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From local indigenous struggles to transnational dynamics: the influence of internal mobilizations on judgments of the Inter-American Court of Human Rights

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Abstract: This article examines how repeated legal mobilizations by three Indigenous communities in the Paraguayan Chaco—Yakye Axa, Sawhoyamaxa, and Xákmok Kásek—influenced the Inter-American Court of Human Rights' evolving approach to collective reparations. By contextualizing these cases within Paraguay's agrarian political economy, geographic marginalization, and structurally weak domestic remedies, the analysis demonstrates that recourse to the Inter-American system arose amid cumulative national barriers and reflected strategic legal mobilization under restrictive conditions. Drawing on interviews with community leaders, lawyers, and activists, as well as a comparative analysis of the three judgments, the article shows that successive litigation, post-judgment advocacy, and compliance monitoring generated incremental jurisprudential developments. Rather than depicting international law as externally imposed, the findings highlight processes of legal co-construction, in which Indigenous mobilization shaped the design and implementation of reparations. These Paraguayan cases illustrate the

feedback loops between local struggles and transnational adjudication in settings marked by structural constraints.

Keywords: indigenous rights, co-construction of law, collective reparations, Inter-American Court of Human Rights.

Das lutas indígenas locais às dinâmicas transnacionais: a influência das mobilizações internas nos julgamentos da Corte Interamericana de Direitos Humanos

Resumo: Este artigo examina como as mobilizações jurídicas reiteradas de três comunidades indígenas do Chaco paraguaio —Yakye Axa, Sawhoyamaxa e Xákmok Kásek— influenciaram a evolução da abordagem da Corte Interamericana de Direitos Humanos em relação às reparações coletivas. Ao contextualizar esses casos na economia política agrária do Paraguai, na marginalização geográfica e na fragilidade estrutural dos recursos internos, a análise demonstra que o recurso ao sistema interamericano emergiu em um contexto de barreiras nacionais cumulativas e refletiu formas de mobilização jurídica estratégica sob condições restritivas. Com base em entrevistas com lideranças comunitárias, advogados e ativistas, bem como em uma análise comparativa das três decisões, o artigo mostra que os litígios sucessivos, a atuação após as decisões e o monitoramento de seu cumprimento geraram desenvolvimentos jurisprudenciais incrementais. Em vez de retratar o direito internacional como uma imposição externa, os resultados destacam processos de co-construção jurídica, nos quais a mobilização indígena moldou o desenho e a implementação das reparações. Esses casos paraguaios ilustram os ciclos de retroalimentação entre as lutas locais e a adjudicação transnacional em contextos marcados por restrições estruturais.

Palavras-chave: direitos indígenas, co-construção do direito, reparações coletivas, Corte Interamericana de Direitos Humanos.

De las luchas indígenas locales a las dinámicas transnacionales: la influencia de la movilización interna en las sentencias de la Corte Interamericana de Derechos Humanos

Resumen: Este artículo examina cómo las movilizaciones jurídicas reiteradas de tres comunidades indígenas del Chaco paraguayo —Yakye Axa, Sawhoyamaxa y Xákmok Kásek— influyeron en la evolución del enfoque de la Corte Interamericana de Derechos Humanos en materia de reparaciones colectivas. Al contextualizar estos casos en la economía política agraria del Paraguay, la marginación geográfica y la debilidad estructural de los recursos internos, el análisis demuestra que el recurso al sistema interamericano surgió en un contexto de barreras nacionales acumulativas y reflejó formas de movilización jurídica estratégica bajo condiciones restrictivas. A partir de entrevistas con líderes comunitarios, abogados y activistas, así como de un análisis comparativo de las tres sentencias, el artículo muestra que los litigios

sucesivos, la incidencia posterior a las sentencias y el seguimiento de su cumplimiento generaron desarrollos jurisprudenciales incrementales. En lugar de presentar el derecho internacional como una imposición externa, los resultados destacan procesos de co-construcción jurídica, en los cuales la movilización indígena influyó en el diseño y la implementación de las reparaciones. Estos casos paraguayos ilustran los bucles de retroalimentación entre las luchas locales y la adjudicación transnacional en contextos marcados por restricciones estructurales.

Palabras clave: derechos indígenas, co-construcción del derecho, reparaciones colectivas, Corte Interamericana de Derechos Humanos.

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INTRODUCTION

The struggle of Indigenous peoples for recognition of their territorial and cultural rights represents a significant human rights issue in Latin America. These mobilizations demonstrate a dual movement, taking place both within nation-states and at the international level. The interaction between local and global spheres is rooted in a fundamental relationship between identity and territory, which extends beyond land ownership to include the reproduction of ways of life, historical narratives, and cosmovisions specific to each community. This relationship is essential for Indigenous communities to assert their rights and secure effective recognition.

Paraguay's recent history illustrates this dual movement. After the end of the dictatorship in 1989, the adoption of a new Constitution in 1992 and the ratification of Convention 169 of the International Labour Organization in 1993 (ILO C169) established a formal legal framework for the recognition of Indigenous rights. Nevertheless, this framework faced institutional barriers, such as the political influence of the livestock sector, inadequate financial resources for land restitution, and the continued enforcement of a 1981 law that did not align with international standards. These challenges gradually restricted access to national remedies, prompting communities to seek alternatives at the international level. The inter-American human rights system, particularly the Inter-American Court of Human Rights (IACtHR), subsequently emerged as a central forum for mobilization by several Paraguayan Indigenous communities.

Instead of providing a broad assessment of the effectiveness of international litigation, this article specifically examines how repeated litigation by three Paraguayan Indigenous communities contributed to shaping the Inter-American Court's evolving approach to collective reparations. The analysis focuses on the co-construction of inter-American law through the cases of three Indigenous communities in the Paraguayan Chaco—Yakye Axa, Sawhoyamaxa, and Xákmok Kásek—that mobilized the IACtHR. The central research question is: how do successive legal mobilizations and post-judgment practices influence the development of international legal norms?

Based on in-depth field research and interviews with community representatives, lawyers, and activists, this study investigates how these communities, through legal and political mobilizations, have influenced the IACtHR's jurisprudence on Indigenous rights, particularly in relation to reparations. Rather than serving as passive recipients of externally imposed norms, these communities have actively contributed to the development of new legal standards. The analysis does not claim that communities directly influenced individual judges. Instead, it examines how successive cases, post-judgment mobilizations, requests for interpretation, and compliance monitoring processes resulted in cumulative jurisprudential adjustments within the Court. While the Court's decisions produced significant local political effects, this study addres-

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ses these dynamics only insofar as they reveal feedback loops between communities and the Court, rather than offering a comprehensive socio-legal impact assessment.

This article contributes to socio-legal scholarship in two ways. First, it advances the literature on the co-construction of law by demonstrating that legal norms are not only shaped through processes of translation or vernacularization, but also through post-judgment practices, particularly compliance monitoring, which remains underexplored. Second, it shows that international jurisprudence should be understood not as a top-down imposition of norms, but as an iterative and relational process, shaped by ongoing contestation across scales.

The analysis does not claim that Indigenous communities directly influence individual judges. Rather, it traces how legal arguments, implementation challenges, and political mobilizations accumulate across cases, producing incremental adjustments in the Court's reasoning. In doing so, it foregrounds the role of Indigenous actors as participants in the production of law, rather than as passive recipients of international norms. The article is organized into three sections. After outlining the methodology, the first section situates Indigenous mobilization in Latin America within broader transformations in political and legal opportunity structures, with particular emphasis on transnationalization, intermediary actors, and the boomerang effect. The second section examines the Paraguayan case, demonstrating how agrarian political economy, geographic marginalization, and a procedurally fragile legal framework led to cumulative domestic closure and shaped distinctive trajectories of Indigenous mobilization. The third section analyzes the "Paraguayan trilogy" before the Inter-American Court of Human Rights, tracing how successive litigation, post-judgment advocacy, and compliance monitoring contributed to incremental jurisprudential adjustments, particularly regarding the design and collective implementation of reparations. The conclusion provides a critical reading of these dynamics, emphasizing both the possibilities and the limitations of legal recognition within a state-centered framework.

METHODOLOGY

I began data collection in June 2022 as part of my doctoral dissertation, primarily through comprehensive interviews designed to understand the dynamics of Indigenous mobilizations in Paraguay. Access to the field was facilitated by a key contact within the NGO Tierraviva, a principal organization representing Indigenous communities before the IACtHR. This connection enabled the development of a snowball sampling network that included current and former Tierraviva members, Indigenous leaders, and representatives of allied organizations, such as religious actors. I conducted 46 interviews, each averaging 90 minutes, primarily in Spanish, and held in locations and under conditions chosen by participants, including offices, homes, and remote calls. My repeated visits to Tierraviva's offices and participation in community events fostered a climate of trust that enabled in-depth exchanges.

I fully transcribed the interviews and subjected them to a multi-phase qualitative analysis. This process included partial restitution to participants for validation and clarification, followed by manual thematic analysis to identify discursive patterns, tensions, and nuances (Mucchielli, 2007).

In addition to reconstructing mobilization trajectories, I specifically analyzed the interviews to identify: (1) the evolution of legal strategies across cases; (2) actors' perceptions of ambiguities or limitations in previous judgments; (3) the strategic use of requests for interpretation and compliance monitoring processes; and (4) the ways in which international legal categories were appropriated, reformulated, or contested at the community level.

This analytical strategy enables the tracing of indirect forms of jurisprudential influence, not through direct interaction with judges, but through iterative litigation, post-judgment advocacy, and the accumulation of legal arguments across cases. For this reason, I did not conduct interviews with judges; the objective was not to reconstruct judicial deliberation, but rather to trace the circulation and accumulation of legal arguments across cases.

I complemented this methodological approach with documentary analysis of national legislation and IACtHR jurisprudence, which allowed me to situate the collected narratives within their legal and institutional contexts. I conducted a comparative reading of the three judgments in parallel with the interview data to identify shifts in the Court's reasoning, particularly concerning collective reparations and implementation mechanisms.

INDIGENOUS POLITICAL AND LEGAL STRUGGLES IN LATIN AMERICA: BETWEEN THE REGIONAL, THE TRANSNATIONAL AND THE LOCAL

The analysis of Indigenous mobilization in Latin America must be situated within the broader transformations that redefined political and legal opportunity structures beginning in the 1980s. For much of the twentieth century, state policies in the region promoted assimilationist models that subsumed Indigenous peoples under peasant or class-based identities. Although corporatist regimes and agrarian reforms recognized land claims to a limited extent, they often denied collective cultural and territorial rights (Yashar, 1998, 2005; Jackson & Warren, 2005; Merino, 2021).

Democratic transitions during the 1980s and 1990s fundamentally altered this landscape. Constitutional reforms in several countries introduced multicultural recognition and acknowledged specific collective rights. While these reforms did not eliminate structural inequalities, they established new institutional arenas for Indigenous claims. Consequently, Indigenous mobilization diversified to encompass protest, electoral participation, legal advocacy, and engagement in constituent processes (Van Cott, 2005, 2007; Rice, 2015, 2021).

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Simultaneously, Indigenous struggles assumed an increasingly transnational character. The adoption of ILO Convention 169 in 1989, followed by its widespread ratification across Latin America, established a binding international framework recognizing collective land, cultural, and consultation rights. The subsequent adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 further consolidated the normative shift toward collective self-determination (Anaya, 2004; Sieder, 2014; Young, 2020).

The concept of the "boomerang effect" (Sikkink, 2005, 2017) effectively explains this process, wherein social movements redirect their claims to international forums when domestic avenues are obstructed, thereby generating external pressure on national governments. The ratification of international instruments was not exclusively a top-down initiative by democratizing states; it also reflected sustained advocacy by Indigenous movements and their allies operating across multiple scales.

Intermediary actors played a crucial role in connecting local mobilization with international law. Non-governmental organizations, church networks, anthropologists, and transnational advocacy groups translated local grievances into the language of human rights and facilitated access to international institutions (Niezen, 2003; Blaser, Feit & McRae, 2004; Martí i Puig, 2010). In Paraguay, interviewees articulated the intermediary role in specific terms. One former participant noted that the withdrawal of Anglican structures left communities "orphaned," which led to the emergence of Tierraviva as an organization that provided legal support and continuity for land claims previously pursued through church channels. While these actors did not replace Indigenous agency, they played a significant role in shaping litigation strategies, framing claims, and navigating complex legal systems.

Collectively, these transformations have produced a multilayered legal field in which Indigenous movements increasingly combine grassroots mobilization with strategic litigation. Recent scholarship challenges the notion of international law as an external normative imposition, instead emphasizing legal hybridization and co-construction, whereby local struggles actively reshape and reinterpret international norms through practice. The Paraguayan case should be understood within this broader regional dynamic. Socio-legal research further complicates linear models of norm diffusion by highlighting processes of vernacularization and legal hybridization. Rather than viewing international law as externally imposed, scholars contend that global human rights norms are translated, reframed, and appropriated within local struggles (Merry, 2006; Levitt & Merry, 2009; Kirsch, 2014). Vernacularization describes the reinterpretation of universal legal categories in ways that resonate with existing cultural norms, political agendas, and collective identities. This process is mediated by translators or intermediary actors such as lawyers, NGOs, religious networks, and activists, who operate across local and transnational scales to reframe claims in ways that are both legally legible and locally meaningful. Notably, this translation process does not merely adapt global norms but

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can also reshape them. As Sieder and Barrera Vivero (2017) argue, while international law has been influenced by decades of Indigenous organizing, its incorporation into national and local contexts has simultaneously transformed Indigenous claims, resulting in hybrid legal formations. Indeed, one interviewee articulated this mediation clearly, observing that certain younger leaders and intermediaries were "very good in translating, in our terms, what the communities maybe want," while also rendering those demands intelligible to Paraguayan institutions. These dynamics demonstrate that legal change emerges through iterative interaction rather than one-directional diffusion.

THE PARAGUAYAN CASE: POLITICAL ECONOMY AND STRUCTURAL CONSTRAINTS

The Paraguayan context must be analyzed within the framework of agrarian political economy that determines access to land. Paraguay exhibits one of the highest levels of land concentration in Latin America, a phenomenon originating from the redistribution of public lands during the Stroessner dictatorship and perpetuated by the subsequent growth of agrarian extractivism. In the eastern region, the expansion of large-scale soybean cultivation has resulted in deforestation and land dispossession. In the Chaco region, the growth of cattle ranching has gradually incorporated Indigenous ancestral territories into private property regimes (Correia, 2018; 2023; Rudolph, 2020).

Land represents not only a legal issue but also a foundational element of Paraguay's development model. Efforts to achieve territorial restitution for Indigenous communities directly challenge entrenched economic interests associated with export-oriented agribusiness and livestock production. Paraguay continues to rank among the most unequal countries globally regarding land distribution, with 85.5% of agricultural land controlled by only 2.6% of landowners (Rudolph, 2020). This structural arrangement significantly limits the implementation of constitutional and international standards that recognize Indigenous territorial rights.

Geographic factors further exacerbate these constraints. The Chaco, a vast semi-arid region characterized by low population density and limited infrastructure, has historically experienced minimal state presence and administrative neglect (Horst, 2007; Correia, 2021). The fragmentation and privatization of Indigenous territories during the twentieth century created physical barriers such as fences, gates, and enclosed ranches, which continue to hinder territorial continuity and access (Correia, 2023). These geographic and infrastructural challenges complicate land demarcation processes and reinforce bureaucratic delays.

The end of the dictatorship in 1989 initiated a new constitutional era. The 1992 Constitution formally recognized Indigenous collective land rights, and Paraguay ratified ILO Con-

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vention 169 in 1993. However, these normative advancements soon encountered resistance from entrenched political and economic interests. While Law 904/81 defines the legal status of Indigenous communities and permits them to seek recognition and restitution, it lacks effective mechanisms for expropriation and does not ensure timely implementation. In practice, restitution frequently requires congressional approval and financial compensation for private landowners, both of which have been consistently obstructed or delayed.

Congressional resistance, particularly influenced by agrarian elites, has resulted in the obstruction of land restitution bills, even in cases where landowners were open to negotiation. Institutions such as the Instituto Paraguayo del Indígena (INDI) remain politically dependent and lack sufficient resources, which limits their ability to enforce land rights independently. Consequently, constitutional recognition of Indigenous rights coexists with systematic non-implementation. The brief period of political openness in the 1990s was followed by renewed restrictions, sustained by the continued application of a legal framework from 1981 that remains inconsistent with constitutional and international standards.

This situation illustrates a hybrid regime defined by authoritarian enclaves and weak rule-of-law mechanisms. Unlike neighboring countries that have undergone more substantive democratization, Paraguay's transition failed to dismantle authoritarian structures entirely (Sondrol, 2007). Institutional fragmentation, elite capture, and the political influence of agrarian sectors have contributed to the structural closure of domestic remedies. While Indigenous claims are legally recognized, they continue to face persistent procedural and political barriers. The limited success of Indigenous movements in Paraguay should thus be interpreted not as a primary cause, but as a consequence of structural enclosure. In this context, Indigenous mobilization followed a distinct trajectory. Unlike in other Latin American countries where strong national Indigenous federations emerged during the 1980s and 1990s[1], regional or national Indigenous movements in Paraguay only consolidated in the 21st century, notably with the formation of the Coordinadora de Líderes Indígenas del Bajo Chaco (CLIBCH) or the Articulación de Mujeres Indígenas de Paraguay (MiPY) and are still marginal[2]. These movements are mainly made up of members of the same indigenous

1 Examples include Pachakutik and CONAIE in Ecuador, the Ejército Zapatista de Liberación Nacional (EZLN) in Mexico, and the Katarista movement in Bolivia.

2 There are as yet no indigenous parties on the national scene. A bill was tabled to reserve four seats (two for the eastern region and two for the western region) exclusively for indigenous representatives in Congress but was not approved. In the literature, authors explain the case of Paraguay by pointing out that, in this country, democracy has not significantly, if at all, improved the lives of indigenous communities due to their low demographic representation. Thus, although the political opening following the fall of a dictatorship has led to new legal reforms, no concrete effect has been observed in terms of improving the living conditions of indigenous people. This is why their demands are not focused on political openness, but rather on visibility, respect and autonomy (Reed, 2008; Duckworth, 2011).

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community or ethnic group, but this does not prevent other communities from supporting the actions undertaken by one of them[3]. Nevertheless, the weakness of movements is not the cause — it is the consequence of structural enclosure.

Indigenous actions emerged in the 1980s, in parallel with the adoption of Law 904 on the status of indigenous communities. At that time, most indigenous communities in the Chaco were linked to the Anglican Church[4], through the main mission of Makthlawaiya (Horst, 2003 and 2007; Correia, 2023 and interview data). In the eastern region, the natives were linked to the Catholic Church. Because of mistreatment in the missions[5] and the situation of access to land[6], Anglican and Catholic priests, with the help of anthropologists, set up projects to help the natives. The Marandú project is among the most prominent initiatives, explicitly aiming to train indigenous leaders in their legal rights. Similarly, Tierraviva was established by former Anglican priests, lawyers, and academics to assist communities in pursuing land restitution claims, in accordance with new legislation and international instruments. However, the interaction between the context in which movements emerge, intermediaries, and international tools does not fully account for the distinctive characteristics of Paraguay's indigenous movements. The uniqueness of the Paraguayan case is rooted in the country's status as an enclave, both in the strict and authoritarian senses, as well as in its limited connections with the broader international community. Paraguay remains highly isolated, and major international trends have not

3 For example, during the reoccupation of land by the Sawhoyamaxa and Xákmok Kásek communities, the other Bajo Chaco communities sent their shamans and helped block roads when necessary, highlighting the importance of their kinship ties, based on their kinship (interview data and Correia, 2023).

4 The Anglican Church saw widespread membership among the indigenous peoples of the Chaco. Between 1964 and 1970, most Enlhet peoples joined the Anglican Church. The indigenous people of the Chaco represent around 90% of the membership of the Anglican Church of Paraguay (Horst, 2003).

5 Land dispossession in the Chaco occurred after the Chaco War (1932–1935), when Indigenous territories were ceded to European landowners as compensation for war expenses. This led to the forced displacement of Indigenous communities from their ancestral lands, compelling them to work for landowners on portions of what had once been their own territory. Many communities sought refuge in Anglican missions in the Chaco to escape conditions akin to slavery on ranches, but there they were resettled and converted to Christianity, undergoing significant Western cultural influence. Although slavery was somewhat reduced within the missions, the Anglican Church imposed labor on farms and ranches without fair compensation, aiming to assimilate Indigenous populations as labor for the cattle industry. The influence of Anglican missions expanded in the Chaco primarily after the 1930s, facilitated by supply chains connecting the region to the national center in the aftermath of the war. In the 1980s, the Anglican Church adopted a more social approach, acquiring land to return it to Indigenous communities through an initiative called La Herencia, and establishing Indigenous settlements with the aim of turning Indigenous people into farmers, in line with the assimilationist policies of both the state and the missions. However, agricultural challenges in the Bajo Chaco region hindered the realization of this vision, and the acquired lands were instead used as labor camps for local ranches, keeping Indigenous people in precarious conditions (Correia, 2023 and interview data).

6 The dictatorial regime sold nearly 8 million hectares of land to its political allies.

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produced the same effects as observed in other regions. The so-called democratic "transition," which did not constitute a genuine transition, exemplifies this phenomenon: Paraguay is one of the few countries that has not experienced substantive democratization (Sondrol, 2007). This distinctiveness also partially accounts for the relative weakness of indigenous movements, which have not benefited from external influences to the same extent as in other countries and have not established extensive trans-regional connections, either externally or internally. This broader conception of enclave status influences the functioning of the rule of law. While neighboring countries exhibit varying degrees of rule of law, which affects access to justice, Paraguay remains largely closed to legal claims. This situation contributes to the high rate of mobilization before the IACtHR rather than national courts[7].

Although a political opportunity briefly emerged, it was quickly foreclosed due to persistent legal and procedural deficiencies. The land claims process remains governed by legislation from 1981, which is inconsistent with the 1992 Constitution and Convention 169 (Brunet-Bélanger, 2023). This legal gap has rendered effective recognition of indigenous rights nearly unattainable at the national level, a situation further aggravated by the obstruction of legislative initiatives intended to facilitate territorial restitution. In response to this national deadlock, indigenous movements redirected their efforts toward the international sphere. Recognizing the increasing inaccessibility of domestic avenues, these groups have engaged with international mechanisms and utilized international legal instruments to advance their rights. Interview data indicate that this shift occurred gradually, following years of unsuccessful domestic efforts. According to one of the founders of Tierraviva, after repeated attempts through INDI and Parliament, and after observing the systematic obstruction of land-claim bills, actors determined that "we had to do something else" and subsequently turned to the Commission.

Within this context of progressive domestic exclusion, analysis of the Paraguayan cases before the IACtHR is essential. Characterizing these communities solely as passive recipients of international protection overlooks their active role in influencing jurisprudence through post-judgment mobilization and ongoing advocacy.

Indigenous Claims before the Inter-American Court of Human Rights

Three Indigenous communities—Yakye Axa, Sawhoyamaxa, and Xákmok Kásek—sought recourse through the Inter-American human rights system to defend their territorial rights. In the 1990s, these communities pursued all available legal avenues within Paraguay, repeatedly filing claims in national courts to obtain recognition and restitution of their ancestral lands. Despite these efforts, the state consistently refused to formally acknowledge their land rights.

7 As of 2020, 22% of the judgments issued by the IACtHR concerning indigenous territorial restitution come from Paraguayan cases.

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Recognizing the limitations of domestic legal remedies, the communities submitted their claims to the Inter-American Commission on Human Rights (Correia, 2021; 2023). After exhausting internal remedies and with support from the NGO Tierraviva a los Pueblos Indígenas del Chaco, they requested the Commission's intervention. In the absence of a friendly settlement, the IACtHR issued rulings in 2005, 2006, and 2010. Each judgment affirmed that the distinctive material and spiritual relationship between Indigenous peoples and their land constitutes the foundation of their identity. The Court ordered the state to title, delimit, and return these ancestral lands to guarantee the full exercise of land rights.

Although these decisions represent significant legal milestones, their outcomes remain mixed. Despite formal recognition of territorial rights, implementation has been slow and incomplete, resulting in continued land insecurity and ongoing conflict. Persistent challenges include administrative delays, political resistance, and logistical obstacles.

This article does not seek to provide a comprehensive assessment of implementation outcomes. Instead, it examines how iterative litigation and post-judgment mobilization have influenced the Court's evolving approach to collective reparations. The analysis considers how ongoing interactions between the lived experiences of Indigenous communities and the Court's legal decisions have enabled Indigenous movements to shape and influence human rights norms. This perspective underscores the agency of Indigenous communities as active participants in shaping and transforming law.

THE PARAGUAYAN TRILOGY AND THE CONSTRUCTION OF THE REPARATIONS SYSTEM

From Recognition to Experimentation: The Gradual Construction of Collective Reparations

When the Yakye Axa case reached the Inter-American Court of Human Rights (IACtHR), the jurisprudence on Indigenous peoples' rights was still in its formative phase. Prior to Yakye Axa (2005), the Inter-American system had generated only two major precedents on Indigenous territorial rights: the Inter-American Court's judgment in Awas Tingni v. Nicaragua (2001) and the Inter-American Commission's merits report in Mayan Indigenous Communities of the Toledo District v. Belize (2004). The doctrinal framework recognizing collective property under Article 21 of the American Convention had been opened, but it remained conceptually and remedially underdeveloped.

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The emergence of these earlier cases, particularly Awas Tingni, was frequently cited in interviews as a decisive turning point. According to one interviewee, cases processed before the Inter-American Commission and subsequently before the Court "gave arguments and possibilities for our cases to reach those instances." Another interviewee observed that as domestic legal avenues became increasingly inaccessible and "the doors were closing more and more at the national level," affected communities began to "explore the international arena." This shift was not solely reactive but also strategic. Awas Tingni served as both a legal precedent and evidence that collective territorial rights could be judicially recognized at the supranational level.

This transnational opening provides the context for what is often referred to as the Paraguayan trilogy: Yakye Axa (2005), Sawhoyamaxa (2006), and Xákmok Kásek (2010). These cases did not merely apply existing precedent; instead, they progressively expanded and refined it, particularly regarding reparations. Through this process, they contributed to reshaping the Court's remedial logic in response to the practical and political challenges encountered during implementation.

To understand this evolution, it is necessary to recall that the Inter-American system is fundamentally structured around the principle of reparations. Article 63(1) of the American Convention empowers the Court to order measures of restitution, compensation for material and moral damages, and satisfaction. Traditionally, however, these measures were conceived in individual terms, addressing identifiable victims whose rights had been violated by the State. The notion of collective reparation—particularly in relation to Indigenous peoples as collective rights-holders—remained largely undefined.

While Awas Tingni recognized collective property as protected under Article 21, it did not articulate a comprehensive framework for collective reparations. The Paraguayan cases would directly address this gap.

Yakye Axa: Recognition Without Procedural Precision

In its 2005 ruling, the Court did not establish a precise framework for implementing reparations. It merely indicated that the State should adopt measures to protect the unique and fundamental relationship between the community and its ancestral territory, notably by establishing domestic legal mechanisms guaranteeing the effective enjoyment of indigenous property rights[8].

8 In Yakye Axa Indigenous Community v. Paraguay, the Court ordered the State to identify the traditional territory of the Yakye Axa community and return it to the community free of charge within a maximum period of three years from the date of notification of the judgment. The Court further held that if the territory is in the hands of private owners, the State must assess the legality, necessity, and proportionality of any expropriation—or of a decision not to expropriate—in order to pursue a legitimate objective in a democratic society. In conducting this assessment, the State must take

Although, in theory, the ruling represents a major step forward in the recognition of indigenous peoples' rights, its practical application has proved largely ineffective, particularly in the context of a Paraguayan state historically resistant to any form of legal recognition and institutional change. Indeed, the lack of procedural clarity in implementing restorative measures had significant consequences for the restitution process. Indeed, as the judgment did not specify the procedures to be followed, the community was unable to enforce its rights at the national level. Thus, for almost 20 years, the Yakye Axa community remained confined to the outskirts of the freeway in deplorable living conditions.

Following the Court's decision, the community filed a new claim for territorial restitution, which was rejected by the Paraguayan Congress. This refusal had far-reaching consequences: the territory initially claimed was never returned, forcing the community to accept an alternative plot later. Several interviewees emphasized the deleterious effects of this outcome, perceived as a form of forced abandonment or compromise.

One of the main factors behind this failure was the Court's ruling's imprecision. According to the lawyer who represented the community, the judgment, formulated in overly general terms, left the door open to a restrictive interpretation by the Paraguayan state. A request for interpretation was therefore submitted, leading the Court to clarify a posteriori that the lands in question were indeed those documented during the trial. But in the meantime, this ambiguity had already undermined the implementation of the judgment. On this matter, the interviewee explained:

> The first judgment by the Inter-American Court was very general and, in fact, caused problems. When the State issued the ruling, it said: 'The Court does not necessarily say that it must be these exact lands; it could be other lands.' This was very vague, very general, very generic. Although, in good faith, one could understand that they referred to certain lands because that had been proven during the trial, as lawyers, we also realized that the Court had opened a door through which the State could challenge the scope of the judgment. We therefore filed a request for interpretation in this case because we agreed that the Court had not been very clear. This judgment was unclear; we did not say so publicly, but some State lawyers realized it. Subsequently, the Court issued a second interpretative ruling of its own decision, providing guidelines on how it should be interpreted. Of course, it referred to what had been proven regarding property rights, specifically mentioning the particular real estate involved. However, this difficulty had already been created, and the State continued to insist that it was not obliged to provide this particular land.

into account the specific characteristics of the community, including its values, practices, customs, and customary law. Finally, the Court explained that if objective and duly justified reasons make it impossible to restore the ancestral territory, the State is required to allocate alternative lands to the community. These lands must be selected by consensus with the community, in accordance with its own mechanisms of consultation, deliberation, and decision-making.

Sawhoyamaxa: The Limits of Individualized Reparations

When the Court ruled in favour of the Sawhoyamaxa community, the IACtHR shifted its approach to reparations, focusing on individual restitution and outlining detailed restitution procedures. The Court's reasoning was based on a list of deceased victims provided by community representatives, who attributed the deaths to the lack of medical services and clean water. As of the Court's follow-up visit in May 2024, the community was still waiting for the construction of the road connecting their territory to the broader society, a delay that has lasted 14 years.

This ruling also generated other challenges. The IACtHR ordered two types of reparations and prescribed specific measures for the State to comply with. Besides the restitution of lands, Paraguay was held internationally responsible for violating the right to life (Art. 4) of those who died due to the inhumane living conditions linked to their forced displacement from ancestral territories.

To address this situation, the IACtHR ordered the State to provide monetary reparations to the families of the deceased. However, only nineteen families or individuals received $20,000 in compensation each. The lawyer who represented the community before the IACtHR expressed reservations about this ruling, criticizing its individualistic approach to reparations, which he attributed to a dominant Western perspective. He explained that reparations under international law rely on norms foreign to Indigenous peoples—norms imposed at a global level—which Indigenous peoples either accept or reject, though this remains unclear. In the case of Paraguay, the reparations ordered for Sawhoyamaxa involved nineteen families receiving individual payments, which caused significant problems within the community and seemed disconnected from its realities. The lawyer added that the Court set these compensation amounts without evaluating their impact on the community, leaving uncertainties about how the community could manage such reparations. The lawyer criticizes the dominant Western framework of reparations under international law and highlights the problematic individualistic compensation approach imposed on the community:

> […] The fact that reparations for Indigenous peoples under international law are also based on laws and norms that are foreign to Indigenous peoples—they are norms that we have imposed. I would say even at a global level, right? These are the parameters, and Indigenous peoples either accept them or not, it is not very clear […] In the case of Paraguay, the reparations measures ordered for Sawhoyamaxa regarding the deaths […] nineteen families received these individually granted compensations. This caused enormous problems within the community and was completely out of the Court's mind […] We have no idea about the parameter. Someone, a judge of the Court, said: 'We will fix these amounts' without checking the impact. Whether it is too much or too little, how will the community manage that?

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The rest of the community members did not receive any monetary compensation, which led to tensions and internal conflicts. It is also important to note that the Sawhoyamaxa community comprises three distinct clans. Following the forced displacements in the 1930s, these clans were scattered and relocated to different Anglican missions and separate estancias (ranches). It was only in the late 1990s that the community reassembled to collectively demand the restitution of its ancestral territory. While tensions already existed within the community, the Inter-American Court's ruling exacerbated these divisions, particularly due to the individualized nature of the reparations.

Xákmok Kásek: Toward Structurally Collective Reparations

The Xákmok Kásek judgment, handed down four years later, took place in a transformed international legal and political context. Between the Sawhoyamaxa and Xákmok Kásek judgments, several significant events marked the evolution of international indigenous law. These included the adoption of the UNDRIP, and the judgment in Moiwana v. Suriname. Alongside Xákmok Kásek, the Court also ruled on the case of the four Ngöbe communities in Panama.

These developments, together with insights from previous Paraguayan cases, led to a more refined approach by the Court regarding collective reparations. A significant change was the establishment of more precise criteria to ensure genuinely collective implementation of reparations. In the Xákmok Kásek case, financial compensation was allocated to a community fund managed by the community itself. This method aimed to promote equitable distribution and coordinated resource use. Notably, this community is distinct from the other two due to its smaller size and greater internal cohesion, as all 79 families had been relocated together to the same Anglican mission, where they resided for several decades.

Beyond the Judgment: Compliance Monitoring and the Co-Construction of Jurisprudence

Indigenous communities actively and continuously influenced the development of collective reparations within the Inter-American system, rather than serving as passive beneficiaries. Jurisprudential refinement took place both within judicial decisions and through prolonged implementation challenges.

Compliance supervision, which includes interpretative requests, follow-up resolutions, and in situ monitoring visits, became a significant venue for further legal development. In the Yakye Axa case, the need for interpretative clarification exposed the limitations of the initial ruling and required the Court to specify the lands designated for restitution. These post-ju-

dgment interactions demonstrate that legal doctrine was modified in response to challenges encountered during implementation[9].

Mobilization extended long after judgments were issued, as road blockades, demonstrations, and persistent political advocacy continued for years. Interviewees consistently reported that, without sustained pressure, implementation would have ceased. Several participants explained that ambiguities, delays, and procedural gaps identified in earlier cases were deliberately reintroduced during later litigation and monitoring. According to a former Tierraviva fieldworker, the judgments became "a way to push the state," particularly as internationalization increased the number of pressure points. State representatives attending international meetings were frequently questioned about their efforts to comply with the cases. Comparative analysis of the three judgments supports these accounts, revealing progressively detailed and collectively oriented reparations frameworks. Repeated interview accounts further confirm that successive litigation functioned as a learning process shaped by previous implementation failures.

The resulting jurisprudence reflects an iterative process shaped by ongoing interaction, rather than solely by abstract legal reasoning. Collective reparations were continually redefined through confrontation, negotiation, and institutional learning. This process also operated across national boundaries. Several interviewees identified the Awas Tingni case as a catalyst that prompted Paraguayan actors to pursue new avenues of contestation. The recognition of collective property at the supranational level broadened strategic possibilities and enabled the transfer of legal concepts between contexts. This iterative dynamic aligns with Kirsch's (2014) analysis of the reciprocal shaping of law through repeated interactions between Indigenous actors and legal institutions. This article further develops his argument by demonstrating that such iterative processes occur not only through advocacy and resistance, but also through post-judgment implementation, compliance monitoring, and the ongoing redefinition of reparations within institutional contexts. Consequently, the jurisprudence of the IACtHR should be viewed as the product of sustained local struggles that have been formalized into legal doctrine, rather than as a purely top-down normative development.

Vernacularization and the Translation of Collective Property

The recognition of collective property within the Inter-American system represented more than a doctrinal expansion. It introduced a legal category that fundamentally restructu-

9 As part of the fieldwork, the author attended, as a non-participating observer, a 2024 virtual compliance monitoring session in which community representatives directly articulated implementation concerns before the Court. This observation provided additional empirical grounding for the analysis of post-judgment interaction.

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red the framework for articulating territorial claims. However, this category did not generate entirely new meanings. Instead, it offered a juridical form that translated pre-existing relationships to land into the language of international law.

Interviewees consistently characterized the 2001 Awas Tingni decision as a pivotal turning point. The recognition of collective territorial rights at the supranational level expanded the perceived boundaries of legal possibility. As one respondent stated, "We said to ourselves that it was time to change the space of contestation." The judgment served not only as precedent but also as a normative signal, indicating that collective ownership could be recognized as a right-bearing category.

However, the introduction of "community property" did not create territorial belonging; rather, it reformulated existing attachments. In interviews, abstract questions about the relationship between identity and land often elicited hesitant responses. When the inquiry shifted to "How do you feel about your land?" territoriality was expressed through narratives of kinship, memory, named trees, burial sites, and intergenerational transmission. The ontology of territory thus preceded its juridical articulation.

The legal category functioned performatively, but not as an act of invention. It translated lived territorial practices into intelligible rights-based claims. This process exemplifies vernacularization: global legal norms are not simply adopted, but are reframed, adapted, and embedded within existing moral and social contexts (Merry 2006). The Paraguayan cases illustrate how collective property became a strategic means of self-translation. Communities appropriated the doctrinal language of Article 21, not as an external imposition, but as a tool for making their claims legible within supranational adjudication.

Nevertheless, this process of translation was not without challenges. As one lawyer involved in the litigation observed regarding monetary reparations, international legal parameters frequently reflect normative assumptions that are unfamiliar to Indigenous communities. The individualized structure of compensation, for example, exposed the limitations of a Western remedial framework when addressing collective harm. Legal translation, therefore, operates within asymmetrical normative terrains.

The jurisprudence of the IACtHR should therefore be understood not as the unilateral diffusion of international norms, but as a partial crystallization of struggles articulated across multiple scales. Collective property emerged through an encounter in which supranational doctrine supplied the formal category and communities contributed the substantive meaning. In this context, law was neither imposed nor entirely endogenous; it was co-constructed through processes of translation.

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CONCLUSION

This article examines the active participation of Indigenous communities in Paraguay in the co-construction of Inter-American law, emphasizing their sustained mobilization within and beyond the Inter-American Court of Human Rights (IACtHR) process. Rather than serving solely as recipients of externally imposed norms, the Yakye Axa, Sawhoyamaxa, and Xákmok Kásek communities have contributed to incremental jurisprudential change through iterative litigation, post-judgment advocacy, and ongoing contestation. Empirical analysis identifies three interconnected mechanisms underpinning this co-construction: the accumulation of legal arguments through successive cases, compliance supervision—including interpretative requests and in situ monitoring—and the vernacularization of key legal categories such as collective property and collective reparations.

This analysis provides a critical assessment of the ambiguous effects of these legal decisions. While the rulings create opportunities for recognition and redress in contexts where domestic avenues are closed, they remain situated within a state-centered, predominantly Western remedial framework that may channel Indigenous claims into conditional forms of recognition. Access to international remedies frequently necessitates translating fundamentally different worldviews into legal categories comprehensible to judges and embedding rights within state structures that offer limited scope for full self-determination.

Fieldwork indicates that Indigenous actors frequently recognize and navigate these tensions. In contexts of dispossession and urgency, the language of rights is often employed pragmatically as a temporary strategy to advance essential territorial claims, without necessitating full ontological commitment. Consequently, the long-term effects of these judgments cannot be assessed solely through compliance indicators. Their significance also resides in their ability to sustain struggles, foster alliances, and reshape future possibilities. Viewed in this manner, the Paraguayan trilogy demonstrates that Inter-American doctrine on collective reparations is not simply applied to Indigenous struggles but is progressively redefined through them, particularly in the processes of implementation, monitoring, and translation.

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