

# Strategic Litigation Impacts



**INDIGENOUS PEOPLES' LAND RIGHTS**

OPEN SOCIETY JUSTICE INITIATIVE



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**Open Society Justice Initiative**



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For more information, please contact:  
Erika Dailey  
Senior Research Officer  
[erika.dailey@opensocietyfoundations.org](mailto:erika.dailey@opensocietyfoundations.org)

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# About the Strategic Litigation Impacts Series

This report is the third in a planned five-volume series looking at the impacts of strategic litigation. Strategic litigation is of keen interest to the Open Society Foundations (OSF), which both supports strategic litigation and engages in it directly—and thus has an interest in gaining an unbiased view of its promises and limitations. Strategic litigation can be a powerful engine of social change. Yet it can also be costly, time-consuming, and risky. Studying its strengths, weaknesses, unintended consequences, and the conditions under which it flourishes or flounders may yield lessons that enhance its potential and improve future social change efforts.

To produce the five studies in this series, OSF worked closely with a broad array of litigators and social change agents to assess the impacts of strategic litigation in specific thematic and geographic areas.

The first of the five studies, *Strategic Litigation Impacts: Roma School Desegregation*, was published in 2016 and looks at endeavors to end discrimination against Roma school children in the Czech Republic, Greece, and Hungary. It is available online at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-roma-school-desegregation>. The second study, *Strategic Litigation Impacts: Equal Access to Quality Education*, was published in 2017 and assesses efforts to increase equal access to quality education in Brazil, India, and South Africa. It is available at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-equal-access-quality-education>.

The fourth volume in the series will examine strategic litigation against torture in custody in Argentina, Kenya, and Turkey. The fifth and final volume will look to distill

from the preceding four studies lessons that may inform the future work of litigators and allied activists.

Although it is certainly hoped that these studies may lead to more effective use of strategic litigation as a possible driver of social change, OSF is well aware that strategic litigation is no panacea, and that the field would benefit from more—and more rigorous—thinking. This series of studies, then, may be thought of as one small step toward developing a better understanding of the promise and pitfalls of strategic litigation.

# Acknowledgments

This report was written by Jérémie Gilbert, who has published extensively on the rights to land for indigenous peoples and has been involved in litigation and related efforts to support land claims for indigenous peoples across the globe. The author is indebted to in-country field researchers for their work and their direct inputs to the overall study: Joel Correia (Paraguay), Kanyinke Sena (Kenya), Colin Nicholas, and Yogeswaran Subramaniam (Malaysia). The study would not have been possible without their support and professional engagement with the research. Thanks are also due to the interviewees who provided valuable insights to the study. The opportunity to meet and reflect on the litigation at the outset of the study was a significant impetus. Thanks to all those who participated in the two-day peer consultation held June 20–22, 2016, in Nairobi, Kenya, which greatly enriched the analysis.

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Erika Dailey and David Berry edited the report. The opinions expressed are those of the author.



# Methodology

The history of the struggle for land rights, rather than the substantive content of the law and its jurisprudence, drives this socio-legal study. In other words, it seeks to tell a story, rather than analyze the law. It examines strategic litigation of the right of indigenous peoples to their lands in Kenya, Malaysia, and Paraguay, as well as in regional and international jurisdictions, principally the Inter-American and African human rights systems.

The aim of this study is to provide some reflection on the impacts of litigation in securing land rights across the globe. However, to be able to offer an in-depth analysis, the study focuses on three highly diverse countries which have witnessed a high level of such litigation: Kenya, Malaysia, and Paraguay. Through its focus on these three countries, the report seeks to provide insights that may be relevant to other indigenous communities, litigators, and advocates around the world.

The choice of countries and cases reflects five considerations. First, following a global desktop mapping and expert consultations, the author prioritized three countries where there was reportedly substantial interest in the findings. Second, the study seeks geographic breadth by including one country in Asia, one in Africa, and one in the Americas, all of which had significant litigation activity on land rights.<sup>1</sup> Third, the three countries selected represent three disparate legal systems: civil law (Paraguay), common law (Kenya), and pluralistic law (Malaysia). Fourth, cases have been selected that have emerged variously from local, national, and regional courts, to permit a comparison of these jurisdictions. Fifth, the cases all concluded at least five years prior to the research, to allow a post-judgment analysis. It is hoped that the insights provided here may illuminate litigation on land rights in other communities, in that they are part of a larger movement of litigation on land rights across the globe.

To assess the varied impacts of strategic litigation and related advocacy efforts regarding land rights for indigenous peoples, the study uses a hybrid of legal analysis, academic research, and qualitative methodologies. Significant bases for the study include:

- A constructivist conception of the relationship between law and society, meaning that it not only focuses on the direct material effects of the judgments, but also adopts a broader perspective under which legal judgments and social dynamics affect one another.
- Qualitative research consisting of semi-structured interviews with a diverse range of key players, including members of the concerned indigenous communities, public officials, NGO leaders, lawyers, paralegals, activists, journalists, government officials, judges, corporate officials, policy makers, and members of non-affected communities. (Please see the Appendix of this report for the questions used in these interviews.)
- A focus on the broader issues, rather than solely on cases. The study includes examinations of some of the tactics used in indigenous peoples' land rights litigation and the strategies behind them. Three instances of litigation have been selected from each of the three countries, in order to offer a variety of situations and decisions for study.

To the greatest extent possible, the inquiry seeks to adhere to principles of impartiality, even-handedness, intellectual integrity, and rigor. To be sure, the study's sponsor, the Open Society Foundations, advocates, funds, and itself engages in strategic litigation as a vehicle for realizing human rights. The Open Society Justice Initiative both conducts and provides instruction in strategic litigation. And other parts of the Open Society Foundations network financially support grassroots efforts to litigate for human rights protections around the world. In light of this, the present study seeks to be as even-handed as possible in assessing the strengths and weaknesses of strategic litigation.

Independent experts, rather than Open Society Foundations staff, researched and wrote the study, hundreds of individuals provided their expertise to the researcher, and an eight-person advisory group whose members are unaffiliated with Open Society Foundations oversaw it from conception through publication.<sup>2</sup> In addition, the research process was designed to garner input from the widest possible spectrum of stakeholders and observers, including those who have been publicly skeptical or critical of using strategic litigation to achieve justice. This inquiry is born of an authentic desire to understand the complexities and risks of—rather than platitudes about—the use of strategic litigation to advance social justice. A lack of impartiality would only thwart that goal.

The inquiry draws on scores of semi-structured in-country interviews with diverse stakeholders in the three focus countries. Joel Correia (Paraguay), Colin Nicholas (Malaysia), Kanyinke Sena (Kenya), and Yogeswaran Subramaniam (Malaysia) conducted the interviews between June and October 2016. All are independent activists, scholars, and/or attorneys. To test the emerging hypotheses about the impacts of strategic litigation in this sphere and to catalyze transnational research and reflection, the Justice Initiative co-hosted a three-day peer consultation in Nairobi, Kenya, in June 2016, at the early stages of the fact-finding process. Proceeds from that consultation are publicly available.



# Executive Summary

*“The community now believes they exist and they have a future. The case gave them psychological healing.”*

—Charles Kamuren, Endorois Welfare Council, Nakuru, Kenya, July 2016

*“We now have confidence that we have control over our land and that we have the right to fight for our rights.”*

—Ilam Senin, Kampung Orang Asli Bukit Tampoi village, Malaysia, August 2016

*“After the ruling we had many meetings and debated for a long time what to do. It made us think and talk about our struggle more. The resolution from the court was important and it made us stronger. It spoke of a truth.”*

—Serafin Lopez, Xákmok Kásek community, Paraguay, July 2016

The right to land constitutes the basis for access to food, housing, and development, and is therefore an essential human right. But it is unlike other human rights in at least one respect: the possibility to enjoy it is, for most people, rapidly and permanently disappearing. In particular, indigenous peoples, who represent roughly five percent of the world’s population, struggle to exercise their right to land, forced to cede ground to state development, corporate land grabs, armed conflict, rising sea levels, and exponential population growth.

According to the World Bank, “[w]hile Indigenous Peoples own, occupy or use a quarter of the world’s surface area, they safeguard 80% of the world’s remaining biodiversity. Some of the most biologically important lands and waters are intact as a result

of Indigenous Peoples' stewardship. They hold vital ancestral knowledge and expertise on how to adapt, mitigate, and reduce risks from climate change and natural disasters. However, only a fraction of these lands are officially recognized by states, whether they are lands Indigenous Peoples traditionally owned or possessed under customary title."<sup>3</sup> The inability of the world's roughly 370 million indigenous peoples to access and control their land threatens their very existence and acutely jeopardizes proper management of this unique global good.

The rule of law should be an essential protection against these existential threats. In recent years, indigenous peoples have increasingly turned to the courts as non-legal tactics—such as protests—have failed to protect their historic lands from arbitrary seizure and their communities from eviction and the ensuing destruction of their livelihood and culture. Non-litigation actions such as protests are increasingly being met with violent attacks, such as the 2016 assassination of Honduran activist Berta Cáceres. In 2015 alone, 185 environmental activists were killed, 42 of whom were simply participating in protests.<sup>4</sup>

Around the world, existing power dynamics strongly privilege almost all other economic and political interests over those of indigenous peoples. Today, indigenous peoples are three times more likely than others to live in extreme poverty.<sup>5</sup> But the guarantee of equality before the law makes litigation a particularly promising way for indigenous peoples to attempt to right this extreme power imbalance and exercise their right to land.<sup>6</sup> Since the introduction of protective legal norms, notably the International Labour Organisation's Indigenous and Tribal Peoples Convention in 1989 and the UN Declaration on the Rights of Indigenous Peoples in 2007, more and more indigenous peoples have turned to the courts to seek remedies, using litigation as a significant element of their broader strategies to protect their ways of life. Litigation on land rights is now a growing, global phenomenon. This study seeks to shed light on the impacts of strategic litigation on indigenous peoples' exercise of their rights to lands and territories.

There is significant extant literature concerning indigenous engagement with litigation in common-law countries such as Australia, Canada, New Zealand, and the United States, but less is available regarding litigation for the rights of indigenous peoples in other jurisdictions. This study focuses on three highly diverse countries which have significant, long term, if less well known, experience with litigation on land rights: Kenya, Malaysia, and Paraguay. The report offers insights into the distinctive nature of litigation as a strategy to fulfill indigenous peoples' right to land, but also questions its effectiveness.

The use of strategic litigation as a tool to secure indigenous peoples' land rights has been fraught with obstacles and shortcomings. Chief among them are courts' typi-

cally weak knowledge of relevant legal norms, and their tendency to focus on formal law and land title, which ignore indigenous customs and land usage, and the international customary law statutes that protect them. Indigenous peoples and their legal teams are usually submitted to legal processes which impose an onerous burden of proof on the indigenous plaintiffs. Furthermore, the general political and economic playing field is tilted against indigenous rights, usually favoring formal, individualistic, and commercial land possession. Other challenges are more material, including a general lack of affordable legal aid, language barriers, political and judicial corruption abetted by wealthy land developers, and the physical remoteness of plaintiffs from courts.

Fortunately, despite the obstacles, litigation has proven to be an increasingly effective vehicle to challenge the lack of recognition of land rights for indigenous peoples. As the dozens of semi-structured interviews illustrate, strategic litigation had a particularly empowering impact on communities, their sense of agency, and their awareness of their rights. With several landmark decisions on the books in each of those countries, it is clear that strategic litigation can be a game-changer in what some scholars refer to as “unlocking” or “reframing” land disputes that were usually lost by indigenous peoples in the past.

Three broad categories of “impact” frame this and the other studies in the Strategic Litigation Impacts Series: (1) material outcomes (both direct and indirect); (2) judicial, jurisprudential, institutional, and policy changes; and (3) impacts on attitudes and behaviors toward and of indigenous peoples and their rights to. Field researchers gathered testimony from a diverse range of actors, including members of the concerned indigenous communities, public officials, NGO leaders, lawyers, paralegals, activists, journalists, government officials, judges, corporate officials, policy-makers, and representatives of non-affected communities. Together, this testimony is intended to provide a “360-degree” perspective on this complex topic.

Below are the report’s principal findings.

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. In all three countries, the communities’ previous attempts at negotiation, mediation, and dialogue had not borne fruit. Indigenous communities were left with no realistic alternative but to seek justice through the courts. **Even if it was their**

last resort, many interviewees described how taking legal action became a central element of their struggle, whether or not it resulted in restitution.

3. **Implementation of judgements in favor of indigenous communities was uniformly poor.** In several instances, indigenous peoples won a case in court, but reaped limited material benefits due to the state's failure to enforce the judgment.
4. **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. For example, some indigenous communities were able to return to their historic lands in Paraguay following unlawful eviction, because the positive ruling emboldened them to simply move back. And 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.
5. Strategic litigation usually took place in a very challenging environment, in which land rights were not properly protected or embedded into the legal framework of the state. In such contexts, litigation offered a platform for indigenous peoples to challenge the state's failings. As demonstrated in the research for this study, **litigation prompted a new interpretation of the law to counteract the lack of land rights recognition**. In this scenario, the judiciary interpreted the existing legal framework in ways that enhanced the integration of indigenous customary land rights.
6. Indigenous communities usually sought material remedies, such as land title, monetary compensation, health services, access to education, or paid jobs. Cash awards, in the form of damages or compensation, constituted an important source of alternative income for some communities. Material remedies also advanced their enjoyment of social and cultural rights. Hence, **it is important to judge the impacts of these efforts by looking at the broader economic and social rights that these judgments may secure**.
7. An important non-material result of litigation was that the legal challenge supported the development of new power relationships between the concerned communities and other interests, notably private actors. **It sometimes contributed to challenging the imbalance of power that the state and private companies uniformly enjoy over indigenous peoples.**

8. **Politically, strategic litigation for indigenous peoples' land rights had limited effect on government policy.** In the three concerned countries, there was no direct executive or legislative action to give effect to any judicial pronouncements favorable to indigenous peoples. **However, litigation did have a substantial impact on the work of some state institutions,** sometimes leading to the establishment of new institutions and administrative practices for monitoring, supporting, or negotiating indigenous peoples' concerns (such as in Malaysia and Paraguay) or implementing related judgments (such as in Kenya).
9. Even where material gains were minimal or contested, strategic litigation generated non-material outcomes, such as shifts in attitudes and behaviors within the judiciary and within the communities themselves. Across the three countries, many members of the communities at issue reported that the process of litigation, separate from any resulting judicial decision, sometimes caused internal rifts and changed traditional decision-making processes, while at other times it provided a sense of empowerment. Overall, **there is evidence that strategic litigation substantially improved rights awareness and a sense of agency among concerned communities.** The way the communities organized, 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.
10. **Strategic litigation influenced attitudes and behavior toward indigenous peoples' right to land among external stakeholders as well. For example, it prompted civil society organizations 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.** However, strategic litigation had little apparent impact on mainstream society's perception of indigenous people and their rights. **It did little to change negative and often discriminatory attitudes of non-indigenous populations.** While some positive impact was noted in generating more evenhanded or supportive media coverage and more respectful language from state institutions, by and large the act of litigating appeared to have had a more powerful impact on the indigenous communities than on the majority populations.



# Introduction

## A. Context: Indigenous Peoples, Land Rights, and Strategic Litigation

Over the last two decades, the rights of indigenous peoples have gained significant visibility and recognition in international institutions. For example, the UN established the UN Permanent Forum on Indigenous Issues in 2002 and adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. A body of jurisprudence from international human rights treaty monitoring bodies has arisen alongside these developments. Rights to land and natural resources have been among the most litigated and contentious issues for indigenous peoples across the globe. While indigenous peoples represent one of the most diverse groups of the world, coming from the Arctic, the Amazon, the hills of Asia, and the plains of Africa, they nonetheless all share a particular historical, spiritual, social, and cultural attachment to their ancestral territories. Forced displacement, loss of land, and restriction of their access to natural resources are a grim set of common denominators.

National, regional, and international courts have received numerous cases concerning indigenous peoples' land rights. The Inter-American Court of Human Rights (IACtHR) has been especially active regarding indigenous peoples' land rights in the Americas, but litigation has not been limited to one particular region, as across the globe indigenous peoples have increasingly turned to courts to seek remedies for violations of their right to land.

This study concerns strategic litigation, also known as public interest litigation, impact litigation, or cause lawyering. Here, "strategic litigation" refers to cases that

have an explicit aim of positively affecting persons beyond the individual complainants before the court. Strategic litigation is one of many social-change tools, and is often used in concert with public protests, lobbying, legal aid, and other forms of advocacy. Strategic litigation is therefore part of a broader narrative of change.

The High Court of Belize,<sup>7</sup> the Supreme Court of India,<sup>8</sup> the Constitutional Court of Ecuador,<sup>9</sup> the Constitutional Court of Colombia,<sup>10</sup> and the Constitutional Court of Indonesia<sup>11</sup> have all adopted important rulings on indigenous peoples' land rights in response to strategic litigation cases in the last five years. This engagement with litigation exists in contrast to the fact that law and legal institutions have been part of a system of oppression rather than places to seek remedies for most indigenous peoples. Most legal systems have rejected their right to land, usually privileging political elites and corporate property owners. Litigation has extremely high financial costs, and indigenous peoples face ignorance among lawyers and judicial officers about their rights, the absence of domesticated international treaties, and usually the absence of a legal framework on indigenous peoples' land rights. From this perspective, the recent access to courts and legal institutions by indigenous peoples is remarkable. It also calls for a larger understanding and analysis of the impact of such engagement with litigation.

The recourse to litigation often exists within a larger struggle for indigenous peoples seeking justice. That struggle frequently includes grassroots organizing, lobbying, and other forms of mobilization. This study is designed to explicate litigation's role in this larger struggle for land rights. Litigation is often the crystallization of a long-standing land struggle. These cases are collective; they seek remedies for a larger community rather than an individual or a family. They concern collective land claims, which play a very important role in the collective identity of indigenous peoples.

## B. Research Objectives: Looking Beyond Implementation

This study analyzes the impact of strategic litigation seeking to support the rights of indigenous peoples to their lands and territories. Its focus goes beyond the implementation of the judgments to explore the extent to which strategic litigation and its outcomes generate social changes. While implementation (or lack thereof) has a direct effect on our understanding of the impact of litigation, it is possible that litigation's effects are felt beyond the question of implementation.

This is not a study about the law, nor is it a legal study; it is a socio-legal analysis of the impact of litigation. A significant body of literature exists regarding the legal content of the judgments, but little analysis is available on their practical impact. Therefore

this study seeks to address whether litigation contributes to broader social changes and whether, in the words of legal scholar César Rodríguez-Garavito, it “produce[s] indirect transformations in social relations” and “legitimize[s] the litigants’ worldview” within the overall society.<sup>12</sup> The objective is to examine what social, political, and legal contributions litigation has made to the advancement of land rights. Through an in-depth examination of the situation in three selected countries, the study aims to demonstrate the different ways in which strategic litigation impacts the concerned communities and society more broadly.

## C. Indicators of Impact

Assessing the impacts of strategic litigation is a subjective undertaking. Such an assessment must take into account the cost and effort of bringing the case to court, the nature of the judgment or settlement itself, and the monitoring and implementation (or lack thereof) of the rulings. Assessing the impacts must also include whether and to what extent the strategic litigation may correlate to, if not outright cause, the perceived impacts.

It is difficult to measure the successes and shortcomings of strategic litigation. First, attributing any particular outcome to litigation alone is challenging. Governments tend to claim that any changes taking place in the wake of litigation would have happened anyway. Moreover, since the reasoning behind an individual judicial or policy decision is often unclear—and since many different legal, social, and political dynamics work simultaneously and in a complementary manner to effect change—it may be impossible to demonstrate definitively that a ruling or a change in a government’s policy toward indigenous peoples would not have happened but for the strategic litigation.

Further, indigenous peoples’ struggles for land rights have been unfolding for many years in the focal countries, and many other acts of resistance, advocacy, lobbying, and protest have occurred at the same time. To be able to analyze the effects of litigation among these other tools, the study relies on a number of indicators to assess the impact that litigation can have. Specifically, this study examines three types of impact.

First, the study focuses on material impacts, both direct and indirect. In the context of indigenous peoples’ land rights, direct material impacts include land restitution, land demarcation, and land titling. Indirect material impacts, such as the construction of schools for indigenous children, may emerge as a consequence of litigation. But there may also be negative indirect impacts attendant to strategic litigation, such as increased corruption.

Second, the study examines the jurisprudential and policy impacts of litigation. Relevant areas of assessment include the impact of strategic litigation on the legal,

administrative, and political frameworks governing indigenous peoples' land rights. Litigation can have a direct effect in terms of legal or policy changes. It can also have an impact on the institutional make-up of the state, such as the creation of new institutions charged with safeguarding the land rights of indigenous peoples.

Third, litigation can also have behavioral effects, such as changing public opinion regarding indigenous peoples' rights and building awareness among indigenous communities. Litigation can also have an impact on mainstream society's general perceptions of indigenous peoples. Other behavioral effects of litigation include the reframing of media coverage or changes in the relationship between indigenous communities and the broader society. Other important indicators include the impact that litigation can have on social movements, and more generally on indigenous activism. By changing how indigenous peoples view their own agency and how they view the courts, strategic litigation can beget further litigation and related activism.

By studying these varied manifestations of the impacts of strategic litigation, it is possible to assess the overall effectiveness of strategic litigation for indigenous peoples' land rights. But first, it is necessary to understand the context in which this litigation has taken place; thus, the next chapter examines the situation of indigenous peoples in Kenya, Malaysia, and Paraguay, and their struggle for land rights.

## II. Background

### A. Kenya

There is no disaggregated census data on indigenous communities in Kenya. However, indigenous peoples constitute an estimated 25 percent of the country's population and inhabit 80 percent of the country's landmass.<sup>13</sup> Kenya's 2010 Constitution identifies indigenous communities as "marginalized communities,"<sup>14</sup> which it defines using language similar to the criteria the African Commission Working Group on Indigenous Populations/Communities<sup>15</sup> adopted to identify indigenous populations in Africa.<sup>16</sup> The communities that identify themselves as indigenous are predominately pastoralists and hunter-gatherers, as well as some minority fisher communities.<sup>17</sup> Most of the rights violations indigenous communities experience in Kenya are related to their access to land and natural resources. Historical injustices derived from colonial times, conflicting laws and unclear policies on land rights, mismanagement, and land grabbing have led to a crisis in the country's land tenure system.<sup>18</sup> Most indigenous communities face land and resource tenure insecurity, poor service delivery, poor political representation, discrimination, and exclusion.

#### **Legal and Institutional Framework**

The lack of recognition for indigenous people's land rights in Kenya dates to the colonial period (1895–1963), when the British colonial government implemented policies that either expressly denied land rights to indigenous peoples or ignored them.<sup>19</sup> The post-independence legal framework did not recognize marginalized communities' land

rights, opting to categorize communal land as “Trust Lands” and other forms of governmental land. Many indigenous peoples lost their land, which was instead codified as protected areas or public land.

The 2009 national land policy and the new constitutional framework adopted in 2010 launched the development of a new legal regime governing land rights. Article 63 of the new Constitution guarantees the rights of communities to their lands and territories. It states that “community land” consists of land lawfully held, managed, or used by specific communities as community forests, grazing areas, or shrines and that it includes ancestral lands and lands hunter-gatherer communities traditionally occupied. The Environment and Land Court Act No. 19 of 2011 established the Environment and Land Court as a superior court to hear disputes relating to the environment and land. However, the Community Land Act, which was enacted into law in September 2016, gives national and county governments the authority to continue to use land previously appropriated from indigenous peoples for national parks and forest reserves.<sup>20</sup> Indigenous communities view this as a major failure of the law.<sup>21</sup>

A major impediment to indigenous peoples’ realization of land rights comes from the extreme political marginalization of indigenous communities. Kenya has a poor record of providing access to elective and nominative positions for indigenous peoples.<sup>22</sup> This marginalization has significant bearing on their rights to land, especially when their land claims are in direct conflict with land claims of more mainstream and dominant communities.<sup>23</sup> Ethnic political allegiances are a significant element in determining land allocation in Kenya, and political leaders generally do not support the land claims of minority communities.

Several public institutions currently work on issues relevant to indigenous peoples, including the Kenya National Commission on Human Rights, the National Gender and Equality Commission, the Commission on the Administration of Justice, and the National Land Commission.<sup>24</sup> But these institutions have largely failed to engage with indigenous communities on land rights. This has contributed to indigenous peoples’ turning to Kenya’s courts in hope of redress.

## **Engagement with Litigation**

Overall, Kenya offers a rich and complex history of engagement with litigation. Attempts by indigenous communities to use litigation to protect their land rights date to colonial times.<sup>25</sup> However, without a legal framework to protect indigenous land rights prior to the 2010 Constitution, and faced with poor legal representation, hostile judges, lack of judicial independence, and limited technical capacity and resources to pursue effective litigation, successes were rare.<sup>26</sup> Yet these failures have not ended indigenous peoples’ efforts to protect their land rights, as can be seen from the following summaries of three cases related to this issue.

► *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya (2010)*

The Endorois are an indigenous community of approximately 60,000 people. For centuries, they have lived in the Lake Bogoria area in the western part of Kenya. However, in 1973 the government dispossessed them of their land to create the Lake Hannington Game Reserve, now Lake Bogoria National Reserve. To this day, the denial of access to their land damages their livelihoods, culture, and religious practices. The community receives no benefits from the reserve and the government neither consulted with the Endorois nor provided appropriate compensation. Endorois leaders sought for years to negotiate with the provincial administration for redress, before finally filing a claim through the African Commission on Human and Peoples' Rights (ACHPR). The Centre for Minority Rights Development, a Kenyan NGO, connected the community to Minority Rights Group International (MRG), an international NGO that helped them pursue their claim. The Endorois sought redress for: violations resulting from their displacement from their ancestral lands, the minimal compensation they received, disruption of the community's pastoral way of life, and violations of the right to practice their religion and culture, as well as the disruption of the process of development of the Endorois people. The ACHPR found that the government had violated several rights of the Endorois, including their right to property, culture, religion, and development. It recommended that the government:

- a) Recognize the Endorois' rights of ownership and restitute Endorois ancestral land;
- b) Ensure the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle;
- c) Pay adequate compensation to the community for the losses they suffered;
- d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve;
- e) Grant registration to the Endorois Welfare Committee;
- f) Engage in dialogue with the complainants for the effective implementation of these recommendations; and
- g) Report on the implementation of these recommendations within three months from the date of notification.

This decision was quickly hailed by activists as the first important legal decision concerning land rights for indigenous peoples in Africa and a landmark victory

for the Endorois. Nonetheless, as of this writing most of the recommendations of the African Commission have not been implemented by the government, and the Endorois still live in impoverished conditions at the margin of their ancestral land.

► *Joseph Letuya & 21 others v. Attorney General & 5 others [2014] eKLR*

The Ogiek primarily reside in the Mau Forest, their ancestral territory in Kenya's Rift Valley.<sup>27</sup> However, their land rights have been under attack since the colonial period, and the state evicted them to create national forest reserves<sup>28</sup> and allow the settlement of other communities in the area.<sup>29</sup> The Ogiek first lost their land rights through the Anglo-Maasai Agreement of 1904, and then in 1932 a government commission recommended their assimilation into neighboring communities. Since then, the Ogiek have pursued non-litigation avenues for the recognition of their land rights, including petition drives and advocacy meetings with high-level government officials. They began to engage in litigation in 1997, when 22 members of the community decided to file a representative suit on behalf of members of the Ogiek community living in East Mau Forest.<sup>30</sup> They demanded a declaration recognizing that through forcible eviction the government had violated their right to life and to livelihood. They claimed that their evictions contravened their constitutional protections, notably their right not to suffer discrimination. They requested restraining orders against the Provincial Administration and Forest Department to restore their lands to them. After 17 years of legal engagement, in 2014, the court granted all of these requests. The adoption of the new Constitution in 2010 may have been the trigger for this positive result.<sup>31</sup> However, rather than expressly recognizing their land rights, the court directed the National Land Commission to work with the Ogiek Council of Elders to create a registry of Ogiek and identify land on which they might settle.<sup>32</sup> It specifically excluded claims to the Mau Forest on the basis that ancestral use and occupation were not grounds for the award of property rights.<sup>33</sup> Thus, earlier denial of rights became a reason to continue the denial of rights.

► *Narasha Maasai Cases*

Three connected cases concern land in the Maiella area of Narok District in southwestern Kenya, to which the local Maasai lay claim.<sup>34</sup> The Maasai have lived in the Maiella area for hundreds of years and consider it part of their ancestral territory. During the colonial era, a European settler acquired the land in question, and in 1974 he sold it to the Ngati Farmers Cooperative Society. In the mid-1990s, Ngati farmers went to court to seek an injunction restraining the Maasai from occupying the land or interfering with their work.<sup>35</sup> The Ngati farmers requested

a declaration deeming the Maasai trespassers. The Maasai filed a counter claim seeking a declaration that adverse possession had entitled them to ownership of the property, as well as an injunction restraining the farmers from evicting them.<sup>36</sup> The court recognized the Maasai claims to a 4,200-acre portion of the land on the grounds of adverse possession, but left the remainder of the land (totaling 12,100 acres) to the Ngati. In 2005, some of the Maasai went back to court seeking clarification of the court's ruling.<sup>37</sup> They invoked ancestral ownership, saying that they had no alternative land on which to settle and they had lived on the land all their lives. However, the court rejected their claims on ground of *res judicata* (or claim preclusion) and found that the Maasai had not established "that they have been in continuous, uninterrupted possession of the suit land," calling their claims "amorphous" and the rights they sought to reinstate "unspecified," and therefore "defeat[ing] common sense."<sup>38</sup> The Maasai continue to live on the 4,200 acres to which the court gave them access in the 1990s, but they have no titled deed. Today, exploration by the geothermal energy industry<sup>39</sup> and the possible construction of an industrial park further threaten their land rights.<sup>40</sup>

Although these three cases have yielded mixed results, they illustrate how indigenous peoples are attempting to use strategic litigation to advance their cause. As this report will describe, cases such as these have opened a space for indigenous peoples to turn to regional institutions to seek remedies.

## B. Malaysia

Malaysia is a federation of three separate political regions: Peninsular Malaysia, and the states of Sabah and Sarawak, on the island of Borneo. Indigenous people, the Orang Asal, account for close to 14 percent of Malaysia's population of 30 million.<sup>41</sup> Orang Asal (meaning original or first peoples) is an overarching term encompassing all indigenous peoples in Malaysia. The related term Orang Asli refers specifically to those living in Peninsular Malaysia. Indigenous peoples in Peninsular Malaysia number around 215,000 (0.7 percent of the national population) while in Sabah and Sarawak they number 2,203,500 and 1,899,600 respectively (or about 60 percent and 70 percent of their respective regional populations).

Legal recognition of indigenous customary territories is sparse in Malaysia, and those laws that do exist are not robustly implemented or enforced. The Orang Asal communities have endured a long history of dispossession of their customary territories. As demand for land increases, encroachment and appropriation of the remaining areas inhabited by local indigenous communities has expanded. Indigenous communities

often lack security of tenure over their customary areas and have struggled to resist this encroachment.

## Legal and Institutional Framework

The legal framework relating to land rights is not the same across Malaysia. In Peninsular Malaysia, the principal act that governs indigenous administration, including occupation of the land, is the Aboriginal Peoples Act 1954. The National Land Code, enacted in 1965, only applies to the peninsular region and does not recognize indigenous customary land rights. The Department of Orang Asli Development has primary responsibility to protect the rights of the Orang Asli of Peninsular Malaysia, but the agency has not been proactive in providing assistance in relation to land rights litigation. By contrast, the written laws of Sabah and Sarawak recognize native customary rights. However, both state legislatures and executives determine the scope and applicability of such recognition. The government has a history of prioritizing state and commercial interests over the rights of indigenous communities.

## Engagement with Litigation

Orang Asli advocacy for land and other rights dates to the 1980s, when they began engaging with the burgeoning worldwide indigenous rights and conservation movements. Their advocacy measures included engagement with the government and broader civil society, articulation and presentation of demands, media coverage and public awareness initiatives, civil disobedience, and peaceful protests. When this advocacy failed to yield the desired results, they began to seek redress in the courts in the 1990s. The 1996 High Court decision in the case of *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor and Anor* (“*Adong HC*”)<sup>42</sup> was the first time that any Malaysian court recognized the pre-existing customary land rights of the Orang Asli.<sup>43</sup> The decision was affirmed on appeal in 1998. Subsequent cases have deemed the common law recognition of their pre-existing rights applicable to native customary rights in the jurisdictions of Sabah<sup>44</sup> and Sarawak.<sup>45</sup>

Almost two decades of jurisprudence on land rights have followed *Adong HC*. Significantly, in 2007, the Malaysian Federal Court (the country’s highest court) affirmed this jurisprudence recognizing indigenous pre-existing customary land rights, while carving out the exception if plain and clear legislation has extinguished such rights.<sup>46</sup> Below are brief summaries of three cases—*Sagong bin Tasi*, which occurred in Peninsular Malaysia;<sup>47</sup> *Nor Anak Nyawai*, which occurred in Sarawak; and *Andawan bin Ansapi*,

which occurred in Sabah—and the precedents they set.<sup>48</sup> They reflect a diversity of tactics by indigenous litigants and their lawyers.<sup>49</sup>

► ***Sagong bin Tasi***

In 1995, authorities in Selangor State (located in Peninsular Malaysia) gave 23 families of the Temuan-Orang Asli community at Kampung Bukit Tampoi 14 days to vacate their land in order to make way for the construction of a highway leading to the newly-constructed Kuala Lumpur International Airport.<sup>50</sup> In accordance with the provisions of the Aboriginal Peoples Act, the state compensated the families for their dwellings, crops, and fruit trees, but not for the value of their land.<sup>51</sup> They refused to leave and enforcement personnel forced them out and oversaw the bulldozing of their homes. The families sought legal recourse through the courts, with help from the Malaysian Bar Council.<sup>52</sup> In 2002, the High Court recognized their customary title *to* the land (in contrast to *Adong HC's* recognition of usufructuary rights *over* the land). It granted the families entitlements to compensation on the basis of “full ownership,” in accordance with the Land Acquisition Act 1960. The High Court also held that the federal and state governments had breached their fiduciary duty to protect the plaintiffs’ land rights by failing to protect Orang Asli land as an aboriginal reserve. The Court of Appeal affirmed the decision of the High Court in 2005.<sup>53</sup> Authorities threatened to challenge the decision, but a new party came to power, which led to an amicable settlement in 2008, under which the Orang Asli received compensation for the loss of their land.<sup>54</sup> Significantly, the case also prompted the new state government to adopt the principle of proactively protecting and recognizing the rights of the Orang Asli to their customary land, including establishing an indigenous-led Orang Asli Land Task Force to study land issues in the state.

► ***Nor Anak Nyawai***

In Sarawak, the state issued a provisional lease to a plantation company, covering land to which the indigenous Iban people lay claim. In the 1980s, the company then subleased the land to a timber contractor, which cleared the land. In *Nor Anak Nyawai*, the Iban sought declaratory and consequential relief for the contractor’s trespass and damage to land subject to native customary rights. In its 2001 ruling, the High Court extended common law recognition of native customary rights to Sarawak.<sup>55</sup> It also ruled that the 1958 Sarawak Land Code had not extinguished or abrogated the Iban’s customary rights.<sup>56</sup> While the Court of Appeal in 2005 found that the Iban lacked sufficient evidence to prove native customary rights,<sup>57</sup> the appellate court nonetheless endorsed the High Court’s

legal pronouncements on common law recognition of native customary rights. It also held that a state could extinguish these customary rights only in accordance with the laws and after compensating the group.<sup>58</sup>

Following the advice of its legal team, the indigenous community decided not to appeal the ruling, in part because the court decision supported a positive interpretation of customary native title.<sup>59</sup> The plantation company has not developed the cleared land and the Iban have rebuilt their huts there.

► *Andawan bin Ansapi*

In this case, the state of Sabah charged six members of the indigenous Murut peoples under Section 20 of the 1968 Forest Enactment for undertaking cultivation in an area located within a forest reserve without express government authority. As a defense, the six Murut argued that the concerned land was part of their native customary land rights. The magistrate's court ruled that they could not claim customary rights pertaining to land already designated as a forest reserve. The state's fine stood. On appeal, the High Court ruled that the appellants did in fact possess native customary rights to the land.<sup>60</sup> The authorities appealed and in 2013 the Court of Appeal reversed the High Court's ruling. The six Murut men were found guilty of trespassing, and fined RM500.00 (US\$125.00) each. Their lawyer also had to provide the court an affirmation that the six would not enter the forest area again without official permission from the state.

Taken together, these cases from Malaysia illustrate how indigenous peoples have used the courts to defend their land rights, including winning compensation in the case of the Asli and de facto restoration in the case of the Iban. Significantly, all three judgments came from Malaysian domestic courts rather than regional courts—in contrast to the situation in Paraguay, which is examined in the next section.

## C. Paraguay

Paraguay is a country of roughly 6.5 million inhabitants, with 1.8 percent of that total (or 117,150 people) identifying as indigenous; among 19 distinct indigenous peoples, there are five language families.<sup>61</sup> The overwhelming majority of the indigenous population is rural, with just under half living in the arid, isolated Chaco region in the country's northwest. Paraguay's history of agricultural expansion, concentration of land tenure, and deforestation has led to the expulsion and continued dispossession of many indigenous peoples from their ancestral lands. They have long been the targets of discrimina-

tion and violence. The majority population effectively normalizes discrimination against indigenous peoples, and Paraguay, unlike most countries in Latin America, does not have a law against discrimination.<sup>62</sup> Indigenous peoples experience the highest levels of infant mortality, unemployment, and illiteracy of any sector of Paraguayan society, while receiving the lowest levels of access to health services and state-run education.<sup>63</sup> The UN special rapporteur for the Rights of Indigenous Peoples recently reported that Paraguay should consider the status of indigenous peoples in the country as a “state of emergency.”<sup>64</sup> Broad discrimination and racism against indigenous peoples severely limit the exercise of indigenous rights. Numerous civil society organizations have denounced the state for its inaction on structural discrimination, exploitation, forced labor, and racism against indigenous peoples.<sup>65</sup> Paraguay’s indigenous peoples have long been denied access to consultation regarding development projects that encroach on or appropriate their ancestral territories.<sup>66</sup>

## Legal and Institutional Framework

Paraguay’s first substantive step toward creating a legal framework to support indigenous rights came in 1981 with the creation of Law 904/81, also known as the “Indigenous Communities Statute.” The country officially adopted a multicultural legal and policy framework with the Constitution of 1992, which explicitly outlined the rights of indigenous peoples. Chapter 5 of the 1992 Constitution recognizes the existence of indigenous peoples before the creation of the state, and recognizes their rights to land within their ancestral territories. The Agrarian Statute (Law 1863/02) entitles indigenous peoples in the southeastern region to a minimum of 20 hectares of land per family and those in the northwestern region to 100.<sup>67</sup> Paraguay has also ratified all the major international treaties and conventions relevant to indigenous peoples’ rights, including the ILO Convention 169 in 1993 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Hence, on paper, Paraguay has a robust indigenous rights legal framework,<sup>68</sup> but in practice it lacks the ability or will to guarantee those rights in a timely or effective manner.

The National Indigenous Institute, (*Instituto Nacional del Indígena*, INDI), and the National Institute of Development and Land (*Instituto Nacional de Desarrollo y de la Tierra*), are the main government bodies overseeing indigenous territorial issues. However, INDI is one of the least funded federal programs, lacking the power or authority to advocate for the rights of indigenous peoples due to its status as an “institute,” not a ministry or higher-level office.

Paraguay’s legal framework exists within a context in which approximately two percent of the country’s population owns at least 72 percent of the land.<sup>69</sup> Large-scale

cattle ranchers and soy farmers control virtually all of the Chaco region, home to nearly half of Paraguay's indigenous population. State development priorities and increasing global demand for beef and soy are driving phenomenal rates of deforestation in the Chaco: more than 1.6 square miles of forest are destroyed every day.<sup>70</sup>

## Engagement with Litigation

More Inter-American Court of Human Rights (IACtHR) rulings have concerned violations of indigenous land rights in Paraguay than in any other country in the Americas.<sup>71</sup> This section considers three cases that began as land claims and that—upon reaching the Inter-American System—became “strategic” in the sense of serving as vehicles for broader social change beyond the claimant communities. The *Yakye Axa Indigenous Community v. Paraguay* (2005), *Sawhoyamaya Indigenous Community v. Paraguay* (2006), and *Xákmok Kásek Indigenous Community v. Paraguay* (2010) rulings embody the contemporary problems with indigenous rights to land in Paraguay.

### ► *Yakye Axa Community*

The Yakye Axa are an indigenous community, part of the larger Enxet Sur people. Decades ago, they lost access to their ancestral territories in the Chaco, which were parceled and sold to cattle ranchers and other private owners. They have been forced to live in makeshift shacks on the side of the highway since the 1990s, with no access to services of any sort, no clean water, and no land on which to grow crops. In 1993, the community officially started legal proceedings to seek remedies through INDI. When INDI failed to respond, they initiated litigation in 1997, claiming that the ineffectiveness of government procedures established to respond to claims to ancestral territory directly violated the community's human rights.<sup>72</sup> Following three years of stops, starts, appeals, and frustrations with Paraguayan courts, the community filed a complaint with the Inter-American Commission on Human Rights in 2000. In 2005, the IACtHR ruled that Paraguay had failed to ensure that its domestic laws guaranteed the community's effective use and enjoyment of their ancestral land, thus threatening the free development and transmission of its culture and traditional practices. The court concluded that Paraguay had violated the rights to property, as well as the right to life, since it had prevented the community from accessing its traditional means of livelihood. The court ordered the state to demarcate the traditional land, to provide it to the community at no cost, and to provide basic goods and services necessary for the community to survive until they recovered their land.

► *Sawhoyamaxa Indigenous Community*

The Sawhoyamaxa indigenous community initiated claims for land restitution in 1991 through negotiations with Paraguayan authorities in accordance with the policy established in Law 904/81. When these processes proved ineffective, they filed for the legal expropriation of the land, arguing that the devolution of land to indigenous peoples reflected broader societal interest as proclaimed under the Paraguayan multicultural policy and constitutional framework. Congress entertained the expropriation request in 1997, but powerful ranching interests with direct ties to numerous state officials defeated it. The community petitioned the IACHR in 2001 and their case was filed before the IACtHR in 2005. In 2006, the court found various violations of the American Convention on Human Rights, specifically the right to a fair trial and judicial protection, right to property, right to life, and right to recognition as a person before the law. The court ordered very specific remedies: to return the ancestral lands to the community within three years; to create a development fund for the community in the amount of US\$1 million, administered by a committee; and to pay compensation for non-pecuniary damages, costs, and expenses within one year. It called on the state to pay US\$20,000 to each of 19 families who had documented the loss of loved ones as a result of their displacement. The court also ordered the government to deliver basic goods and services and implement an emergency communication system as long as the community remained without land. Faced with a lack of government action to implement these remedies, the Sawhoyamaxa reoccupied their traditional lands in June 2013.<sup>73</sup> In 2014, Congress passed and the president signed a bill expropriating the land and officially returning it to the Sawhoyamaxa.<sup>74</sup>

► *Xákmok Kásek Community*

This case concerns a long process of land claims by the Xákmok Kásek community to regain rights to territories the government sold to a private ranching company in the early 1900s. The company has offered the community numerous other parcels of land—but not the original land—since that time. The community entertained these offers, but determined that they lacked the cultural and historic value of their ancestral lands, as well as the hunting and fishing resources. Despite the community's advocacy efforts—including asking Parliament to expropriate 10,700 hectares from the private owners—the state allowed the private ranching company to sell part of the land at issue to a Mennonite cooperative in 2002. In addition, the state declared another part of the territory a Protected Wild Area in 2008 without consulting the community.

In response, the community turned to the Inter-American system for help in 2001.<sup>75</sup> The IACHR acknowledged the right of the community to claim the land and reverted the case to the IACtHR. In a 2010 decision, the court found violations of the right to communal property, right to life, and personal integrity. The court acknowledged the relationship between the traditional land and the cultural identity of the community, as well as the state's failure to provide for the community's needs while it was impossible for them to be self-sufficient due to lack of access to their land, resulting in a violation of the right to life and livelihood. As a remedy, the IACtHR required the identification of 10,700 hectares in consultation with community leaders for restitution to the community. The court also required the state to publish its decision and acknowledge responsibility for violating the community's rights. Furthermore, the court ordered the government to adopt provisional measures to protect the community's economic and social rights, as well as create a community development fund.

As the cases from Kenya, Malaysia, and Paraguay show, the expropriation of indigenous peoples' lands and denial of their land rights are sadly common. In all three countries, indigenous groups first sought to organize and use non-litigation advocacy to defend their rights, before turning to the courts and incorporating litigation into their overall efforts. That litigation has generated significant impacts in Kenya, Malaysia, and Paraguay. The next chapter considers the material impacts, both direct and indirect, of litigation in the three countries.

### III. Material Impacts

Strategic litigation is often deployed with the goal of generating multiple impacts. One type of impact is material: the goods and services gained by the litigants. Other material outcomes may be less direct, and may even be negative, such as disagreements within a community that may arise during protracted litigation. This chapter first examines the direct material impacts of strategic litigation, then considers the indirect material impacts. Subsequent chapters will examine impacts on policies and jurisprudence, before looking at less quantifiable impacts such as changes in attitudes and behaviors.

Direct material impacts are generally considered to consist of explicit remedies listed in courts' rulings. This can include land restitution, land demarcation, land titling, reparations, and monetary compensation. Under international legal standards, the main principle governing remedies for land rights violations is restitution of the land.<sup>76</sup> Due to the intrinsic cultural, social, and economic value of ancestral territories to indigenous peoples, most envision land restitution as the best outcome of litigation. Other forms of direct impact may include other economic, cultural, and social remedies, such as the provision of employment opportunities, benefit-sharing and royalties for land usage, access to healthcare facilities, or protection of usage rights over some of the natural resources. From the perspective of indigenous peoples, these are less than ideal, and are often considered last resorts when restitution is impossible. While simplest for a court to award, material restitution addresses only one component of a community's loss. Far harder is identifying remedies to compensate for such profound losses as the loss of a language or of traditional community ties.

Indirect material impacts are not directly connected to the courts' rulings, but they consist of events that would not have occurred if litigation did not take place. They may be positive or negative. Positive outcomes include increases in funding or grants of material support to community development. Negative outcomes include indebtedness of the community due to the cost of litigation.

## A. Direct Material Impacts

### Land Restitution, Land Titling, and Alternative Land

In line with international law, court decisions often call for land restitution. In Malaysia, recent decisions from the superior courts indicate that the restitution and return of lands and resources constitute an essential remedy for indigenous communities. For example, land restitution was one of the main remedies in the African Commission's landmark 2010 *Endorois* decision. Kenya's first compliance with the *Endorois* decision came four years after the judgment, in the form of a task force with a mandate to study its implications. As of this writing Lake Bogoria remains classified as a national reserve managed by the Baringo County government.<sup>77</sup> Nonetheless, the decision has triggered negotiations toward an eventual land restitution process.

In Malaysia, the *Nor Anak Nyawai* judgment helped lead to the Iban peoples' reoccupation of their lands. And in Paraguay, the IACtHR ordered the government to adopt all necessary measures to return ancestral lands to the concerned communities in the three cases described in the previous chapter. Generally, implementation has been slow and uneven in these cases. Yet even in cases where land restitution and titling remain largely delayed, material impacts can be measured through processes now underway.

The IACtHR ordered the return of 10,700 hectares of land to the Xákmok Kásek community in 2010; the state titled 1,500 of them to the community in 2015. The government began the purchase of an additional 7,700 hectares of the originally claimed land from private owners in September 2016, to be conveyed to the Xákmok Kásek community.<sup>78</sup> The remaining 3,000 hectares of the community land is held by a ranching consortium, which has thus far refused to sell it.<sup>79</sup>

In its 2006 *Sawhoyamasa* decision, the IACtHR ordered the restitution of the disputed land to the community within three years. However, the authorities did not adopt an order of expropriation for the cattle ranchers living on their land until 2014. No legal or juridical survey of the land—a necessary precursor to its return—has taken place as of this writing, and there is no established time frame to complete this fundamental task.<sup>80</sup>

The Yakye Axa community has not to date obtained restoration of their land, which was ordered by the IACtHR in 2005. The community negotiated with the holder of their ancestral land for years. The authorities provided no substantial support to expropriate the land, but in 2008 the government offered alternative land. In 2012 the community accepted, following a long period of internal community debates. The community has lived alongside a road on the fringes of their ancestral land for decades and their long stay there has caused unforeseen complications. Many members of the Yakye Axa community have family members buried on the roadside and are loath to leave them behind. A Yakye Axa woman told researchers in an interview that leaving her father's bones would mean "He will never see what he spent so much time fighting and suffering for!"<sup>81</sup>

The community ultimately reached consensus, recognizing that the purchaser's unwillingness to part with the land and the government's reluctance to compel him were unlikely to change. The state presented the community with a number of different potential sites and leadership chose one based on overflights, as well as site visits conducted with community members, lawyers, and representatives of state agencies. A state-provided surveyor and evaluator assessed the price of the land based on its resources, soil types, and infrastructure. The purchase of the alternative land was completed in 2012. However, no progress has been made toward transferring legal title of the new property to the community.<sup>82</sup> Moreover, the construction of an "all-weather" access road, which was an essential condition of the community's acceptance of the alternative land, is pending completion by the Ministry of Public Works as of this writing.<sup>83</sup> Until that road is completed, the community cannot access the land.

The situation of the Yakye Axa community illustrates the complexity of accepting alternative land as a remedy. Community members recognize that their choice to accept the new land was in some ways coerced. As one woman said:

They did this to us. The state, the government—they don't care about us, about indigenous people. They did this to us and make us suffer. We would never have taken [the alternative land] but they told us it would be quick and that we'd have peace. Here we are waiting... We are still here and people are suffering!<sup>84</sup>

## **Monetary Compensation, Damages, and Development Funds**

Most positive judgments in land rights cases include monetary damages, allocation of compensation, and/or the creation of special development funds to recompense the communities for the loss they have suffered. Yet such compensation is not always forthcoming. In the case of the Endorois community in Kenya, the African Commission recommended that the government "pay adequate compensation to the community

for all the loss suffered,” and “pay royalties to the Endorois from existing economic activities [on their land].” No compensation payments have been issued so far. The Endorois currently receive 10 percent of revenue collected from economic activities involving Lake Bogoria as part of the County Integrated Development Plan, which distributes resources to all communities in the county.<sup>85</sup> The county government has explicitly described these distributions as separate from the African Commission’s recommendation.

In contrast to the Endorois’ wait for compensation, in Malaysia the Sagong bin Tasi families received cash compensation in accordance with the Land Acquisition Act 1960.<sup>86</sup> Through an amicable settlement reached in 2010, the federal government paid the 23 families RM6.5 million (US\$1.6 million) in a lump sum, in addition to the compensation for the loss of dwellings and crops they received when they were dispossessed of their land. Ilam Senin, chairman of the Sagong bin Tasi’s Village Development and Security Committee, highlighted the positive changes in the community stemming from these funds. “The biggest change would be in terms of infrastructure; there are now more houses that have been built,” he said in an interview. “This could have never been built if [the Sagong bin Tasi] had accepted the government’s [initial] offer.... There has been an increase in cars bought by members of the community. The monies have also been used to help fund children’s education—but only a few, not many. We have also kept a community trust fund.”<sup>87</sup>

Community trusts are not always created by the community itself; in one of the Malaysian cases, the trust was created by the government, following a court order. In the case of *Adong Kuwau*, the Jakun-Orang Asli in Johor were awarded a sum of RM26.5 million (US\$6.6 million) in 1997 for “loss of livelihood” because the state had denied them access to 53,000 acres of forest.<sup>88</sup> Because the calculation for the compensation was based in part on providing an alternative income for the 52 dispossessed families for the next 25 years, the court ordered the state to place RM22 million (US\$5.5 million) in a trust fund for the community. The judgment calls for the families to receive a monthly sum of RM900 (US\$225), to be paid from interest on the principal. After 25 years, a new court order will be required to decide what to do with the principal.

Strategic litigation in Paraguay has also resulted in shared community resources. In the IACtHR rulings, the court judged that the state should make a payment for the material damages that the communities suffered, and for all of the costs and related expenses of the proceedings. With this fund, the Xákmok Kásek community has purchased a small cattle herd and a community vehicle. The acquisition of these goods was based on a community decision to invest some of those funds collectively. The remainder was divided accordingly among the victims to whom the funds corresponded. Members of the Xákmok Kásek community said that the Sawhoyamaxa and Yakye Axa had not received any lasting beneficial material impact from the individual distribution of such payments and that this

influenced their decision to use their funds to benefit the community broadly.<sup>89</sup> Through a long process of negotiation, the community of Xákmok Kásek decided to purchase 10 cows to start a small community herd and a truck that would serve their transportation needs, including the need to travel to emergency health services, which are not nearby.

In the three cases concerning Paraguay, the IACtHR has ordered the government to create development funds for the communities. While these measures appear to have promise in terms of their likelihood of materially benefiting members of the community, the management of these funds has become problematic. The government's annual reports to the IACtHR regarding the funds awarded the Sawhoyamaya community, for example, clearly reveal vulnerability to misappropriation, corruption, and embezzlement.<sup>90</sup> For example, the government agency INDI, not the Sawhoyamaya, received part of the development fund within its 2015 budget. Members of the Yakye Axa and Xákmok Kásek communities have also expressed concern about state misappropriation of funds.

## **Employment, Food, Healthcare, and Other Sources of Livelihood**

The lack of access to their traditional land and the poor living conditions communities endure while fighting for restoration frequently leave them without resources. Therefore their litigation may seek access to essential services such as water, food, healthcare, education, and employment opportunities. Hence the outcome of litigation can have a powerful impact on these rights.<sup>91</sup>

In Kenya, the Endorois gained some access to the lake in their ancestral land through litigation; they need not pay the entrance fees the general public must pay to enter the reserve. About 100 families also reside within the reserve's boundaries. The lake is not fenced, so the Endorois graze their cattle freely. The Baringo County government and the community jointly oversee the grazing.

In the three cases in Paraguay, the court ordered the government to deliver basic goods and services as long as the communities remained landless. Our research suggests the state often fails to fulfill this order in a timely manner. The *Servicio Nacional de Emergencia* has a responsibility to deliver monthly food rations to the Sawhoyamaya. Community members describe inadequate, sporadic deliveries of poor quality food. The Yakye Axa lack access to health services, clean and reliable drinking water, education, employment opportunities, and basic safety, as a highway bisects the community.<sup>92</sup> In probably the best outcome of these types of orders, the IACtHR ordered the state to establish a permanent healthcare facility with medicine and equipment necessary for adequate healthcare for the Xákmok Kásek community.<sup>93</sup> While the facility has been constructed and supplied with medical equipment and medicine, it lacks medical staff on a regular basis.<sup>94</sup>

Beyond sustenance, health, water, and safety, a positive ruling can have some important consequences for community members' employment. In Kenya, the African Commission has called on the government to ensure that the Endorois benefit from employment opportunities within the reserve. Out of the more than 40 staff currently employed at Lake Bogoria, about 50 percent are from the Endorois community. As the executive officer in charge of tourism for the area noted, "[A]s we develop the new Lake Bogoria Management Plan, we will factor in the ACHPR *Endorois* decision as [we] develop more economic opportunities for the Endorois. This is because until recently we were not aware [of and did not] properly understand the decision."<sup>95</sup>

Losing traditional lands can not only cut off indigenous people from their way of life, sustenance and water, but it can also cut them off from state and government services. In Paraguay, indigenous communities have been unable to vote or receive benefits from the state due to a lack of official documents. The IACtHR ordered the authorities to establish a program to document and register members of these communities. In its implementation report to the court, the state noted that the Department of Identification, in accordance with the Ministry of Interior and in coordination with the General Directorate of Civil Registrations, had implemented the periodic distribution of documents to members of the community. However, community members reported that problems with obtaining new documents persist and that members have had to travel several days at considerable expense to the capital to receive national identity cards.<sup>96</sup> Nonetheless, many people in the community now have identity documents due to the court's ruling.

Clearly, the primary goal of strategic litigation for land rights is to win restitution of the land in question. But frequently this is not possible, and alternative forms of remedy must be found, including monetary compensation. These direct material impacts are at the core of the litigation described in this study. But there are other material impacts—which may be less direct but are still quantifiable—that should be accounted for in assessing the effectiveness of strategic litigation for indigenous peoples' land rights. These indirect material impacts are considered in the next section.

## B. Indirect Material Impacts

### **Indirect Monetary Impacts**

Litigation on land rights can be protracted and onerous, and the outcome unpredictable. A positive judgment can result in a sudden and significant influx of financial resources, but those resources only come at the conclusion of the process, if they come at all. Meanwhile, indigenous people need resources to sustain them during the litigation

process. Fortunately, one often overlooked side benefit of engaging in strategic litigation is increased attention from the outside world to the plight of indigenous peoples. Some groups have had success in turning that attention into material benefits not directly related to the litigation itself.

In Paraguay, the Sawhoyamaxa community benefited from the construction of two small schools on the land they reoccupied, which a Mennonite charitable organization donated. Yakye Axa community members have received fiberglass tanks for rainwater catchment that were donated by a local NGO. These indirect material gains came after the communities went to court.

Kenyan communities have experienced similar indirect benefits. Following the decision of the African Commission, the Endorois have received several grants from donors. These include a grant from the Ford Foundation to develop a cultural center and conduct mapping of Endorois land.<sup>97</sup> In 2014, Novozymes, a Danish biotechnology company, paid the Endorois community KSh2.3 million (US\$22,625.86) in royalties for the use of bio enzymes from Lake Bogoria.<sup>98</sup> The payment was not the direct result of the ACHPR's decision, but rather the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.<sup>99</sup> It is an indirect result of the recognition of the Endorois' rights over the natural resources over Lake Bogoria.

Although such material benefits are not directly related to their litigation, they nevertheless assisted the indigenous groups. However, not all indirect material impacts are positive.

## **Violence, Harassment, and Unsettling Interpersonal Relationships**

The research in Kenya, Malaysia, and Paraguay shows that indigenous peoples often experience increased violence in the wake of their engagement with courts and tribunals. Litigation can change power dynamics both within an indigenous group and between the group and outside actors. In particular, winning a case can have a detrimental impact on the relationship between indigenous communities and their neighbors, and in their relationship with private actors who have an interest in indigenous territory. In Paraguay, members of the indigenous communities said that the litigation exacerbated tensions in their relationships with private ranchers. Members of the Sawhoyamaxa community noted a serious deterioration of their living and working conditions after legal claims were implemented. The fact that the authorities adopted an act ordering expropriation from the ranchers in 2014, but have not acted on it, created a toxic environment between the ranchers and the community. Teofilo, one of the Sawhoyamaxa men interviewed for this study, mentioned that he was afraid to go hunting or fishing in the forest because

armed personnel were known to ride through it.<sup>100</sup> A ranch administrator drew his pistol and pointed it at a community member in 2015, in full view of police, at least 40 community members, the community's lawyers, and a journalist.<sup>101</sup> A context in which two groups are contesting the same parcel of land inevitably leads to strife. Another male community leader stated:

The [ranchers] just sit there in the house all day long. They don't leave anymore, but they sit and watch. And they have guns and drink. We have demanded that the state evict them, but they have not done so because they don't care about indigenous rights or indigenous lives. Our culture is based on the land and we will keep fighting until they leave and we can live in peace.<sup>102</sup>

The fear of violent and forced eviction is palpable among all three indigenous communities in Paraguay. It represents a significant harm to each community's well-being, sense of security, and long-term welfare. The ever-present fear of forcible removal, which would devastate community resources, may undermine the groups' long-term planning.

Indigenous people in Kenya also describe increases in harassment and confrontations with police and outside actors after they pursued litigation. Land rights activists from the three indigenous communities in Kenya have been arrested on many occasions.<sup>103</sup> Their land claims have also been met with violent resistance. The Ogiek have been evicted over 22 times in East Mau, while Maasai homes in Narasha have been burned down and their livestock killed by hired assailants who also had police protection.<sup>104</sup> One of the principal participants in the *Joseph Letuya* case, Patrick Kiresoy, suffered sustained harassment because of his involvement. He said of the ordeal, "No one can be able to compensate me for the loss suffered."<sup>105</sup>

External supporters of the community's land claims, including lawyers, NGO supporters, and expert witnesses, also describe facing harassment. Nicholas Bawin Ak Anggat was the deputy head of the *Majlis Adat Istiadat* (Customary Laws Council) of Sarawak when he testified as an expert witness on Iban customs and tenurial rights in the case of *Nor Nyawai* in Malaysia.<sup>106</sup> The head of the *Majlis Adat Istiadat* censured him for acting as an expert witness "against" the state government. The deputy chief minister summoned him and asked him to retract his statement in court. He refused, and lost his job when his contracted term ended.<sup>107</sup> In Paraguay, the lawyer and activist Maria Julia Cabello was punished in a similar manner for her advocacy work on the Sawhoyamaxa case and subsequent critiques of the Ministry of Justice and Supreme Court for their handling of the constitutional challenges of the expropriation law.<sup>108</sup>

## Increased Corruption

Land is valuable and attempts to possess it often attract corruption. The demarcation of land, titling schemes, and selling or leasing to investors often involve corrupt processes.<sup>109</sup> Corruption can readily undermine any positive results of litigation. In Paraguay, former President of INDI Ruben Quesnel embezzled approximately US\$700,000 that was intended for the Yakye Axa and Sawhoyamaxa community development funds in 2013.<sup>110</sup> In the *Yakye Axa* and *Sawhoyamaxa* rulings, the court called for the establishment of a development program and fund for the communities, consisting of US\$900,000 for the Yakye Axa and US\$1,000,000 for the Sawhoyamaxa. Quesnel embezzled monies from these funds.<sup>111</sup> As Senator Miguel López-Perito notes:

The governmental apparatus is vulnerable to *coima* [bribes] as we say here, to the interests of the big [agricultural] producers. This produces a type of complicity that destabilizes the actions of the state. These are some big challenges that we are facing and have to face in the future to improve the situation of indigenous land rights here.... There is a problem of incompetency and a lack of comprehension and at times complicit behavior. Because there are cases [where] we can directly observe the complicity between state actors and different companies.<sup>112</sup>

The type of collusion and corruption described by the senator is a common form of impact, however regrettable, resulting from strategic litigation for indigenous peoples' land rights. While the goal of such litigation is of course to generate positive material impacts, it is important to be clear-eyed about the potential for negative material impacts as well.

Whether positive or negative, material impacts may be limited in scope, primarily affecting the communities involved in the litigation. But strategic litigation, by definition, is intended to generate impacts beyond a specific case, including by catalyzing changes in jurisprudence and government policy, as discussed in the next chapter.



## IV. Judicial, Jurisprudential, Institutional, and Policy Impacts

Strategic litigation for indigenous peoples' land rights is intended to advance the rights of, and secure material gains for, the groups engaged in the litigation. But it can also aim to win broader impacts that ripple outward from the courtroom, affecting jurisprudence, state institutions, and government policies. This chapter examines such broader impacts, starting with a simple but critically important step: the recognition that an indigenous group's land rights have been violated.

### A. Public Apologies and Recognition of Violations

Strategic litigation for land rights is a relatively recent development, following a long history of violations of indigenous rights. In this context, an important aspect of litigation is its declarative value in recognizing the historical wrongs indigenous peoples have suffered. The IACtHR has noted the importance of official and public apologies as an important remedy, calling for the Paraguayan government to publicly accept its role in and responsibility for the violation of indigenous communities' rights. In the case of the Sawhoyamaya community, the IACtHR ruled in 2006 that the state should publicly accept its role in and responsibility for the violation of the community's rights and apologize for those wrongdoings within one year.<sup>113</sup> But research conducted for this report found that no community members had any recollection of the state publishing this information as the ruling required. Similarly, the court has indicated that the state should admit its wrongs toward the Yakye Axa in the official state newspaper and other

newspapers with national circulation. The state's compliance has been limited to the official gazette of the Supreme Court and radio broadcasts in Spanish on a station that does not serve the area where the community lives. Paraguay has ignored entirely the 2010 IACtHR order to publicly acknowledge its violation of the rights of the Xákmok Kásek.

Kenya has not made any official apology for rights violations suffered by the Endorois. The minister of Lands attended a ceremony to celebrate the Endorois court victory at which he unveiled a plaque commemorating the decision. The plaque is prominently placed at the entrance of the Lake Bogoria National Reserve, but the government has not publicly acknowledged the community's entitlement in any other respect. Delays by the Ministry of Lands in implementing the decision have fueled skepticism about the minister's intentions in attending the ceremony. In general, community members felt the minister's attendance at their ceremony was an isolated incident rather than an official recognition of their rights. However, Kenya's Truth, Justice and Reconciliation Commission (TJRC) has publicly acknowledged the state's failure to fully implement the ACHPR's ruling, which represents a small victory for the Endorois.<sup>114</sup> Based on its mandate to address historical injustices, the TJRC has acknowledged the importance of land rights for indigenous peoples.<sup>115</sup> The TJRC's 2013 report concluded that Kenya's sustained refusal to implement judgments in favor of indigenous peoples "has consistently undermined minority groups' confidence in the ability of the Kenyan justice system to deliver substantive equality."<sup>116</sup>

In Malaysia, litigation to restore customary land to the Orang Asal has played a role in prompting the Human Rights Commission of Malaysia to undertake an official national inquiry into the land rights of the Orang Asal/Orang Asli. But there is no general government policy of acknowledging violations indigenous peoples have experienced.

Overall, litigation has had a limited impact in securing formal apologies from the authorities. Even those judgments that explicitly require apologies do not always achieve them. Fortunately, another branch of government, the judiciary, may be more willing to acknowledge land rights violations, as noted in the next section.

## B. Impacts on Jurisprudence and the Legal Profession

### Jurisprudence

In Malaysia, litigation has played an important role in establishing jurisprudence that recognizes indigenous customary rights. The *Nor Anak Nyawai* judgment not only clearly established the legal status of native customary rights; it also had a significant impact on subsequent jurisprudence.<sup>117</sup> The situation in Malaysia shows that litigation

can support the legal recognition of indigenous peoples' land rights. Litigation can have a very significant impact not only for the applicants in these cases, but also broadly for all indigenous communities. The *Sagong bin Tasi* litigation achieved recognition that indigenous customary land rights have the same legal value as full ownership or title to the land.

However, there are risks inherent in solely relying on judicial pronouncements to advance indigenous territorial rights. In affirming the land rights of indigenous peoples, the High Court of Malaysia also observed that proprietary interest in the land of the Orang Asli was geographically limited to areas forming part of their settlement.<sup>118</sup> Likewise, in *Nor Anak Nyawai*, the court permitted serious limitations to indigenous rights over their ancestral territory by questioning the “vastness” of the Orang Asli’s hunting and foraging areas.<sup>119</sup> In another case, a court restricted hunting and foraging to those areas where the community had established a degree of occupational control.<sup>120</sup> Evidentiary difficulties and uncertainties in the law resulting from judicial misinterpretation have at times stymied effective outcomes for indigenous rights. As See Chee How, a leading lawyer on native customary rights in Sarawak, notes:

What was pronounced by the courts remains very vague. Each case still needs to be litigated in the courts. There are questions on evidence, the existence of rights, and of facts. So in that sense, I think we have not made much headway because each case still needs to be litigated at the High Court, to the Court of Appeal, and the Federal Court.<sup>121</sup>

Hence, while Malaysia offers a vivid illustration of the potential beneficial impact of litigation as a platform to support the recognition of land rights, it also shows the potential drawbacks and limitations of overreliance on a jurisprudential approach. Relying on jurisprudential precedent means that any court-imposed limitation to land rights in one specific case could undermine the broader protection of land rights across a whole jurisdiction. Litigation is inherently more fragile than statutory recognition would be and subject to restrictive and circumstantial legal interpretations. Indeed, examples in all three countries examined here show that winning in court can lead to new litigation against a decision.

Closely connected to this limitation is that litigation can create precedents that threaten earlier gains. As Bob Manolan, an Orang Asli activist in Malaysia, notes, such outcomes can come from “evidential problems.”<sup>122</sup> Shadrack Omondi, the executive director of the NGO Resource Conflict Institute (RECONCILE) in Kenya described strategic litigation as a double-edged sword.<sup>123</sup> While a win may lead to securing land rights not only for the community involved in the litigation but also other indigenous communities, he notes that:

Losing a community land rights case and therefore setting a negative precedent could be a disaster to indigenous communities' land rights. A community or legal team has to be very careful with the public interest litigation case it takes to court and the research that goes into such cases. A negative precedent will close that route for indigenous peoples' land claims.<sup>124</sup>

## Effects on Future Cases

In each of the three countries studied here, the first winning case clearly encouraged subsequent litigation. The *Endorois* case set a precedent as the first community land rights case that the African Commission decided. Following it, the Ogiek community also started a case before the African regional human rights system. In the case of the Maasai in Narasha (*Joseph Kashau Olokuo & 6 others v. Ngati Farmers Co-operative Society Ltd* [2011] eKLR), the court's decision noted the role of an earlier case: "it would appear to the Court that the success of the earlier suit provided the impetus and resolve to claim the remainder of the land owned by the *Ngati farmers cooperative society*" (italics original).<sup>125</sup> This suggests that communities may see the benefits and potential power of litigation, even where implementation is poor.

However, just as successful litigation by one indigenous group may spur litigation by other indigenous communities, it can also bring about counter-litigation by the current land holders. For example, in Kenya, following the 2014 ruling in the *Joseph Letuya* case, the National Land Commission initiated a process of resettling the Ogiek of East Mau. However, another community in that area legally challenged the resettlement, and the process is currently stalled while other interest groups continue to occupy the Ogiek territory.<sup>126</sup> Similarly, ranchers in Paraguay challenged the constitutionality of the land expropriation order in the *Sawhoyamaxa* decision. While the Supreme Court rejected the ranchers' claim in 2015, the case nonetheless held up implementation of the *Sawhoyamaxa* decision. Similarly, as of this writing, an appellate court is entertaining the landowner's demand that the state reassess the value of the land before he will accept payment and transfer title to the community.

## Impacts on the Legal Profession

Precedents set through strategic litigation for indigenous peoples' land rights tend to affect how indigenous peoples, their supportive organizations, and their legal teams engage in subsequent litigation and how judges decide follow-on cases. Litigating indigenous peoples' land rights requires an extremely high level of comparative legal

analysis, and comparative elements affect most legal decisions. The Malaysia cases in particular reflect the influence of precedents in Canada, Australia, and New Zealand. Therefore litigation can have an impact on the legal profession on a global scale. Both judges and lawyers learn about land rights cases from cases in other jurisdictions and use cases from across the globe to support their legal reasoning.

Evidence shows that precedents can affect not only judges, but also lawyers and potential plaintiffs. See Chee How, the litigator in Malaysia, said:

I think the biggest impact for this litigation from my experience is that people's awareness has increased. The most important thing is awareness building and public education.... The biggest changes are in the perception of the courts or the judges towards NCR claims, and also in the companies and other lawyers involved.<sup>127</sup>

When it comes to indigenous land rights cases, lawyers' awareness of relevant precedents varies considerably depending on jurisdiction; the educating influence of litigation could certainly be greater than it is.

Unfortunately, the cases this report has addressed in Kenya and Paraguay do not support a theory of learning impact on the legal profession. In both countries, the decisions were made at regional levels rather than at national levels. There is no evidence the cases had a direct impact on national jurisprudence in either country or on the knowledge of lawyers and judges in either country. The IACtHR rulings finding violations of rights in Paraguay did have an impact on the subsequent jurisprudence of that regional court. However, so far these cases have not had any direct impact on domestic jurisprudence in Paraguay. Interviews conducted for this report suggest that most lawyers in Paraguay have not studied the indigenous land rights cases. Mirta Periera, a former employee of Tierraviva who supports indigenous rights in Paraguay, said that she is familiar with the content of the cases involving indigenous rights, but that many lawyers in the country only know they exist but are generally not familiar with the content.<sup>128</sup>

In Kenya, interviews also demonstrated a general lack of in-depth understanding of community land rights on the part of judges and magistrates. The 2015 ruling in the case of *James Kaptipin v. Director of Forests* exemplifies the judiciary's lack of comprehension of the jurisprudence regarding indigenous peoples' land rights. In this case, Justice Obaga stated:

I am aware that the Government is making efforts to re-settle people removed from forests such as Mau forest.... For the sake of protection of the environment for present and the future generations, Kapolet forest should not be carved out for settlement of the Sengwer community. It is on this basis that I find that this petition cannot succeed.<sup>129</sup>

Justice Obaga’s decision does not recognize international and comparative legal jurisprudence linking indigenous land rights and environmental protection, which has been established since the *Endorois* decision.

In another case, in its 2015 decision in the case of *Simion Swakey Ole Kaapei v. Commissioner of Lands*, the High Court of Kenya referred to and relied on the *Endorois* decision but misinterpreted it. In spite of established interpretations of *Endorois*, the judges ruled that the term “indigenous peoples” could apply to nearly anyone in the country, and that therefore it had no legal bearing on the issue at hand. The decision was actually unusual in that it referenced *Endorois* at all. Lawyers in Kenya have failed to present arguments based on the precedent, and law schools in Kenya do not teach the decision, although this Kenyan case is well-known and taught in law schools across the globe.<sup>130</sup>

### C. Impacts on Statutes, Legislation, and Policies

Neither Paraguay nor Malaysia has changed its legal framework in positive ways following cases that affirm indigenous peoples’ land rights. In 2010, the IACtHR actually ruled that Paraguay should create an “internal legal framework...that outlines the legislative and administrative means to guarantee the effective and necessary processes that will allow indigenous peoples to gain private property” within two years of the *Xákmok Kásek* ruling. Seven years later, as of this writing, no legislative changes have ensued concerning indigenous rights in Paraguay.<sup>131</sup> As the UN special rapporteur on the Rights of Indigenous Peoples noted in her 2015 report on the situation in Paraguay, “[T]he legal framework suffers from conceptual shortcomings, as it characterizes land as no more than a productive resource without taking into account traditional land uses and the cultural and spiritual values that indigenous peoples associate with the land.”<sup>132</sup>

In Malaysia, legislative consequences of strategic litigation for indigenous land rights have been negative. Twenty years of successful cases have failed to generate positive executive or legislative action. In fact, the government has consistently attempted to reverse or, alternatively, narrow the scope of these legal pronouncements through legislative amendments narrowing the possibilities of litigation. After the High Court decision in *Nor Nyawai*, the Sarawak state government attempted to limit the ways in which indigenous peoples can acquire native customary rights.<sup>133</sup> The Sarawak Land Surveyors Bill 2001, which was introduced following the *Nor Nyawai* ruling, disallows the use of community maps in courts. It requires a map by a licensed surveyor to show the delimitation of the boundaries of any land, including state land and any land held under native customary rights. Nicholas Mujah, an indigenous rights activist in Sarawak, described such changes as a serious impediment to future cases.<sup>134</sup> He saw the changes that followed the *Nor Nyawai* ruling as uniformly negative.<sup>135</sup>

Kenya is the only country among the focal countries that has improved its legal framework governing community land rights since the rulings described here. The 2010 Constitution of Kenya, the Land Act 2012, the Community Land Act 2016, and other legislation represent significant changes in favor of indigenous communities' claims to their ancestral land. While it is difficult to establish causation, individual activists from both the Endorois and the Ogiek communities pushed for the inclusion of principles established by their successful litigation and had direct involvement in drafting the new Constitution and ensuing legislation. At a minimum, it appears the litigation contributed to the country's reform of its legal framework on land rights.

## D. Impacts on Administrative Rules and Institutions

### **Establishment of Specific Institutions in Charge of Implementation**

Litigation can have a significant institutional impact, including in the establishment of specific institutions in charge of implementing court decisions. Kenya, Malaysia, and Paraguay have all established new institutions in charge of dealing with land rights following a victory in court. For instance, the *Sagong bin Tasi* case from Malaysia provided the impetus for significant impacts and changes in the way the state government of Selangor treats land rights. Following the case, the state took proactive steps to secure Orang Asli land rights by establishing the indigenous-led *Badan Bertindak Tanah Orang Asli Selangor* (Selangor Orang Asli Land Task Force). This task force was established after a series of consultations with the Orang Asli and other interest groups. It consists of Orang Asli members and has a responsibility to protect and publicly record all Orang Asli areas in the state as Orang Asli reserves.<sup>136</sup>

In Paraguay, the government established a special institution in charge of supporting the implementation of international rulings. The Inter-institutional Commission Responsible for the Execution of Necessary Actions for Compliance with International Rulings and Recommendations (Comisión Interinstitucional responsable de la ejecución de las acciones necesarias para el Cumplimiento de las Sentencias y recomendaciones Internacionales, CICSI) was a direct response to various international rulings, rather than to strategic litigation, but Paraguay's multiple losses in many indigenous cases played a role in its creation.<sup>137</sup> Since its establishment, CICSI has been in charge of reporting progress regarding implementation of the judgments to the IACtHR. The creation of CICSI is significant, although it has had very little impact in terms of concrete steps toward implementation. But its creation may yet reflect a change in the government's attitude toward complying with international rulings.

In Kenya, the government created a task force for the implementation of the ACHPR's recommendations following the *Endorois* case in September 2014. However, it was set up only to “study” implementation, “provide guidance on the political, security and economic implications of the Decision” and “examine the potential environmental impacts on Lake Bogoria and the surrounding area because of the implementation.”<sup>138</sup> It has no funds to support implementation.<sup>139</sup> The task force does not include members of the community and it has no obligation to consult with the Endorois Welfare Council (EWC), or any Endorois representative.<sup>140</sup> The task force's mandate ended in September 2015 without addressing Endorois land rights issues.<sup>141</sup>

## Collateral Institutional Developments

All three focal countries saw collateral institutional developments following litigation, in which institutions that had not previously engaged with indigenous peoples' rights expanded their mandates to include land rights. The *Letuya* ruling specifically called on Kenya's National Land Commission to address the issue of resettlement. The head of the commission, Commissioner Clement Lenashuru, said in an interview:

Implementation is a process rather than an event. The government must be seen to be taking action towards implementing court decisions. The environment for implementation is complex. Communities may have differences, resources are required, and implementation of court decisions like the *Endorois* decision, must also be looked at against other national concerns.<sup>142</sup>

The commissioner here seems to envision the commission engaging with indigenous peoples' land rights beyond the implementation of the *Endorois* decision. From this perspective, litigation can play a positive role in pushing national human rights institutions to engage with indigenous land rights. Similarly, in Malaysia, the number of cases on land rights played a role in pushing the Human Rights Commission of Malaysia to conduct its first ever national inquiry focusing on indigenous peoples' land rights. Litigation may also have led the Paraguayan Senate to create a Commission on Indigenous Peoples in 2013.

The impact of strategic litigation can also be seen on international institutions. For example, the African Commission's positive ruling regarding the rights of the *Endorois* has spurred the involvement of the UN special rapporteur on the Rights of Indigenous Peoples. The case also precipitated Kenya's involvement in the African Commission. The commission informed the government that it would decide the case *ex parte* if Kenya did not participate. In response, a high-level delegation that included the minister

of justice and attorney general attended the commission's session deliberating the case, and Kenya has participated in subsequent sessions in relation to other cases.<sup>143</sup> Strategic litigation can also have some impact on the funding policies of financial institutions such as the World Bank. Edward Dwumfour, a senior environmental specialist at the World Bank, acknowledged the role of courts and other human rights mechanisms in determining the standards to which the World Bank holds borrower countries.<sup>144</sup>

These changes in jurisprudence, government policy, and institutional behavior illustrate how the impacts of strategic litigation can radiate beyond the affected communities to influence lawyers, judges, and officials. This influence can result in quantifiable changes, such as revised jurisprudence and the creation of new institutions. But strategic litigation can also generate less quantifiable changes in attitudes and behaviors, as explored in the next chapter.



## V. Impacts on Attitudes and Behaviors

While the immediate goal of strategic litigation may be a positive court judgment, and the secondary goal may be more far-reaching changes in policy and jurisprudence, there are also ancillary goals of strategic litigation, including changes in attitude, perceptions, and behaviors. Such impacts may affect the community involved in the litigation, or may have a broader influence on attitudes held by the public, civil society, government, and even private individuals and corporations. That such impacts are difficult to measure does not make them any less significant.

### A. Impacts on Communities

#### **Legal and Political Empowerment**

Members of the communities studied in this research indicated that litigation gave them a sense of empowerment. For example, Charles Kamuren, of the Endorois Welfare Council (EWC), said “the Endorois case has injected the community with a lot hope and determination. The community now believes they exist and they have a future. The case gave them psychological healing.”<sup>145</sup> Wilson Kipkazi, the current executive director of EWC, and Jimmy Karatu, a member of the EWC board, expressed similar sentiments. As Kipkazi said, “Community members have learned the importance of being proactive not only in community struggles but also in their personal struggles. The victory has

motivated many young Endorois to go school after observing how their professionals came together and organized around the case.”<sup>146</sup> Kamuren noted that members of the community are now more confident in pursuing different economic activities.<sup>147</sup> Shadrack Omondi of the NGO RECONCILE agrees: “When the community wins a land case, it has a motivational impact.”<sup>148</sup>

In Malaysia, Bob Manolan, an Orang Asli activist, noted that the *Sagong bin Tasi* litigation greatly improved awareness among the Orang Asli of their land rights. He said the community had become “braver,” that it had put aside writing letters to the government pleading for their rights in favor of forming NGOs and creating “organized dialogues to spread awareness on their land rights.”<sup>149</sup>

In Paraguay, indigenous interviewees were keenly aware that they have rights associated with the rulings, suggesting rulings have provided a sense of empowerment. Numerous people in the Sawhoyamaxa and Xákmok Kásek communities also cited the rulings in their favor as encouraging them to reoccupy their land prior to the state’s full compliance with the decisions. Protest banners frequently reference IACtHR rulings in Paraguay. Interviewees from civil society organizations, local media outlets, and local officials mentioned that other communities that have not been involved in cases probably do not have the same sense of confidence and empowerment.<sup>150</sup>

Attributing empowerment to litigation specifically is difficult when communities might also experience empowerment through public protests, re-occupation of land, and other community actions. Hence the impact on the community’s sense of empowerment has to be placed within this overall dynamic. However, interviewees did single out litigation specifically as a source of confidence and belief. Moreover, the fact that many communities have been involved in capacity building programs as part of the process of litigation may contribute to their sense of empowerment.<sup>151</sup>

## **Cultural Regeneration and Historical Documentation**

Litigation often requires indigenous communities to present in court their historical, cultural, social, and religious precepts. This process may have positive effects beyond the courtroom in terms of re-generating the cultural pride of the communities. The Endorois, for example, developed material and immaterial loss reports to substantiate their claims for compensation. This documentation became an important vehicle to capture the Endorois’ cultural heritage. This effort is now visible and accessible to the community in its cultural center, which displays a map the community developed to record its usage of the land.

Mapping requires communities to collectively gather evidence about their interaction with their ancestral land, including cultural, social, and economic elements. Elders

in particular may have an important role in this process. Nicholas Mujah in Malaysia highlighted the mapping process as one way to measure the impact of strategic litigation:

Strategic litigation is also important to the communities, because it makes the community document their customary claims, which is very good because the community are [knowledgeable] about their communal boundary, land use, [and] location of important landmarks such as burial grounds. Documentation is good for the community's future as it can be a tool for dispute resolution.<sup>152</sup>

Activists expressed similar sentiments in both Paraguay and Kenya, and mapping of ancestral land is a common aspect of indigenous communities' engagement in litigation across the globe.

Resettlement on ancestral land delivers many benefits, including cultural regeneration. Ignacia of the Xákmok Kásek community in Paraguay described with evident pleasure the "sweet potatoes, passion fruit, and flowers" she grows in the "really good" soil of her ancestral land, as well as the plants she gathers from the forest and the animals and fish it provides. She concluded, "Here we live better and we are at peace because this is our land and we have come back."<sup>153</sup>

The forced displacement of the community was a leading factor in the loss of cultural norms and practices, especially language.<sup>154</sup> The vast majority of people in all three communities speak Guaraní, not Enxet Sur or Sanapana (their ancestral languages). Many of the interviewed community members mentioned, however, that some people began speaking Enxet again after they reoccupied their ancestral land. The traditional dances and ceremonies the community had abandoned, as well as the practice of shamanism, after their displacement have begun to resurge. Resettlement has led to the preservation of indigenous culture, traditions, and identity and a special connection with the land that justifies their land claims.<sup>155</sup>

## **Community Cohesion, Gender Relations, and Leadership**

Engaging with litigation often results in a restructuring of, or at least a renewed focus on, the communities' decision-making structures and leadership. Engaging with legal proceedings requires efficient collective decision-making mechanisms. Existing decision-making structures are usually based on ancestral and customary structures, which may not be compatible with bringing litigation. The Endorois created the EWC to organize the community fight for their land rights.<sup>156</sup> It became a formal NGO after the African Commission recommended that the government accede to a longstanding application and register it. The EWC has become the main body for decision making

within the community. The community now has an implementation committee, a benefit sharing committee, a Lake Bogoria management committee, and a draft community decision-making code so that the community can benefit from the outcome of exploitation of resources based on their land.

To the extent that engaging in strategic litigation may replace a community's traditional decision-making processes with more contemporary structures (such as the creation of an NGO), one might expect a similar disruption of traditional gender roles. However, our specific enquiry into this possible impact of litigation revealed minimal effects. In Paraguay, for example, women have played a key role in community meetings and planning around the cases. But there is no information on the long term effects of such engagement on gender dynamics. In Kenya, Christine Kandie is a woman's representative on the EWC, but she suggested that while women have gained some decision-making power, they have also continued to devote most of their energy to caring for their children, livestock, and homes. The EWC, together with the human rights NGO ESCR-Net, is developing a program specifically targeting Endorois women's development. Daniela Ikawa from ESCR-Net, who is involved in supporting post-litigation work with the Endorois, noted: "The Endorois case was won on the basis of international human rights law. Its implementation must therefore follow the norms of international human rights law that include the rights of women."<sup>157</sup> This suggests that the legal ruling provides a supportive environment for a more inclusive and equitable approach to gender relations in this community.

Yet schisms can occur within communities because of litigation. By their nature legal proceedings require leaders to take a decisive role, beginning with when they put their name to the case. The impacts on the leaders of each community who pushed the litigation forward in the name of the community could be significant. These representatives become the face of the litigation in the public eye. Winning a case could require these representatives to travel extensively, attend official high level meetings, and be exposed to public debates. In Kenya, Endorois and Ogiek leaders are regularly invited to participate in processes ostensibly geared towards securing their communities' land rights and other governmental processes. They have also traveled across the region to meet other communities and share their experiences with them. These kinds of distinction can be a burden and complicate their relationship to others in their communities.

## **Disillusionment and Disempowerment**

Strategic litigation can be a long process with an uncertain outcome, and the long periods of waiting and uncertainty associated with it can have negative effects. Interviewees in both Paraguay and Kenya said that delayed implementation created a sense

of disillusion in their communities. They described how winning a judgment in their favor raised hopes for immediate change, but their communities experienced disappointment and disillusionment when authorities failed to implement the judgments. A 25-year-old member of the Yakyé Axa community, Belfio Gomez Benitez, said that living on the side of the road waiting for the government to create an access road is tantamount to “living in jail.”<sup>158</sup> Similarly, Jennifer Koinante and Wilson Kipkazi, members of the Endorois community, described the strategic litigation as meaningless without implementation.<sup>159</sup> The Endorois describe this as demotivating, and many of the elders involved in the case fear they will die before they enjoy the fruits of their hard work. Some young people in all three of the concerned communities in Kenya feel that their elders have wasted their time on the lawsuits.<sup>160</sup>

In Malaysia, members of the Orang Asli community described a particular pitfall of engaging with the adversarial civil court system, which they describe as potentially incompatible with indigenous worldviews. Orang Asli witnesses usually perform poorly on the witness stand, regardless of expert preparation. Their customary conflict resolution systems (*bicaraq*) involve seeking the truth of the dispute rather than the adversarial method adopted by the courts. The use of English as the language of the court also puts them at a disadvantage. The members of the Imahit community highlighted this problem as well.<sup>161</sup>

## B. Media and Public Awareness

In most countries around the world, indigenous peoples face high levels of discrimination and racism. Strategic litigation for indigenous peoples’ land rights represents a form of interaction between indigenous communities and majority communities, and as such has the potential to either reduce or reinforce this discrimination and racism. In particular, the way indigenous peoples and their campaigns are portrayed in the media can either win sympathy for their cause or worsen negative stereotypes. However, research conducted for this report finds that media coverage of the litigation has been limited and has had little discernable impact on public perceptions.

In Kenya, national and local media have covered the Endorois ruling; our research finds some of the coverage positive and some of it negative.<sup>162</sup> The *Daily Nation* hailed the decision as “a major legal precedent,” describing it as the first recognition in Africa of “indigenous peoples’ rights over traditionally owned land and their right to development.” But the paper also described the decision as potentially leading to “a flood of suits against forced acquisition of land by the government and its agencies including local authorities, Railways Corporation, Kenya Wildlife Service and the military.”<sup>163</sup>

In Malaysia, litigation resulted in greater awareness of Orang Asal land rights among the media, resulting in more coverage and a better understanding of the issues at stake. For example, the logging blockade by the Temiar-Orang Asli in the state of Kelantan at the end of 2016 garnered attention from both the mainstream and online media. Several media teams entered the area to report on the situation, in which loggers committed violence against protesters. The media interest continued when the authorities destroyed the blockades and when the Orang Asli rebuilt them, citing the legal judgments in their favor. The media coverage expressed empathy for Orang Asli rights in connection with the event, and a former court of appeal judge publicly condemned the destruction of the blockades as a violation of case law.<sup>164</sup>

In Paraguay, various news outlets regularly cover indigenous issues. Much of the coverage in the media centers on three themes: protests by indigenous peoples in the capital city, the living conditions of indigenous peoples, and special interest articles that focus on indigenous peoples' cultural practices and festivals. Such coverage can be positive in tone, or, as the UN special rapporteur on Indigenous Issues noted in 2015, reflective of "a deep-rooted racist attitude towards indigenous peoples."<sup>165</sup> The three indigenous communities concerned in litigation live in remote areas, quite far from the nearest non-indigenous communities, which limits mainstream media coverage and blunts broader awareness of the litigation. Interviews confirmed that few people in Paraguay know about litigation to restore land rights to indigenous communities. The greatest coverage of the rulings has been in media outlets that are aligned with indigenous issues, particularly *Radio Pa'i Puku*. *Radio Pa'i Puku* has been covering indigenous issues in the Chaco for 20 years. It has provided coverage and a forum for indigenous peoples from each IACtHR claimant community to discuss their issues and the progression (or lack thereof) of the cases. According to radio station representatives, the IACtHR rulings have played an important role in validating the concerns of indigenous peoples and bringing the issue of indigenous rights to a much broader audience, within and outside of Paraguay.<sup>166</sup> However, they noted that the mainstream media in general—and radio in particular—have not changed their attitudes and behaviors as a result of the rulings.

## C. Impacts on Civil Society Strategy

### Impacts on Litigators

The long-term process of strategic litigation has an impact on the litigators themselves, in their relationship with the communities they represent, and on the way they approach advocacy and legal work on indigenous rights. Several litigators have indicated that engaging in litigation with indigenous communities constituted a “crash course” on indigenous rights and working with communities.

The main litigators who worked on the Paraguay cases described the cases as eye-opening and educational.<sup>167</sup> They noted they had experienced a significant broadening and deepening of their legal knowledge and their ability to advocate in support of both human and indigenous rights within Paraguay and beyond. They also noted that they had expended enormous effort, time commitment, and financial resources in litigating the cases and that the communities they represented had as well. The cases raised the profile of their employer, the NGO Tierraviva. They have gained enormous international credibility and have been involved in subsequent cases. Juan Carlos Yuste of *Diakonia* (which is a key funder of Tierraviva) mentioned that the rulings provided an important tool to attract donations and funding to support the organization’s ongoing legal efforts in relation to these cases and communities.<sup>168</sup>

Another impact on the litigators relates to their long-term involvement. When implementation is lacking, litigators have remained engaged in the cases, seeking ways to advocate for implementation. Working with communities, they have shown great creativity in adopting new approaches to enhance the engagement of authorities with the rulings. In Kenya, lawyers from Minority Rights Group (MRG) worked with the community to create the pressure that led to the establishment of the implementation taskforce. MRG has worked with the EWC to develop an independent Lake Bogoria Management Plan process, part of a three-pronged strategy to support the long-term implementation of the decision. Though the management plan in itself would not give the community legal ownership, it will support the community’s claim for legal recognition and illustrate how it can be integrated into the new Community Land Act. Similarly, in Paraguay, Tierraviva has worked with all three communities to develop a law that will provide the government guidance on administering and delivering the community development funds. These post-decision strategies illustrate a long-term engagement between the litigators or the supportive civil society and the communities.

## Impacts on Other Civil Society Actors

Litigation can have a positive impact by engaging civil society actors who might not have supported indigenous land rights previously. In Kenya, RECONCILE, an NGO working on economic and social rights, started to support both the Endorois and Ogiek cases through local advocacy. The organization uses the legal principles established in precedents such as the *Endorois* judgment to influence policy and law formulation processes.<sup>169</sup> Similarly, the Kenya Land Alliance has produced hard copies of the *Endorois* decision for circulation.<sup>170</sup> Paraguay has a long tradition of civil society support for indigenous peoples, commonly labeled as *indigenista*.<sup>171</sup> This movement in support of indigenous rights has been active since the 1960s.<sup>172</sup> While the movement's support for indigenous communities long precedes the litigation examined here, it appears that the positive rulings of the IACtHR have created a new momentum for the movement, notably by attracting the attention of larger international NGOs. Amnesty International started a campaign entitled "*Hacer Visible lo Invisible*" (Make the Invisible Visible) in coordination with Tierraviva and each claimant community has focused on raising awareness in an effort to build public support and induce the authorities to comply with the rulings. This campaign was largely focused on making an impact in Paraguay, but Amnesty International also circulated it internationally among its network of supporters. The campaign involved photo exhibits with images captured by community members to illustrate their living conditions, fine art renditions of people's lives, community leaders speaking at concerts by international music groups interested in their cause, and numerous public events designed to inform non-indigenous Paraguayans about the situation. The NGOs Cultural Survival and ESCR-Net also engaged with the communities to support the post-litigation implementation phase by publishing and circulating information about the cases on their respective websites and to their constituencies.

Litigation also affected the approach of a regional indigenous organization in Paraguay, the *Coordinador de Lideres Indigenas del Bajo Chaco* (the Coordinator of Indigenous Leaders from Lower Chaco), which represents over 50 indigenous communities in the region. This pan-indigenous organization has supported the three communities in their efforts to promote implementation of the rulings. The group's engagement has increased awareness of the litigation among other indigenous groups not directly involved in it. Notably, they have been educated in three areas: (1) that the IACtHR exists and can support indigenous rights (to a degree); (2) that the rulings exist and have been made as a means of admonishing the state; (3) that indigenous peoples have avenues to gain support for their claims. These are all significant, and show how the impacts of strategic litigation can affect even those groups not directly involved in it.

## D. Impacts on Policy Makers and State Officials

In general, policy makers and government officials are far removed—both literally and metaphorically—from the day-to-day lives of indigenous peoples. To assess the potential impact of the litigation on policy makers, the study focused on investigating: (1) their awareness, knowledge, and comprehension of the cases and issues at hand; and (2) the effect of this understanding on their behavior.

In Kenya, the primary engagement of public officials with the cases has been through task forces charged with duties related to implementation. The EWC has regularly engaged with the solicitor-general and other public authorities, notably the minister for Lands and the Kenya National Commission on Human Rights, since the decision in the Endorois case, and the latter has played an important role in monitoring and advocating for implementation. Our interviews suggest that awareness of the case among government officials is significant, although it does not always translate into political action.

In Paraguay, the research has demonstrated a very limited impact on policy makers' comprehension and awareness of the issues. As Senator López-Perito notes:

We have some non-governmental organizations that work very closely with [indigenous communities] and their work has repercussions, but those repercussions are greater outside of Paraguay than inside the country. Because I think there is still little awareness about the significance of these cases in Paraguay today.<sup>173</sup>

In general, it appears that the litigation has not resulted in any meaningful changes in the actions of policy makers in Paraguay. The research also indicates a very high level of incomprehension, lack of knowledge, and bias against indigenous peoples among officials working in public institutions. One anonymous source who does not identify as indigenous, who works for INDI, describes facing discrimination as someone who works with indigenous Paraguayans, describing jeers such as, “[W]hy would you work with the Indians, they are dirty, lazy, and only want to take from us [non-indigenous Paraguayans]. It would be better if they didn’t exist so we wouldn’t have to see them here begging in Asunción. You should be ashamed to work with them!”<sup>174</sup> This source reported that racism is prevalent within many high-level officials, who openly use disparaging terms in meetings and treat indigenous peoples’ rights and compliance with the IACtHR rulings as a joke. These comments suggest that positive judgments in favor of the indigenous communities have had limited positive effects on officials in Paraguay, many of whom remain resistant to the judgments.

Research conducted in Malaysia paints a more hopeful picture. Elizabeth Wong, the Selangor state executive committee member for Tourism, Environment, Green

Technology, Consumer Affairs and chair of the Selangor Orang Asli Land Task Force, indicated that the litigation played an important role in raising long-term awareness of Orang Asli issues, and had direct effect on official policy formation and decision making in the state of Selangor. She also noted that the treatment of Orang Asli in the state of Selangor evolved with the *Sagong bin Tasi* case, especially when it was at the final appeal stage in Federal Court, noting that “it was momentous in the sense that from then onwards, we actually made decisions based on that case.”<sup>175</sup>

## E. Impacts on Private Interests, Private Actors, and Corporations

Strategic litigation for indigenous peoples’ land rights often pits indigenous groups against private business interests and corporations in a conflict over the land in question. Not surprisingly, this can increase tensions between the indigenous groups and the private and corporate interests. The research in Paraguay finds that litigation exacerbated tensions between the indigenous community members and the private ranchers, which led to increased violence between ranchers and indigenous communities. Research on the perception and attitude of the ranchers towards the IACtHR rulings indicates a general resentment against the rulings, which they consider unjust. Cattle ranching and timber products consortiums affected by the decision in favor of the Sawhoyamaxa community have shown significant resistance.<sup>176</sup> In an interview, Modesto Guggiari, one of the principal administrators of the ranching company Grupo Liebig, emphasized his frustration with the ruling. Speaking on behalf of the company, he stated:

We do not have any problem with indigenous rights or the Inter-American Court of Human Rights.... Our problem is with the way that the state government deals with the ruling. The state is breaking its own laws and not following legal norms. Why do I say this? Because the constitution, more powerful than any international treaty or convention, clearly states that if a parcel of land is “rationally exploited” it cannot be expropriated. The land is rationally exploited. We’ve made many improvements to the land—fences, ponds, roads, buildings, infrastructure, pasture. We’ve done a lot and at times had many head of cattle there.... Without a doubt our rights have been violated too.<sup>177</sup>

Grupo Liebig has filed two claims before Paraguay’s Supreme Court stating that Law 5194/14 and the process of expropriation are unconstitutional. The court denied them both. Yet the cattle ranching company still maintains staff in one of the farm

houses on the property in question, and Sawhoyamaxa community members describe threats of violence by company staff.<sup>178</sup> The Xákmok Kásek community has faced similar problems with Eaton y Compañía S.A., the private cattle ranching company that occupies their land. Roberto Eaton, one of the co-owners of the company, has repeatedly and publicly opposed the sale of the land to the community. Documents that he has made available at a local museum show his efforts to find alternative land for the community.<sup>179</sup> He views the sale of the land as against the company's interest.<sup>180</sup>

In Kenya and Malaysia, research found fewer confrontations between indigenous groups and corporate interests. In Kenya, this may be due to a general lack of awareness on the part of corporations. For example, a representative of Kenya Electricity Generating Company Limited, a power company working in indigenous territory, noted that the company was largely unaware of court decisions that might affect company operations, but also noted that the company "would like training on this area."<sup>181</sup> In Malaysia, mass commercial activities are taking place on indigenous territories, including logging, mining, and palm oil harvesting. The engagement of the communities with litigation might have had an impact on the conduct of these commercial interests, encouraging them to engage more with the community as a whole. As Nicholas Mujah, head of the Sarawak Dayak Iban Association, notes, "Previously, the companies would only engage community leaders, but now as more people are aware of their rights, the companies would have to talk to the rightful landowners and they are more careful in their approach."<sup>182</sup>

Strategic litigation for indigenous peoples' land rights has clearly had an effect on attitudes and behaviors in Kenya, Malaysia, and Paraguay. Such effects are difficult to quantify, and can indeed be negative, including sowing disillusionment among indigenous communities when implementation lags, and hardening anti-indigenous sentiment among some officials and corporate interests opposed to the exercise of indigenous land rights. Yet on balance, the effects of strategic litigation on attitudes and behaviors appear to be positive: the litigation has led to cultural regeneration and increased cohesion among indigenous communities; greater engagement with indigenous issues on the part of the media, litigators, and other civil society actors; and even some begrudging acknowledgment among government and corporate officials. Although these changes in attitudes are far from the primary goal of litigation for land rights, they show how strategic litigation is capable of generating impacts far beyond the courtroom.



## VI. Conclusions, Analysis, and Recommendations

*“I advise those who have land dispute issues with the government to not be afraid to assert and claim your rights. We are not fighting the government but we are fighting to get our rights recognized and respected. We are not opposing for the sake of opposing but are trying to make things right.”*

—Simo Anak Sekam, community leader of Kampung Rejoi Nyegor,  
Upper Bengoh, Malaysia.<sup>183</sup>

Indigenous communities’ initial skepticism about the law and litigation as potential tools for change has given way to a more hopeful view of its potential in recent years. In all three countries, interest in litigation has spread from the communities engaged in it to neighboring indigenous groups. This suggests that indigenous peoples feel that litigation has an overall positive impact, even if litigation’s position within a much larger and longer-term struggle for land rights makes it hard to pinpoint that impact. To further explore these findings, this chapter focuses on the main findings that are common among the three countries before engaging in a more in-depth analysis of the impact of litigation. Based on this analysis, the chapter closes by offering recommendations for indigenous communities and their advocates considering strategic litigation to assert their land rights.

## A. The State of Practice

### **When Litigation Becomes a Long-Term Strategy**

One of the objectives of this study is to analyze litigation's role within the larger struggle for land rights. The cases examined here show that communities undertake litigation only after years of frustration and seeking other means of redress. The research for this study shows that in most situations litigation did not begin as "strategic litigation" per se; not until the cases reached a higher level in the court system (either nationally or internationally) were they viewed as possibly strategic in the sense of serving as vehicles for broader social change beyond the claimant communities. In all the examined cases, the communities' attempts at negotiation, mediation, and dialogue did not bear fruit. But while litigation is not a first option it nonetheless seems to be an essential strategic choice when other institutions of governance fail to uphold human rights. More and more indigenous peoples have turned to the courts to seek to enforce their right to land. Indigenous communities and supportive NGOs have increasingly integrated litigation as a significant element in their strategy. The court battle is an increasingly important element in the long-term effort to protect and advance rights.

### **Poor Implementation**

Another common denominator between the three countries is the poor level of implementation of the various rulings, particularly regarding land restitution. Indigenous peoples usually face extreme delays, protracted processes, and incomplete land titling. The process of land restitution, land demarcation, and land titling has been slow and partial at best. Monetary compensation is more common than restitution of land. Nonetheless, some communities have re-occupied their land without direct state sanction. Thus, the judgments have provided a galvanizing push to physically reclaim their land.

### **Limited Impacts on General Mainstream Perceptions**

Indigenous peoples usually suffer from high levels of discrimination from mainstream society. They are often perceived as primitive and lacking development. Overall the interviews suggest that litigation does little to challenge the negative and often racist mainstream perception of these communities. While some positive impact was noted regarding media coverage, and in some of the political and legal institutions of the states, changes in the overall perceptions of mainstream society across the three studies are minimal.

## B. The Reframing, Participatory, and Economic, Social, and Cultural Impacts of Litigation

This study relies on César Rodríguez-Garavito's proposed framework for analyzing the impact of litigation, which posits that litigation can have an "unlocking effect," a "participatory effect," a "reframing effect," and "socio-economic effects."<sup>184</sup> Since land rights generally have a deep rooted, historical origin, indigenous peoples' land rights can be dormant for a long time, which suggests litigation could have a significant "unlocking effect" and "reframing effect." It can both raise and redefine issues that have previously been overlooked. Litigation can also have a significant "participatory effect," by mobilizing indigenous peoples and increasing their sense of agency. In some ways, this participatory effect can be almost as important as the judgments themselves. Finally, as noted earlier, land rights are at the heart of indigenous peoples' cultural, social, and economic rights, and no analysis would be complete without considering impacts on these three types of rights.

### **The Unlocking and Reframing Effects of Litigation**

The legal frameworks of most states do not sufficiently protect the land rights of indigenous peoples. Litigation has the potential to support land rights, or at least to provide a platform for challenging the lack of legislative or administrative rights to land for indigenous peoples. As the situation in Malaysia demonstrates, litigation can open a new interpretation of the law to counteract land rights violations. Courts interpret the legal framework to enhance the integration of indigenous customary land rights and thereby "unlock" the process of land rights, opening a new legal interpretation providing space for indigenous land rights when written laws did not. The impact of litigation in such a context can be immense.

However, jurisprudential interpretation of land rights has two significant limitations. The first relates to the fact that very often this jurisprudential impact remains subordinate to the overall re-interpretation and restrictions of the formal legal framework. The change in the jurisprudence has had minimal bearing on the legislative framework in the three focal countries: no impact on the statutes in Paraguay, a negligible and indirect impact in Kenya, and a negative and restrictive impact in Malaysia. No direct executive or legislative action has given effect to the legal pronouncements on indigenous rights in the three countries.

The second potential limitation of the jurisprudential recognition and affirmation of land rights relates to the dominance of Western legal language on land rights.

Indigenous peoples have to make their own customary land practices fit within the narrow scope of legal interpretation, in a context of Western perceptions of land rights as market-oriented and exclusive. However, litigation, if it leads to the recognition of the legal value of customary indigenous land rights, can challenge this restriction. This represents another potentially important reframing impact of litigation in ushering the formal recognition of indigenous concepts of land rights into the legal doctrine of the state, as has happened in Malaysia.

The situations in Paraguay and Kenya point towards another type of “unlocking” effect that litigation can have when the process for land rights recognition stalls at the national level. After years of frustration in trying every possible avenue for land rights recognition at the national level, indigenous communities in these countries unlocked their situations by finding a new platform to challenge the non-recognition of their land rights through litigation at the international level. However, there are drawbacks to engaging with such regional or international platforms. In Paraguay, the regional litigation has had very little impact on the institutions of the state, and the litigation has created very little awareness among either the political or the legal professions. Nonetheless, in this context litigation at the regional level is a reminder that until the domestic legal system is improved, the country will continue to face cases on land rights in international forums.

Litigation can also have a “reframing” effect, notably allowing indigenous peoples to transform cases of trespassing into land rights claims. The reframing of cases of alleged criminal trespass in Malaysia and Kenya into a land rights claims illustrates this effect. Through litigation, indigenous communities turned trespass charges against them into positive claims to recognize their fundamental rights to their land and territories. In both situations, due to the litigation and the work of the legal team, the court agreed to reframe the issue as an issue of indigenous land rights.

## **The Participatory Impacts of Litigation**

The participatory impact of litigation can be measured at two levels: internal, among the community, and external, in terms of the relationship between indigenous communities and the larger society. Engaging with litigation has a significant impact on the internal decision-making process for indigenous communities. Engaging with litigation forces communities to either renew traditional processes to make decisions or establish new forums. Whether via their traditional structures or through newly established ones, litigation can have a significant, long-lasting impact on decision-making within the concerned communities. Communities that do not have strong and coherent mechanisms

in place to make decisions for the group may struggle to find the best way to engage in the litigation. Across the three countries and the nine cases, the different ways the communities were organized and their respective levels of unity played crucial roles in their engagement with the litigation and their ability to push for implementation. Litigation can either strengthen or weaken these structures, but it is unlikely to leave them unchanged.

Litigation can also have significant impact on community leadership. Engagement with litigation has empowered community leaders and key representatives from each community while also giving the broader affected community an important political tool to leverage their rights. Another noticeable internal impact relates to the level of legal awareness among community members. During the interviews across the three countries, the discourse of indigenous rights was prominent. People have varying levels of understanding of the specifics of those rights, but many people know that they have rights associated with the rulings. Litigation creates a significant level of legal awareness among communities involved in it. This awareness is the result of regular community outreach during the litigation, as well as the capacity building and empowerment that accompany the litigation effort. The work of the legal teams in supporting capacity building and community outreach plays a central role in such increased awareness.

Litigation has a direct impact on the engagement of state institutions with the concerned communities. Spurred by court judgments, governments often create new institutions to engage with communities on land rights. In the three countries, litigation has led to the establishment of specific institutions in charge of engaging with land rights, either directly, to support the implementation of the rulings (Paraguay and Kenya), or more generally, to provide a process for land rights claims (Selangor State, Malaysia). These new institutions have an important impact on the engagement of the communities with the official state machinery. Even if the processes in place are not perfect, these new institutions provide indigenous people with platforms to participate directly in the formulation and implementation of the country's land policies.

By increasing the public profiles of indigenous groups, litigation also opens new forums for participation. In Paraguay and Kenya, indigenous communities have received greater exposure, nationally and internationally. The Endorois and Ogiek have national and international recognition because of the litigation concerning them. This exposure has led to increased media attention to and aid for the concerned communities. This has led to new civil society alliances and the development of new partnerships to support implementation, giving indigenous peoples a far more prominent role in civil society movements.

## **Economic, Cultural, and Social Impacts of Litigation**

The litigation rulings studied here shed light on the challenges that many indigenous peoples face regarding their rights to land, among other rights associated with their living conditions. In terms of the material impact, it is clear that actual land restitution is rare. But in all the situations examined the litigation has helped give rise to a process for land restoration or substitution. The material situation of the concerned communities has not dramatically changed, however, and most still live precariously. Yet the concerned communities and other actors involved in the litigation still perceive it as positive in its impact on indigenous peoples' economic, social, and cultural rights.

In this regard it is notable that most communities have received some forms of compensation, either in the form of monetary payments or through increased access to their sources of livelihood. For example, the concerned communities in Paraguay have gained access to health facilities and identity documents.

Another finding from the research is that engaging in litigation has a very significant cultural and social impact on the concerned communities. The process of documentation and evidence gathering is particularly significant in this context, as it invites communities to conduct cultural, social, and historical analyses of their relationship to the land. This community engagement in mapping their historical and cultural attachment to their land has particular impact on the intergenerational and gender relationships within communities. These processes of evidence gathering also have some impact on the role and place of women, especially in patriarchal societies, allowing a space for recording their connection with the claimed territories. The whole process of engaging in litigation can contribute to cultural regeneration and the renewal of cultural practices tied to land usage.

## **C. Limitations and Recommendations**

### **Limitations of International and Regional Rulings**

Litigation in the countries under study has brought some benefits to the concerned indigenous communities and their direct neighbors, but has had little impact nationally. The decisions of regional human rights courts concerning Paraguay and Kenya have had a limited impact on national jurisprudence or the legal profession's awareness of the cases. In each country, positive rulings from these international courts have not fundamentally changed the dynamic of poor institutional engagement on indigenous rights issues at the national level. On a more positive note, decisions at the supranational level have galvanized the communities, leading them to reframe their land rights struggles.

To a limited extent, litigation has increased the engagement of national institutions, such as national human rights commissions in Kenya and Paraguay, in supporting indigenous rights.

### **Post-Litigation Strategy and Long-term Involvement of Litigators**

The experience of Kenya, Malaysia, and Paraguay illustrate both the importance of having a robust post-ruling strategy and the need for sustained community engagement. A court's decision is in many ways the beginning of the battle, rather than the end of a process. Successfully pushing for implementation generally requires continuous engagement by the concerned community and its allies long after decisions are issued. Long-term relationships among litigators, legal organizations, and communities have proved critical once judgments have been handed down. Tierraviva in Paraguay, Minority Rights Group in Kenya, and the Center for Orang Asli Concerns in Malaysia have been crucial partners in such long-term engagements.

### **Capacity Building, Leadership, and Community Cohesion**

The nine case studies suggest that litigation can increase community cohesion and cooperation. It appears that organized communities are better positioned to engage in litigation and push for the implementation of judgments. Pursuit of a legal process is often alien to indigenous structures and decision-making processes. Engagement with supportive NGOs and litigators has often been critical in building leadership and confidence within the community. Litigation strategy should include a focus on issues of decision-making processes and leadership. This cannot be externally imposed but needs to be carefully crafted around the existing institutional capacity to shape an effective, implementable strategy to support the legal effort.

### **Long-Term Financial Support**

Litigation is expensive. While the communities often received financial support from NGOs and even lawyers, across the three countries indigenous peoples did not have access to publicly-funded legal aid to engage in litigation. Land rights cases are usually long and strenuous; the cases are often appealed and challenged, making the whole process more expensive. Ultimately, communities and their legal teams will have to bear some litigation costs. Financial support from donors must address not only the

litigation itself, but also the post-ruling advocacy struggle for implementation. Attention must be paid to how various forms of compensation are distributed to communities. Communities that lack a plan for the financial management of such funds are vulnerable to theft, corruption, and loss of hard-won gains.

For indigenous peoples around the world, strategic litigation to assert their land rights is filled with pitfalls. The process is long and costly, and the outcome uncertain. As this study has noted, indigenous people rarely win the restoration of their traditional land. And the process of litigation itself may destabilize communities, increase conflict, and frustrate participants. Yet as this study has also shown, there are undeniable benefits to strategic litigation. Even where traditional land is not restored, indigenous groups may benefit from other forms of restitution. And beyond material benefits, indigenous communities may gain from greater cohesiveness, increased sense of agency, and cultural renewal.

Litigators, advocates, and indigenous groups themselves should be aware of the costs—both obvious and hidden—of engaging in strategic litigation. But they should also be aware of its potential benefits. The world is increasingly encroaching on indigenous peoples' traditional land. Strategic litigation bears consideration as a potentially powerful tool to assert land rights and help indigenous peoples survive and thrive in the 21<sup>st</sup> century.

# Appendix: Research Questionnaire

This study used the following normative questions in its primary research and as the basis for the semi-structured interviews from which the analysis was drawn. All researchers associated with this study used these questions to elicit views from all of the stakeholders they interviewed for the “360-degree” harvesting of perspectives on the impacts of strategic litigation. Views were captured according to the three types of impact identified in the study (see Methodology):

1. material outcomes (such as the number of indigenous people securing their rights to land);
2. legal and policy impacts (such as amendments to national laws, issuance of administrative directives, or changes in budgets); and
3. behaviors and attitudes (reported changes in rights awareness, mobilization of coalitions, etc.).

As much as possible, questions were formulated so as to elicit views on the situation before the case was mounted and after the judgement or settlement, to reflect correlation or causation, if any. Responses to these questions were recorded in both written and audio form, in English and/or the local language.

Whenever possible, the researchers began every interview or email exchange with a request for a brief oral or written narrative of the history of the struggle for indigenous peoples’ land rights in the respective context. If oral, the responses were captured on video or audio recorder and submitted to Jérémie Gilbert.

**1. Impacts on claimants (members of the petitioning community, community leaders)**

- a) What was the situation in terms of land rights before the case was filed and/or the judgment handed down? What, if anything, has changed since then?
- b) What legal redress was made for the claimant(s)? (Whether in form of monetary compensation, authoritative judicial finding, overturning a wrongful lower court decision, etc.)
- c) What has happened to the individual communities, and individual members, on whose behalf the cases were brought?
  - i. To their broad socio-economic and/or racial or ethnic cohorts?
  - ii. How do they think their rights have changed as a result of the case, or their perception of the use of strategic litigation, if at all?
  - iii. How do they perceive their life possibilities to have changed, if at all? Their views on the rule of law, if at all?
- d) What did claimant(s) expect from the litigation at the time?
  - i. Why did they choose to engage in litigation? Were they aware that their claim was a “strategy,” or could be part of a larger strategic litigation?
  - ii. How do they today perceive the litigation?
  - iii. What impact has it had subjectively on them?

**2. Impacts on the affected communities**

- a) What is the affected community’s awareness of:
  - i. rights violations and the role of the courts in providing redress
  - ii. the judgments
  - iii. rights to non-discrimination against indigenous peoples and their right to land
  - iv. actions taken to enforce those rights apart from strategic litigation
- b) What has been the impact in terms of community cohesion?
  - i. How was it decided who should go to court, i.e., was it specific individual members of the community, leaders, the full community?
  - ii. How was the decision made in that respect?
  - iii. To what extent have the decisions prompted and/or benefited from mobilization/organization inside the community itself, or was this influenced/decided by external actors?

- c) Interaction with the claimant(s):
  - i. How would you assess the nature of the relationship between the claimant(s) and the rest of the community before and after the litigation?
  - ii. If there were some remedies awarded by the court, have these been “shared,” accessible to the whole community, or just to the claimant(s)?
- d) How has access to indigenous lands changed as a result of the judgments/settlements, if at all?
  - i. Has it had any knock-on effect for indigenous communities who also suffer these violations but may not have (yet) brought a case?

**3. Impacts on non-indigenous communities living in close proximity to the concerned indigenous communities**

- a) Attitudes of majority population about the issue of discrimination against indigenous groups and their claims to land: (1) before the judgment; (2) after the judgment
- b) Awareness of non-indigenous populations of the judgments and impact (or perceived impact) of the judgment on them
- c) Interaction with the claimant(s): (1) before the judgment; (2) after the judgment

**4. Impacts on strategic litigators (lawyers, legal team, supporting NGOs)**

- a) What was the relationship with the concerned communities before the case was filed and/or the judgment handed down?
- b) Strategic litigation strategy:
  - i. What substantive strategy was selected to argue the case? For what reasons?
  - ii. How far were the affected communities involved in the decision as to strategy?
    - Did they support this?
    - Did the strategy fit with their own grounds for why the case should be pursued?
  - iii. How successful has selection of this strategy proven/promised to be?
  - iv. Has this strategy made it more difficult for the case to be dismissed?
  - v. Has adoption of this strategy engaged a wider community of support?

- c) Outcomes for strategic litigators and lessons learned:
  - i. What did they learn, if anything, from the experience as litigators? As social-change agents?
  - ii. How did they apply the learning in their work as they went, if at all?
  - iii. How important (or not) was international and comparative law in the arguments put forward to the court?
  - iv. What would they have changed in their litigation approach in retrospect?
  - v. In what way, if any, have they or would they adapt their practice for similar cases in the future?
  - vi. Any impact of the case regarding the relationship between the legal professions and the broader cohort of strategic litigators?

## 5. Impacts on policymakers

- a) Interview national officials (legislators, ministers) and regional officials if relevant (at the Inter-American Commission, the African Commission on Peoples' and Humans' Rights, as relevant) to explore their perceptions of the cases and how they have or have not impacted their understanding, decisions and actions with regard to indigenous land rights.
  - i. How did the national governments and, as relevant, municipalities, interpret the cases and their impacts, such as in speeches, public reporting, media interviews, etc.?
  - ii. What was the situation before the case was filed and/or the judgment handed down?
    - What, if anything, has changed since then?
  - iii. What changes in policy, if any, emerged from the court proceedings, judgments and implementation or lack thereof? Any specific rule adopted by relevant governmental bodies as result of judgment?

## 6. Impacts on the judiciary and the law

- a) Interview national judges and judges at the regional courts/commission (as relevant): What is their perception of the impacts of these cases to date? Does this create a new approach to the law?
  - i. What was the situation before the case was filed and/or the judgment handed down?
    - What, if anything, has changed since then?

- ii. Education of the judiciary about issues at stake and/or about their own role/responsibility to act—domestic jurisprudence—to what extent have domestic courts been impacted
  - iii. Number of references to any of the relevant judgments
  - iv. Number of cases decided at domestic level on issue of indigenous peoples' land rights
- b) Interview national judges and judges at the regional courts = what is their perception of the impacts of these cases to date?
  - c) To what extent have your customary indigenous laws or equivalent indigenous land tenure systems been important?
    - i. How did the judges react to inclusion/references to customary land tenure systems? Were they aware of this before the case?
    - ii. If customary laws were used/included, was there an impact on the overall legal system of the country (both legislative and jurisprudential)?

## **7. Impacts on media coverage**

- a) What was the situation before the case was filed and/or the judgment handed down?
  - i. What, if anything, has changed since then?
- b) To what extent were these cases covered in local and national media at all?
  - i. When mentioned, what were the principle messages conveyed?
- c) Interview media: What are media perceptions of the cases and of the broader issue of indigeneity and/or land rights and/or indigenous land rights in the cases addressed?

## **8. Impacts on officials (e.g., Ministry of Interior staff, wildlife guards, etc.)**

- a) Interview relevant officials who are dealing directly with land claims: for example, land registry, conservation agencies, wildlife parks rangers, forestry department, etc:
  - i. To what extent are they aware of the judgment? Do they know how they have to support implementation?
  - ii. What was the situation before the case was filed and/or the judgment handed down?
  - iii. What, if anything, has changed since then?

**9. Impacts on organized civil society**

- a) What was the situation before the case was filed and/or the judgment handed down?
  - i. What, if anything, has changed since then?
- b) Community rights groups (whether related to indigenous rights or land rights or not)
- c) Policy research and advocacy organizations
- d) Mainstream human rights NGOs and specialized NGOs, such as those dedicated to indigenous peoples' rights, environmental rights, food security, climate change prevention and adaptation, gender equality, sustainable development, and others
- e) Conservation or wildlife organizations if relevant
- f) The Bar or other similar legal professional body
- g) Impact on donors (i.e., organizations that might have funded litigation—if relevant)

**10. Impacts on non-state actors, such as corporations and investors disputing the land claims**

- a) What was the situation before the case was filed and/or the judgment handed down?
  - i. What, if anything, has changed since then?
- b) Awareness of the disputes and the legal challenges
- c) Awareness of the judgments, if relevant
- d) Changes in company policies or practices as a result of the challenge, if any

# Endnotes

1. While there has been some engagement with litigation in Europe, there is nonetheless a lack of a developed jurisprudence on indigenous peoples' land rights. See Koivurova, Timo. (2011). "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects." *International Journal on Minority and Group Rights*, 18 (1): 1–37. See also Otis, Ghislain, & Laurent, Aurélie. (2013). "Indigenous Land Claims in Europe: The European Court of Human Rights and the Decolonization of Property." *Arctic Review on Law and Politics*, 4 (2): 156–180.
2. Foundations staff members Emily Martinez, program director of the Human Rights Initiative, and Borislav Petranov, division director at the Human Rights Initiative, have contributed to the framing and substance of the inquiry since its inception.
3. See: <http://www.worldbank.org/en/topic/indigenouspeoples/overview>, accessed February 27, 2017.
4. Global Witness, *On Dangerous Ground*, June 20, 2016, available at: <https://www.globalwitness.org/en/campaigns/environmental-activists/dangerous-ground/>.
5. See: <http://www.worldbank.org/en/topic/indigenouspeoples/overview>, accessed February 27, 2017.
6. Art. 26 of the UN Declaration on the Rights of Indigenous Peoples states: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." See: [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).
7. Supreme Court of Belize, *SATIIM (Sarstoon Temash Institute for Indigenous Management) v. Attorney General of Belize* (2014).
8. Supreme Court of India, *Jagpal Singh & Ors. v. State of Punjab & Ors.*—(2011).
9. Constitutional Court of Ecuador, *Leonel Ufredo del Pezo Yagual (President of the Montañita Commune) et al.* (2013).

10. See T-661/15—Corte Constitucional de Colombia (2015); Constitucional: Sentencia T-379/14—Corte Constitucional de Colombia, Constitutional Court Sentencia T-129/11 (2011).
11. Constitutional Court Decision 55/PUU-VIII/2010, reviewing Law 18 of 2004 on Plantations, issued September 6, 2011 (Plantation Law case (2011); Constitutional Court Decision 3/PUU-VII/2010, reviewing Law 27 of 2007 on the Management of Coastal Areas and Small Islands, issued June 16, 2011 (Coastal and Remote Areas Law case (2011); *The Indigenous Peoples' Alliance of the Archipelago (AMAN) v. Government of Indonesia*—Constitutional Court (2013).
12. Rodríguez-Garavito, César. (2010). "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America." *Texas Law Review* 89: 1669.
13. The African Commission on Human and Peoples' Rights. (2011). Report of the African Commission Working Group on Indigenous Populations/Communities: Research and Information Visit to Kenya March, 1–19, 2010: 35. Accessed June 23, 2016, at [http://www.achpr.org/files/sessions/50th/mision-reports/indigenous-2010-kenya/misrep\\_specmec\\_indig\\_kenya\\_2010\\_eng.pdf](http://www.achpr.org/files/sessions/50th/mision-reports/indigenous-2010-kenya/misrep_specmec_indig_kenya_2010_eng.pdf).
14. Republic of Kenya. (2010). The Constitution of Kenya, Article 260: "Marginalized Communities."
15. The Working Group on Indigenous Populations/Communities in Africa was established by the African Commission on Human and Peoples' Rights through Resolution 51 at the 28<sup>th</sup> Ordinary Session, held in Cotonou, Benin, from October 23 to November 6, 2000.
16. African Commission on Human and Peoples' Rights and International Working Group on Indigenous Affairs. (2006). "Indigenous Peoples in Africa: The Forgotten Peoples?" Accessed June 28, 2016, at [http://www.achpr.org/files/specialmechanisms/indigenoupopulations/achpr\\_wgip\\_report\\_summary\\_version\\_eng.pdf](http://www.achpr.org/files/specialmechanisms/indigenoupopulations/achpr_wgip_report_summary_version_eng.pdf).
17. International Working Group on Indigenous Affairs. (2016). "Indigenous Peoples in Kenya." Available at <http://www.iwgia.org/regions/africa/kenya>. Pastoralists include the Turkana, Rendille, Borana, Maasai, Samburu, Ilchamus, Somali, Gabra, Pokot, and Endorois. Hunter-gatherers include the Ogiek, Sengwer, Yaaku, Waata, El Molo, Boni (Bajuni), Malakote, Wagoshi and Sanya.
18. Stavenhagen, Rodolfo, United Nations Office of the High Commissioner for Human Rights. (2007). Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People—Mission to Kenya. UN Doc. A/HRC/4/32/Add.3, para 25.
19. Some of the laws include the Indian Land Acquisition Act (1894); Crown Land Ordinance No. 21 of 1902; Native Lands Trust (Amendment) Ordinance of 1934; and the Crown Land (Amendment) Ordinance of 1934. The Land Acquisition Act 1894 was extended to Kenya from India, under Section 6 of the Indian Land Acquisition Act, 1894. All the land situated within one mile of either side of the Uganda Railway line that was then under construction was reverted to the crown.
20. Community Land Act, (2016). Section 13 (2).
21. Under Section 13 (2) of the Community Land Act, 2016 "Any land which has been used communally, for public purpose, before the commencement of this Act shall upon commencement of this Act be deemed to be public land vested in the national or county Government, according to the use it was put for."
22. National Gender and Equality Commission. (2014). Flares of Marginalization Among Selected Minority Communities of Kenya, p. 13. Available at <http://www.ngeckkenya.org/Downloads/flare-of-marginalization-in-Kenya.pdf>.

23. See Odhiambo Makoloo, Maurice. (2005). Kenya: Minorities, Indigenous Peoples and Ethnic Diversity. London: Minority Rights Group International.
24. The NLC was established pursuant to article 67(2) of the constitution to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.
25. For example, with the *Ol Ole Njogo and Others v. The Attorney General*, Civil Case No. 91 of 1912 ( *E.A.P.* 1914), 5 *E.A.L.R.* 70.
26. A few recent examples where courts have failed to recognize indigenous peoples' land rights include *Parkire Stephen Munkasio & 14 others v. Kedong Ranch Limited & 8 others* and *Ledidi Ole Tauta & Others v. Attorney General & 2 others*. See <http://kenyalaw.org/caselaw/> for other cases.
27. On the general situation of the Ogiek, see African Commission on Human and Peoples' Rights *Communication 381/09—Centre for Minority Rights Development—Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v. Kenya*. In 2012, the commission referred the case to the African Court on Human and Peoples' Rights.
28. Interview with Joseph Towett, August 2016, in Njoro, Kenya.
29. See Towett, Joseph. (2004). "Ogiek Land Cases and Historical Injustices 1902–2004." Nakuru, Kenya: Ogiek Welfare Council.
30. Under Kenyan law, a representative suit is a lawsuit filed by a group of people sharing a common legal position. See Order 1, Rule 8 of the Civil Procedure Rules.
31. See "Environment and Land Court" at <http://www.judiciary.go.ke/portal/page/land-and-environment-court>.
32. Regarding their land rights, the court stated: "The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership.... The Applicants did not bring evidence of such processes of allocation of title to land located in the Mau Forest and solely relied on their long occupation of the same."
33. The government is currently appealing the case but the appeal has not yet been heard and the judgment has not been implemented. The case examined by the African Court on Peoples' and Human Rights regarding the Ogiek would also have some consequences with respect to this approach.
34. *Ngati Farmers Cooperative Society v. John Ledidi & Others*, Civil Case No. 89 (1996), *Joseph Kashau Olokhuo & Others v. Ngati Farmers Co-Operative Society Limited* (2006), and *Joseph Kashau Olokhuo & 6 others v. Ngati Farmers Co-operative Society Ltd* (2011). The properties are L.R. No. Narok/Maiella Estate/2662, Narok/Maiella Estate/1380, and Narok/Maiella Estate/8398/2.
35. *Ngati Farmers Cooperative Society v. John Ledidi & Others*, Civil Case No. 89 (1996).
36. "Adverse possession is a method of acquiring title by possession for a statutory period under certain conditions, usually based on proof of non-permissive use, which is actual, open and notorious, exclusive, adverse, and continuous for the statutory period." Black, Henry T. (1979). Black's Law Dictionary, 5th ed. St. Paul: West Publishing Co., 49.

37. *Joseph Kashau Olokhuo & 6 others v. Ngati Farmers Co-operative Society Ltd* [2011] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/77907/>.

38. *Ibid.*

39. See Patel, Sonal. (2015). "Olkaria Geothermal Expansion Project, Rift Valley Province, Kenya." *Power Magazine*. Available at <http://www.powermag.com/olkaria-geothermal-expansion-project-rift-valley-province-kenya/>

40. MediaMax, (February 2016). "KenGen moves to establish Olkaria industrial park." Available at <http://www.mediamaxnetwork.co.ke/people-daily/198070/kengen-moves-to-establish-olkaria-industrial-park/>

41. See: <http://www.worldometers.info/world-population/malaysia-population/> (accessed March 30, 2017).

42. *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor and Anor* [1997] 1 MLJ 418.

43. Pursuant to ss 6 and 7 the *Aboriginal Peoples Act 1954 (APA)* or, more broadly, s 62 of the *National Land Code 1965*. Statutory rights of occupancy of customary lands were thought to be no better than that of a tenant-at-will (*APA*, s 8) while mandatory redress for the loss of such lands was limited to monetary compensation for the loss of fruit and rubber trees located on the lands (*APA*, ss 11 and 12).

44. See, for example, *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* ("*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).

45. See, for example, *Rambilin binti Ambit v. Assistant Collector for Land Revenues, Pitas* (Kota Kinabalu High Court Judicial Review Application for Judicial Review Nos. K 25-02-2002 and K24-240-2002, July 9, 2007).

46. See *Superintendent of Land & Surveys Miri Division & Anor v. Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)* ("*Madeli FC*") [2008] 2 MLJ 677, 692, 696-7, 698.

47. See *Sagong bin Tasi & Ors v. Kerajaan Negeri Selangor and Ors* ("*Sagong HC*") [2002] 2 MLJ 591; *Kerajaan Negeri Selangor and Ors v. Sagong bin Tasi & Ors* ("*Sagong CA*") [2005] 6 MLJ 289.

48. For the high court decision, see *Andawan bin Ansapi and Ors v. PP* (Kota Kinabalu High Court Criminal Appeal K41-128-2010, March 4, 2011).

49. However, in the case of TR Sandah adopted on December 20, 2016, the Federal Court put serious restrictions on the land rights of the Orang Asal of Sarawak by ruling that the custom of "*pemakai menoa*" and "*pulau*" does not fall within the definition of "law" under Article 160(2) of the federal Constitution.

50. The project affected a 38.5 acre (15.5 hectare) part of the village.

51. By comparison, the neighboring landowners were paid RM100,000 (US\$25,000) per acre as compensation. The Temuan collectively received approximately RM900,0000 (US\$225,000) instead of the approximately RM4million (US\$1m) to which they believed themselves entitled.

52. In 1996, the Temuans' suit was filed in the Shah Alam High Court in Selangor. The defendants were the federal government, the Selangor State government, the Malaysian Highway Author-

ity and the contractor, United Engineers Malaysia Berhad. However, the case proper only started in December 2000.

53. See *Sagong CA* [2005] 6 MLJ 289.

54. See Nicholas, Colin. (2010). "How Selangor Won Over the Orang Asli." In: *The Road to Reform: Pakatan Rakyat in Selangor*, ed. Tricia Yeoh. Petaling Jaya: SIRD Publishers, 221–227.

55. *Nor Nyawai CA* [2006] 1 MLJ 256, 269.

56. *Ibid*; *Nor Nyawai HC* [2001] 6 MLJ 241, 289.

57. The company regained its lease despite the fact it was bankrupt. They leased 200,000 hectares of monoculture pulp plantations to three of the largest logging and industrial plantation corporations in Sarawak.

58. The court of appeal effectively raised issues of proof of native customary rights, and the Ibans' claim was ultimately dismissed for lack of sufficient evidence. Unfortunately for indigenous communities, scrutiny reveals that these issues frequently surface as a source of legal dispute.

59. This proved wise when a later native customary rights decision in the federal court—*Superintendent of Lands & Surveys Miri Division and Government of Sarawak v Madeli bin Salleh* (2007) 6 CLJ 509—upheld the learned high court judge's view in *Nor Nyawai*.

60. See *Andawan bin Ansapi and Ors v. PP* (Kota Kinabalu High Court Criminal Appeal K41-128-2010, March 4, 2010).

61. *Dirección General de Estadística, Encuestas, y Censo*. 2014. "Atlas de Comunidades de Pueblos Indígenas en Paraguay 2012." Asunción, Paraguay. Accessed August 15, 2016, at <http://www.dgeec.gov.py/Publicaciones/Biblioteca/indigena2012/Pueblos%20indigenas%20en%20el%20Paraguay%20Resultados%20Finales%20de%20Poblacion%20y%20Viviendas%202012.pdf>.

62. It should be noted, however, that Law 2128/03 ratified the International Convention for the Elimination of all Forms of Racial Discrimination.

63. See *Dirección General de Estadística, Encuestas y Censos*, Gobierno Nacional 2014: *Pueblos Indígenas en el Paraguay. Resultados Finales de Población y Viviendas 2012. III Censo Nacional de Población y Viviendas para Pueblos Indígenas. Censo 2012*. Fernando de la Mora: dgeec (<http://www.dgeec.gov.py/>).

64. Tauli-Corpuz, Victorial. (2015). Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Paraguay.

65. CONAPI. 2014. "Situación de los pueblos indígenas en el Paraguay, elaborado por las organizaciones indígenas para la 44 asamblea general de la OEA." Coordinación Nacional de Pastoral Indígena. IWGIA. 2015. "Pueblos indígenas del Paraguay: Una historia de discriminación sistemática." Grupo Internacional de Trabajo sobre Asuntos Indígenas.

66. Horst, Rene. 2007. "The Stroessner Regime and Indigenous Resistance in Paraguay." Gainesville, University of Florida Press. Blaser, Mario. 2010. "Storytelling Globalization from the Chaco and Beyond." Durham: Duke University Press. FAPI (Federación por la Autodeterminación de los Pueblos Indígenas), FPP 2015: *Situación Territorial de los Pueblos Indígenas de Paraguay*.

67. The difference in number of hectares reflects the fact that there are serious ecological and environmental constraints on land productivity and the presence of resources in the Chaco region.

68. Roldán Ortega, Roque. (2004). "Models for recognizing indigenous land rights in Latin America (No. 99)." World Bank, Environment Department. Stocks, Anthony. (2005). "Too Much for Too Few: Problems of Indigenous Land Rights in Latin America." *Annual Review of Anthropology* 34: 85-104.

69. Paraguay is one of the most unequal countries in Latin America in regards to land rights, with a GINI co-efficient for land distribution at 0.92, where a score of 0 equates perfect equality and 1 equates total inequality. See Galeano, Luis A. (2012). "Paraguay and the Expansion of the Brazilian and Argentinian Agribusiness Frontiers." *Canadian Journal of Development Studies*. 33 (4): 458-470. Glauser, Marcos. (2009). "Extranjerización del territorio Paraguayo." Asunción, Paraguay.

The problem of land distribution is longstanding and has deep historical roots. The sale of state land to pay for war debts incurred in the devastating Triple Alliance War (1864-1870) resulted in the concentration of vast expanses of land in the hands of few foreign, and some Paraguayan, investors and families firmly establishing agricultural *latifundias* across the country. Another factor contributing to the inequality in land distribution relates to the manipulation of the Stroessner-era agrarian reforms that occurred in the mid- to late 1960s. The reforms essentially created a home-steading act that encouraged internal colonization of Paraguayan farm families and Brazilian in indigenous lands in the eastern half of the country.

70. Christine MacDonald, "Green Going Gone: The Tragic Deforestation of the Chaco," *Rolling Stone*, July 28, 2014, available at: <http://www.rollingstone.com/culture/news/green-going-gone-the-tragic-deforestation-of-the-chaco-20140728>, accessed March 30, 2017.

71. This also includes two friendly settlements in the Riachito and Kelyenmagatema cases, and the current situation of the Ayoreo Totobiegosode people in voluntary isolation and the state's inability to take effective measures to protect their rights to land, Comisión Interamericana de Derechos Humanos, 2016. "Medida Cautelar No. 54-13: Asunto comunidades en aislamiento voluntario del Pueblo Ayoreo Totobiegosode respecto de Paraguay 3 de febrero de 2016."

72. For a timeline and overview, see Vyas, Ushma. (2016). "Yakye Axa Indigenous Community v. Paraguay: A Summary," *Loy. L.A. Int'l & Comp. L. Rev* 38: 1601. Available at [https://iachr.lls.edu/sites/iachr.lls.edu/files/iachr/Cases/Yakye\\_Axa\\_Indigenous\\_Community\\_v\\_Paraguay/vyas\\_yakye\\_axa\\_indigenous\\_community\\_v.\\_paraguay.pdf](https://iachr.lls.edu/sites/iachr.lls.edu/files/iachr/Cases/Yakye_Axa_Indigenous_Community_v_Paraguay/vyas_yakye_axa_indigenous_community_v._paraguay.pdf).

73. "Paraguayan Indigenous Community Reoccupies Territory after Two Decades of Forced Expulsion," *The Real News Network*, June 23, 2013, available at [http://therealnews.com/t2/index.php?option=com\\_content&task=view&id=31&Itemid=74&jumival=10336](http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=10336) (accessed March 30, 2017).

74. See <https://www.escri-net.org/caselaw/2013/case-sawhoyamaya-indigenous-community-v-paraguay> (accessed March 30, 2017).

75. Initial petition before the Inter-American Commission in 2001; deemed admissible in 2003; advanced to the IACtHR in 2009.

76. See article 28 of UNDRIP: "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"; also, see CERD, General Recommendation XXIII: Indigenous Peoples, U.N. Doc. CERD/C/51/misc 13/Rev 4 (1997): "[W]here they have been deprived of their lands and terri-

tories traditionally owned or otherwise inhabited or used without their free and informed consent, [indigenous peoples have the right] to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.” See also IActHR, *Caso de los pueblos indígenas kuna de madungandi y embera de bayano y sus miembros vs. Panamá* (2014).

77. Wildlife Conservation and Management Act (2013). Section 35 (2). See the Eleventh Schedule, p. 1349. Available at <http://faolex.fao.org/docs/pdf/ken134375.pdf>

78. The Ministry of Finance must approve the expenditure and release the funds to INDI, which then transfers the payment to the landowner. The communities are involved in that they approve the lands that are purchased on their behalf and determine (with the aid of their legal counsel) that the documents are in order and the land is indeed as promised. As of September 2016, no progress has been made in these processes.

79. Eaton y Compania (a cattle ranching company) actually sold the land to a ranching consortium (Cooperativa Chortizer); the ruling made it clear that it was part of the community’s territory but the authorities did nothing to stop the sale.

80. The limits of the property exist on the title to the land, but the property in question is part of a parcel of land that is over 60,000 hectares in size and thus the 14,404 hectares expropriated for the community must be explicitly measured and delimited on the ground to ensure they are accurate and within the measure of the law.

81. Interview with Jorgelina Flores, member of the Yakye Axa community, July 27, 2016. This interview was conducted in Guaraní.

82. Interviews with Tierraviva and consultation of internal documents drafted by Tierraviva and CEJIL that were submitted to the Inter-American System regarding issues of state compliance with the rulings.

83. The access road will comprise a total of approximately 34 kilometers and will unite the property the state has purchased for the community of Yakye Axa (in accordance with the 2005 IACTHR ruling) with neighboring indigenous communities and also the main highway. By the beginning of July 2016 and during the site visits conducted for this study in July 2016, the MOPC had begun construction of the road and cleared some seven kilometers of the total route.

84. Interview with Jorgelina Flores, member of the Yakye Axa community, July 27, 2016. This interview was conducted in Guaraní.

85. Interview with Stella Kereto, county secretary, Baringo County, July 2016, in Nakuru, Kenya.

86. The 23 families shared a total of RM6.5 million (US\$1.6m) in payments.

87. Interview with Ilam Senin, JKKK chairman, August 23, 2016.

88. The forest area in question was assigned to the Singapore government to construct a dam in order to supply water to the island nation. This deprived the Jakun families access to forests where they hunted and foraged and collected various forest products to be exchanged for cash.

89. Community members reported that the funds were paid, but nobody could indicate how the money was paid as the state used an indemnity.

90. Former President of INDI Ruben Quesnel embezzled at least US\$150,000 from the Sawhoyamaxa Community Development Fund in 2013, as the section on corruption describes.
91. Litigation also has significant material cultural aspects in supporting access to cultural and religious sites vital to indigenous cultures and societies. This cultural aspect is examined later in the section dedicated to cultural regeneration.
92. Community members noted that many people and their animals have been hit by vehicles passing by on the highway, as their homes are located generally between 25 and 35 feet from the road. Many people have died or been maimed due to being struck by passing traffic.
93. The nearest health care center was poorly run and 75 kilometers away. It did not have any kind of ambulance that could reach the community. The nearest hospital was over 400 kilometers away and the public bus fare there was expensive.
94. The country has one hospital dedicated to serving indigenous peoples, which is located on the outskirts of Asunción and at a great distance from the majority of indigenous populations, as is the INDI office where indigenous peoples must go for a myriad of legal proceedings and to request aid.
95. Interview with Hon Keitany, executive officer in charge of Tourism, Baringo County Government, July 2016, in Nakuru, Kenya.
96. Sometimes it is possible to acquire these in a closer regional city, but the service is sporadic and thus most people travel to Asuncion to acquire documents.
97. Interview with Paul Chepsoi, July 2016, in Nakuru Kenya.
98. About US\$20 000. See CIPIT Law blog, “Danish Firm Pays 2.3 Million Shillings in Royalties to Endorois Community for Lake Bogoria Enzyme” at <http://blog.cipit.org/2014/11/02/danish-firm-pays-2-3-million-shillings-in-royalties-to-endorois-community-for-lake-bogoria-enzyme/>.
99. For the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, see <https://www.cbd.int/abs/>.
100. Interview with Teofilo, member of the Sawhoyamaxa community, July 25, 2016.
101. Despite the fact that this act was caught on film and many people saw it, the police took no action against the ranch administrator and he has never been formally charged with threatening the leader’s life.
102. From field notes on a conversation with Eriberto Ayala, July 23, 2016. The original conversation was in a mixture of Guaraní and Spanish.
103. Interviews with Joseph Towett, August 2016, Njoro Kenya, and Charles Kamuren, July 2016, Nakuru, Kenya.
104. See Rachel Savage, “Kenya’s Ogiek people forced from homes amid ‘colonial approach to conservation,’” *The Guardian* (UK), August 18, 2016; Ben Ole Koissaba, “Forceful Evictions of Maasai from Narasha: A Recipe for Tribal Clashes in Kenya,” *Cultural Survival*, July 29, 2013. Available at <https://www.culturalsurvival.org/news/forceful-evictions-maasai-narasha-recipe-tribal-clashes-kenya>.
105. Interview with Patrick Kiresoy, July 2016, in Njoro, Kenya.

106. A body established in 1977 to “undertake data collection, compilation, codification, review, initiate amendments and provide greater awareness and advisory service in relation to the proper and correct interpretation of the native customs and adat.” Sourced from the website of the Majlis Adat Istiadat: [http://www.nativecustoms.sarawak.gov.my/modules/web/pages.php?mod=webpage&sub=page&id=42&menu\\_id=0&sub\\_id=42](http://www.nativecustoms.sarawak.gov.my/modules/web/pages.php?mod=webpage&sub=page&id=42&menu_id=0&sub_id=42).

107. Interview with Nicholas Bawin Ak Anggat, October, 30, 2016, via telephone.

108. Interview with Maria Julia Cabello of Tierraviva, July 2016. This situation is an example of the harassment that human rights defenders working on land rights can face. See Mendieta-Miranda, M. (2015). *Defensoras y defensores de derechos humanos en el Chaco Paraguayo: Relatos de lucha por la tierra*. (Asunción: Teirraviva a los pueblos indígenas del Chaco); also, see <https://www.escri-net.org/news/2015/escri-net-and-dejusticia-present-amicus-brief-supporting-right-freedom-expression>.

109. See the ICAR, Oxfam America, and Global Witness project “Tainted Lands: Land, Corruption, and Human Rights” at <http://icar.ngo/analysis/tainted-lands-land-corruption-and-human-rights-project/>.

110. The exact sum was 3,127,191,572 guaranies (the Paraguayan currency) or about US\$700,000 at the rate of exchange when the money was taken in 2013. See Tierraviva. (2014). “Fiscalía cause a Rubén Quesnel por apropiación de dinero para indígenas.” (District attorney accuses Rubén Quesnel of appropriating money for indigenous peoples). Accessed November 10, 2016, at <http://www.tierraviva.org.py/?noticia=fiscalia-acusa-a-ruben-quesnel-por-apropiarse-de-dinero-para-indigenas>.

111. Ruben Quesnel embezzled a total of US\$700,000 in connection with the Sawhoyamaya and Yakye Axa cases.

112. Interview with Senator Miguel López-Perito, August 2, 2016, in the senator’s office at the Paraguayan Congress.

113. The ruling called for publication of this acknowledgement in the official newspaper and other newspapers with national circulation in a notice including all of the confirmed facts of the case. It also called on the state to pay for the transmission of this information on the radio.

114. This was part of the long-term measures and solutions the TJRC was to implement. (Its purview included constitutional, institutional, and legal reforms; land reform; addressing poverty, inequity, and unemployment; consolidating national cohesion and unity; and promoting transparency, accountability, and impunity.) See Kenya Law Reform Commission, *A National Accord and Agenda Four Commissions*. <http://www.klrc.go.ke/index.php/our-work/national-accord-and-agenda-four-commissions>.

115. TJRC Kenya. (2013). Report of the Truth, Justice and Reconciliation Commission, Para. 216-221. Available at [http://www.kenya-today.com/wp-content/uploads/2013/05/TJRC\\_report\\_Volume\\_4.pdf](http://www.kenya-today.com/wp-content/uploads/2013/05/TJRC_report_Volume_4.pdf).

116. TJRC Kenya. (2013). Report of the Truth, Justice and Reconciliation Commission. Para. 221. Accessed June 28, 2016, at [http://www.kenya-today.com/wp-content/uploads/2013/05/TJRC\\_report\\_Volume\\_4.pdf](http://www.kenya-today.com/wp-content/uploads/2013/05/TJRC_report_Volume_4.pdf).

117. See, for example, the high court judge in the *Andawan bin Ansapi* case relying on the “well known case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation s/b & Ors* [2001] 2 CLJ 769,” which he noted, “had held that customary law is a practice by the habit of the people and not the dictate of the written law; and legislation has neither abolished nor extinguished native customary rights.”

118. See *Sagong HC* [2002] MLJ 591, 611.
119. See *Nor Nyawai CA* [2006] 1 MLJ 256, at 269.
120. See *Ketua Pengarah Jabatan Hal Ehwal Ehwat Orang Asli & Anor v. Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors and another appeal* [2015] 6 MLJ 527, 539–40.
121. Interview with See Chee How, September 12, 2016.
122. Interview with Bob Manolan, August 28, 2016.
123. The Resource Conflict Institute is based in Nakuru. The organization works on resource governance and on how to negotiate conflict free and community empowering investments on natural resources. For more information, see <http://reconcile-ea.org>.
124. Interview with Shadrack Omondi, in Nanyuki, Kenya.
125. See *Joseph Kashau Olokuo & 6 others v. Ngati Farmers Co-operative Society Ltd* [2011] eKLR.
126. Interview with Josphe Towett, August 2016, in Njoro, Kenya.
127. Interview with See Chee How, September 13, 2016. Interview conducted by Mark Bujang.
128. Interview with Mirta Periera, July 12, 2016, at the *Federacion de la Autodeterminacion del Pueblos Indigenas* offices.
129. See *James Kaptipin & 43 Others v. The Director Forest & 2 others* [2014] eKLR
130. Interview with Program Officer Obara EWC.
131. See, however, the enactment of the law which expropriated lands on behalf of the Sawhoyamaxa: <https://www.escr-net.org/news/2014/land-restitution-sawhoyamaxa-paraguay>.
132. Report of the Special Rapporteur, Paraguay, para. 20.
133. For example, the deletion of the provision “other lawful methods” in Section 5(2) of the *Sarawak Land Code*, which encompassed the acquisition of customary rights beyond those based on occupation, cultivation, and the clearing of areas (such as hunting areas).
134. Interview with Nicholas Mujah, head of the Sarawak Dayak Iban Association, September 11, 2016.
135. *Ibid.*
136. The Badan Bertindak Tanah Orang Asli Selangor (the Selangor Orang Asli Land Task Force), was launched on May 4, 2009. Orang Asli from all the districts of the country participate and an Orang Asli leads the force. Its task is to document the land status, as well as the socio-economic situation, of all the Orang Asli villages in the state and to come up with a plan of action, including the production of community maps, to resolve all issues pertaining to them.
137. Presidential Decree 4367 of November 9, 2015, restructured CICSI such that it was drawn under the control of the Ministry of Exterior. The first sentence of the body of the document begins: “In light of: the international rulings from the Inter-American Court of Human Rights and the recommendations from the Inter-American Commission on Human Rights.” The document opens with explicit language stating that CICSII was formed in large part due to these rulings, among the others against Paraguay from the IACtHR.
138. For more information on the task force, see <https://www.escr-net.org/news/2014/first-meeting-kenyan-task-force-implementation-endorois-decision>.

139. Interview with Patricia Nyaundi, chairperson, Kenya National Commission on Human Rights, August 2016.
140. Interview with Patricia Nyaundi, chairperson, Kenya National Commission on Human Rights, August 2016.
141. Interview with Patricia Nyaundi, chairperson, Kenya National Commission on Human Rights, August 2016.
142. Interview with Commissioner Clement Lenashuru, August 2016, in the Great Lakes Golf and Country Club, Niavasha, Kenya.
143. Interview with Charles Kamuren, July 2016, in Nakuru, Kenya.
144. Interview with Edward Dwumfour, World Bank, August 2016, in Nanyuki, Kenya.
145. Interview with Charles Kamuren, July 2016, in Nakuru, Kenya.
146. Interview with Wilson Kipkazi and Jimmy Karatu, July 2016, in Marigat, Kenya.
147. Interview with Charles Kamuren, July 2016, in Nakuru, Kenya.
148. Interview with Shadrack Omondi, August 2016, in Nanyuki, Kenya.
149. Interview with Bob Manolan, August 23, 2016.
150. Interviews with Oscar Ayala and Maria Julia Cabello of Tierraviva, July 2016; interviews with Sarah Fischer and Victor Hugo, August 2016.
151. For example, community workshops were conducted with the Endorois community in 2013, 2014, 2015, and 2016 involving ESCR-Net members, such as Dejusticia (Colombia), Hakijamii (Kenya), KHRC (Kenya), MRGI and OPDP (Kenya), among others, regarding issues of compensation, restitution, registration, community bylaws, and women's inclusion.
152. Interview with Nicholas Mujah, September 11, 2016.
153. Interview with Ignacia, member of the Sawhoyamaya community, July 21, 2016. She mentioned *Yypo*, a vine, *Tuna'a*, cactus fruit, and *Algarrobo*, meaning mesquite, referring to the seeds of the mesquite tree.
154. The community was displaced to marginal lands during much of the time of the Inter-American System's consideration of their case (between 2008 and their land reoccupation in early 2015).
155. Similar cultural resurgences have been noted in Malaysia. See Subramaniam, Yogeswaran & Edo, Juli. (2016). "Common Law Customary Land Rights as a Catalyst for the Resurgence of Orang Asli Shamanism in Peninsular Malaysia: Some Lessons from the Semai and Temiar Peoples." *Shaman* 24 (1-2), 74-94.
156. Interview with Charles Kamuren, July 2016, in Nakuru, Kenya. The name of the Endorois Welfare Management Committee was later changed to Endorois Welfare Council.
157. Interview with Daniela Ikawa, June 2016, via Skype.
158. Interview with Belfio Gomez Benitez, member of the Yakeye Axa community, July 26, 2016.
159. Interviews with Jennifer Koinante and Wilson Kipkazi on various dates in July and August 2016, in Nanyuki, Marigat and Njoro, Kenya.

160. Interview with Bernard Ochieng, program officer, EWC, July 2016, in Nakuru, Kenya.
161. Interview with Imahit community, August 28, 2016.
162. See, for example, Daily Nation, “Endorois Ruling Taskforce Formed,” September 24, 2014, at <http://www.nation.co.ke/news/Endorois-Task-Force-President-Uhuru-Kenyatta/1056-2466646-10p99nmz/index.html>.
163. See also Daily Nation, “Endorois to Get Back Their Land, Thanks to AU Court,” February 2010, at <http://www.nation.co.ke/news/regional/1070-858948-9qubqiz/index.html>.
164. See <http://www.freemalaysiatoday.com/category/nation/2016/12/10/orang-asli-have-right-over-their-ancestral-land/>.
165. Tauli-Corpus, Victoria, Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Paraguay, UN Doc. A/HRC/30/41/Add.1, para. 46.
166. Interviews with Sarah Fischer and Victor Hugo. August 2016.
167. Interviews with Oscar Ayala and Maria Julia Cabello of Tierraviva, July 2016.
168. Interview with Juan Carlos Yuste, July 11, 2016, at the Diakonia office in Asuncion, Paraguay.
169. Interview with Shadrack Omondi, August 2016, in Nanyuki, Kenya.
170. Interview with Odenda Lumumba, Kenya Land Alliance, August 2016, Nakuru, Kenya.
171. Across Latin America, *indigenista* refers to persons and/or organizations that are interested in and advocate for the rights and well-being of indigenous peoples.
172. The movement involves different religious organizations (e.g., the Anglican, Catholic, and Mennonite churches and affiliated NGOs such as Coordinación Nacional de Pastoral Indígena or the Asociación de Servicios de Cooperación Indígena-Menonita), non-sectarian NGOs (e.g., Tierraviva, Federación por la Autodeterminación de los Pueblos Indígenas, or the Asociación de Parcialidades Indígenas), and national and international academics.
173. Interview with Senator Miguel López-Perito, August 2, 2016, in the senator’s office at the Paraguayan Congress.
174. For security purposes and fear of political retribution, this individual has asked to remain anonymous. The interview was conducted in July 2016.
175. Interview with Elizabeth Wong, August 24, 2016.
176. Kansol S.A. and Roswell S.A., subsidiaries of Grupo Liebig.
177. Interview with Modesto Guggiari, July 18, 2016.
178. One event of such violence was captured on film in May 2015. See Tierraviva. (2015). “Ganaderos atacan comunidad Sawhoyamaya.” Tierraviva de los pueblos indígenas del Chaco. Available at <http://www.tierraviva.org.py/?galeria=ganaderos-atacan-comunidad-sawhoyamaya>.
179. Eaton, Roberto. (2010). “Veinte años de persecucion.” Accessed October 1, 2016, at <https://vivapy.wordpress.com/2010/11/02/veinte-anos-de-persecucion/>.
180. Due to outstanding debts and internal changes in the ownership of the company, Eaton y Compania changed its official stance toward selling the land to the state in early 2014. The company began to work with the indigenous community, its legal counsel, and the state to negotiate a price

and to sell the land. In July 2016 the state signed an official agreement to purchase the land and payments should be completed by the end of the year.

181. Interview with the KenGen community liaison officer, July 2016, in Naivasha, Kenya.

182. Interview with Nicholas Mujah, September 11, 2016.

183. Interview with Simo Anak Sekam, September 14, 2016. Interview conducted by Mark Bujang.

184. Rodríguez-Garavito, César, (2015). *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South*. Cambridge, UK: Cambridge University Press.

## Open Society Justice Initiative

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The world is increasingly encroaching on indigenous peoples' traditional lands. Around the globe, indigenous communities are forced to cede ground to state development, corporate land grabs, rising sea levels, environmental degradation, and population growth. The right to land provides the basis for access to food, housing, and development. But for indigenous peoples, traditional lands are more than this; they represent essential ties to their ancestors, their culture, and their languages. Losing their land means losing their way of life.

In recent years, indigenous groups have increasingly turned to the courts as non-litigation tactics such as protests have failed to protect their lands from seizure and their communities from eviction. This comparative study, based on dozens of interviews in Kenya, Malaysia, and Paraguay, examines the ways indigenous communities and their advocates are using litigation in an effort to defend their rights and win compensation. In so doing, it finds a sobering reality: even when successful in court, indigenous groups rarely get their land back. They can also suffer financial loss, breakdown of community cohesion, and reprisal. But the study does find benefits of litigation, including gaining alternate lands and financial compensation, better informed courts and general populations, and community empowerment. It also reveals the importance of less quantifiable results of litigation, including official apologies, increased group cohesion, and cultural renewal.

This study—the third in a five-part series examining the impacts of strategic litigation—takes a clear-eyed view of the promises and limitations of using litigation to assert land rights. It suggests that while litigation is no panacea, it can still be a helpful tool for indigenous groups seeking to defend their culture, their livelihoods, and their traditional lands.



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