. Yakye Axa, for example, 'won' its case before the IACtHR in 2005 with a favourable ruling that recommended the Paraguayan state return lands that comprise the Loma Verde ranch for the community. Despite years of negotiations, the owners of Loma Verde resisted selling the land, and state officials did not pursue the option of expropriating the land on behalf of the community. Nevertheless, the Yakye Axa community maintained the claim for its communal territory until 2012. Seven years after the initial IACtHR ruling, community members had grown weary of living on the margin of the highway and agreed to accept an 'alternative' parcel of land to resolve the pending land claim. State officials promptly purchased the land, yet in the interceding years have failed to construct an access road so the community can move to, and utilise, the land. The alternative lands purchased for Yakye Axa are located some 60 kilometres from the community and surrounded by privately held cattle ranches with no public access road. The Paraguayan state has technically complied with a vital component of the IACtHR judgment by purchasing land for the community but has done little to change the material conditions that the community confronts in everyday life on the margin of the highway.

The situation creates a 'liminal legal geography'[81] whereby the community is the legal owner of property per Paraguayan law and the IACtHR judgment but cannot benefit from those rights because there is no way to access or use the land. Road construction began in June 2016, but the 34-km access road is yet to be completed. Meanwhile, the community continues to occupy a space on the margin of the highway created in part by the failure of the Paraguayan state to uphold the rights of the

81. *See* Correia (2017), above n. 11, at 2.

community and in part by the very legal situation that allows communities to choose specific parcels of land that pertain to them without creating a complementary mechanism to effectively acquire those lands from property owners who resist selling the land. In numerous interviews and conversations with Yakye Axa community members, the affected community members reported that the lack of state action to resolve their land claim maintains their social, economic and political marginalisation. Community members often described the situation as emotionally and psychologically painful due to the harsh living conditions and uncertainty about the fate of their land and livelihoods.[82]

Like Yakye Axa, the Sawhoyamaxa community was also forced to occupy the margin of a highway for over 20 years of their land claim. The community was dispossessed of land by local cattle ranchers shortly after initiating their formal claim in 1991 for ranching lands that had enclosed their communal territory. The case is distinct because Sawhoyamaxa decided to reoccupy their communal territory because the Paraguayan state systemically delayed implementing the IACtHR judgment and its recommendations for land restitution. In 2013, 7 years following the IACtHR judgment, community members from Sawhoyamaxa reoccupied their communal territory and embarked on an intensive advocacy campaign with the assistance of Tierraviva and Amnesty International. To the surprise of the community and Tierraviva, the Paraguayan Senate approved a Law 5124 in 2014 to expropriate 14,404 hectares of land to the community.

The law of expropriation, like the IACtHR judgment, was a remarkable legal victory that bolstered the community's claim to its communal territory.[83] Despite the momentous victory, state officials refused to force the landowners to accept payment for the 14,404 hectares, surrender the title to the property, or vacate ranch buildings contained therein. Moreover, the Paraguayan Supreme Court entertained two challenges made by the landowner to question the constitutionality of Law 5124 because he argued the land was 'rationally exploited' and therefore ineligible for expropriation. The abnormality of the legal proceeding was underscored by the censure of one of Sawhoyamaxa's lawyers who criticised the Supreme Court for violating juridical protections against 'double jeopardy'.[84] Adjudication before the IACtHR and advocacy to pass Law 5124 were successful, but their aftereffects created a legal geography whereby Sawhoyamaxa enjoys de facto usage of their land but limited de jure protection because the property technically remains under the legal control of the ranching company that refuses to cede the title.

The Xákmok Kásek case is distinct from Yakye Axa and Sawhoyamaxa in several ways. The community was situated within a cattle ranch for most of the years that it pursued its claim for 10,701 hectares of that very ranch.

82. *Ibid*.
83. *Ibid*.
84. *Ibid*.

In 2010, the IACtHR issued its judgment in favour of Xákmok Kásek and recommended that the Paraguayan state acquire the specific parcel of land that corresponds to the claimed communal territory. The ranch owners refused to sell the 10,701 hectares to the community, citing the fact that many other parcels of land within the Sanapana ancestral territory were available for purchase. Xákmok Kásek refused to accept alternative lands, partly due to what transpired in the Yakye Axa case but mostly because of the importance of the communal territory to the community's identity. Influenced by the successful reoccupation and subsequent law of expropriation for Sawhoyamaxa, Xákmok Kásek community members reoccupied their communal territory in early 2015 to spur the land restitution, be it by expropriation or by the wilful sale of the land by the owner.

I accompanied Xákmok Kásek in their reoccupation efforts for many months in 2015. Throughout that time, the community members were in regular negotiations with state officials and the ranch owners in attempts to broker an amenable solution. It was not until early 2017, however, that the owners, state officials, and community members agreed to sell the 7,701 hectares of the Xákmok Kásek communal territory. The community is now the legal owner of that land (though title has not been issued to the community yet) and in the process of negotiating the purchase of the remaining 3,000 hectares of land from an influential cattle ranching and dairy consortium that resists selling. Regarding land restitution, the case has been successfully adjudicated, but like all three cases, only to a degree.

6 Conclusion

As I suggested in the introduction, the aftereffects of adjudication and translation of that process to practices that support Indigenous land rights and livelihoods are uneven and have been problematic due to the Paraguayan state. Implementing the IACtHR's recommendations is far from being a technical problem[85] of getting the policy 'right',[86] surveying, or mapping land,[87] or a simple question of political will.[88] The Paraguayan state has the technical capacity and professional expertise to demarcate the land, execute the recommended reparations, and a relatively favourable policy framework in place to support such efforts. While Paraguay has a relatively robust Indigenous rights legal framework on paper, adjudication and implementation politics show that the state lacks the will to guarantee those rights in a timely or effective manner.[89] Ultimately then, the state's

85. My point also draws from conversations with Dr. Joe Bryan from University of Colorado Boulder Geography.
86. A. Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights', 44(3) *Cornell International Law Journal* 494 (2011).
87. *See also*, J. Bryan, 'Walking the Line: Participatory Mapping, Indigenous Rights, and Neoliberalism', 42 *Geoforum* 40 (2011).
88. Stavenhagen (2009), above n. 12, at 2.
89. Tauli-Corpuz (2015), above n. 38, at 6; Stavenhagen, above n. 12, at 2.

delayed actions in each of these cases has exacerbated Enxet-Sur and Sanapana marginalisation and threaten the ability of the IACtHR judgments to change the material conditions of life that sustain human rights violations in these communities.

Adjudication does not end in the courtroom but opens a new series of legal struggles that shape society, space and law. The cases that I have discussed in this article suggest that the aftereffects of adjudication create new legal geographies that hold new possibilities but have uncertain outcomes. Embedded within broader processes that drive structural violence against Indigenous peoples, the three Paraguayan cases have undeniably benefited each claimant community while also creating new challenges. One of those challenges is rooted in rectifying differences in how land and territory are conceived, valued and articulated through the adjudication process but also through material practices by different actors in situ. Land and territory, though distinct, are situated within the broader politico-juridical structures of the geopolitical state system. Within these structures, authority and political economy often operate through property in land. The legal ownership of land is legitimised and sanctioned by the state and politico-legal authorities[90] that 'regulate relations among people by distributing powers to control valued resources'.[91]

The aftereffects of adjudication in the trio of Paraguayan IACtHR cases thus illuminate two fundamental dynamics. First, the slow and uneven process by which the Paraguayan state implements the IACtHR recommendations undermines the efficacy of the judgments and their ability to change the conditions that create human rights violations. Second, the implementation process reveals a discord in how territory is conceived, enacted and valued by different actors involved in that process. These are critical empirical issues within Paraguay and Latin America that speak to the broader theoretical debates about the territorial turn,[92] the performance of law[93] and production of liminal legal geographies.[94] Legal geography provides a way of analysing the issues raised in this article by highlighting how law and space are iteratively related. We see this in how rights based on specific juridical notions of socio-spatial relations, such as a 'special relationship' or 'rational exploitation', shape the limits and possibilities that Indigenous claimants can make within the modern state system, but also reflect how normative Indigenous orders also inform the law. This article contributes to burgeoning debates between legal scholars and critical human geographers concerned with the promise and peril of the international law to support de facto Indigenous rights that lead to greater socio-environmental justice.

90. T. Sikor and C. Lund, 'Access and Property: A Question of Power and Authority', 40(1) *Development and Change* 1 (2009).
91. J.W. Singer, 'Property and Social Relations: From Title to Entitlement', in C. Geisler and G. Daneker (eds.), *Property and Values: Alternatives to Public and Private Ownership* (2000), at 3.
92. K. Offen, 'The Territorial Turn: Making of Black Territories in Pacific Colombia', 2(1) *Journal of Latin American Geography* 43 (2003).
93. Blomley (2013), above n. 65, at 15.
94. *See* I. Braverman, 'Rights of Passage: On Doors, Technology, and the Fourth Amendment', 12(3) *Law, Culture and the Humanities* (2016), at 669; Correia (2017), above n. 11, at 2.

Litigation as a Tool for Community Empowerment: The Case of Kenya's Ogiek

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Abstract

In May 2017, the Ogiek indigenous community of Kenya successfully challenged the denial of their land and associated rights before the African Court of Human and Peoples Rights ('the Court'). In the first indigenous peoples' rights case considered the Court, and by far the largest ever case it has had to consider, the Court found violations of Articles 1, 2, 8, 14, 17 (2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights ('the African Charter'). It therefore created a major legal precedent. In addition, the litigation itself and Ogiek's participation in the various stages of the legal process provided a model for community engagement, through which the Ogiek were empowered to better understand and advocate for their rights. This article will first explain the history of the case and the Court's findings, and then move on to examine in further detail methods employed to build the Ogiek's capacity throughout, and even beyond, the litigation.

In May 2017, the Ogiek indigenous community of Kenya successfully challenged the denial of their land and associated rights before the African Court of Human and Peoples' Rights ('the Court'). In the first indigenous peoples' rights case considered by the Court, and by far the largest ever case it has had to consider, the Court found violations of the Ogiek's rights to freedom from discrimination, to free practice of religion, to property, to cultural life, to natural resources and to development and other measures under the African Charter on Human and Peoples' Rights[1] ('the African Charter').[2] It therefore created a major legal precedent. In addition, the litigation itself and Ogiek's participation in the various stages of the legal process provided a model for community engagement, through which the Ogiek were empowered to better understand and advocate for their rights. This article will first explain the history of the case and the Court's findings and then move on to examine in further detail methods employed to build the Ogiek's capacity throughout, and even beyond, the litigation.

1 The Ogiek: A History of Dispossession and Marginalisation

The Ogiek, who number some 30,000,[3] are some of Africa's last remaining forest dwellers. Traditionally honey-gatherers, they survive mainly on wild fruits and roots, game hunting and traditional beekeeping. The Ogiek have lived since time immemorial in Kenya's Mau Forest and are the custodians of the environment on which they depend. They have a unique way of life well adapted to the forest. To them, the Mau Forest is a home, school, cultural identity and way of life that provides the community with an essential sense of pride and destiny. In fact, the term 'Ogiek' literally means 'caretaker of all plants and wild animals'. Unsurprisingly, the survival of the ancient Mau Forest is therefore inextricably linked with the survival of the Ogiek.

Since independence, and indeed prior to it, the Ogiek have been routinely subjected to arbitrary forced evictions from their ancestral land by the Kenyan Government, without consultation or compensation. The Ogiek's rights over their traditionally owned lands have been systematically denied and ignored. The Government has allocated land to third parties, including political allies, and permitted substantial commercial logging to take place, without sharing any of the benefits with the Ogiek. The eviction of the Ogiek from their ancestral land and the refusal to allow them access to their spiritual home has prevented the Ogiek from practising their traditional cultural and religious practices. The culmination of all these actions has resulted in the Ogiek being prevented from practising their traditional hunter-gatherer way of life, thus threatening their very existence.

Over the last 50 years, the Ogiek have consistently raised objections to these evictions with local and national administrations, task forces and commissions

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1. Specifically, Arts. 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter, together with a violation of Art. 1 as a result of the Government of Kenya failing to take legislative or other measures to protect these rights.
2. *ACHPR* v. *Kenya*, App. no. 006/2012, judgment of African Court of Human and Peoples' Rights, issued 26 May 2017 (the '*Ogiek* judgment'), available at: <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>.
3. The *Ogiek* judgment refers to the Ogiek, comprising about 20,000 members (at para. 6), but a more accurate number is provided above and as set out in para. 2 of the Applicant's Submissions on the Merits, available at: <http://minorityrights.org/wp-content/uploads/2015/03/Final-MRG-merits-submissions-pdf.pdf>.

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and have instituted several rounds of judicial proceedings in the national courts, to no avail.

In October 2009, the Kenyan Government, through the Kenya Forestry Service, issued a 30-day eviction notice to the Ogiek and other settlers of the Mau Forest, demanding that they leave the forest. Concerned that this was a perpetuation of the historical land injustices already suffered and having failed to resolve these injustices through repeated national litigation and advocacy efforts, the Ogiek decided to lodge a case against their Government before the Commission,[4] with the assistance of Minority Rights Group International (MRG), Ogiek Peoples' Development Programme and Centre for Minority Rights Development (CEMIRIDE).[5] They argued violations of their rights to property, natural resources, religion, culture, development, life, freedom from discrimination and equality, pursuant to the African Charter, as a result of the treatment by the Kenyan Government. In November 2009, the Commission, citing the far-reaching implications on the political, social and economic survival of the Ogiek community and the potential irreparable harm if the eviction notice was actioned, issued an Order for Provisional Measures requesting the Kenyan Government to suspend implementation of the eviction notice. The Ogiek were not evicted on that occasion, but their precarious situation continued. In early 2012, following the Kenyan Government's lack of response on the issue, the Commission referred the case to the Court, and in July 2012, the Court declared itself seized of the matter, pursuant to Article 5(1)(a) of the Protocol.

On 15 March 2013, the Court issued an Order for Provisional Measures, mirroring the order already issued by the Commission, requiring the Kenyan Government to (i) immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest Complex, and (ii) refrain from any act/thing that would/might irreparably prejudice the main application, until the Court gives its final decision in the case. The Order was issued as the Court considered that 'there is a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the [rights of the] Ogiek of the Mau Forest'.[6] This Order was, unfortunately, not complied with, and evictions, harassment and intimidation of the Ogiek have continued, including a violent eviction of approximately 1,000 Ogiek and police intimidation in March 2016.

On 27 and 28 November 2014, the Court heard arguments from the parties as well as two Ogiek witnesses, an expert witness and an intervention by MRG on behalf of the Original Complainants.[7] In March 2015, the Court proposed that amicable settlement be investigated, although this was ultimately unsuccessful.[8] In March 2016, the Court decided to proceed to judgment, issuing its landmark ruling on 26 May 2017.

2 The Ogiek's Key Arguments

In order to benefit from the substantial body of international human rights law recognising indigenous peoples' rights, the Ogiek argued first that they are an 'indigenous people', a status that would also entitle them to benefit from provisions of the African Charter that protect collective rights. They substantiated this argument by stating that the Ogiek have been living in the Mau Forest since time immemorial and that their way of life and survival is inextricably linked to the forest as their ancestral land.[9]

The Ogiek argued that the failure of the Kenyan Government to recognise them as an indigenous community denies them their right to communal ownership of their traditionally owned lands. They claimed that the encroachment by the Kenyan Government on Ogiek property, without their consent and without adequate compensation, as well as the inability of Kenyan law and the refusal of the Kenyan courts to respect collective ownership rights, does not comply with the appropriate international laws on indigenous peoples' rights, resulting in a violation of Article 14.[10]

The Ogiek alleged that they have suffered routine discrimination at the hands of the Respondent State, and the reasons for such difference in treatment cannot be considered strictly proportionate to, or absolute necessary for, the aims being pursued. As a result, the laws that permit this discrimination are in violation of Article 2 of the African Charter.[11]

By evicting the Ogiek from their land, refusing the Ogiek access to the Mau Forest and the religious sites within it, and failing to demarcate or protect those sites, the Ogiek argued, the Kenyan Government has interfered with their ability to practise and worship as their faith dictates in violation of Article 8.[12]

The Ogiek further alleged that the eviction of the Ogiek from their ancestral land and the refusal to allow them access to their cultural home resulted in a disproportionate interference by the Respondent State and a denial of the Ogiek's right to culture under Articles 17(2) and (3) of the African Charter.[13]

The Ogiek argued that they have been denied use of the natural resources on their ancestral land while the Kenyan Government has plundered them, without seeking the consent or effective participation of the Ogiek, or sharing the benefits. They claim a violation of Article

4. CEMIRIDE, *Minority Rights Group International & Ogiek Peoples Development Programme* (*On Behalf Of The Ogiek Community*) v. *Republic Of Kenya*, Communication 381/09.
5. CEMIRIDE and OPDP are both NGOs registered in Kenya; OPDP works specifically to promote and protect Ogiek culture, land, language, environment and human rights.
6. *See* <http://en.african-court.org/images/Cases/Orders/006-2012-ORDER__of_Provisional_Measures-_African_Union_v._Kenya.pdf>.
7. *See* paras. 14, 27 and 29 of *Ogiek* judgment.
8. *Ibid*., paras. 31-39.
9. *Ibid*., para. 103.
10. *Ibid*., paras. 114-119.
11. *Ibid*., paras. 132 & 133.
12. *Ibid*., paras. 157-160.
13. *Ibid*., paras. 170-172.

21(1) and, accordingly, pursuant to the provisions of Article 21(2), the Ogiek are entitled to the lawful recovery of their property as well as to adequate compensation for the losses they have suffered.[14]

The Ogiek further maintained that the critical failure of the Respondent State to consult with or seek consent from the Ogiek community about their shared cultural, economic and social life within the Mau Forest resulted in a violation of the Ogiek's right to development under Article 22.[15]

The Ogiek claimed that the Government of Kenya is obliged under Article 1 to adopt legislative or other measures to ensure the Ogiek's rights are protected under the African Charter. The Government's failure in this respect results in a violation of Article 1.[16]

Finally, the Ogiek alleged that the continued prohibition of access to the Mau Forest's resources by the Ogiek prevents the sustainability of the Ogiek's traditional hunter-gatherer way of life, and, as such, violates the Ogiek's right to life under Article 4 of the African Charter.[17]

3 The Kenyan Government's Response

In relation to the Ogiek's claim that they are an indigenous people, the Government argued that the Ogiek are not a distinct ethnic group but rather a mix of different ethnic communities. During the public hearing, however, the Government admitted that the Ogiek constitute an indigenous people of Kenya but claimed that the Ogiek of today are different from those of the 1930s, having transformed their way of life through time and adapted themselves to modern life, and that they are currently like all other Kenyans.[18]

Responding to the arguments on Article 14, the Government contended that the Ogiek are not the only tribe indigenous to the Mau Forest and therefore cannot claim exclusive ownership of it. It stated that title for all forest in Kenya is vested in the State. It further argued that the Mau Forest is a protected conservation area upon which the Ogiek were encroaching and that the Ogiek had been consulted and notified before every eviction, which was carried out in accordance with the law. Finally, it claimed that Kenya's land laws recognise community ownership of land and provide for mechanisms by which communities can participate in forest conservation and management.[19]

In relation to the Ogiek's claims of discrimination under Article 2, the Government submitted that this was baseless and lacked evidence. It further claimed that, in any event, the alleged discrimination would be contrary to a number of provisions of its Constitution.[20]

The Government contended in relation to Article 8 that the Ogiek had failed to adduce evidence to show the exact places where their religious sites are located. They argued that the Ogiek had abandoned their religion as they have converted to Christianity and that the religious practices of the Ogiek are a threat to law and order, necessitating Government interference. They further alleged that they are free to access the Mau Forest, except at night, and are prohibited from carrying out certain activities in the forest without a licence.[21]

The Government argued under Article 17(2) and (3) that it has taken reasonable steps at the national and international levels to ensure that the cultural rights of indigenous peoples in Kenya are promoted, protected and fulfilled, referring specifically to its ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as Constitutional provisions. It stated that it has the responsibility to ensure a balance between cultural rights and environmental conservation, and that Ogiek and other indigenous peoples' cultural rights may include activities such as hunting or fishing, which could have a negative impact on the environment. The Government further added that the Ogiek's lifestyle has metamorphosed and the cultural and traditional practices that made them distinct no longer exist, and that, therefore, the group no longer exists and cannot claim any cultural rights, nor can they be said to conserve the environment.[22]

The Government denied a violation of the Ogiek's rights to freely dispose of their wealth and natural resources, claiming that Article 21 of the African Charter calls for reconciliation between the State, on the one hand, and individuals or groups /communities, on the other, when it comes to the ownership and control of natural resources. They also argued that states ultimately exercise the enjoyment of this right in the interest of the people and that efforts are being made to maintain a balance between conservation, a people-centred approach to the control of natural resources and their ultimate control, with an emphasis on access to, rather than ownership over, natural resources.[23]

In relation to the right to development under Article 22, the Government argued that the Ogiek had not shown how it had failed to undertake development initiatives for their benefit, or how they had been discriminated against within development processes. It further stated that consultation had taken place with the Ogiek's democratically elected representatives in relation to development of the Mau Forest.[24]

The Government did not address the Ogiek's arguments under Article 1 of the African Charter.[25]

14. *Ibid.*, paras. 191-193.
15. *Ibid.*, paras. 202-204.
16. *Ibid.*, para. 212.
17. *Ibid.*, para. 147-149.
18. *Ibid.*, para. 104.
19. *Ibid.*, paras. 120-121.
20. *Ibid.*, paras. 134-135.
21. *Ibid.*, para. 161.
22. *Ibid.*, paras. 173-175.
23. *Ibid.*, para. 194.
24. *Ibid.*, paras. 205-206.
25. *Ibid.*, para. 213.

With regard to the arguments under Article 4 of the African Charter, the Government claimed that the Mau Forest Complex is important for all Kenyans and that it is entitled to develop it for the benefit of all its citizens. It further argued that the effects of any economic activity on Kenya's indigenous people should be seen in the light of the principle of proportionality.[26]

4 Analysis of the Court's Judgment

Before addressing the merits of the Ogiek's substantive claims, the Court addressed various procedural aspects of the case, responding to some preliminary objections raised by the Government of Kenya. First, the Court ruled that it has jurisdiction to hear the case following the Commission's referral, confirming and clarifying the procedure under which cases can be referred to the Court by the Commission.[27] This included clarifying that there was no need for the Commission to have first brought the case to the attention of the Assembly of Heads of State and Government of the African Union before referring the case to the Court[28] and that the status of the Original Complainants before the Commission was irrelevant because the Commission – the Applicant in the instant case – is entitled to submit cases to the Court, pursuant to Article 5(1) of the Protocol Establishing the Court.[29] This is particularly important for future Commission-referred cases, given this is the first judgment to be delivered following a referral and a substantive hearing on merits and admissibility.[30] Second, the Court held that even though the Government only became a Party to the African Charter on 10 February 1992 and a Party to the Protocol Establishing the Court on 4 February 2004, the alleged violations related to events that occurred before those dates but that were continuing to take place and therefore the Court had the power to consider the totality of the Ogiek's claims.[31] Finally, the Court considered various points regarding whether or not the Court had the power to hear the case, confirming that the Commission did not need to have itself considered this issue before the case was referred to the Court since the Court will make its own separate determination once referred; that the case before the Commission is no longer pending; and that even though the Commission (the party before the Court) had not taken steps to exhaust domestic remedies, the Ogiek had taken steps to do so, which the Court was satisfied were unduly prolonged and therefore were not available to the Ogiek to exhaust. Again, as the first Court judgment to be delivered following a referral by the Commission and a substantive hearing on merits and admissibility, this has provided important procedural precedent for future Commission-referred cases, as well as building on the Court's jurisprudence regarding its admissibility criteria.

Turning then to the alleged violations of the African Charter, first, the Court dealt with the claim that the Ogiek are an indigenous people. It specifically drew inspiration[32] from the Commission's Working Group on Indigenous Populations/Communities and the UN Special Rapporteur on minority issues, concluding that the relevant factors to consider when determining whether a community is indigenous or not include the priority in time with respect to the occupation and use of a specific territory; a voluntary perception of cultural distinctiveness, which may include aspects of language, social organisation, and religion and spiritual values; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist. It further stated that these criteria generally reflect the current normative standards to identify indigenous populations in international law, and deemed it appropriate, by virtue of Articles 60 and 61 of the Charter, to draw inspiration from other human rights instruments to apply these criteria to the case before it.[33] The Court considered that it had received significant evidence to affirm the Ogiek's assertion that the Mau Forest is their ancestral home,[34] recognising the link between indigenous populations and nature, land and the natural environment, and that for centuries they had depended on the Mau Forest as a source of livelihood. The Court also found that the Ogiek exhibit all aspects of the second factor, which include aspects of language, social organisation, religious, cultural and spiritual values, modes of production, laws and institutions though self-identification and recognition by other groups and by State authorities, as a distinct group. Despite the fact that the Ogiek' are divided into clans made up of patrilineal languages each with its own name and are of habitation, they have their own language, social norms and forms of subsistence, which make them distinct from other neighbouring tribes. They are also identified as distinct by those tribes, with whom they have regular interaction.[35] Finally, the Court ruled that the Ogiek have suffered continued subjugation and marginalisation, as evidenced by the evictions from their ancestral lands, their forced assimilation and lack of recognition of their status as a tribe. Accordingly, the

26. *Ibid*., para. 150.
27. Cases can be referred pursuant to Art. 5(1) of the Protocol Establishing the Court.
28. *Ogiek* judgment, paras. 48-55
29. *Ibid*., paras. 56-61
30. The first Commission-referred Court case in which a judgment was issued by the Court was *African Commission on Human and Peoples' Rights* v. *Libya*, App. no. 002/2013, 3 June 2016, in which judgment was issued in default and not after hearing both parties, available at: <www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl%20%20002-2013%20African%20Commission%20v%20Libya-%20Engl%20.pdf>.
31. *Ogiek* judgment, paras. 62-66.
32. Pursuant to Arts. 60 and 61 of the Charter, para. 108.
33. *Ogiek* judgment, para. 108.
34. *Ibid*., para. 109.
35. *Ibid*., para. 110.

Court recognised the Ogiek as an indigenous population that is part of the Kenyan population and deserves special protection deriving from their vulnerability.[36]

In relation to the right to property under Article 14, the Court held that this can apply to groups or communities: that it can be individual or collective.[37] Rather than view the right to property in its classical conception, the Court held that in order to determine the extent of the rights recognised for indigenous communities in their ancestral lands, Article 14 must be interpreted in the light of Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognises indigenous peoples' 'right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership.'[38] This provision places greater emphasis on the rights of possession, occupation and use/utilisation of land. Since the Government had not disputed that the Ogiek have occupied lands in the Mau Forest since time immemorial, and since the Court had also held that the Ogiek constitute an indigenous community, the Court ruled that they have the right to occupy their ancestral lands, as well as use and enjoy them.[39] Further, the Court accepted that the right to property under Article 14 can be restricted in the public interest and where such restriction is necessary and proportionate. However, it rejected the Government's public interest justification for evicting the Ogiek from the Mau Forest – the preservation of the natural ecosystem – since it had not provided any evidence to the effect that the Ogiek's continued presence in the area is the main cause of the depletion of the natural environment. Varying reports revealed that the main causes were government excisions for settlements and ill-advised logging concessions, and indeed the Government had conceded in its pleadings that the degradation of the Mau Forest could not be associated entirely with the Ogiek.[40] Therefore, the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the Government's purported justification. Accordingly, the Court held that the expulsion of the Ogiek from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, constitutes a violation of Article 14.[41]

The Court next considered the Ogiek's claims under Article 2 of the African Charter. It first emphasised that Article 2 is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter, and explained the relation between the right to non-discrimination and the right to equality under Article 3. The Court stated that 'The scope of the right to non-discrimination extends beyond the right to equal treatment by the law and also has a practical dimension in that individuals should in fact be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.'[42] In determining whether a ground falls under this last category, the Court held that it shall take into account the general spirit of the Charter. Further, the Court drew attention to the difference between a distinction or differential treatment and discrimination, explaining that '[a] distinction or differential treatment becomes discrimination, and hence, contrary to Article 2, when it does not have objective or reasonable justification and… where it is not necessary and proportional'.[43] Although not specifically referenced in the judgment, the Court clearly drew upon regional standards in reaching this conclusion, including the approach taken by the European Court of Human Rights.[44] In this sense, the Court went much further in articulating the right to non-discrimination under Article 2, and the ruling therefore sets out a clear standard for the future.[45]

The Court moved on to consider the position of the Ogiek in Kenya. It found that the Ogiek's request for recognition as a tribe goes back to the colonial period, where their request was rejected by the then Kenya Land Commission in 1933, and has been continuously denied. In contrast, other groups in Kenya, such as the Maasai, have been recognised as tribes and consequently have been able to enjoy related rights derived from that recognition – while the denial of the Ogiek's request for recognition has resulted in them being denied access to their own land. The Court considered this treatment to amount to a 'distinction' based on ethnicity and/or 'other status' and held that it therefore falls within the prohibition on non-discrimination as specified in Article 2.[46] Further, while the Court noted that Kenya's 2010 Constitution recognises and accords special protection to indigenous populations that could theoretically benefit the Ogiek, these provisions can be effective only when actually respected and have been available only since the new Constitution was enacted in 2010. It therefore found that the persisting eviction of the Ogiek, and the failure to comply with decisions of the national courts that protected them, demonstrates that the new Constitution and the institutions that the Government has set up to remedy past or ongoing justices are not fully effective.[47] Finally, again, the Court concluded that Government's purported justification that the evic-

36. *Ibid*., para. 112.
37. *Ibid*., para. 123.
38. *Ibid*., para. 126.
39. *Ibid*., para. 128.
40. *Ibid*., paras. 129-130.
41. *Ibid*., para. 131.
42. *Ibid*., para. 138.
43. *Ibid*., para. 139.
44. *See, e.g.*, case *Relating to certain aspects of the laws on the use of languages in education in Belgium*, ECtHR judgment of 23 July 1968, App. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 , para 10; as referenced in para. 366 of the Applicant's Submissions on the Merits, available at: <http://minorityrights.org/wp-content/uploads/2015/03/Final-MRG-merits-submissions-pdf.pdf>.
45. The Court has only found a violation of Art. 2 in one other case, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila* v. *United Republic of Tanzania*, Appl. Nos. 009&011/2011, judgment dated 14 June 2013.
46. *Ogiek* judgment, paras. 141-142.
47. *Ibid*., paras. 143-144.

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tion of the Ogiek were prompted by the need to preserve the natural ecosystem of the Mau Forest could not reasonably or objectively justify the lack of recognition of the Ogiek's indigenous or tribal status or the denial of the rights associated with that status. This was particularly true given the earlier finding in relation to Article 14 that the Mau Forest has been allocated to other people in a manner that cannot be considered compatible with the preservation of the natural environment.[48] Accordingly, the Court found a violation of Article 2.

Considering the allegations under Article 8 of the African Charter, the Court specified that the right to freedom of worship offers protection to all forms of beliefs regardless of denominations, while the right to manifest and practise religion includes the right to worship, engage in rituals, observe days of rest, wear religious garb, allow individuals or groups to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes as well as to celebrate ceremonies in accordance with the precepts of one's own religion or belief. It drew inspiration, in particular, on international standards on the right to free practice of religion, including Article 18 ICCPR, CCPR General Comment no 22 on Article 18 ICCPR and Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The Court went on to note that, in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment, and any impediment to accessing that environment severely constrains their ability to conduct or engage in religious rituals.[49] The Court considered that the evictions of the Ogiek from the Mau Forest were interfering with their freedom of worship. While Article 8 allows restrictions on the exercise of the freedom of religion and in the interest of maintaining law and order, these restrictions must be necessary and reasonable. The Court viewed that there were other less onerous measures that the Government could have put in place, such as collaborating to maintain the religious sites.[50] Further, the Court noted that not all Ogiek have converted to Christianity and that there was significant evidence to show that they still practise their traditional religious rites.[51] It could not therefore be said that the Ogiek's traditional spiritual values and rituals have been entirely eliminated. As a result, given the link between indigenous populations and their land for the purposes of practising their religion, the evictions of the Ogiek from the Mau Forest rendered it impossible for the community to continue their religious practices, resulting in an unjustifiable interference with the Ogiek's freedom of religion and a violation of Article 8.[52]

Addressing the Ogiek's arguments under Article 17(2) and (3) of the African Charter, the Court considered it to have a dual dimension: ensuring the protection of individuals' participation in the cultural life of their community while also obliging the State to promote and protect traditional values of the community. It considered that the right goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, cultural heritage essential to the group's identity, and should be construed in its widest sense, encompassing the group's total way of life: languages, symbols, manner of constructing shelters, economic activities, rituals (such as the group's particular way of dealing with problems) and shared values that reflect its distinctive character and personality.[53] The Court noted that preservation of culture is of particular importance for indigenous populations, who have often been affected by economic activities of other dominant groups and large-scale developmental programmes and drew on the work of the Commission's Working Group on Indigenous Populations/Communities, which recognises that such communities have been the target of deliberate policies of exclusion and forced assimilation, threatening and extinguishing their cultural distinctiveness. It also referred to Article 8 of the UNDRIP, which provides the right not to be subjected to forced assimilation or destruction of their culture, and requires States to provide effective mechanisms to prevent any action that deprives them of their integrity as distinct peoples or of their cultural values or ethnic identities. Similarly, it relied on General Comment No 21 of the UN Committee on Economic, Social and Cultural Rights, which has observed that indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.[54] This approach of recognising the duality of indigenous peoples' rights to participating in the cultural, social and political life of society while also maintaining their own separate cultural systems is very much in line with the spirit of UNDRIP, particularly Articles 11, 12 and 13. The Court considered that it had sufficient evidence demonstrating the Ogiek have their own distinct culture distinguishing them from other communities living around and outside the Mau Forest Complex, and considered that the restrictions on access to and evictions from the Mau Forest have greatly affected their ability to preserve their traditions, resulting in a violation of the Ogiek's right to culture.[55]

Having found this, the Court then needed to determine whether such interference could be justified by the need to attain a legitimate aim under the African Charter. The Court did not consider that the Ogiek's way of life has changed over time to the extent that it has eliminated their cultural distinctiveness, and viewed that the

48. *Ibid*., para. 145.
49. *Ibid*., para. 164.
50. *Ibid*., para. 167.
51. *Ibid*., para. 168.
52. *Ibid*., para. 169.
53. *Ibid*., paras. 177-179.
54. *Ibid*., paras. 180-181.
55. *Ibid*., para. 183.

invisible traditional values embedded in their self-identification and shared mentality often remain unchanged. Indeed, the Court could see that some of these changes were caused by the Government as a result of restrictions on their right to access their land and natural environment.[56] This approach should be widely welcomed, since it avoids the debate around whether indigenous peoples still practise their traditional culture and completely dismisses any requirement to prove 'cultural authenticity' in order for any indigenous people to be able to claim their cultural rights. Finally, given that the Court had already found that the Government had not adequately proved its claim that the eviction of the Ogiek was for the preservation of the natural ecosystem of the Mau Forest, it held that this could not constitute a legitimate justification for the interference in the Ogiek's exercise of their cultural rights under Article 17(2) and (3) of the African Charter.[57]

In relation to the Ogiek's right to freely dispose of their wealth and natural resources under Article 21, the Court first considered whether these rights could be extended from constituent peoples to sub-state ethnic groups and communities that are a part of the State's population. It concluded that they could, provided such groups or communities do not call into question the sovereignty or territorial integrity of the State without consent.[58] It reached this decision by finding that it would be difficult for the Charter to automatically recognise the ethnic groups' and communities' right to self-determination and independence guaranteed under Article 20(1) of the Charter, which would amount to a veritable right to secession, but nothing prevents other peoples' rights from being recognised, where necessary, specifically for the ethnic groups and communities that constitute the population of a state. The Court's reasoning clearly recognises that self-determination goes beyond secession, which is important in the African context, given claims often voiced by African states – and particularly during the UNDRIP draft process – that to grant indigenous peoples their self-determination threatens territorial integrity. The Court then referred back to its earlier findings in relation to the Ogiek's right to property, including their right to use and enjoy the produce of the land, which presupposes the right to access and occupation of the land, and declared a violation of Article 21 since the Ogiek have been deprived of the right to enjoy their ancestral lands.[59]

Regarding the claimed violation of the Ogiek's right to development, the Court reiterated its view on the definition of 'peoples' as already developed under Article 21 of the African Charter, stating that all populations that comprise a constitutive element of a State are entitled to social, economic and cultural development under Article 22 of the African Charter. Accordingly, the Ogiek population is entitled, under Article 22, to enjoy their right to development.[60] The Court again relied on UNDRIP, citing Article 23, which states, 'indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and…to administer such programmes through their own institutions.' Since the Ogiek have been continuously evicted from the Mau, without being effectively consulted, adversely impacting on their economic, social and cultural development; and since they have not been actively involved in developing and determining programmes affecting them, the Court held that the Government had violated Article 22 of the African Charter.[61]

With regard to Article 1, the Court observed that this imposes a duty on states to take all legislative and other measures necessary to give effect to the rights and freedoms guaranteed in the African Charter. It also observed that Kenya's 2010 Constitution and other 2016 legislation regarding community and forest lands had made some progress in this respect – but noted that these laws had been enacted relatively recently. The Court stated that it had already found the Government had failed to recognise the Ogiek as a distinct tribe, leading to denial of access to their land and the consequential violations of their rights under Articles 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter. The Government had not demonstrated that it had taken measures to give effect to these rights. Therefore, the Court found a violation of Article 1.[62]

Finally, in relation to the alleged violation of the right to life under Article 4 of the African Charter, the Court noted that this is a right to be enjoyed irrespective of the group to which he or she belongs. The Court also understood that the violation of economic, social and cultural rights, including through forced evictions, may generally engender conditions unfavourable to a decent life. However, the Court viewed that a deprivation of economic, social and cultural rights may not necessarily result in a violation of the right to life under Article 4 of the African Charter, finding it necessary to make a distinction between the classical meaning of the right to life and the right to decent existence of a group. Concluding that Article 4 relates to the physical right to life, rather than to existence, and that no causal link had been established between the evictions of the Ogiek and the deaths that had occurred subsequent to their evictions, it found there had been no violation of Article 4. The Court's approach in this respect differs markedly from the stance adopted in Inter-American jurisprudence, which has incorporating aspects of indigenous community's livelihood – including the possibility of access to traditional means of subsistence, to use and enjoyment of the natural resources necessary to obtain clean water and to practise traditional medicine to prevent and cure illnesses – within the right to life and human dignity.[63]

56. *Ibid*., paras. 184-186.
57. *Ibid*., paras. 187-190.
58. *Ibid*., paras. 196-199.
59. *Ibid*., para. 201.
60. *Ibid*., para. 208.
61. *Ibid*., paras. 209-211.
62. *Ibid*., paras. 214-217.
63. *See, e.g.*, I/A Court H.R.,*Yakye Axa Indigenous Community* v. *Paraguay*. Merits, Reparations and Costs. Judgment of 17 June 2005. Series

5 Remedies and Reparations

In their legal submissions to the Court, the Ogiek sought a declaration that the Mau Forest is the ancestral home of the Ogiek in which they have a communal property right and that they are entitled to full reparations for the violations suffered. They requested a separate judgment of the Court,[64] including the following orders: restitution of Ogiek ancestral land; compensation for all the damage suffered; the adoption of legislative and other measures ensuring the Ogiek's right to be effectively consulted; the issuance of a full apology to the Ogiek; the erection of a public monument acknowledging the violation of Ogiek rights; and full recognition of the Ogiek as an indigenous people of Kenya. The Court decided that it would rule on reparations in a separate decision, taking into consideration additional submissions from the Ogiek and the Government of Kenya, and granting each party a period of 90 days in which to provide its submissions.[65] At the time of writing, this period is ongoing and the Court's reparations order is hoped for 2018.

The Government was also ordered to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within 6 months of the date of the judgment.[66]

6 A Model for Community Engagement?

Litigating the *Ogiek* case on behalf of such a large community, who had been systematically discriminated, marginalised and disenfranchised by successive governments since the 1900s, who had lost faith in the ability of any justice system to offer them redress, and who live in scattered geographical locations, represented numerous challenges for the Original Complainants. Yet, as will be explained, these challenges also offered significant opportunities to provide the Ogiek with legal empowerment.

First, there was a need to establish the historical relationship that the Ogiek have had with their ancestral land in the Mau Forest since time immemorial. The complicated factual matrix of evictions and treatment of the Ogiek over the years also needed to be clearly detailed and evidenced. Both of these processes required vast documentation and anthropological research, within social science libraries, in Kenya's national archives as well as online research. There was also a detailed evidence gathering process conducted by MRG and OPDP, in order to unearth relevant documents proving ownership, such as maps, correspondence with local and national authorities dating back many years, pleadings and related evidence in the numerous land disputes brought by the Ogiek before the national courts. Similarly, extensive witness statements were collected from Ogiek community members, including elders, women and youth, in order to substantiate not just the evictions that were suffered, but also to fully explain the Ogiek's relationship with the Mau Forest, its central function in the conduct of customary religious and cultural practices, the crucial part it plays as a source of food and traditional medicine, and, above all, its vital role in defining Ogiek identity. Detailed witness evidence was also collected on Ogiek identity and traditional lifestyle, including hunting, honey production, traditional medicines and other traditional uses for plants, cultural rituals and ceremonies, crafts, use of territory, social organisation, language, religion, tribal interactions, as well as the extent to which that lifestyle has been forced to change over the years.

In addition to considerable research on matters of international comparative law, MRG's legal team also needed to establish the role of Ogiek as conservationists of the Mau Forest. Photos of indigenous plants well known to the Ogiek and the role that these play in Ogiek customs were collected and submitted to the Court, demonstrating Ogiek traditional knowledge and their keen awareness of how to conserve their ancestral surroundings. OPDP and MRG also produced a film of Ogiek land and cultural practices, which was submitted as video evidence to the Court, giving the judges the opportunity to witness firsthand the traditional Ogiek way of life. An expert on customary land tenure also presented critical written and oral evidence to the Court on the way that the practice of indigenous communities can and does save threatened natural forests.

As a result of this detailed and lengthy process of evidence gathering to support the litigation process, the Ogiek have been considerably legally empowered. Legal empowerment involves strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community. It aims to deliver grassroots justice, ensuring that law is not confined to books or courtrooms, but rather is available and meaningful to everyone.[67] Through significant engagement with the community – which was not only necessary to ensure

C No. 125; I/A Court H.R., *Sawhoyamaxa Indigenous Community* v. *Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146; I/A Court H.R., *Xákmok Kásek Indigenous Community* v. *Paraguay* Merits, Reparations and Costs. Judgment Merits and reparations. Judgment of 24 August 2010. Series C No. 214.

64. Pursuant to Rule 63 of the Court rules.

65. *Ibid*., paras. 222-223 and 227 Merits (iv) and (v); note that para. 227 (v) provides a period of 60 days, but at the hearing during which the judgment was delivered, a period of 90 days was requested by both parties and granted by the Court.

66. *Ogiek* judgment, para. 227, Merits (iii).

67. *See, e.g.*, <https://www.opensocietyfoundations.org/projects/legal-empowerment> and <https://namati.org/>; *see also* UN Commission on the Legal Empowerment of the Poor, 2008, 'The Four Pillars of Legal Empowerment', in Making the Law Work for Everyone Volume I, Commission on Legal Empowerment of the Poor and United Nations Development Programme, New York, pp. 25-42, which identifies ways of empowering those in poverty, focusing around access to justice and the rule of law, property rights, labour rights and business rights (the latter two were less explored in the case of the Ogiek).

the success of the litigation efforts, but also part of a conscious effort by the Original Complainants – the Ogiek have become familiarised with their human rights under both national and international law, have been enabled to advocate for full protection of those rights, and better understand the judicial process. These approaches also had the effect of uniting the Ogiek behind – and in spite of – a long, protracted, uncertain legal struggle. This was particularly important for a community as vulnerable as the Ogiek, some of whom were also being intimidated and harassed: it would have been relatively easy for the Government to have sought support for their own position had the Ogiek not been firmly committed to the case.

Working closely with MRG, OPDP went to great lengths to ensure that Ogiek community members were closely consulted as the litigation developed and were kept fully informed of procedural and other developments, via community forums, through consultative meetings with Ogiek elders and community representatives, and through regular informal outreach and liaison. This was particularly important during amicable settlement discussions, as Ogiek views on both the course of action and the settlement terms were necessarily central to the process. Several Ogiek community members also gave oral evidence direct to the Court during the November 2014 hearing, providing powerful testimony that played a pivotal role in assisting the judges to deliver their ruling. In addition, MRG and OPDP facilitated over 50 Ogiek to attend the hearing and over 80 to attend the judgment delivery, giving the Ogiek a clear sense of ownership over their case, which was being decided by a Court sitting in a different country and by judges from many different states. Many Ogiek community members also attended meetings with Commissioners and representatives of the Commission team representing them before the Court, in order to ensure that their voices were heard.

In addition, MRG and OPDP also trained 25 Ogiek community members as paralegals, through a series of in-depth and follow-up refresher sessions. This enabled the Ogiek not only to have a better understanding of their rights under national, regional and international law, and the national judicial system, but also to challenge instances of intimidation, violence and harassment that resulted following efforts to defend themselves from ongoing evictions, by bringing cases before domestic courts and recording and collecting evidence that could be used within the regional case. The training also equipped them with skills to monitor the Court's 2013 Provisional Measures Order, submitting vital evidence of violations of the Order to OPDP and MRG that could then be forwarded to the Court. These will be essential competencies necessary as the implementation process commences in order that the Ogiek monitor the extent to which the Kenyan Government complies with the judgment; but, as explained further below, resources will still be needed to continue the outreach as implementation begins and to enable them to conduct national and local advocacy, giving the Ogiek a sense of ownership over their own destiny.

7 Evaluating the Role of Litigation in Community Empowerment

The *Ogiek* judgment was delivered while MRG was conducting a detailed external evaluation of its litigation and legal empowerment programmes implemented with minorities and indigenous peoples in East Africa over the last 15 years, including the *Ogiek* case. The evaluation found that litigation and legal empowerment are powerful tools that create spaces and opportunities for communities to unite around shared struggles and make decisions that can impact positively on their collective rights,[68] while also recommending further strategies to be employed at the national and domestic levels.

First, the Ogiek sought via litigation to find solutions to deeply historically embedded land disputes. In doing so, they were able to draw on the experiences of other communities in Kenya and East Africa, as well as internationally, that have also resorted to litigation. The social and political climate in these states has been extremely resistant to recognising indigenous peoples' land rights in accordance with international law. These common contexts allowed for cross-fertilisation of human rights standards and provided a strong platform for community-led litigation strategies.

In the course of the litigation processes, the evaluators observed significant and positive social changes, including the enhancement of communities' sense of justice, legal empowerment and unity around long-term struggles.[69] A certain degree of positive change in attitudes and behaviours of other parts of society, such as neighbouring communities, local authorities and the media, was also reported as a consequence of the legal and human rights activities and litigation, although this state of affairs remains fragile, given they are not supported by material and legal changes. However, some concerns were expressed by communities that litigation can contribute to the inflammation of existing tensions and surges of violence where the socio-political climate is unstable. For example, Ogiek claiming their rights over their ancestral land caused tension with other non-Ogiek communities, who used intimidation and, in some cases, violence, to prevent them from doing so. Responsible action is necessary and a litigation programme operating in such circumstances must be supplemented with security screening measures and risk assessments

68. *See* <http://minorityrights.org/programmes-evaluations/indigenous-peoples-land-rights-tanzania-kenya-impact-strategic-litigation-legal-empowerment/foracopyofthereportinfull>.
69. The Ogiek's immediate sense of justice upon receiving a positive ruling in their favour can clearly be witnessed in a short film, available at: <http://minorityrights.org/law-and-legal-cases/the-ogiek-case/>.

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for the prevention of violence, as well as access to funding and remedies in case of violence.

Further, now that the regional human rights system has ruled in favour of the Ogiek and ordered land restitution, demarcation and titling, a strong plan to support implementation and actual material gain for the communities is necessary. In terms of redress and material consequences, winning these regional legal cases is the start of a process. For the Ogiek, the material consequences of litigation so far have been minimal, and implementation will be a great challenge. The prospects of effective implementation can be stalled by a lack of access to long-term financial support and human resources for national and international NGOs, as well as for human rights mechanisms and governmental bodies responsible for implementation, so adequate support on that front is essential. However, a strong and well-resourced implementation programme, incorporating international regional, national and advocacy, mapping of community land, regular community outreach meetings and trainings, appropriate use of the media and focusing on the needs of women, youth and elders, can be effective at uniting a community behind a common cause.

However, the impact of strategic litigation on the national legal framework of Kenya is not straightforward. While legal empowerment of communities is undeniable, the judiciary in Kenya and Tanzania have not yet taken on board international law on indigenous peoples' rights. For example, training of judges, registrars and lawyers in Tanzania shows the importance of such activities in raising the awareness of decision-makers about indigenous peoples' rights in Africa and internationally. Litigation is part of a larger advocacy strategy aiming at making national laws and the legal profession more conversant with indigenous peoples' rights as per international law. From this perspective, litigation is a powerful tool for change, but the impact of the Ogiek litigation seems to have been felt mainly at the community, regional and international levels, where the contribution of indigenous peoples' organisations in Kenya and of MRG to the regional jurisprudence on land rights in Africa has been found to be considerable. Further legal empowerment work clearly needs to be done at the national level in order to achieve change on the ground and secure implementation of the *Ogiek* judgment.

8 A Wider Impact beyond Kenya?

The Court's landmark judgment is a momentous achievement that offers hope to other indigenous and rural communities across Africa, and beyond. The Court has firmly embraced and adopted the concept of indigenous peoples' rights, in relation to not only communal property rights over ancestral land, but also rights to culture and religion, and also their right to freely enjoy their natural resources. By specifically drawing inspiration from the concept of indigenous peoples as set out in UNDRIP, as well as stating that such people deserve special protection deriving from their vulnerability, it sends a clear message to governments across the continent that indigenous peoples must be recognised and can no longer be routinely discriminated and marginalised. The Court also made some very clear rulings in relation to the role of indigenous peoples, and specifically hunter-gatherers, in conservation. It stated in no uncertain terms that the preservation of the forest could not justify the lack of recognition of the Ogiek's indigenous or tribal status or the denial of the rights associated with that status, and explicitly confirmed that the Ogiek could not be held responsible for the depletion of the Mau Forest, nor could it justify their eviction or the denial of access to their land to exercise their right to culture.

The *Ogiek* case has also demonstrated that litigation and related legal empowerment efforts can significantly build and increase community cohesion. Not only can they provide the driving force behind community unity, but when organised, communities like the Ogiek are in a strong position to strengthen and support that litigation, seek their rights as both individuals and as a collective, and advocate for implementation of judgments when successful. As the Ogiek await a further Court ruling on reparations, which is hoped for 2018, many will be monitoring whether the Kenyan Government respects the judgment. Needless to say, the Ogiek will be at the forefront.

The Courts and the Restitution of Indigenous Territories in Malaysia

Yogeswaran Subramaniam & Colin Nicholas*

Abstract

Despite enjoying distinct and privileged constitutional statuses, the Indigenous minorities of Malaysia, namely, the natives of Sabah, natives of Sarawak and the Peninsular Malaysia Orang Asli continue to endure dispossession from their customary lands, territories and resources. In response, these groups have resorted to seeking justice in the domestic courts to some degree of success. Over the last two decades, the Malaysian judiciary has applied the constitutional provisions and developed the common law to recognise and protect Indigenous land and resource rights beyond the literal confines of the written law. This article focuses on the effectiveness of the Malaysian courts in delivering the preferred remedy of Indigenous communities for land and resource issues, specifically, the restitution or return of traditional areas to these communities. Despite the Courts' recognition and to a limited extent, return of Indigenous lands and resources beyond that conferred upon by the executive and legislative arms of government, it is contended that the utilisation of the judicial process is a potentially slow, costly, incongruous and unpredictable process that may also not necessarily be free from the influence of the domestic political and policy debates surrounding the return of Indigenous lands, territories and resources.

1 Introduction

Access to remedies and redress for land rights constitute an important element of indigenous peoples' recourse to litigation. The right of indigenous peoples to redress in respect of their lands, territories and resources has been acknowledged in international law. Article 28 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[1] provides as follows:

> Indigenous peoples have the right to redress, by means that can include *restitution or, when this is not possible, just, fair and equitable compensation*, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

This provision represents an important element of the declaration, which was forged over more than a decade and in consultation with worldwide indigenous representation. It underscores the significance of the inextricable link that indigenous communities commonly have with their traditional territorial space and perhaps more relevant to this article, the preference for restitution of indigenous lands, territories and resources as a remedy for past and continuing dispossession.

For the right of restitution to be meaningful in effectively addressing the concern of UN Member States that 'Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources',[2] restitution should ideally extend beyond the return of indigenous areas *continuously* occupied, used or enjoyed to those areas *previously* occupied, used or enjoyed by aggrieved communities. Unfortunately for most indigenous communities, state acceptance of the restitution of indigenous lands, territories and resources as the favoured mode of legal redress, particularly in respect of lands earlier lost to others and where third party rights have intervened, has been shown to be contentious, or at best an 'ambiguous compromise'.[3]

This article focuses on the potential of the common law as applied by the Malaysian courts to return indigenous lands, territories and resources *continuously* (until the present or very recently) occupied, used or enjoyed by an indigenous community that have been encroached

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1. GA Res. 61/295, 13 September 2007.
2. UNDRIP, preambular para. 6.
3. For further commentary on the issues surrounding the right to restitution of indigenous land, territory and resource rights under international law, *see e.g.* J. Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Leiden: Brill, 2nd edn.) (2016), at 147-68; A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge: Cambridge University Press) (2007), at 264-7.

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upon by third parties or taken away by the state. Across Malaysia, many indigenous communities have had recourse to courts to reclaim their fundamental rights over their traditional lands and resources. Utilising common law jurisprudence and considering the special status of indigenous groups shaped during colonial and post-independence constitutional and legal arrangements, the Malaysian judiciary has recognised the legal continuity of pre-existing indigenous customary land and resource rights over the past two decades. Despite not specifically addressing the historical dispossession of lands, territories and resources suffered by Malaysian indigenous communities, this recognition has been instrumental in providing these communities some legal redress for claims of illegal dispossession from their lands, territories and resources beyond the literal confines of the written law. It is hoped that the scenario in Malaysia will inform further inquiries into the utilisation of domestic courts as a redress mechanism for the dispossession of traditional indigenous areas.

After providing the necessary background on the indigenous communities of Malaysia and the salient issues pertaining to their customary territories, this article will synthesise the Malaysian courts' recognition of customary rights relating to lands, territories and resources beyond written law and the remedy of restitution in relation to such recognition. The article will then examine the legal challenges and more generally, the political realities faced by indigenous communities in gaining effective restitution of their customary territories through the Malaysian courts.

2 Indigenous Customary Territorial Rights in Malaysia: A Contextual Overview

Geographically, the bulk of the Federation of Malaysia consists of the peninsular land that separates the Straits of Malacca from the South China Sea and most of the northern quarter of the island of Borneo. Peninsular Malaysia consists of eleven states and two federal territories. The Borneo territories are made up of the states of Sabah and Sarawak and a federal territory.

As of July 2017, the population in Malaysia was estimated at 32.0 million[4] of which around 50.1% and 11.8% consisted of ethnic Malays and indigenous groups, respectively.[5] Ethnic Malays[6] and other indigenous groups, meaning, the natives of Sabah[7] and natives of Sarawak[8] and Orang Asli ('aborigine(s)' in the English version of the Federal Constitution)[9] have been afforded varying degrees of constitutional rights and privileges as a result of the legal arrangements for the protection of those considered to be 'indigenous' or 'native' during the decolonisation process and the formation of the Federation of Malaya in 1957 and subsequently, the Federation of Malaysia (with Sabah and Sarawak) in 1963.

Although the term 'indigenous peoples' is not contained in the Federal Constitution, the natives of Sabah and Sarawak and Peninsular Malaysia Orang Asli have self-identified as indigenous peoples at international human rights fora and domestically. Additionally, these groups fulfil international criteria for 'indigenous people' under various international human rights documents in that they are individually considered the earliest inhabitants of their respective ecological spaces and collectively constitute a non-dominant and marginalised group in the Federation of Malaysia who have voluntarily perpetuated a cultural distinctiveness compared to dominant society.[10] Similar to other indigenous peoples internationally, these heterogeneous communities, which have been officially categorised into more than 100 ethnic and sub-ethnic groups, also struggle to maintain the inextricable political, social, economic and cultural link that they possess with their respective and distinctive local spatial niches. This link defines their culture, identity and well-being. Accordingly, the focus of this article will be on the customary territorial rights of these three groups, namely the natives of Sabah, natives of Sarawak and Peninsular Malaysia Orang Asli.

Notwithstanding the provision for equality under Article 8 of the Federal Constitution, Article 153 of the Federal Constitution provides for the *Yang Dipertuan Agong*[11] to safeguard the 'special position of … natives of any of the States of Sabah and Sarawak'.[12] This spe-

4. Department of Statistics, Malaysia Official Portal, <https://www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=155&bul_id=a1d1UTFZazd5ajJiRWFHNDduOXFFQT09&menu_id=L0pheU43NWJwRWVSZklWdzQ4TlhUUT09> (last visited 6 September 2017).
5. Central Intelligence Agency Library, *The World Factbook: East and Southeast Asia: Malaysia* <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html> (last visited 1 May 2017).
6. A 'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and: (a) was before *Merdeka* Day (31 August 1957) born in Malaya or Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of that person (*see* Art. 160(2) *Federal Constitution*).
7. Article 161A(6)(b) of the *Federal Constitution* provides that a native in relation to Sabah is a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day [16 September 1963) or not) either in Sabah or to a father domiciled in Sabah at the time of birth.
8. Article 161A(6)(a) of the *Federal Constitution* provides that a native in relation to Sarawak is a person who is a citizen, is the grandchild of a person of the Bukitan, Bisayah, Dusun, Sea Dayak, Land Dayak, Kadayan, Kalabit, Kayan, Kenyah (including Subup and Sipeng), Kajang (including Sekapan, Kejaman, Lahanan, Punan, Tanjong and Kanowit), Lugat, Lisum, Malay, Melano, Murut, Penan, Sian, Tagal, Tabun and Ubit race or is of mixed blood deriving exclusively from these races.
9. Orang Asli are defined as 'the Aborigines of the Malay Peninsula' and are officially classified into 18 sub-ethnic groups consisting of three broad groups, namely, the Negrito, Senoi and Aboriginal Malays (*see* Department of Orang Asli Development, *The Orang Asli of Malaysia* <www.jakoa.gov.my/en/> (last visited 26 May 2017)).
10. SUHAKAM, *Report of the National Inquiry into the Land Rights of Indigenous Peoples* (2013), at 10-11.
11. This is the domestic equivalent of the 'King' in Malaysia who is appointed on a rotational basis every 5 years by and from the Council of Rulers of the States in Peninsular Malaysia that have monarchs as a head of state (*see Federal Constitution*, Arts. 33-38, Third and Fifth schs.).
12. This article was introduced when Sabah, Sarawak, the Federation of Malaya and Singapore formed Malaysia in 1963.

cial position includes reservations of positions in the public service, scholarships and other educational and training privileges and licences for the operation of any trade or business required by federal law.[13] In terms of land, Article 161A(5) of the Federal Constitution permits any provision of state law for the 'reservation of land…or for alienation' to natives of Sabah and Sarawak or 'for giving them preferential treatment as regards the alienation of land by the State'.

In contrast, Peninsular Malaysia Orang Asli do not enjoy such overt constitutional rights as they are legally dependent on the federal government to exercise its discretion for their welfare, possibly due to their lack of political power when the *Malayan* and, subsequently, the Federal Constitution was forged in 1957 and 1963, respectively. Item 16 of the Ninth schedule of List I of the Federal Constitution specifically empowers the federal government to legislate for the welfare of Orang Asli.[14] Article 8(5)(c) of the Federal Constitution permits laws 'for the protection, well-being or advancement' of Orang Asli 'including, the reservation of land' or the 'reservation to Orang Asli of a reasonable proportion of suitable positions in the public service' without offending the equal protection clause of the Federal Constitution contained in Article 8(1). Despite enabling positive discrimination laws in favour of Orang Asli, these constitutional provisions do not expressly oblige the federal government[15] to safeguard the position of the Orang Asli. Natives of Sabah and Sarawak also enjoy broader constitutional protection against laws that touch upon their respective customs[16] while Orang Asli have no equivalent protection with respect to their languages, laws, traditions, customs and institutions.

Despite these different levels of constitutional protection, both native and Orang Asli communities, similar to other indigenous peoples internationally, have shared a long history of dispossession of their customary territories, a predicament exacerbated by their lack of security of tenure over these areas.[17] More recently, increased demand for lands and resources has resulted in acute encroachment and appropriation of the remaining areas inhabited by local indigenous communities.[18] These problems exist for the natives of Sabah and Sarawak in spite of the express legal recognition of native customary rights (NCR) in both Sabah[19] and Sarawak.[20] Part of the problem lies with the fact that the relevant written laws in Sabah and Sarawak empower the respective state executives to determine the extent of legal recognition and protection granted in respect of native customary lands.[21] More visibly in Peninsular Malaysia, the statutory power of the individual state government to recognise and protect Orang Asli land and resource rights through the grant of title, reservations, licenses and exemptions under written law has not worked to the advantage of the Orang Asli.[22]

The indigenous land, territory and resource issue and the apparent failure to effectually crystallise the special constitutional and legal position of Malaysian indigenous peoples was examined in the 2013 Malaysian Human Rights Commission (SUHAKAM) Report of the National Inquiry into the Land Rights of Indigenous Peoples (the SUHAKAM Report), a culmination of an 18-month public inquiry into indigenous land rights issue commissioned by the Malaysian government.[23] The SUHAKAM Report suggests that the definitional scope and implementation of laws enacted in favour of indigenous communities are the root legal causes for the indigenous land rights problem. Notwithstanding court pronouncements recognising indigenous customary rights, the SUHAKAM Report found that state legislatures and executives had, amongst other matters and in common, determined the scope of legal recognition afforded in respect of indigenous customary territories in a manner that reduced the spatial extent of indigenous territories and limited indigenous participation in respect of matters affecting their lands and resources.[24] Compounding matters, existing laws and policies relating to lands and resources were not effectively implemented in favour of indigenous communities, with the respective governments deprioritising the rights of these communities in favour of other agendas.[25]

In terms of redress for the loss of customary territories, there are legal provisions for the payment of monetary compensation under statutory law when indigenous lands, territories and resources are expropriated or

13. Article 153(2).
14. Article 74(1) of the *Federal Constitution* empowers the federal government to legislate for matters enumerated in the Federal list (Ninth sch. List I) and Concurrent List (Ninth sch. List III).
15. Notwithstanding, the Malaysian courts have held that the federal and state governments owe Orang Asli a fiduciary duty to protect the welfare of the Orang Asli, including their lands when Orang Asli have taken the Federal and State governments to court for third party encroachments over lands proven to be Orang Asli customary areas. The findings were supported by constitutional and statutory provisions and other sources (*see Sagong bin Tasi* v. *Kerajaan Negeri Selangor* (2002) 2 MLJ 591, at 618-19). For an overview on the scope of the fiduciary duty owed to the Orang Asli, *see* Y. Subramaniam, 'Affirmative Action and Legal Recognition of Customary Land Rights in Peninsular Malaysia: The Orang Asli Experience', 17(1) *Australian Indigenous Law Review* 103 (2013), at 109.
16. *Federal Constitution*, Arts. 76(2) and 150(6A). There are also constitutional rights for the resolution of such disputes by the Syariah courts (*see Federal Constitution*, Art. 121(1A)) in respect of Malays and native courts (*see Federal Constitution*, Art. 72(20) and Ninth sch, List IIA, Item 13) in respect of natives of Sabah and Sarawak.
17. For an acknowledgment of these issues by the Malaysian Human Rights Commission, *see e.g.* SUHAKAM (2013), above n. 10, at v-vi.
18. Open Society Justice Initiative ('OSJI'), *Strategic Litigation Impacts on Indigenous Peoples' Land Rights* (2017), at 31-32.
19. *See e.g. Sabah Land Ordinance*, ss. 15, 65 and 66.
20. *See e.g. Sarawak Land Code*, s. 5.
21. For statutory scope of 'recognised' NCR as determined by the State, *see* e.g. nn. 19 and 20 above. In respect of State administrative powers to determine NCR claims in Sabah, *see e.g. Sabah Land Ordinance*, ss. 81 and 82. In respect of the State powers for the creation of Native Communal Reserves and the granting of permits for native claimants after 1958 In Sarawak, *see e.g. Sarawak Land Code* ss. 6 and ss. 5(1) and 10 respectively.
22. For statistics and observations on the State's poor performance in protecting Orang Asli lands, *see* SUHAKAM (2013), above n, 10, at 132.
23. *See* SUHAKAM (2013), above n. 10.
24. *Id*., at 101-4 (Sabah); 124-5 (Sarawak); 149-51 (Peninsular Malaysia).
25. *Id*., at 105-7 (Sabah); 126-7 (Sarawak); 151-2 (Peninsular Malaysia).

rights to such areas are extinguished.[26] However, the adequacy of the statutory compensation scheme is arguable since for most indigenous peoples it is not the monetary value of the land which is at stake, but rather access to their ancestral territories to maintain and perpetuate their own way of life. As such, the return of indigenous lands, territories and resources expropriated or taken is regarded as more vital to indigenous communities. In this respect, there are no *statutory provisions* that provide for the remedy of restitution or return of indigenous lands, territories and resources. Faced with the threat of being stripped of their remaining customary territories, affected indigenous communities have, in addition to other political responses, sought redress in the courts from the late 1980s for their dilemma and in particular employed the common law to some measure of success.

3 The Malaysian Courts' Recognition of Indigenous Customary Rights

Applying international common law developments on indigenous land rights,[27] the Malaysian courts have, since 1996, recognised the pre-existing customary land rights of indigenous peoples without the need for formal recognition by the legislature or executive.[28] In *Adong bin Kuwau & Ors* v. *Kerajaan Negeri Johor and Anor* ('*Adong HC*'),[29] the High Court awarded the sum of RM26.5 million as compensation for the loss of Jakun-Orang Asli foraging lands expropriated for the construction of a dam on the basis of the privileged constitutional, statutory and common law status held by Peninsular Malaysia Orang Asli. Essentially, the Court recognised the principles of common law native title from other common law jurisdictions, including the landmark decisions of *Mabo* v. *Queensland [No 2]*[30] ('*Mabo [No 2]*') and *Calder* v. *AG*[31] ('*Calder*') from Australia and Canada, respectively. In doing so it recognised the continued legal enforceability of pre-existing Orang Asli rights to their ancestral and customary lands held as native inhabitants. *Adong HC*, which was affirmed on appeal in 1998,[32] opened the door for indigenous communities to assert their customary territorial rights in the courts beyond codified law. To some extent, the common law recognition of pre-existing rights of indigenous peoples was subsequently found to be applicable to NCR in the jurisdictions of Sabah[33] and Sarawak.[34]

The Malaysian superior courts' recognition of pre-existing rights of indigenous peoples to their ancestral and customary lands at common law has complemented existing protections afforded to Orang Asli and natives of Sabah and Sarawak under the Federal Constitution and written law. Due to the Malaysian legal system's common law roots from British rule, the doctrine of judicial precedent means that decisions of the superior courts – meaning the Federal Court and Court of Appeal – are usually binding upon the lower courts in subsequent similar cases. Under Articles 160(2) and 162 of the Federal Constitution, the common law as developed in Malaysia forms part of 'existing law' in Malaysia and is therefore legally binding.[35]

3.1 Madeli bin Salleh and the Source of Common Law Rights

In 2007, the apex court of Malaysia, namely the Federal Court, affirmed *Adong HC* and the subsequent Sarawak decision of Nor *Anak Nyawai*'s domestic application of *Mabo [No 2]* and *Calder* as a *question of law* when ruling that the Malaysian common law recognises and protects the pre-existing rights of indigenous people in respect of their lands and resources.[36] In doing so, a unanimous panel in *Madeli bin Salleh* held, amongst other matters, that the common law was not mere precedence but formed part of the substantive law in Malaysia and that the recognition of such indigenous rights was in accordance with the provisions of the Civil Law Act 1956, the relevant legislation enabling the domestic application of the common law.[37]

According to the Federal Court in *Madeli bin Salleh*, the source of the recognition of indigenous rights to lands and resources at common law in Malaysia lay in its application of the 'general statement of the common law' enunciated 'throughout the Commonwealth' in *Mabo [No 2]*, *Calder* and other colonial decisions of the Privy Council that 'the courts will assume that the Crown intends that rights of property of the *(native)*

26. *See e.g. Aboriginal Peoples Act 1954* ('*APA*'); ss. 11 and 12 (Peninsular Malaysia); *Sarawak Forest Ordinance*, ss. 4(1)(c), 11, 17, 24, 26(1)(c), 35(2)-(4), 39; *Sarawak Land Code*, ss. 5(3), (4) and (6); *Sabah Forest Enactment*, s. 13; *Sabah Land Ordinance*, ss. 16, 83; *Sabah Land Acquisition Ordinance*.
27. For commentary on these developments internationally, *see* P.G. McHugh, *The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press) (2011).
28. *See e.g. Adong bin Kuwau* v. *Kerajaan Negeri Johor* [1997] ('*Adong HC*') 1 MLJ 418 *Kerajaan Negeri Johor* v. *Adong bin Kuwau* ('*Adong CA*') [1998] 2 M.L.J 158, (Court of Appeal, Malaysia); *Sagong bin Tasi* v. *Kerajaan Negeri Selangor* ('*Sagong HC*') [2002] 2 MLJ 591; *Sagong CA* [2005] 6 MLJ 289; *Nor Anak Nyawai* v. *Borneo Pulp Plantation Sdn Bhd* ('*Nor Nyawai HC*') [2001] 6 MLJ 241; *Superintendent of Lands & Surveys, Bintulu* v. *Nor Anak Nyawai and another appeal* ('*Nor Nyawai CA*') [2006] 1 MLJ 256 (Court of Appeal, Malaysia). For an analysis of the relevant jurisprudence, *see* SUHAKAM (2013), above n. 10, at 68-80; Y. Subramaniam, *Orang Asli Land Rights by UNDRIP Standards in Peninsular Malaysia: An Evaluation and Possible Reform* (PhD Thesis, University of New South Wales, 2012), chs. 6 and 7).
29. *Adong HC* [1997] 1 MLJ 418, at 426-33.
30. (1992) 175 C.L.R 1.
31. [1973] S.C.R. 313.
32. *Adong CA* [1998] 2 MLJ 158.
33. *Rambilin binti Ambit* v. *Assistant Collector for Land Revenues Pitas* (Judicial Review K 25-02-2002).
34. *See e.g. Nor Nyawai HC* [2001] 6 MLJ 241; *Nor Nyawai CA* [2006] 1 MLJ 256.
35. *Superintendent of Land and Surveys Miri Division* v. *Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)* ('*Madeli* ') [2008] 2 MLJ 677, at 690-1 (Federal Court).
36. *See Madeli* [2008] 2 MLJ 677, at 692.
37. *See Madeli* [2008] 2 MLJ 677, at 692.

inhabitants are to be fully respected' and that '[t]he Crown's right or interest is subject to any native rights over such land'.[38]

Since then, the Malaysian courts have developed their own brand of common law domestic jurisprudence on the recognition of indigenous rights to lands, territories and resources guided by local laws and circumstances. In this regard, there are nonetheless several observations that can be made from *Madeli bin Salleh* that suggest a guarded and insular judicial approach to common law indigenous rights. First, the Federal Court, having recognised the legal continuity of indigenous rights to land at common law in its reasoning, went on to refer to prior executive edicts and orders expressly recognising such rights to reinforce its decision,[39] when there was no legal necessity to do so. Further, the lower court decisions of *Adong HC* and *Nor Nyawai* recognising indigenous rights to land affirmed by the Federal Court were not solely based on the common law but were equally justified by the particular constitutional status[40] held by the indigenous claimants.[41] Finally, the Federal Court did not employ any sources of international law in arriving at its decision, possibly indicating a reluctance to apply international norms which will be revisited in Section 4.2.2.

3.2 Relevant Characteristics of Common Law Doctrine in Malaysia

The main characteristics of common law indigenous land and resource rights in Malaysia can be said to have been derived from early 'recognition' jurisprudence from Canada and Australia,[42] qualified however by domestic constitutional and statutory provisions for the recognition, regulation and protection of such rights. Notwithstanding these legal provisions, it can be seen that the relevant features of the common law doctrine in Malaysia are not dissimilar to general common law principles in Australia and Canada. The Malaysian superior courts have held that the radical title held by the state is subject to any pre-existing rights held by indigenous people.[43] These rights are primarily established by way of prior and continuous occupation of the claimed areas[44] and oral histories of the claimants relating to their customs, traditions and relationship with these areas.[45] 'Occupation' of land does not require physical presence but evidence of continued exercise of control over the land.[46]

These rights can be taken away through legal extinguishment by the state or alternatively, if the local indigenous community is demonstrated to have abandoned its lands, territories and resources. Legal extinguishment of these rights may be by way of plain and unambiguous words in legislation[47] or an executive act authorised by such legislation.[48] If these rights are extinguished, adequate compensation, meaning compensation that is just in the circumstances, is due in accordance with Article 13 of the Federal Constitution.[49] Indigenous customary rights under Malaysian law are therefore susceptible to unilateral extinguishment by law, with relatively little jurisprudential development on the principle of free, prior and informed consent of indigenous communities in matters affecting their lands, territories and resources.

At present, the remedy of restitution in Malaysia appears to be limited to circumstances where the court determines that the extinguishment has been wrongful or there has been no extinguishment by plain and obvious words.[50] The term 'wrongful' extinguishment here refers to circumstances where the state possesses the statutory power to extinguish NCR as in the cases of Sabah and Sarawak but may have exercised that power unlawfully. Practically, the argument that there has been no extinguishment of rights has been and is more likely to arise in the case of the Peninsular Malaysia Orang Asli as the written laws of Peninsular Malaysia do not recognise Orang Asli customs relating to lands and resources, let alone evince a 'plain and obvious' legislative intent to extinguish those rights.

3.3 Restitution as a Remedy for Indigenous Dispossession?

In terms of restitution, the Malaysian Court of Appeal has returned and alienated settled and cultivated customary lands and reserved foraging areas in favour of Semelai-Orang Asli claimants who had *continuously* occupied and inhabited those areas before the creation of a Malay reservation.[51] In Sarawak, the Court of Appeal has ordered the return of leasehold lands to natives who had established prior customary rights.[52]

Although the judicial return of indigenous lands seems to be legally permissible in Malaysia, indigenous communities would have to overcome the barriers of establishing their claims by evidence and the doctrine of extinguishment *before* the remedies of restitution or adequate compensation are ordered by the court. Addition-

38. [2008] 2 MLJ 677, at 691-2.
39. [2008] 2 MLJ 677, at 693-4.
40. For the relevant constitutional provisions, *see* nn. 11-16 above and accompanying text.
41. *Adong HC* [1997] 1 MLJ 418, at 431-2; *Nor Nyawai HC* [2001] 6 MLJ 241, at 277-8, 297, 298.
42. *See* n. 38 above and accompanying text. For observations on the extensive application of Canadian and Australian jurisprudence by the Malaysian courts in this regard and some comparative analysis, *see* Subramaniam (2012), above n. 28, at chs. 6 and 7.
43. *See e.g. Sagong CA* [2005] 6 MLJ 289, at 301-2; *Madeli* [2008] 2 MLJ 677, at 692.
44. *See Nor Nyawai CA* [2006] 1 MLJ 256, at 269.
45. *See Sagong HC* [2002] 2 MLJ 591, at 610, 621-4.
46. *Madeli* [2008] 2 MLJ 677, at 694-5.
47. *Ketua Pengarah Jabatan Hal Ehwal Ehwal Orang Asli & Anor* v. *Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors and another appeal* ('*Nohing CA*') [2015] 6 MLJ 527, at 542-4; *Madeli* [2008] 2 MLJ 677, at 690, 696-7.
48. *Madeli* [2008] 2 MLJ 677, at 689, at 698.
49. *Adong CA* [1998] 2 MLJ 158, at 163-4; *Sagong HC* [2002] 2 MLJ 591, at 617; affirmed, *Sagong CA* [2005] 6 MLJ 289, at 309-10; *Madeli* [2008] 2 MLJ 677, at 691-2.
50. *Nohing CA* [2015] 6 MLJ 527, at 542-4.
51. *Id*.
52. *See e.g. Superintendent of Lands and Surveys, Kota Samarahan Division* v. *Luking ak Uding* ('*Luking*') [2016] 2 MLJ 783; *Superintendent of Lands and Surveys Department Sibu Division* v. *Usang ak Labit* [2014] 3 MLJ 519.

ally, the issue of whether indefeasibility of grants of title trump prior indigenous customary rights across all three jurisdictions, meaning Sabah, Sarawak and Peninsular Malaysia, has yet to be authoritatively determined by the Malaysian courts.[53] As will be observed in Sections 4 and 5 below, indigenous communities face legal and extra-legal problems in securing the restitution of their current lands, territories and resources, which transcend issues of proof and extinguishment of rights.

4 Legal Challenges to Litigating Restitution of Indigenous Territories

This section examines the obstacles faced by Malaysian indigenous communities in negotiating the litigation process to secure customary territorial rights before analysing the main vulnerabilities and limitations relating to the substantive common law jurisprudence on the recognition and restitution of indigenous customary areas. Observations are also made on the practical utility and resilience of court litigation as a mode for the return of indigenous territories to the community. The analysis will focus on both general issues confronting indigenous plaintiffs claiming recognition of common law customary rights and those seeking the remedy of restitution.

4.1 The Litigation Process

In the first place, many potential indigenous litigants in Malaysia cannot afford legal services and are not provided legal aid for customary land rights litigation,[54] thus dashing the prospect of many a claim from its outset. If the community is able to secure legal representation, indigenous litigants constantly have to grapple with marshalling community participation, decision-making and unity throughout the litigation process, ranging from the gathering of evidence to support a claim to trusteeship matters relating to the fruits of litigation in the event of a successful claim.[55] Disunity within the claimant community[56] and breaches of trust in relation to compensation monies[57] have functioned to prejudice and defeat claims and deprive successful litigants, respectively. Once a community finds the joint will to pursue litigation, their doors open to a long and arduous process that does not inevitably translate to an immediate remedy to their problem. To illustrate, the Temuan-Orang Asli claimants in the *Sagong bin Tasi* case[58] endured 12 years of litigation including appeals before they were adequately compensated for the loss of their customary lands acquired for the construction of a highway. And in the Semelai-Orang Asli case of *Mohamad bin Nohing*,[59] despite all avenues for appeal being exhausted in March 2016, the Court of Appeal's 2015 decision to return and alienate the Semelai-Orang Asli's land has yet to see fruition due to various administrative delays.[60]

As seen in other jurisdictions,[61] the formal setting and adversarial nature of civil proceedings are arguably at odds with indigenous perspectives on dispute resolution, which are relatively less formal and more participatory. This can make giving evidence for indigenous witnesses an extraordinarily difficult ordeal, and perhaps more importantly, put them at a tactical disadvantage compared to other witnesses.[62] Language barriers, particularly in the case of community elders who may not have a sufficiently good command of the official language of the Malaysian courts (Malay or English), can function to weaken the plaintiffs' claim. Epistemological differences between indigenous worldviews and those of others also do not necessarily work to the advantage of an indigenous witness in court.

Aggravating matters for indigenous claimants, the Malaysian courts have prescribed an overly circumspect view that testimonies by 'self-serving' indigenous plaintiffs in support of their claims 'should carry little or no weight in the absence of some other credible corroborative evidence'.[63] Indigenous laws, customs and traditions in Malaysia are steeped in oral histories and would be at a handicap compared to the written word of others, particularly official maps and documents, which ironically and in many ways, are 'self-serving' in their own right.

The evidential burden in civil claims has functioned to defeat indigenous land rights claims in other commonwealth jurisdictions.[64] While the Malaysian courts have been said to have adopted a relatively more relaxed and sensitive judicial approach towards the proof of customary rights,[65] the need for supporting evidence, particularly in light of the relative dearth of documentation directly relating to historical indigenous occupation, use and enjoyment of areas claimed, remains a challenge in Malaysia. This requirement necessitates corroborative expert evidence, documents and maps to assist in the

53. At the time of writing, the Federal Court is deliberating this issue in the context of Sarawak. This case is discussed in Section 4.2.3.
54. *See* OSJI (2017), above n. 18, at 6, 76; Y. Subramaniam, 'Orang Asli, Land Rights and the Court Process: A "Native Title" Lawyer's Perspective' in K. Endicott (ed.), *Malaysia's Original People: Past, Present and Future of the Orang Asli* (Singapore: National University Press) (2015), 423-45, 432-3.
55. For a practical examination of issues surrounding indigenous land rights litigation in Malaysia, Kenya and Paraguay, see generally, OSJI (2017), above n. 18.
56. *See* OSJI (2017), above n. 18, at 58.
57. *Id*., at 35 (n. 87).
58. *See Sagong HC* [2002] 2 MLJ 591; *Sagong CA* [2005] 6 MLJ 289.
59. *Nohing CA* [2015] 6 MLJ 527 (Court of Appeal).
60. Interview with Ms Tan Hooi Ping from Messrs Lee Hishamuddin Allen Gledhill, solicitors for the Semelai-Orang Asli plaintiffs, 27 April 2017.
61. For example, in respect of Canada, *see e.g.* Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996), at vol 2, Part 2, ch 4 s 1, <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>, 6 December 2017 and Australia, *see e.g.* Sean Brennan *et al, Treaty* (2005), at 114-16.
62. *See* Subramaniam (2015), above n. 54, at 439.
63. *Nor Nyawai CA* [2006] 1 MLJ 256, at 272.
64. For a broad discussion of these issues, *see e.g.* McHugh (2011), above n. 27, at 258-68.
65. McHugh (2011), above n. 27, at 193.

court's deliberation. Furthermore, the controversial nature of indigenous claims, which involve the state and large corporations, may function to reduce the number of experts willing to testify on behalf of indigenous claimants. Perhaps more pertinently, the lack of financial resources to fund the court case and to engage an expert, work to the detriment of indigenous litigants.

However, there is also precedent from the Malaysian Court of Appeal that propounds a 'realistic approach' when considering supporting evidence in customary rights claims, taking cognisance of the claimants' reliance on oral evidence and the impediments in producing surveyed maps and official documentation.[66] In advocating this approach, the Court seems to have taken cues from the Canadian Supreme Court in *Delgamuukw* v. *British Columbia*,[67] which acknowledges the evidential difficulties inherent in aboriginal land claims and the need to have regard to aboriginal perspectives in such matters. If there are lessons to be learnt from Canada, it is that much remains to be done to address the larger issues of structural bias and cultural difference and control that indigenous peoples encounter in bringing their cases to the Canadian courts in spite of the courts' acknowledgment of interpretative difficulties and consideration of aboriginal perspectives.[68]

In any event, the contrasting approaches taken by the Malaysian court in considering evidentiary matters in an indigenous land and resource rights claim epitomises the uncertainties inherent in the litigation process which, as will be observed in the following section, transcends procedural law and moves into the substantive jurisprudence on indigenous rights and remedies relating to their customary lands, territories and resources.

4.2 The Evolving Jurisprudence

The spatial extent of indigenous areas legally recognised by the Malaysian courts through the common law jurisprudence, the Malaysian courts' application of international norms, and the resilience of common law recognition of rights when pitted against overlapping land and resource interests created by the state are vital aspects in evaluating the overall effectiveness of the courts in the restitution of indigenous lands, territories and resources. All these aspects of the doctrine are examined in the following sections.

4.2.1 The Recognition of Unsettled and Uncleared Areas

Following established jurisprudence including the landmark Privy Council opinion in *Amodu Tijani* v. *The Secretary, Southern Nigeria*, where property rights peculiar to native communities throughout the British commonwealth were legally recognised through the common law,[69] the Malaysian Court of Appeal observed that the precise nature of indigenous customary rights to lands and resources is 'determined by the customs, practices and usages of each individual community' and this matter 'is a question of fact' to be determined by the court.[70] In other words, common law indigenous customary land rights in Malaysia do not 'owe their existence to any statute' or executive declaration.[71] It would therefore follow that these rights exist independently of written law, a proposition supported by the decision in *Adong HC* where the court held 'in order to determine the extent of aboriginal peoples' full rights under law, their rights under common law and statute has to be looked at conjunctively, for both these rights are complementary…'.[72]

Accordingly, the Malaysian courts have granted rights ranging from usufructuary rights (53,000 acres of foraging land in *Adong HC*) to customary title (38.77 acres of settled lands in *Sagong HC*[73]) in favour of indigenous claimants who have been able to establish customary rights through prior and continuous occupation of and/or the maintenance of a traditional connection with the land in accordance with distinctive customs of the claimant group. However, most defendants have consistently disputed the legal right of indigenous communities to unsettled lands, which would include hunting and foraging areas. Specifically, the Sarawak state government has disputed whether the common law recognition of NCR should extend beyond cleared and settled areas as the written laws of Sarawak do not expressly provide for the recognition of traditional forest areas set aside by native communities for, amongst others, hunting and the collection of forest produce.

Despite earlier jurisprudence that such native customs need not be contained in written laws to be recognised under the common law, this issue found its way to the Federal Court in *Director Of Forest, Sarawak* v. *TR Sandah Tabau* ('*TR Sandah FC*')[74] in 2015 where the Federal Court had to determine whether the common law recognition of NCR or, more specifically, *Iban* customary rights, extended to the broader native customary territory ('*pemakai menoa*') and forest reserved for food and forest produce ('*pulau*'), primarily because these customs were never contained in any of the legislation and executive orders relating to Sarawak.[75]

In December 2016, the Federal Court found in favour of the state and other appellants and allowed their appeals by a majority decision of 3:1 but of greater consequence were the findings of the court on the legal questions posed on the scope of the recognition afforded to the Iban natives by the common law in the state of Sarawak.

Of the five judges on the panel (of which one judge had retired before the Federal Court judgment was handed

66. *Abu Bakar bin Pangis* v. *Tung Cheong Sawmill Sdn Bhd* [2014] 5 MLJ 384, at 407-8.
67. [1997] 3 SCR 1010, at 1065-1066.
68. *See e.g.* J. Borrows, 'Listening for Change: The Courts and Oral Tradition', 39(1) *Osgoode Hall Law Journal* 1 (2001).
69. [1921] 2 A.C. 399.
70. *Sagong CA* [2005] 6 MLJ 289, at 301-2.
71. *Sagong HC* [2002] 2 M.L.J 591, 612; *Nor Nyawai CA* [2006] 1 MLJ 256, at 270.
72. *Adong HC* [1997] 1 MLJ 418, at 431.
73. [2002] 2 MLJ 591.
74. [2017] 3 CLJ 1.
75. *See TR Sandah FC* [2017] 3 CLJ 1, at 16-17 for the questions of law posed to the Federal Court.

down), Raus PCA (with Ahmad Maarop FCJ concurring) held that the pre-existence of rights under native laws and custom, which the common law respected, were limited to the Iban custom of *temuda* (covering cleared, settled and cultivated lands) and did not encompass rights to land in the entire customary territory and the primary forest which natives had not felled or cultivated (meaning the *Iban* customs *pemakai menoa* and *pulau*, respectively) because these rights had not been recognised by the laws of Sarawak.[76]

In arriving at this finding, Raus PCA confined himself to construing the written laws, edicts and executive orders of Sarawak because in his Honour's view, that 'customs which the laws of Sarawak recognise' were limited to written laws that had been given the force of law[77] by the legislature and executive and not those recognised through the common law by the courts. Perhaps focusing more on the specific legal history of Sarawak, Raus PCA had earlier cited with approval the Peninsular Malaysia decisions of *Adong HC* and *Sagong*,[78] which had recognised Peninsular Malaysia indigenous customary rights at common law, including rights to foraging areas notwithstanding that there had been no prior legislative or executive sanction for such rights.[79]

In dissent, Zainun Ali FCJ held that the fact that neither the *pemakai menoa* nor *pulau* were not contained in the written law of Sarawak would preclude the recognition of those rights under the common law. Her Ladyship observed in the following terms:

> …the repeated reliance on the fact that these customs have never received legislative recognition misses the heart of the appeal in this case.
>
> [214] With respect, the submission of the appellant thus far, does not seem to add up. In other words, the wrong weight has been given to legislation – it should not and has never been completely determinative/fatal to recognition in the common law. The two are separate questions. And that the lack of regulation does not mean that there is no existence – there is no logical link between the two, merely a descriptive one (what we could, perhaps call a correlation). Customs are sui generis and do not find their roots in statute, hence they are called customs.[80]

Having effectively answered the legal questions posed favouring the natives in holding that the common law recognition of NCR was 'a question of evidence' rather than law,[81] the fourth judge, Abu Samah FCJ, remarkably found it unnecessary to answer the questions posed to the court on the basis of his opinion that the plaintiff had failed to prove their claims on a balance of probabilities.[82]

The majority decision in *TR Sandah FC* is pending review, a process that is successful only in the most exceptional of circumstances. Currently, it is also unclear as to the extent to which the Malaysian courts will apply the majority decision in the jurisdictions of Peninsular Malaysia and Sabah given the questions posed and the determination made in respect of particular legal circumstances in Sarawak. Merits aside, the decision in *TR Sandah FC* in effect limits the remedy of restitution in the state of Sarawak by confining enforceable indigenous customary rights to cleared, settled and cultivated areas.

The lack of doctrinal reasoning by the majority of the Federal Court as to why the continuity of pre-existing customary rights *without the need for formal recognition*, as recognised by established common law principles and affirmed by the Federal Court in *Madeli bin Salleh*, should only be limited to cleared, settled and cultivated areas and not larger hunting and foraging areas begs the question of a possible predisposition towards sedentism of indigenous communities. Sedentism and eventual integration of indigenous communities, as contained in the *ILO Convention 107*,[83] the earliest international treaty explicitly recognising indigenous rights, has since been considered to be outmoded and no longer reflective of international human rights standards on indigenous self-determination.[84] Such perspectives, if indeed dominant in the Malaysian courts, do not augur well both for the municipal judiciary and the domestic indigenous rights movement.

More generally, *TR Sandah FC* yet again illustrates the proposition that the development of indigenous rights through the courts is subject to regress and a degree of judicial unpredictability.[85]

4.2.2 Reluctance to Apply International Indigenous Norms

Despite there being instances where the Malaysian courts have utilised the provisions of international human rights conventions to which Malaysia is party in their deliberations,[86] the appellate courts have demonstrated a marked reluctance to treat such provisions as legally binding or in 'sticking very closely'[87] to those

76. *TR Sandah FC* [2017] 3 CLJ 1, at 36.
77. *Id*., at 33.
78. *Id*., at 22-26.
79. *Id*., at 29-30. For general principles on the common law doctrine in Malaysia, *see* above nn. 27-50 and accompanying text.
80. *Id*. at 63.
81. *Id*. at 84-85.
82. *Id*. at 85-87.
83. *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, ILO C 107.
84. *See e.g.* Xanthaki (2007), above n. 3, at 52-56, 67-71.
85. This is not an altogether unfamiliar phenomenon. For the judicial curtailment of native title in Australia, *see e.g.* S. Brennan, 'Native Title in the High Court of Australia a Decade after Mabo', 14 *Public Law Review* 209 (2003).
86. *See e.g. Noorfadilla Ahmad Saikin* v. *Chayed Basirun* [2012] 1 CLJCLJ 769 in respect of the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13; *PP* v. *MFK* [2010] 6 CLJ 95 in respect of the United Nations *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.
87. *Pathmanathan Krishnan* v. *Indira Gandhi Mutho* [2016] 1 CLJ 911, at 935-7 (Court of Appeal).

provisions unless they have been enacted into local laws.[88] Malaysia is also not a party to any binding international conventions that directly concern indigenous rights to lands, territories and resources. As for the UNDRIP, which is a declaration rather than a binding treaty, the draft was referred to by the Court in *Nor Anak Nyawai* but the judge was quick to add that the document played 'no part in my decisions on the issues in this case since they do not form the law of our land'.[89] In the Federal Court appeal in *Bato Bagi* v. *Kerajaan Negeri Sarawak*, Raus PCA observed in no uncertain terms:

> [o]n the issue whether this court should use "international norms" embodied in the UNDRIP to interpret arts. 5 and 13 of the Federal Constitution I have only this to say. International treaties do not form part of our law, unless those provisions have been incorporated into our law. We should not use international norms as a guide to interpret our Federal Constitution.[90]

Perhaps more ambivalently, Zaki CJ observed on the invocation of the UNDRIP, 'it must still be read in the context of our Constitution',[91] suggesting that the issue may be open for future consideration before less conservative appellate panels.

It can therefore be gleaned from this section that the judicial development of indigenous rights *and remedies* in Malaysia has been a slow and measured process, impaired by not only the vagaries of the legal process but periods where judicial conservatism is more pronounced.

4.2.3 Extinguishment by Alienation?

In Malaysia, extinguishment of indigenous customary land and resource rights at common law can take place by plain and unambiguous legislative words[92] or in the case of Sabah and Sarawak, where there are express statutory provisions for the extinguishment of NCR.[93] In either case, adequate compensation is payable to customary rights holders with no apparent right of restitution of appropriated lands and resources in the future. It is also clear that a mere reservation of land by the state without plain and clear legislative intent for extinguishment does not extinguish indigenous rights as such power 'cannot be derived by mere implication'.[94]

However, the Malaysian superior courts have yet to authoritatively determine whether the alienation of state lands to public or private owners amounts to an acquisition or extinguishment of indigenous customary rights to their lands, territories and resources. In this sense, common law jurisprudence may function as a double-edged sword in Malaysia where indigenous rights can, in certain circumstances, be extinguished by a grant of title inconsistent with the continued enjoyment of such rights.[95]

In *Kong Chee Wai*, the court nullified a document of title that overlapped with lands continuously occupied by the Semai Orang Asli plaintiffs and ordered the reservation of these and other lands where customary rights had been established.[96] The Malaysian courts have also ordered the restitution of state-created leasehold interests to native claimants where NCR had been established as 'the issue of indefeasibility of title is dependent on the finding of fact whether the plaintiff had proved their NCR claim'.[97] The legal justification for restitution seems to lie in the principle that the radical title held by the state is subject to any pre-existing rights held by indigenous people.[98]

That said, the Malaysian superior courts are due to revisit the remedy of restitution of indigenous lands and territories where lands continuously inhabited by indigenous claimants have been afterward alienated and registered in favour of subsequent owners. At the time of writing, the Federal Court is deliberating an appeal from Sarawak on the questions of: (i) whether indefeasibility of title under *Land Code* (Sarawak) remains applicable even if it can be shown that prior NCR had been created over land under the same Land Code; and (ii) if the proper remedy for the loss or infringement of NCR as a result of alienation where such rights exist without extinguishment should be an award of damages and not a declaration to nullify the title.[99] In Peninsular Malaysia, the High Court, having held that the Seletar-Orang Asli plaintiffs had established customary rights to the lands in question, refused the plaintiffs' claim for return of lands that overlapped with alienated lands under the Peninsular Malaysia *Land Code 1965* and instead ordered, the payment of adequate monetary compensation.[100] A paramount consideration in refusing restitution was that the registered landowner defendants were innocent bona fide purchasers who also possessed constitutional and statutory rights to property that co-existed with but could not be overridden by prior indigenous customary rights.[101] Both the plaintiffs and defendants have appealed against the decision.

In other jurisdictions, similar rulings have been viewed as discriminatory since it assumes that indigenous title is

88. *See e.g. Airasia Bhd* v. *Rafizah Shima Mohamed Aris* [2015] 2 CLJ 510, at 521 (Court of Appeal).
89. [2001] 6 MLJ 241, at 297-8.
90. [2011] 6 MLJ 297, at 338.
91. *Id*., at 307.
92. *See* above nn. 47-48 and accompanying text.
93. *See e.g.* s. 5(3), (4) and (6) *Sarawak Land Code*; s. 12(6) *Sabah Forest Enactment*.
94. *Madeli* [2008] 2 MLJ 677, at 696-7.
95. *See Mabo [No 2]* (1992) 175 CLR 1, at 68.
96. *Kong Chee Wai* v. *Pengarah Tanah Dan Galian Perak* [2016] 1 CLJ 605. In 2016, both State government and landowner appeals were dismissed by the Court of Appeal in Civil Appeal No. A-01-(NCVC)(A)-388-12/2015. As there was no leave to appeal to the Federal Court was sought against the decision, the Court of Appeal exercised its discretion not to provide formal written grounds for its decision.
97. *Luking* [2016] 2 MLJ 283, at 808 (Court of Appeal).
98. *Id*. *See* also above n. 43 and accompanying text.
99. *TH Pelita Sadong Sdn Bhd* v. *TR Nyutan Ak Jami and other appeals* (Federal Court Civil Appeal No: 01-26-12/2014 (Q)).
100. *See Eddy Salim* v. *Iskandar Regional Development Authority* (Johor Bahru High Court C.S. No. 22NCVC-158-06-2013), Grounds of Judgment, 18 June 2017.
101. *Id*. At 88.

'inferior and subordinate'.[102] It will be interesting to observe how the Malaysian appellate courts deal with the issue of competing indigenous, state and private interests over land, particularly in light of the special constitutional position held by indigenous groups.

An unfavourable result for the indigenous communities could mean that the state could circumvent the remedy of restitution of indigenous lands by an administrative act of alienation, reducing legal recourse to a matter of monetary compensation. The issue of 'extinguishment by alienation' and other questions posed on the judicial return of indigenous lands, territories and resources, which possibly favours government interests, necessitates this article to move out of the courtroom and examine the political realities in securing the right to such restitution in Malaysia.

5 Restitution of Indigenous Land and Territories in Malaysia: A Reality Check

The relative inaction of the federal and state executive and legislature to give effect to the full gamut of indigenous customary land and resource rights recognised by the Malaysian courts coupled with persistent government appeals to reduce the scope of these rights indicates a lack of political impetus to do so. In Peninsular Malaysia, this issue has been attributed to a combination of: (i) historical and cultural prejudices against the numerically weaker Orang Asli; (ii) hierarchical, differentiated and contested definitions of indigeneity between the politically and numerically dominant ethnic Malays and the Orang Asli; (iii) Malaysia's subsequent push for economic progress, which is linked to ethnic Malay-centric affirmative action; and (iv) land and resource administration challenges linked to the deprioritisation of Orang Asli interests.[103]

Although the issue of native 'indigeneity' may not be as fundamental in Sabah and Sarawak, native political and numerical dominance at the provincial level in Sabah and Sarawak has not spared indigenous communities from government policy priorities and administrative problems, which have not given primacy to the effectual recognition of NCR to lands and resources.[104]

In this section, it will be contended that the want of political will to effectively recognise indigenous customary lands and resources in Malaysia is exacerbated in the case of the return of indigenous lands and resources, which in turn potentially plays an adverse role in the judicial recognition and restoration of these areas to indigenous claimants.

5.1 A Case of Political and Economic Expediency?

Fundamentally, restitution concerns the reparation of wrongs, whether past, continuous or present, committed by a person or a group against another. In international law, restitution is 'aimed at the reparation of the effects of a proceeding that was unlawful'.[105] Consequently, a legally enforceable right to restitution of indigenous lands and resources would involve a judicial finding or, alternatively, an acknowledgment of a wrong by the perpetrator. Despite past observations made by the Malaysian judiciary on the governments' breach of fiduciary duty for failing to legally protect Orang Asli lands,[106] the federal and state executives or legislature have yet to publicly accept, or for that matter apologise for, any wrongdoing committed in relation to indigenous land and resource policies and management. The Malaysian government's responses on indigenous land rights during Malaysia's last United Nations Universal Periodic Review (UPR) in 2013 best illustrate the position taken by the government in dealing with this issue. Some of the more pertinent responses from the Malaysian delegation from the UPR Working Group Report are reproduced here:

> 130. The delegation responded to questions and comments raised in the preceding interactive dialogue by reiterating that Orang Asli rights to land, beliefs, culture and non-discrimination were clearly provided for by the Federal Constitution and the Aboriginal People's Act 1954.
> 131. The Government clarified that a task force… had been established to review and formulate the necessary strategy regarding the issue of indigenous peoples' land rights, pursuant to the national inquiry into the land rights of indigenous peoples in Malaysia undertaken by SUHAKAM.
> 132. The Government continued to hold consultations with State authorities, other relevant agencies and indigenous groups on land issues. Progress had also been made in the survey and gazetting exercise for Orang Asli land.
> 133. Currently, the Government… was collaborating on a study… for the formulation of an Orang Asli national development plan.
> 134. Sarawak State, with a large indigenous population comprising 27 ethnic groups, …had laws which recognized and protected indigenous rights to land… A survey to demarcate boundaries and guarantee

102. *See e.g.* Gilbert (2016), above n. 3, at 83-104.
103. Subramaniam (2013), above n. 15, at 111-17.
104. For a discussion of some of these issues, *see* SUHAKAM (2013), above n. 10, at chs. 6 and 7 respectively. For recent commentary in relation to Sarawak, *see e.g.* J. Chin, 'The politics of native titles in Sarawak' *new mandala*, <www.newmandala.org/politics-native-titles-sarawak/> (last visited 11 March 2017). In relation to Sabah, *see e.g.* M.J. Munang, 'Land grabs in Sabah, Malaysia: Customary Rights as Legal Entitlement for Indigenous Peoples – Real or Illusory?' in C. Carter and A. Harding (eds.), *Land Grabs in Asia; What Role for the Law?* (London: Routledge) (2015), 137.
105. I. Vasarhelyi, *Restitution in International Law* (Budapest: Publishing House of the Hungarian Academy of Sciences) (1964), at 10.
106. See e.g. *Sagong CA* [2005] 6 MLJ 289, at 314; *Pengarah Tanah dan Galian Johor* v. *Khalip bin Bachik* [2013] 1 MLJ 799, at 812-13; *Eddy Salim* v. *Iskandar Regional Development Authority* (Johor Bahru High Court C.S. No. 22 NCVC-158-06-2013).

> security of tenure of NCR land was ongoing under the Government Transformation Programme.
> 135. The current development agenda…necessitated the use of NCR land. Where rights to NCR land were affected, the State … (a) adopted best international practices…; and (b) provided affected indigenous communities with a comprehensive compensation package…
> …137. In recognizing the challenges facing indigenous communities in Malaysia, the Government maintained that those communities must be afforded choice and be free to decide whether they wished to join mainstream society or not.[107]

Despite recognising indigenous land and resource rights to an extent and reporting initiatives to legally protect rights, the government did not acknowledge any accountability for its undue delay in settling the long-standing issue of indigenous land and resource rights. Paragraph 135 of the Report is equally revealing as it states that the *current development agenda 'necessitated the use of NCR*' land. Therefore, restitution of indigenous lands and resources from the current Malaysian government's perspective can be said not to be a question of reparation of wrongs but more of a question of political and economic expediency.

The national development narrative, with local idiosyncrasies, has justified, and in certain cases legitimized, the taking of indigenous traditional lands and territories in many emerging economies.[108] Likewise in Malaysia, land use policies have been more oriented to land development for commercial agricultural production, or the extraction of revenue from the forests rather than environmental or forest protection, and continue to provide revenue for private enterprises and the state.[109] As such, limiting the legal recognition, and more so the restitution of indigenous lands and resources in Malaysia, increases state revenue, which can be derived from such assets and enables such lands and resources to be exploited for amongst other purposes, commercial use. Due to vested state and commercial interests and the lack of political will to change the status quo, it remains to be seen how any proposed policy initiative for the return of lands and resources to indigenous minorities would play out politically. It should be appreciated that resource exploitation, cash crop cultivation and land development have been key factors in Malaysia's relatively successful economic story. In this setting, the recognition and potential return of close to 6% of Peninsular Malaysia's land mass of Orang Asli inhabited and used lands to the Orang Asli may not be compatible with broader federal and state government land and resource use priorities.

Despite some public sympathy in Malaysia towards the plight of indigenous peoples and their lands and resources, the notion of negotiating and returning large tracts of valuable lands and resources to indigenous minorities in an environment where nationwide sentiments towards the reparation of historical injustices towards these minorities still appear to be questionable is a political risk that may not entice the voting populace. Accordingly, it is not startling that the concept of returning land and resources in favour of indigenous minorities has yet to find favour with the Malaysian politicians and lawmakers.

5.2 Restitution and Indigenous Autonomy

Restitution, including the restitution of lands and resources, is equally vital in establishing the foundation for long-term and lasting self-determination strategies for indigenous nations.[110] In an international indigenous rights context, the right to self-determination has evolved from a concept understood as meaning statehood in the immediate post-colonial era to a right connected with decisions regarding the use, management and control of indigenous lands and resources.[111]

In this regard, Article 4 of the UNDRIP states 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs…' while Article 5 provides, amongst others, for the right of indigenous peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.

As fiduciaries for the natives and Orang Asli,[112] the federal and state governments possess extensive legal powers for the protection of indigenous peoples and their lands.[113] For instance, these powers include the statutory power to determine community headmen,[114] which arguably goes against the indigenous self-determination of their decision-making institutions. Restitution of communal indigenous lands and resources through the courts would shift the balance of economic and political power from the state to local indigenous communities, a scenario that necessitates the state's release of the stranglehold it currently possesses over indigenous leadership and stewardship. Given the relative ease with which the state machinery and politicians in power can exert legal control over indigenous peoples and lands to fulfil their own endeavours, it would be hard to envisage

107. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Malaysia*, HRC Doc. 25/10, 4 December 2013.
108. For such paradigms in South East Asia, *see e.g.* A. Xanthaki, 'Land Rights of Indigenous Peoples in Southeast Asia', 4(2) *Melbourne Journal of International Law* 467 (2003); More generally for land grabbing in this regard, *see e.g.* C. Carter and A. Harding (eds.), *Land Grabs in Asia; What Role for the Law?* (London: Routledge) (2015).
109. K.S. Jomo, Chang Y.T. and Khoo K.J., *Deforesting Malaysia: The Political Economy and Social Ecology of Agricultural Expansion and Commercial Logging* (London: Zed Books) (2004), at 140, 224-5.
110. J. Corntassel and C. Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru', 9(4) *Human Rights Review* 465 (2008), at 471.
111. For commentary on the nexus between indigenous self-determination and their lands, territories and resources, *see e.g.* Gilbert (2016), above n. 3, at 215-45.
112. *See Bato Bagi* v. *Kerajaan Negeri Sarawak* [2011] 6 MLJ 297, at 326.
113. For constitutional powers, *see* above nn. 11-16 and accompanying text.
114. *See e.g. APA*, s.16 (Orang Asli); *Sarawak Community Chiefs and Headmen Ordinance* 2004, s. 5(1); (Sarawak); *Native Courts Enactment, 1992*, s. 2 (definition of 'headman') (Sabah).

governmental support for the empowerment of indigenous peoples through the restitution of their lands and resources at present.

5.3 Broader Perspectives on the Judicial Development of the Remedy of Restitution

Similar to other democracies, Malaysia is no exception to the principle of an independent and impartial judiciary and the broad principle of separation of powers amongst the legislative, executive and judicial arms of government. In the context of Malaysia, the judiciary has, however, not been short of its fair share of controversies surrounding allegations of executive and legislative interference.[115]

In 1988, Article 121 of the Federal Constitution, which vested judicial power in the High Court of Malaya and Borneo, was amended to state that the judicial powers of the Malaysian courts are no longer derived from the Constitution but are essentially limited to those conferred by the federal legislature. In the words of the Federal Court, 'if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law'[116] and that the Federal Constitution 'does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine'.[117]

While concerns about the independence of the Malaysian judiciary may be seen as speculative particularly given its relatively progressive approach to indigenous land and resource rights, there is every possibility that judicial conservatism and 'strict legalism and literalism', still said to be prevalent in Malaysia in respect of other constitutional fundamental liberties,[118] may function to curb the recognition and restitution of indigenous rights to lands and resources. This concern is not unfounded. In *Nor Nyawai CA*, the Court of Appeal made the following observation:

> we are inclined to agree…that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food.[119]

This arbitrary observation to limit NCR in Sarawak based on the concern that 'vast areas of land *could be*' subject to such rights has drawn judicial criticism for having 'no conceptual basis' and appearing to be 'judicial policy-making'.[120] Yet, this very statement provided the avenue for litigious dispute on the issue, which culminated in the Federal Court limiting NCR to settled and cultivated areas in Sarawak more than a decade later.[121]

The judicial remedy of restitution of indigenous lands and resources arguably runs counter to prevailing federal and state land and resource utilisation policies and the broader national development agenda. In Australia and Canada, court judgments on indigenous land rights have been critiqued for being influenced by extra-legal and political considerations.[122] Will the Malaysian judiciary curtail the practicability of restitution and so effectually moderate legal redress to an outcome more consonant with the government programme? Will it resort to the 'safer' remedy of monetary compensation in lieu of restitution for loss of indigenous lands and resources? Past experience suggests that indigenous communities should not be overly optimistic for a favourable outcome.

6 Conclusion

In this article, it has been contended that the utilisation of the Malaysian courts for the restitution of indigenous lands and resources can be a potentially slow, costly, incongruous and unpredictable process. It is still unclear if the Malaysian courts will apply the law decisively to return indigenous lands and resources beyond that conferred upon by the executive and legislative arms of government. Court outcomes aside, indigenous land rights litigation in Malaysia has nonetheless been said to improve indigenous community and judicial awareness, participation and empowerment, increase public and media interest and have positive social and economic effects on indigenous communities.[123] In this sense, the common law, as described by McHugh, is 'not an end in itself'.[124]

Despite the national drive towards economic prosperity that may ultimately leave indigenous land and resource rights marginalised, the Malaysian courts remain the last bastion of justice for Malaysia's indigenous minority peoples. In this sense, the role of the Malaysian judicia-

115. For more recent work on the independence of the Malaysian judiciary, *see e.g.* P.J. Yap, *Constitutional Dialogue in Common Law Asia* (Oxford: Oxford University Press) (2015), at 66-73; H.P. Lee, 'Constitutional Developments in Malaysia in the First Decade of the Twenty-First Century: A Nation at the Crossroads', in A.H.Y. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press) (2014) 244, at 260; 269; Compare with A. Harding, *The Constitution of Malaysia: A Contextual Analysis* (Oxford: Hart Publishing) (2012), at 195-224.
116. *PP* v. *Kok Wah Kuan* [2008] 1 MLJ 1, at 14. But see dissenting judgment of Malanjum CJSS, at 20-26.
117. *PP* v. *Kok Wah Kuan* [2008] 1 MLJ 1, at 16.
118. *See e.g.* F.S. Shuaib, 'Fundamental Liberties under the Federal Constitution: A Critical Analysis' in A.G. Hamid @ Khin Maung Sein (ed.), *Human Rights Law: International, Malaysian and Islamic Perspectives* (Petaling Jaya: Thomson Reuters) (2012) 293, at 309; B.T. Khoo, 'Between Law and Politics: the Malaysian Judiciary Since Independence' in K. Jayasuriya (ed.), *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London and New York: Routledge) (1999) 205.
119. [2006] 1 MLJ 256, at 269.
120. *TR Sandah FC* [2017] 3 CLJ 1, at 68.
121. *See* above nn. 74-85 and accompanying text.
122. *See* K. McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada', 42 *Osgoode Hall Law Journal* 271 (2004).
123. *See* OSJI (2017), above n. 18, at 74-76.
124. Above n. 27, at 213.

ry in protecting indigenous minority rights can function as a litmus test of whether the 'tyranny of the majority' prevails in Malaysia, a helpful scorecard for the practice of democracy.

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Conversations about Indigenous Peoples and Adjudication Interviews with G. Bennet, and S. Corry

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In the following interviews with some key actors of adjudication, B. Barreiro has been posing several key questions regarding the development of litigation on indigenous peoples' rights. Although there is still a long way ahead, national and international adjudication mechanisms are finding more sophisticated methods for the better protection of indigenous peoples' rights.

Interview with Gordon Bennet

Gordon Bennet is a barrister based in the UK who has worked extensively in support of indigenous peoples' rights for many decades. Most recently, Gordon has supported the legal argumentation in a complaint to the oversight mechanism of the Organisation for Economic Co-operation and Development (OECD) regarding the rights of the Dongria Kondh of India, and he was the main lawyer in support of the San in Botswana in a very significant case concerning their rights to land and natural resources after their eviction from their homeland in the Central Kalahari Game Reserve.[1]

B. Barreiro: How did you become interested in litigation for indigenous peoples' rights?

G. Bennet: I was a postgraduate student at Cambridge, in England, when it was suggested to me that research needed to be done on indigenous people's rights. At that time, which was late 1970s early 1980s, almost no work has been done on this issue, so I did some research and wrote a short monograph which was published by the Royal Anthropological Institute in England[2] and it was really trough that work that I became interested in these issues, and I have remained in this issues for the last 20 or 30 years or more. I have to work both on indigenous rights and on commercial practice because I have a family to raise. Now I expend much more time on tribal rights that I once did, which is good.

B. Barreiro: What is your general opinion of international legal norms concerning indigenous peoples, insofar as international law is made for and by the States?

G. Bennet: I think there are always limitations, it is better than it used to be, but it is still a very long way from perfect and I don't know whether it ever would be perfect. It is a long struggle and it must continue. I suppose one issue is that the major threat confronted by indigenous peoples these days tends to come not so much from governments but from multinational corporations because these are the people who want to exploit the land upon which indigenous communities depend. And the real problem obviously is that these multinational corporations are not subjects to International Law. There is now a claim movement to transfer the UN principles developed by John Ruggie[3] into a binding treaty which will impose legally enforced obligations upon multinational enterprises, and that is a good thing, but it may take a very long time to go there, so in the meantime, I think, my generation of lawyers has to find other solutions, and this is usually about trying to trigger mechanisms inside the international financial institutions and in the UN and anywhere else.

You mentioned the OECD.[4] That is one possible avenue, although that avenue has its problems because the OECDprocess is not compulsory, it may result in a decision but the decision is not binding upon the company. So, you have to depend upon the company's desire to protect its reputation for it to comply with the decision. And, of course a major problem is that there are companies which are most likely to trump upon tribal rights, they don't care, they do what they want and as long as they can keep their shares they are happy, they are prepared to accept that their reputation may suffer

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1. See 'Gordon Bennett: the go-to tribal rights guy', in *The Lawyer*, 31 October 2010, available at: <https://www.thelawyer.com/issues/1-november-2010/gordon-bennett-the-go-to-tribal-rights-guy/>.
2. Bennett, Gordon, *Aboriginal Rights in International Law*, London: Royal Anthropological Institute in association with Survival International, 1978.
3. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Bussiness and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Human Rights Council, princ., U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie), available at <www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.
4. OECD States or States adhering to its «Guidelines for Multinational Enterprises Responsible Business» have the obligation of setting up National Contact Points (NCPs) for the mediation and conciliation in cases where non-observance of such guidelines may be at stake. *See* OECD 'OECD, Guidelines for Multinational Enterprises Responsible Business Conduct Matters', 2011. Available at <www.oecd.org/daf/inv/mne/48004323.pdf>.

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because of the way they treat indigenous communities. So that is a problem. But I think this is getting better because companies do now care much more about their profile and their reputation and what they do. It is a long struggle that is better than it was and it will continue to get better, I think, as time goes on. But this is one reason why I have for the most part tried to focus on national legislation – national litigation –, because I think that in the short term that offers the best road to an effective remedy.

B. Barreiro: But the problem arrives when governments are not willing to apply courts' decisions. How do you see this?

G. Bennet: It depends which country you talk about and what kind of resolution you mean. In Botswana, which is the country with which I have most familiarity, I think that, generally speaking, the government would prefer to avoid bad court judgements. They do not want to be seen not complying with court judgements. They are very concerned about their reputation as democracy in which the rule of law prevails. They want to encourage foreign investors into the country and they are afraid that foreign investors will be discouraged if they see a government which fails to comply with court judgements. So that is one situation in which a court decision probably can be effective. But, of course there are many other countries in which that is less so, but still national judgements are so far the best route, I think, to force ruling in favour of tribal communities. It takes time but it is probably the best frame to do it.

B. Barreiro: Do you consider that national courts' decisions can have some preventive effects to protect future encroachments on indigenous peoples' rights?

G. Bennet: I think that it is very difficult to say but generally speaking I think that governments are much more aware now than they used to be about the risk of court actions. For example, again in Botswana when the Bushmen where evicted from the Central Kalahari, the government did not for a minute think that they would be sued, that they would be taken to the court. Now, I think, they are much more careful and much more hesitant about taking actions which might result in being taken to the court. I think that the same is true in other countries. In Kenya for example, there has been a number of court rulings against the government and although unfortunately these rulings have been proved difficult, governments would prefer to avoid things of that kind because of the impact this may have in the government's reputation abroad and on the ability to attract foreign investment.

B. Barreiro: The issue of conservation versus indigenous peoples' rights is very present in your career. The case against World Wildlife Fund (WWF) before the OECD[5]is paradigmatic of how wrong understandings of the needs for protecting nature can negatively impact on indigenous peoples' rights.

G. Bennet: I think that conservationists mostly consider themselves to be just conservationists. They think that they are responsible for conserving natural flora and fauna, they do not see that there is responsibility to protect the people who are affected by their projects, and it has taken them a long time to understand that you cannot separate the two. But if you have a project in a remote and isolated place in which there are local indigenous populations, any attempt to create a protected area in their land will have enormous repercussions for them, and I think that the broad response has been to say "well, that is matter of the government, and not for us" and it has taken them a lot of time to realize that just is not the case. If you look again into the Ruggie principles they demonstrate that companies have a responsibility to respect human rights and they can only do that if they firstly consider the likely impact of a project upon those rights and if then they take active steps to avoid or mitigate that impact. For the most part they have singly failed to do that until now. They will have to learn that they need to do this in their own interest as much as in the interest of local communities.

I think that WWF is probably one example of this. When they went into Cameroon they simply did not consider the position of the Baka. They thought that the Baka could take care of themselves or that the government would take care of them, and it was not part of their responsibility to consider how the effects of the protected area they wished to create, might affect the livelihoods of the Baka. But that is a major mistake. The Baka have paid the price. Something has to be done to change that and I suspect that the answer must lie within the conservation movement itself. In the end, the people who support the conservation movements, the individual subscribers who support WWF have to come together and insist that their organization conduct its affairs in a way that properly respects indigenous communities. And that would very often mean some form of co-management or co-partnership. But the trouble of all this, of course is that it is slow, it takes time, it costs money, and organisations like WWF think that they don't have time. Everything is urgent, everything has to be done the day before yesterday, otherwise the elephants, the ostriches, all will be dead. That is their approach, but unfortunately that does not work. If they do not have local people on their side the project will fail. And I think that many conservationists don't accept that. So, there has to be some mutual understanding, some mutual discussions about how we resolve these problems. It will not happen overnight. But it should happen and I hope that in the next ten or fifteen years we should see if we will progress.

B. Barreiro: In fact the consultation processes with indigenous communities need time, because

5. *See* National Contact Point of Switzerland, 'Final Statement Specific Instance regarding the World Wide Fund for Nature International (WWF) submitted by the Survival International Charitable Trust Berne', 21 November 2017, available at National Contact Point of Switzerland Final Statement Specific Instance regarding the World Wide Fund for Nature International (WWF) submitted by the Survival International Charitable Trust Berne, 21 November 2017.

of the differences concerning languages, traditions, particular legal systems, etc. And I imagine – going back to your role as a lawyer – that it would be difficult to do this translation between different cultural and legal languages, right?

G. Bennet: That is a possible problem but I do not think that this is the main problem. There are some quite complicated legal provisions in Cameroon, Botswana and elsewhere, but for the most part the law can be expressed in fairly simple language. Lawyers have a total habit of complicating things, of using fancy words where simple words would do. And we need to rid ourselves of that habit. So I do not think that the ability to express a legal situation is a real problem. I suspect the real problem is that indigenous communities have been asked to say yes or no to a project which may continue for twenty or thirty years. And what is very difficult for them indeed is to know what the consequences of that project will be and what the consequences for them will be if they say no to the project. So you have to decide, I suppose, what kind of information they need to make a proper decision and then to provide them the information in a clear and accessible way. My experience is that of course tribal peoples are like everybody else: some are stupid, some are sensible, some are intelligent, and they are just as able as anybody else to understand what they have been told, provided they are told it in a proper way and that they are given time to consider it and discuss it amongst themselves. And it may take quite a lot of time, especially in small societies in which there is no tradition of leaders making decisions on behalf of the group as a whole. Everybody has to be involved, and that requires a lot of work, and there can be problems too with some societies – although not as many as we would have believed – in which women are not given a proper say in the decisions that affect them. And again, it might be extensive to Bushmen societies, where women are very well able to understand what is going on, and quite often better able than a man to make decisions about it. And they need to be told, time and time again, that they will not be punished if they make the 'wrong' choice, that is to say, if they make the decision that is not the decision the government wants of them. If people are afraid of governments, if they are afraid of officials, if they are afraid of large companies, there is a strong temptation to reach a decision which they do not want, in order to keep out of the problem. And that is something you have to go against all the time.

B. Barreiro: So, somehow, there is a need to act with precaution, in the way environmental law has suggested to do through the creation of 'precautionary principle': if after an impact study there are risks to the environment, there will be no action. So, there is the need to establish a really binding principle like that for indigenous peoples as well as to make clear the difference between consultation and consent, this last one being the requirement which needs to count.

G. Bennet: Yes, exactly. In fact environmentalism has a very important principle called the precautionary principle, that is to say, if you are not sure of the consequences of a particular course of action, do not do it. Be cautious; only take steps when you are confident. But indigenous peoples should be warned of the risks and they should be told about the benefits.

B. Barreiro: Thank you very much, Gordon, what would be your final statement for closing this interview?

G. Bennet: I would say that this is an area in which of course lawyers are required the same as conservationists and other experts. But it would be far better if lawyers and conservationists come from among indigenous peoples themselves. They will do it. And we need to do all that we can to encourage that and to persuade indigenous peoples that they can do this, that they should do this and that the governments must make facilities available to make it possible for them to do it.

Interview with Stephen Corry

Anthropologist Stephen Corry directs Survival International, a key non-governmental organization in the defence of indigenous peoples' rights. Survival focus its work on raising awareness of violations of indigenous rights all over the world but it funds also judicial claims in defence of such rights. Survival International has supported several cases of adjudication for the protection of indigenous peoples across the globe.

B. Barreiro: How did you start working for the defence of indigenous peoples' rights? How was Survival [International] created?

S. Corry: Survival calls itself the global movement for tribal peoples' rights. It perceives itself as working on several overarching campaigns about specific issues such as uncontacted tribes or the relationship between conservation and tribal peoples. As well as this, it sees itself as trying to create a groundswell of public opinion in favour of tribal peoples. We now have supporters in about a hundred countries. What makes Survival different from almost all other organizations in this field is that it is largely funded by individual supporters, not particularly rich people necessarily but a lot of people giving a little amount of money. That feeds into our objective to make the world a better place for tribal peoples because we think this is not going to happen unless there is public opinion in favour of tribal peoples. So, the long-term focus is public opinion. I myself became involved in it because I encountered tribal peoples for the first time when I was doing something else, which was travelling in Nepal, and I was very surprised at that time – this was 1970 – because I had always assumed before, that everybody wanted the kind of development which the West then (and now, more than in 1970) was – and is – trying to present as the inevitable way in which all peoples want to live, and I realized that this simply was not true, that there were plenty of peoples in the world who did not want to live according to those norms. So in that sense I became aware of the fact that

the history of western, whatever you call it: society, development, is a lie, and tribal peoples kind of epitomize how this lie works in practice. Because the usual accepted narrative was that they have always wanted to catch up with us, that they wanted all the things that we knew as central to modern life and this is simply not true. The term 'Paraguay's reductions' is very accurate: It is an attempt to reduce them to – at best – servant workers. And actually in the process of this a lot of them, of course, are in one way or another killed as individuals or as peoples.

So, Survival first started in 1969. When I came across it in 1972 I became a volunteer for it. Survival identified the problem in exactly the same way as it does today – the problem is the lack of respect for lands rights – but it had not really got any particular formula of what to do about this. The focus on campaigning – and I was mounting a popular public campaign on this specific issue – started at the end of the seventies with a campaign in Brazil which was vigorously pushed by a little NGO consisting really of one or two people. So we magnified that campaign up to the international level, working in different languages, working in different countries and basically pushing it to the press and to the media. And that is still a very large part of what Survival does.

B. Barreiro: So, I see that the focus is put in international public opinion. This way of taking advantage of globalization which has also negative consequences for indigenous peoples' rights is interesting. Concerning the issue of International Law – where there are new developments concerning indigenous peoples' rights – do you think that they are enough?

S. Corry: No, they can never be enough. There are many countries that don't apply the 10 year-old UN Declaration. There is no country in which tribal peoples, where they are minority, have their rights properly respected and this obviously can go very deep. And the kind of approaches taken in countries like Australia or Canada have to cope with the fact that there is a generation of violent dispossession which took place and which is being maintained through education systems, approaches to development and approaches to the kind of problems which these peoples are facing today: addictions, suicide, imprisonment, domestic violence. So, in areas where the violence which has been perpetrated to these peoples has been internalized, as in countries like Australia and Canada or the United States, then obviously the question of simple respect for land rights is no longer enough. There is a hundred and fifty years old oppression which needs to be addressed and which is not addressed at the moment. So the legal situation, or what the law says in a country which has (on paper) relatively good laws, is not the main question, the main question is how these laws are actually applied. So if the law says you cannot do development projects on tribal or indigenous peoples lands without their proper consent, which is broadly the principle behind the UN Declaration and behind the early ILO Convention, if you take this as the starting point, that in itself is complicated, obviously, because it raises questions such as how do you secure that consent, what exactly does this mean: who has to consent? In a society where there is a lack of a pyramidal political structure, that presents, obviously, a problem. If a mining company wants to mine on indigenous peoples' lands, how do they obtain consent? Whose consent? How do they go about that process? So, the law can appear to be OK, but in real life of course it is the question of how it is put into practice. The nation state system and its legal system still cannot properly cope with the fact that there are indigenous peoples who exists outside those systems, and of course there are still many who have never heard of the country they are supposed to live in, leave alone form part of any integrated part of that country. There are many uncontacted tribal peoples.

So, all those questions are an issue, and International Law is moving in the right direction globally but extremely slowly, actually. I mean, the first ILO Convention was in 1953, that is two generations ago and the UN Declaration took 20 years to actually be formulated and there are still problems with that, obviously. So International Law is moving very slowly apparently in the right direction. Some countries are becoming progressively more aware of these issues and other countries are just going backwards: Brazil is an attempt to move things back thirty or forty years because political movements are coming and going, being more progressive or less progressive and obviously these issues are just as important as any legal instrument, and that is actually why a big part of Survival's work is to try to shape public opinion. And the judiciary is as susceptible to public opinion as any other sector of the population, obviously.

B. Barreiro: Regarding the issue of education systems you were referring to, the decision of the Truth and Reconciliation Commission of Canada stating that the education system for indigenous children constituted a cultural genocide is a good step, right?

S. Corry: Yes, but I think that there is a bit danger if we talk too much about culture because the result of the education system not only in Canada but very much in Australia and in US certainly set out to destroy peoples' culture, but it also destroyed individuals: a lot of individuals did not survive the school system. The damage is not only cultural, it's physical: addictions, suicide, domestic violence, these kinds of issues.

B. Barreiro: What are the criteria according to which Survival decides to support a case for bringing it before court?

S. Corry: Actually defining the criteria is very difficult. In the Botswana case we needed to be convinced firstly that the Bushmen themselves were entirely supportive of the idea that their homeland was within the Central Kalahari Game Reserve, and that they did not want to be moved from it on a very deep level. If there'd been a casual "well, we don't really want to be moved but if you give us enough compensation then OK," then we

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would not have supported the court case. So, we spent a lot of time, many years, establishing what these people wanted. This meant going to the communities, talking to people, not just relying on the nearest thing to political leaders (some were emerging) but it meant talking to people at the community level including women and old and young people. That is, people who are not usually so vociferous in any emerging political movement. So that is actually key.

We then had to decide, what are the chances of a fair hearing? In many countries courts are not the places where you go to receive a fair hearing! They are places where the controlling elites use the law to support what they want. So, we have to be reasonably confident that we could at least have a chance of securing a fair hearing. In the Botswana system at that time we knew that the appeal court was still composed of several judges from outside of the country, who were unlikely to be influenced by the dominate elite within Botswana. So, we were hopeful that even if the case was lost, the appeal court might give it a chance. We also had no idea how long a case might last, and therefor how many resources would be needed to be put into this. That's a feature of this kind of work. We took a gamble that our supporters would support financially the costs involved with helping the Bushmen to bring this case. We had to know that the Bushmen were not only adamant about their own resistance to be evicted but that they were actually willing to go through the court system to fight this, rather than fighting in other ways. There is of course a risk involved in this, because, had they lost this case it would have presented a precedent on the other side. So we can look at it now, having won the case. If they had lost the case we would be looking at it in a very different way. It's always a risk.

Survival has supported lots of local court actions in other countries, places like Brazil for instance, where indigenous people are going to court to try to get their land back and some of these are successful and some of them are not. Some of them we do not publicize very widely, or even at all. Sometimes we do not talk about how we are helping these peoples taking their issues to courts. So, the real criteria are that the peoples themselves have to be strongly behind it with determination and we have to have some sense that there is at least a chance of winning it. There are other secondary advantages. The Botswana case is a good example because we did not expect this campaign, this court case to really influence public opinion in Botswana. We were told at the beginning of our campaign that we had no chance of influencing public opinion in Botswana. There is very little orthodox media. There is a weekly and a Sunday independent newspaper and there is a daily government controlled newspaper. The government controls the television. When we started, there was no Botswana television. To our surprise, over the years we found that the Botswana media did actually move quite a long way to be on the Bushmen's side. So, the initial assumption (that the Bushmen did not know what was good for them and that the best thing for them would be to leave their lands and start living outside like other peoples from Botswana) changed over the years to the point where there was a recognition of the part of the media and then of the population that if the Bushmen didn't want to do that, they had the right not to. So the whole system has to go hand in hand with a shift in public opinion. A very good example is slavery abolition where public opinion had to be shifted from being in favour of slavery. Slavery at the time was viewed to be not only beneficial for the British Empire but also to the slaves, since it was considered to take them out of their 'pagan', 'savage' existence and give them the benefits of English 'civilization'. So, in a similar way, in Botswana in 2002, when evictions happened, the general perception of the public was that this was good for the Bushmen. So that had to be shifted in the same way as the court had to look at these things and try to arrive at a position that was fair to Bushmen.

B. Barreiro: What about the difference of bringing a case into the national and international level, for instance, through the quasi-judicial system of some organs of United Nations, or before regional international human rights courts?

S. Corry: Again it depends on the case. Survival as a movement and as an organization knows that in cases where there is no respect for rule of law or in cases of warfare – whether it is declared or not – there is very little point in trying to do anything within the judicial system and there might be very little point in trying to move national public opinion. There was no point during the Guatemalan Civil War to try to influence the Guatemalan media, for example. One could try to influence the international media. No country exists in isolation. Countries have allies and it's possible to think strategically about how to put pressure on a country through the public opinion of its allies, or its neighbours. But there is probably a feature of this work which is quite common which is that national views often don't tend to see the relevance of international work. This applies to national actors like national NGO's, sometimes the national press. Actually it is quite interesting that the indigenous peoples themselves – at least some individuals – if you show them how the international system works (both in terms of media and in terms of notions of human rights), they can have a much more sophisticated approach to the international work than some of the local NGO's.

If people have been oppressed for five hundred years in a given country they can begin to think that the entire country is against them. Obviously, it isn't: there are always people everywhere that are supportive of international rights, but sometimes within the international context (because progressive values are generally accepted internationally, at least until recently), there is a general perception that progressive values are increasing and gaining more traction as the decades pass. And this is how the international context can be applied to the national context. But it depends very much on the country. Regarding our work in Cameroon, trying to stop the violation of the rights of the Baka by eco-guards and

people supported by the conservation movement, there is little active media interest in this in Cameroon itself. It's therefore a very different situation than that of Botswana and it's almost certain that international work is going to have more impact than simply trying to work locally.

B. Barreiro: Survival works in the whole world. What are the differences you have experienced regarding the different areas?

S. Corry: A very important difference is the strength of the indigenous peoples themselves. In areas where there are relatively strong it is a very different situation. In a country like Botswana for instance, firstly the elite claims there's no such thing as indigenous peoples: they do not exit. They say all Botswana citizens are indigenous. The Bushmen are numerically quite small with only a few tens of thousands still holding very strongly to Bushman identity and there are no other indigenous peoples in the country. So, they are very much in a politically weak position. That is very different to the Amazon countries where there is a quite strong indigenous movement. In these cases there is a strong and quite politicized movement which started in some places in the 1960s, and later in other places.

There is a paradoxical situation in which nowadays, if you look at the Amazonia, broadly speaking, until recently the indigenous movement did not need much outside support. They are quite capable of supporting their owns rights even if there are particular issues, such as uncontacted peoples that are not represented by any organization. And there are issues now, particularly in Brazil, of a row-back, a return to oppression and the denial of indigenous rights, following several decades in which broadly (with setbacks, of course) indigenous rights were going upwards. So, it depends very much on the country and in continents like Africa or Asia there is this additional issue of who is indigenous. What makes them indigenous? What gives them rights to land? That brings us into other questions such as what is ethnicity, what is identity, what is an indigenous people, how do you define it, how do you self-define? These issues were deliberately avoided in the UN Declaration. There is no attempt to define who are an indigenous people. Whether that is a good idea I do not know. I think that the ILO Convention has definitions that are not that bad and that are broadly workable. And in real life of course people have multiple identities and that applies to many indigenous peoples as well.

Some countries like Brazil, as mentioned before are moving backwards in terms of indigenous peoples' rights, whereas in others, like Botswana in the last 15 or 20 years, there are some steps forward, at least in terms of visibility.

B. Barreiro: Thank you very much, Stephen. Would you like to add something more in to close this interview?

S. Corry: From my perspective, the most important thing is to realize that these issues are not actually remote or exotic; they are about racism, about nationalism, about control of people, about dominant elites. They are about progressive values or the reverse. It is important to understand that there are peoples in the world who do not want to live in the dominant way. Although indigenous peoples do not threaten any nation state politically, their ideology is actually very threatening because they are a living example of how human beings have found thousands of different ways to live. They are all very different. Many of them are very successful. In fact if you look at the different ways to live, in that sense indigenous peoples constitute a majority. They represent far more variety than anybody else. What they represent could not be more important about our decisions, about what our grand-children and their grand-children are going to think, about how they are going to behave.

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Afterword

Stuart Kirsch*

Although the universal declaration of human rights is often described as having been imposed from the top-down, and based on liberal, Euro-American values, the same cannot be said for the recognition of indigenous rights, which is the result of social movements operating from below.[1] Land is a common focal point of these struggles, given its central significance to the social reproduction of indigenous communities and the protections it affords them against the pressure to assimilate. As the contributors to this valuable collection attest, land rights continue to be of paramount importance to indigenous peoples, and increasingly end up being the focus of contestation in both domestic and international legal arenas.

The resulting legal proceedings have several distinctive features. Although they are similar to class action cases in that they represent a group of plaintiffs, they are intended to protect collective rather than individual rights. Consequently, lawyers must work closely with indigenous communities, including their political leaders and governing bodies. These relationships typically cross cultural and linguistic boundaries. Lawyers need to take local norms and understandings into account, although the tools they have at their disposal for interacting with plaintiffs from different cultural backgrounds and their experience explaining legal proceedings to the uninitiated stand them in good stead. However, an important dynamic of these interactions, albeit not unique to indigenous rights claims, is that the peoples they represent may regard the legal system as illegitimate, given that the law was previously an instrument of colonial dispossession and that the courts have a history of favouring other interests over theirs. Lawyers must be able to overcome these perceptions despite their legitimacy. Working in their favour is the fact that legal action may be the last recourse available to indigenous peoples, apart from violence, after other forms of intervention have been exhausted.[2]

Because of the linguistic and cultural differences between indigenous plaintiffs (or complainants) and members of the court, there may be significant challenges associated with translation. Inevitably, the burden of commensuration is shouldered by the indigenous plaintiffs and their legal representatives, who not only have to convey their concerns to the other participants in the proceedings, but also have to justify why these alternative perspectives should be recognised by the court.[3] One strategy of persuasion has been to incorporate maps, which, despite their historical use as tools of dispossession, are increasingly appropriated by indigenous peoples and their NGO partners as a means of representing previously unacknowledged relationships to land and resources.[4]

Lawyers advocating on behalf of indigenous land rights may also engage anthropologists who are able to render local understandings and perspectives in terms legible to the court.[5] For example, in my own work on a case representing the Akawaio of Isseneru village in Guyana before the Inter-American Commission on Human Rights, the complainants were able to demonstrate that local place names were toponyms in their language, establishing historical ties to the land the state had denied.[6] But to the extent to which anthropologists may be seen to usurp the authority of community members to speak on their own behalf, they may find these interventions unwelcome or sidelined in favour of direct testimony by indigenous community members.[7] Nonetheless, anthropologists can help introduce novel concepts into legal proceedings, such as the equivalence between property rights and rights to subsistence resources in economies that lie partially or wholly outside of the commercial sphere, indigenous definitions of freedom as contingent on access to the forest, or the significance of culture loss resulting from environmental destruction.[8]

Despite the high stakes of these cases, defection by some of the plaintiffs is possible, especially where there is coercion or attempts to alienate their participation in the legal proceedings through monetary means, whether through bribery or compensation agreements that seek to pre-empt the court case.[9] There is also a risk that political disagreements among the plaintiffs may derail legal proceedings, or even prevent them from getting started, as indigenous peoples do not always possess

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1. *See* R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press) (2003).
2. *See* J. Eckert, B. Donahoe, Z.Ö. Biner, & C. Strümpell (eds.), *Law against the State: Ethnographic Forays into Law's Transformations* (Cambridge: Cambridge University Press) (2012).
3. E.A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press) (2002).
4. *See* Anker, this issue; Gilbert, this issue.
5. S. Kirsch, *Engaged Anthropology: Politics Beyond the Text* (Oakland: University of California Press) (2018).
6. S. Kirsch, 'Expert Report, Akawaio Indigenous Community of Isseneru and the Amerindian Peoples Association of Guyana', Petition 1424-13, Inter-American Commission on Human Rights, 14 July (2016).
7. A. Ramos, 'Disengaging Anthropology', in D. Poole (ed.), *A Companion to Latin American Anthropology* (Oxford: Blackwell Publishers) (2005) 266.
8. *See* Kirsch (2018), above n. 5; *see also* Claridge, this issue.
9. S. Kirsch, *Mining Capitalism: The Relationship between Corporations and the State* (Oakland: University of California Press) (2014).

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political organisation at a scale that is commensurate with the scope of their legal claims.

Another challenge is that indigenous rights to land and territories do not necessarily correspond with legal definitions of property ownership.[10] This extends beyond the difference between individual and collective rights. It may include fuzzy boundaries in which people make use of different resources from the same territory.[11] Shared access can be consensual and formalised, as in the case of a recognised commons, although overlapping land claims can also be the result of historical strategies of avoidance, where there is neither a need nor the ability to settle competing claims, resulting in a de facto commons. The kinds of resource mapping discussed in several of these papers can be an effective tool for indigenous communities to illustrate long-standing patterns of land use and help challenge claims made by the state about the appropriate use of resources.[12]

Another prominent feature of these cases is that they are building blocks for the larger, developing framework of jurisprudence that protects indigenous rights.[13] This can occur in domestic courts,[14] in regional human rights courts like the Inter-American court system and the African Court of Human and Peoples rights,[15] in international legal proceedings, and more generally in the circulation of valuable precedents across legal forums. A key example of this process is the gradual incorporation of the provisions of the U.N. Declaration of the Rights of Indigenous Peoples into judgments at all three levels of jurisprudence.[16] The hardening of soft law principles in this process also facilitates their recognition as norms that over time may acquire the force of international legal standards.

There is, however, a risk that the development of international law by piggybacking on indigenous claims occurs at the expense of the plaintiffs in these cases, or neglects other peoples whose rights have been violated,[17] by influencing the lawyers' choice of cases, courts, and legal strategies. This concern is magnified by the problems of implementation that occur when particular legal forums lack the power to enforce their judgments, yielding paper victories that enhance recognition of indigenous rights but do little to alter facts on the ground. Moreover, states may respond to these decisions by using strategies of foot-dragging, evasion, false compliance, feigned ignorance, slander, and sabotage that are ordinarily described as 'weapons of the weak',[18] not to mention the criminalisation of legal proceedings, intimidation, and violence. In addition, as Maria Sapignoli points out in her new book, *Hunting Justice: Displacement, Law, and Activism in the Kalahari*, even a successful verdict may prolong rather than conclude interaction with the legal system.[19]

As several scholars have recently argued, legal activism on behalf of indigenous peoples is more likely to result in soft forms of political recognition than tangible forms of redistribution.[20] Nonetheless, political change is hard won and indigenous recourse to the law may have beneficial 'unlocking effects' that help to overcome stalemates in domestic arenas, 'participation effects' that enhance political agency, and 'reframing effects' that identify new political strategies and activate novel coalitions, in addition to potential 'socioeconomic effects' through compensation and the restitution of land.[21]

Legal proceedings on behalf of indigenous peoples may also have an advantage over other legal claims, in that the recognition of significant cultural differences between the perspectives of the plaintiffs and the assumptions on which the law is based may encourage judges to think more broadly about fundamental questions, such as concerns about culture loss, the importance of maintaining access to the forest for a people's freedom, and the rights of people whose subsistence practices are largely external to the commercial economy. For lawyers, advocates of indigenous rights, and indigenous peoples themselves, this means that legal proceedings, despite their past connections to colonial and imperial projects, may not only serve the interests of the peoples whose rights have been infringed upon, but also expand the law itself in ways that make these past trespasses against and violations of indigenous rights less likely to occur again in the future, the ultimate aim of human rights initiatives.

10. *See* Correia, this issue.
11. *See* Anker, this issue.
12. *See* Anker, this issue; *see also* Gilbert, this issue.
13. *See* MacKay, this issue.
14. *See* Subramaniam and Nicholas, this issue.
15. *See* Correia, this issue; *see also* Claridge, this issue.
16. *See* MacKay, this issue; *see also* Subramanian and Nicholas, this issue.
17. Against the concern that the focus on the rights of indigenous peoples might disenfranchise others (J. Bowen, 'Should We Have a Universal Concept of "Indigenous Peoples' Rights"?', 16 *Anthropology Today* 12 (2000)), the Saramaka case in Suriname (*see* MacKay, this issue) and the Okiek case in Kenya (*see* Claridge, this issue) suggest that legal precedents concerning indigenous rights may be applied to other peoples who are similarly situated.
18. J.C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press) (1987).
19. M. Sapignoli, *Hunting Justice* (Cambridge: Cambridge University Press) (2018).
20. M. Goodale, 'Dark Matter: Toward a Political Economy of Indigenous Rights and Aspirational Politics', 36 *Critique of Anthropology* 439 and J. Gilbert, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights* (2017). <https://www.opensocietyfoundations.org/sites/default/files/slip-land-rights-20170424.pdf>.
21. C. Rodríguez-Garavito and D. Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (New York: Cambridge University Press) (2015), *see also* Gilbert, above n. 20, at 73.

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