

# 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.<sup>1</sup> Discord between international and domestic law<sup>2</sup> and the actions of state governments to implement the law,<sup>3</sup> however, compromise the de facto territorial rights of many Indigenous peoples across the Americas.<sup>4</sup> The Inter-American Court of Human Rights (hereafter IACtHR) has been a

primary vehicle to advance jurisprudence in support of Indigenous land rights.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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' 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 Awast 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](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](http://www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=en)> (last visited 30 September 2017).

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.<sup>8</sup> 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,<sup>9</sup> mandating material and symbolic reparations for the victims,<sup>10</sup> 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<sup>11</sup> 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.<sup>12</sup> A recent Open Society Justice Initiative study<sup>13</sup> 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<sup>14</sup> 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.<sup>15</sup> I therefore contribute a synthesis and analysis of the Yakyé Axa, Sawhoyamaya, 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 Yakyé 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 Sanapaná 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.<sup>16</sup> The impact of the IACtHR on Indigenous rights is little studied outside of critical legal studies. Studies by Wainwright and Bryan,<sup>17</sup> Bryan,<sup>18</sup> Hale,<sup>19</sup> Medina,<sup>20</sup> Correia<sup>21</sup> 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<sup>22</sup> and technical accounting of the implementation process.<sup>23</sup> These two approaches to investigating how the IACtHR shapes social justice for Indigenous peoples are rarely in conversation in existing literature.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup>

### 1.1 Methods and Case Study Selection

Since 2013, I have been working with Enxet-Sur and Sanapaná 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.<sup>27</sup> 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,<sup>28</sup> I do not claim universal knowledge about the Enxet-Sur or Sanapaná 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.<sup>29</sup> 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.<sup>30</sup>

I selected the Yakye Axa, Sawhoyamaxa and Xákmok Kásek cases because they advance Indigenous rights jurisprudence,<sup>31</sup> 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 Sanapaná 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-Mihalopoulos, '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 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. Haec, 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 Derechos 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).



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.<sup>32</sup> 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.<sup>33</sup>

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,<sup>34</sup> 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)<sup>35</sup> 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.<sup>36</sup> 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'.<sup>37</sup>

### 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<sup>38</sup> 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.<sup>39</sup> 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, *Situación 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).<sup>40</sup> Subsequently, foreign investors purchased much of the Paraguayan Chaco and gradually established logging and cattle ranching estates.<sup>41</sup> Powell<sup>42</sup> 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.<sup>43</sup> The Yakye Axa, Sawhoyamaya 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.<sup>44</sup> 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.<sup>45</sup> Over 70% of land suitable for agriculture is dedicated to soya bean production, whereas cattle graze on nearly 18 million hectares of land.<sup>46</sup> As the world's fourth largest exporter of soya and eighth exporter of beef,<sup>47</sup> the Paraguayan agriculture industry has fuelled some of the fastest rates of economic growth in Latin America since 2010.<sup>48</sup> Indeed soya and beef products comprise nearly 50% of the total value of Paraguayan exports.<sup>49</sup> 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.<sup>50</sup>

*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](http://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.<sup>51</sup> 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.<sup>52</sup> Corruption is also a persistent challenge that exacerbates the function of law.<sup>53</sup> 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<sup>54</sup>—e.g. socio-economic marginalisation, widespread discrimination and state neglect—Yakye Axa, Sawhoyamaya 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 Sanapaná to advance their cases to the international arena.<sup>55</sup>

#### 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](http://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.

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.<sup>56</sup> 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 start-

ing 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

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.<sup>57</sup> 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, violat-

ing 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 Deprivation 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.<sup>58</sup> 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.<sup>59</sup> Investigating the relationships between law and space draws attention to the practices that link courtroom adjudication with implementation politics in specific sites.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> Some have referred to this as the 'spatial turn' in critical legal studies.<sup>63</sup> 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<sup>64</sup> in favour of questions about property,<sup>65</sup> the effects of the law on spatial organisation and society,<sup>66</sup> 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.<sup>67</sup> 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,<sup>68</sup> 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-Mihalopoulos (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. Ojalampi 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 to 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,<sup>69</sup> with significant legal frameworks predicated on guaranteeing Indigenous peoples’ rights to ancestral territories that precede the territorial form of states.<sup>70</sup> 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.<sup>71</sup>

What is the difference between ‘ancestral territory’ writ large and specific sites within an extensive ancestral territory? Anthropological studies suggest Enxet-Sur and Sanapaná peoples historically occupied a territory spanning 500,000 square-hectares.<sup>72</sup> 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<sup>73</sup> as a whole and, on that basis, affirms that it can grant an alternate piece of land within this extensive ethnic territory.<sup>74</sup>

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.<sup>75</sup> 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.’<sup>76</sup> 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.<sup>77</sup>

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]<sup>78</sup> 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.<sup>78</sup>

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.<sup>79</sup>

54 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.<sup>80</sup> 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’<sup>81</sup> 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.<sup>82</sup>

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 systematically 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.<sup>83</sup> 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'.<sup>84</sup> 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.

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 Sanapaná 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<sup>85</sup> of getting the policy 'right',<sup>86</sup> surveying, or mapping land,<sup>87</sup> or a simple question of political will.<sup>88</sup> 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.<sup>89</sup> Ultimately then, the state's

82. *Ibid.*

83. *Ibid.*

84. *Ibid.*

85. My point also draws from conversations with Dr. Joe Bryan from University of Colorado Boulder Geography.

86. A. Huneus, '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 Sanapaná 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<sup>90</sup> that 'regulate relations among people by distributing powers to control valued resources'.<sup>91</sup>

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,<sup>92</sup> the performance of law<sup>93</sup> and production of liminal legal geographies.<sup>94</sup> 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.