

# Contested Indigeneity and Traditionality in Environmental Litigation: The Politics of Expertise in Regional Human Rights Courts

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## ABSTRACT

In times when intricate concerns for social and ecological justice are becoming ever more prominent in global environmental discourses, conflicts between minorities' rights and environmental policies present delicate trade-offs that demand ingenious balancing by regional human rights courts. Such conflicts tend to boil down to oppositions between 'indigenous' or 'traditional' practices set against 'modern' ideals, thereby displaying and performing important normative, epistemic and political implications. To legitimise and strengthen their cases, parties resort to expert interventions. While the involvement of experts speaking on behalf of minorities can bolster the communities' legal protection, the shared assumptions, rhetorical style and professional sensibility of intervening experts can trigger unintended consequences for the identity and (self-)perception of the peoples they represent. The case-law analysis presented here instantiates how networks of experts with shared institutional ties intervene before courts, use specific discursive strategies to further their representatives' claims and reinforce the normative salience of their interventions through cross-jurisdictional and cross-cultural referencing. Drawing on insights from discourse analysis, (legal) anthropology and cultural geography, the article develops a critique of the politics of expert-based approaches to conflict management in regional human rights settings.

**KEYWORDS:** strategic litigation, expert networks, indigenous peoples, Roma, minorities, environmental protection

*In order to understand and thus accept you, I have to measure your solidity with the ideal scale providing me with grounds to make comparisons and, perhaps, judgments. I have to reduce . . . I understand your difference, or in other words, without creating a hierarchy, I relate you to my norm. I admit you to existence, within my system. I create you afresh. – But perhaps we need to bring an end to the very notion of a scale. Displace all reduction.*

Édouard Glissant, *Poetics of Relation* (1997)

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## 1. INTRODUCTION

This article explores how experts specialised in indigenous and minority rights' protection intervene in cases of conflicts between vulnerable communities' rights and environmental policies.<sup>1</sup> Such reliance on experts' knowledges is omnipresent in disputes before regional human rights courts that involve marginalised communities. As Sapignoli observes, '[e]vidence and expertise are brought to bear as ways to bring facts to the attention of the court, to lend authority to the facts that make up an argument, and to describe the essential qualities of a people.'<sup>2</sup> There are four ways in which experts can be involved in judicial proceedings before regional human rights courts. First, disputing parties can refer to specialised experts' findings in their argumentation. Second, experts can be designated by a party as witness experts to testify by affidavit or intervene in the oral proceedings to substantiate and lend credibility to a claim in light of their expertise, in accordance with the rules of each regional human rights mechanism.<sup>3</sup> Third, courts can appoint experts to establish the facts relevant to the dispute.<sup>4</sup> Finally, experts can intervene in a case through third party interventions or *amicus curiae* briefs.<sup>5</sup> This article explores these various forms of experts' interventions in specific cases brought before regional human rights courts, and does so through a lens of critical discourse analysis.<sup>6</sup>

The article focuses on two types of cases that exemplify particular dynamics of experts' interventions in strategic litigation: conflicts between indigenous peoples' rights and nature conservation, and conflicts between cultural minorities' rights and landscape preservation. The analysis shows how specialised legal experts deal with trade-offs between human rights and environmental protection in times when both objectives tend to form part of a shared political agenda of global justice concerns.<sup>7</sup> In

- 1 I retain the definition of 'expert' suggested by Ambrus et al., namely 'a person who has, or is deemed or claimed to have, extensive skill or knowledge in a particular field and who is part of a wider group consisting of persons holding similar expertise'. Ambrus et al., 'The Role of 'Experts' in International and European Decision-Making Processes: Setting the Scene' in Ambrus et al. (eds), *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?* (2014) 1–17 at 12.
- 2 Sapignoli, "Bushmen" in the Law: Evidence and Identity in Botswana's High Court' (2017) 40 *Political and Legal Anthropology Review* 210–225, at 217.
- 3 Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights' (2013) 31 *Netherlands Quarterly of Human Rights* 271–313. See also Article 36(2) of the ECHR, Article 26(2) of the ACHPR and Article 65(1) of the Rules of Procedure of the IACtHR.
- 4 Shelton, 'Performance of Regional Human Rights Courts' in Squatrito et al. (eds), *The Performance of International Courts and Tribunals* (2018) 114–153, at 115.
- 5 Third parties tend to get involved in cases with broad social impacts and their interventions are therefore more frequent in cases relating to contested social issues instead of strictly individual matters. See Bürli, *Third-party Interventions before the European Court of Human Rights: Amicus Curiae, Member-state and Third-party interventions* (2017).
- 6 The article adopts a mixed methodology. The case-law analysis uses a critical discourse analysis approach that relies on parties' written and oral submissions in judicial proceedings, courts' decisions, judges' dissenting opinions and—where available—academic literature and/or media articles from experts who directly intervened in the cases. The theoretical part relies on secondary literature from critical scholars specialised in law, (legal) anthropology and cultural geography. I acknowledge the limits of working *on* rather than *with* affected communities and all the (white) privileges that this methodology entails, as set out by Suárez-Krabbe, 'Knowledge and Privilege' in *Race, Rights and Rebels: Alternatives to Human Rights and Development from the Global South* (2016) 127–130.
- 7 The UN Special Rapporteurs on Human Rights and the Environment have long advocated for the need to consider these two issues as intricately related and part of a shared political agenda. See

light of their specialised knowledge, experts' interventions in court can clarify indigenous peoples' and cultural minorities' relationship to the(ir) land, and tend to turn apparent tensions into synergies, where both the social and the environmental concerns are viewed as mutually compatible and intertwined. The argument unfolds along three main observations from the case studies. First, the analysis reveals that particular networks of experts with shared institutional ties intervene in cases concerning indigenous and minorities rights' protection before regional human rights courts. Second, it unravels how these experts employ a generalised legal discourse and imaginary of indigenous peoples and cultural minorities living 'in harmony with nature' in cases of conflicts with environmental policies. Finally, it uncovers how these networks of experts construct generic factual claims based on particular historical and cultural contexts, thereby practicing forms of 'anthropological cherry-picking'.<sup>8</sup> These observations are problematised in light of an interdisciplinary literature on indigenous and minorities' rights protection in transnational litigation. What emerges is a critique of the strategic essentialisations of indigeneity and traditionality that surface as potent performative effects of expert interventions in court, which actively participate in 'ontologising indigeneity'.<sup>9</sup>

The article is divided in three substantive parts. The first part uses four cases decided by the Inter-American and the African human rights mechanisms in which concerns over nature conservation collide with the rights of indigenous peoples. The analysis sheds light on the experts that intervened in the cases and the argumentative tools they employ to support the interests of the indigenous people they represented. The second part of the article concentrates on six cases decided by the European Court of Human Rights that deal with the protection of Roma's rights against concerns over landscape preservation.<sup>10</sup> Although no explicit and direct links are established between the two sets of cases, a comparative reflection on the dynamics at stake sheds light on factual and argumentative similarities among them. First, both sets of cases constitute apparent conflicts between environmental protection and minorities' rights concerns. Second, in both sets of cases, opposing parties relied on experts' knowledges to either assert or contest the 'indigeneity' and 'traditionality' of the applicants against a 'modern' stamp invoked and instrumentalised by government representatives to further environmental

[www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx](http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx) [last accessed 1 December 2020]. See also May and Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (2019); Gonzalez, 'Global Justice in the Anthropocene' in Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (2017) 219.

- 8 'Anthropological cherry-picking' refers to 'the tendency of using isolated observations that are deeply rooted in western-centric epistemology and ontology to either totalise and romanticise indigenous spirituality, or to disavow it as being entirely motivated by political interest'. Schulz, 'Decolonising Political Ecology: Ontology, Technology and "Critical" Enchantment' (2017) 24 *Journal of Political Ecology* 126 at 135. I refer to this concept to indicate how experts and courts can totalise reified ideals of indigeneity by drawing on situated observations and extending their applicability to different peoples and contexts.
- 9 On how 'ontopolitical anthropology' exoticises indigenous knowledges and practices and 'ontologises indigeneity' in response to the demand for non-modern approaches to being in the Anthropocene, see Chandler and Reid, *Becoming Indigenous: Governing Imaginaries in the Anthropocene* (2019) at 42–46.
- 10 In line with the European Landscape Convention, which entered into force in 2005, landscape preservation is here recognised as having 'an important public interest role in the cultural, ecological, environmental and social fields'. Council of Europe, European Landscape Convention, ETS 176 (20 May 2000), preamble and Article 1.

policies in disregard of minorities' rights. The third part of the article reflects on what the recourse to expertise implies for the protection of these communities and sheds light on both bright and dark sides of experts' interventions on behalf of marginalised groups before courts. Drawing on insights from (legal) anthropology and cultural geography, the article concludes by contemplating the broader implications of the observed discursive patterns and the epistemic as well as political consequences they perform.

## 2. CONTESTED 'INDIGENEITY'

Regional human rights courts have come to play an important role in adjudicating the implications of states' environmental policies on indigenous peoples. In the Inter-American human rights system, the 2015 *Kaliña and Lokono* case is celebrated for having established a bottom-up approach to the protection of indigenous peoples' rights in light of nature conservation management. The case concerned Suriname's creation of three nature reserves in parts of the ancestral land of eight communities of the Kaliña and Lokono indigenous peoples.<sup>11</sup> The Kaliña and Lokono claimed that the natural parks violated their right to use and enjoy property collectively in accordance with their ancestral traditions. In assessing the interference, the Inter-American Court of Human Rights (IACtHR) reasoned and argued through the lens of the Kaliña and Lokono's worldview, and recognised the special physical and spiritual relationship between the indigenous peoples and their land and natural resources. Based on their world vision, the IACtHR approached the animals, plants, fish, stones, streams and rivers as 'interconnecting living beings' with protective spirits. The IACtHR also recognised the essence and value of the Kaliña and Lokono's practice of restricting entry into certain areas and forbidding the logging of certain trees, the hunting of certain animals or young specimens and the cutting down of unneeded natural resources.<sup>12</sup> In doing so, the IACtHR emphasised the need to protect both the 'physical and cultural survival' of the community.<sup>13</sup>

The court's findings can be traced back to specific submissions of experts who intervened in the written and oral proceedings of the case. More precisely, the IACtHR relied on the expertise put forward by the two expert witnesses proposed by the representatives of the indigenous peoples and by the Inter-American Commission on Human Rights (IACHR), respectively. The former, Victoria Tauli-Corpuz, as UN Special Rapporteur on the rights of indigenous peoples, referred to international law and policy on protected areas and the sustainable conservation and use of biological diversity in relation to the rights of indigenous peoples.<sup>14</sup> The latter, Jérémie Gilbert,

11 *Case of Kaliña and Lokono Peoples v Suriname* Judgment IACtHR Seriec C 309 (2015). The facts of the case date back to the colonial history of Suriname, when in 1966 and 1969, then Dutch Guiana created two nature reserve on the ancestral land of the indigenous Kaliña and Lokono peoples. All in all, three different nature reserves were created on their land: (i) the Wia Wia Nature Reserve in 1966; (ii) the Galibi Nature Reserve in 1969, and (iii) the Wane Kreek Nature Reserve in 1986. The Inter-American Commission was confronted with the matter in 2007. As the recommendations that the Commission issued in 2013 remained unfulfilled, the Commission submitted the case to the attention of the court in 2014.

12 *Ibid.*, at paras 33, 34 and 35.

13 *Ibid.*, at para 125.

14 *Ibid.*, at para 20.

Professor of Human Rights Law at the University of Roehampton, referred to standards of international and comparative law applicable to situations in which tensions exist between the right to private property of non-indigenous persons and the right to collective property of indigenous peoples, as well as to situations of apparent tension between the rights of indigenous peoples and environmental protection.<sup>15</sup> In its considerations, the IACtHR referred, first, to Tauli-Corpuz's argument that international environmental and human rights law 'should not be considered separate, but rather interrelated and complementary, bodies of law'.<sup>16</sup> It also referred, second, to Gilbert's argument that 'indigenous peoples *are part of* the natural protection' and that, therefore, there was no need and no legitimate reason to expel these indigenous peoples in the name of protecting nature.<sup>17</sup> In light of these experts' observations, the IACtHR concluded that the absence of explicit mechanisms that guarantee the access, use and effective participation of the Kaliña and Lokono peoples in the conservation of the nature reserves established by Suriname on their land constituted a violation of the obligation to adopt the necessary provisions to make such measures effective in order to ensure the rights to collective property, to cultural identity, and to participation in public matters of the Kaliña and Lokono peoples.<sup>18</sup> As such, the *Kaliña and Lokono* case illustrates well how the intervention of experts speaking on behalf of indigenous communities affected by strict environmental policies can help justifying the transformation of an apparent conflict between environmental and human rights protection into a synergy or a mutually reinforcing goal.

The same was true in the *Xákmok Kásek* case, which concerned the creation of a protected wild area by the government of Paraguay on the ancestral land of the Xákmok Kásek, and the resulting alleged violation of their collective property rights.<sup>19</sup> In the *Xákmok Kásek* case, the IACtHR concluded that Paraguay's declaration of the private nature reserve on part of the territory claimed by the Xákmok Kásek people prevented them from carrying out their traditional activities on their land, thereby violating their right to collective property. The IACtHR based its finding on the observations of expert witness Rodolfo Stavenhagen, as former UN Special Rapporteur on the rights of indigenous peoples, who cynically warned that 'the said declaration as a protected wooded area could constitute a new and sophisticated mechanism adopted by the private owners of land claimed by indigenous communities "to obstruct the land claims of the original peoples . . . using legal mechanisms and even invoking purposes as virtuous as the conservation of the environment"'.<sup>20</sup> Here too, the apparent tension between nature conservation management and indigenous peoples' rights was mediated by way of synergistic conflict avoidance based notably on Stavenhagen's expert testimony.

In both cases, the synergistic approach put forward by the intervening experts—who interpreted the alleged trade-off between nature conservation and indigenous peoples' ancestral traditions as being mutually compatible—was not contested by the states' legal representatives. In the *Kaliña and Lokono* case, for example, the representatives

15 Ibid., at para 21.

16 Ibid., at para 174.

17 Ibid., at para 175 (emphases added).

18 Ibid., at paras 197–198.

19 *Case of Xákmok Kásek Indigenous Community v Paraguay* IACtHR Series C 214 (2010) at para 169.

20 Ibid., at para 169.

of Suriname recognised that ‘indeed, these [indigenous] groups are seen as a major actor in nature protection.’<sup>21</sup> What was at stake, instead, was whether the Kaliña and Lokono communities could still be considered as ‘indigenous peoples’ and thereby able to ‘protect nature’ accordingly. By questioning the ‘indigeneity’ of the applicants, it was the whole legal architecture that supported their claims that was undermined and threatened. Over time, the forced evictions suffered by indigenous peoples due to ‘fortress conservation’ policies established since the wake of settler colonialism have led to the adoption of particular procedural rights that provide indigenous peoples with legal guarantees in conservation planning.<sup>22</sup> The heightened degree of protection granted to indigenous peoples has, however, polarised the question of ‘indigeneity’ and led to heated debates regarding *in-* and *out-*siders of this category of legal subjects.<sup>23</sup> As a result, in many instances, states’ legal representatives attempt to deprive affected peoples of such rights by denying their indigenous being. Against this backdrop, experts in indigenous peoples’ rights play a determining role in legally clarifying indigenous peoples’ culture, religion and relationship to the(ir) land and natural resources.

By way of illustration, in the *Kaliña and Lokono* case, Suriname argued that the Kaliña and Lokono peoples were ‘undergoing a process of acculturation and are more interested in modern activities than in traditional knowledge’ and that ‘[t]herefore, they are unable to adapt to changes in nature, such as floods and winds.’<sup>24</sup> By pointing to modern acculturation, the government’s legal representatives clearly sought to discredit the traditional knowledges of the Kaliña and Lokono peoples and thereby disqualify their ability to protect the nature reserves. This allegation denotes a specific vision of the nature-culture interface, where ‘modernity’ signifies a replacement of ‘traditional knowledges’ with ‘scientific expertise’, that is required here to ‘adapt to floods and winds’ and which indigenous peoples are allegedly unable to provide. According to the government, ‘the Kaliña and Lokono peoples have a *limited expert capacity to perform (scientific) management tasks* in relation to the areas classified by the IUCN as category IV reserves, because these require a *special expertise*, which they are unable to provide.’<sup>25</sup> Yet, the IUCN explicitly recognises that Category IV reserves that aim to protect particular species or habitats ‘may use traditional management approaches’ and ‘are not strictly protected from human use’, as is the case for Strict Nature Reserves classified as Category Ia by the IUCN.<sup>26</sup> Neither the parties nor the IACtHR noticed

21 *Kaliña and Lokono* case, supra n 11 at para 190. The government representatives questioned, however, to what extent the Kaliña and Lokono did in fact protect the nature reserves by insisting on their (former) tradition to collect and eat turtles’ eggs, thereby participating in environmental degradation. See paras 77–79 and infra n 136.

22 The concept of ‘fortress conservation’ refers to the creation of protected areas by the coerced displacement or exclusion of existing inhabitants. Doolittle, ‘Fortress Conservation’ in Robbins (ed), *Encyclopedia of Environment and Society* (2007). On the evolution of environmental protection narratives from this ‘fortress conservation’ discourse in early environmental law to the ‘right to a healthy environment’ in modern environmental law, see Petersmann, ‘Narcissus’ Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame’ (2018) 30 *Journal of Environmental Law* 235–259.

23 Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* (2016).

24 *Kaliña and Lokono* case, supra n 11 at para 190.

25 *Ibid.*, at footnote 234 (emphases added).

26 See the seven protected areas categories established by the IUCN, at [www.iucn.org/theme/protected-areas/about/protected-areas-categories/category-iv-habitatspecies-management-area](http://www.iucn.org/theme/protected-areas/about/protected-areas-categories/category-iv-habitatspecies-management-area) [last accessed 1 December 2020].

or explicitly condemned these wrongful allegations by the government. The IACtHR did not substantively engage with these claims but discarded them by responding that ‘the state *must* ensure access to and use of their ancestral territories for their traditional ways of life in the nature reserves.’<sup>27</sup> A vision of compatibility of indigenous peoples’ traditional lifestyle with the conservation policies established in their ancestral lands was thereby advocated by the court, in line with the observations put forward by the expert witnesses.

Similar dynamics are observable in the African human rights systems in environmental cases dealing with indigenous peoples’ rights. In the *Ogiek* case decided by the African Court on Human and Peoples Rights (ACTHPR) in 2017, the Kenyan government attempted to attach a stamp of ‘modernity’ to the Ogieks’ beliefs and practices so as to question their ‘traditionality.’<sup>28</sup> The case concerned the forced eviction of the Ogiek people from their ancestral land following the creation of a natural park in the Kenyan Mau Forest. The government contended that ‘the Ogieks have abandoned their religion as they have converted to Christianity.’<sup>29</sup> What the legal representatives of the Kenyan government indirectly attacked were the ties that bind the Ogieks to the Mau Forest through the traditional religious rites they practice. Against this allegation, the ACTHPR referred to the expert opinion of Dr. Liz Alden Wily, an independent researcher and practitioner specialised in land tenure issues who was proposed as expert witness by the Ogiek people. Based on her expert testimony, the ACTHPR noted first that ‘not all the Ogieks have converted to Christianity’ and second, that the adoption of Christianity does not mean a ‘total abandonment of the Ogiek traditional religious practices.’<sup>30</sup> Alden Wily warned that the culture of hunter-gatherer communities is commonly misconceived as if it could easily be disbanded when the communities had been assimilated by ‘modernism’. ‘[P]eople tend to erroneously think’, she lamented, ‘that because today the Ogieks have not turned up in skins or hides, then they do not need to hunt or that they have given up their culture’. Against this backdrop, she clarified that the livelihoods of hunter-gatherer communities are dependent on a social ecology whereby their spiritual life and whole existence depends on the forest. For such communities, she insisted, culture and religion are intertwined and cannot be separated. ‘[M]any forest dwellers like the Ogieks do the hunting and gathering not just for their livelihood but, rather, for their whole spiritual life’. Their entire existence, she stated, depends on the forest and its intactness.<sup>31</sup>

The ACTHPR determined that ‘[e]ven though some members of the Ogieks might have converted to Christianity, the evidence before this Court shows that they still practice their traditional religious rites’ and that ‘[a]ccordingly, the alleged transformation in the way of life of the Ogieks and their manner of worship cannot be said to have entirely eliminated their traditional spiritual values and rituals.’<sup>32</sup> As in the *Kaliña and Lokono* case, the ACTHPR denied the alleged incompatibility between the traditional lifestyle of the indigenous people with the conservation of their ancestral lands as put

27 *Kaliña and Lokono* case, supra n 11 at para 191 (emphasis added).

28 006/2012, *African Commission on Human and Peoples’ Rights v Republic of Kenya* ACTHPR (2017).

29 *Ibid.*, at para 168.

30 *Ibid.*

31 *Ibid.*, at para 160.

32 *Ibid.*, at para 168.

forward by the government. It recalled that ‘[i]n indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment’. Consequently, the court emphasised, ‘[a]ny impediment to, or interference with accessing the natural environment, including land, severely constrains their ability to conduct or engage in religious rituals with considerable repercussion on the enjoyment of their freedom of worship.’<sup>33</sup> Against this backdrop, the court defined the Mau Forest as the ‘spiritual home’<sup>34</sup> of the Ogieks and saw their eviction from the forest as an interference with their freedom of worship guaranteed under Article 8 of the African Convention on Human and Peoples’ Rights (ACHPR).<sup>35</sup> Rather than evicting the Ogieks, the ACtHPR stated, the Kenyan government should have ensured the continued enjoyment of their right to practice their religion while simultaneously ensuring the maintenance of the legal protection of the Mau Forest.<sup>36</sup> The alleged conflict was, once more, interpreted away by way of a synergistic approach.

Finally, and maybe most explicitly, similar dynamics were also observable in the *Endorois* decision, where the Kenyan government claimed that the inclusion of the Endorois in ‘modern society’ had affected their cultural distinctiveness.<sup>37</sup> The case concerned the creation of a natural park and the resulting forced eviction of the Endorois people from their ancestral land. In their submission, Kenyan representatives explicitly questioned whether ‘the Endorois are a distinct community in need of special protection’ and requested the African Commission on Human and Peoples’ Rights to determine whether they can be recognised as a “community”/sub-tribe or clan on their own.’<sup>38</sup> In particular, during the oral hearings, the Kenyan government claimed that the Endorois do not deserve special treatment since they are no different from the other Tugen sub-group, and that the inclusion of some of the members of the Endorois in ‘modern society’ had affected their cultural distinctiveness, to such extent that ‘it would be difficult to define them as a distinct legal personality.’<sup>39</sup> The Commission started by noting that ‘the concepts of “peoples” and “indigenous peoples/communities” are contested terms’ and that ‘[a]s far as [these concepts] are concerned, there is no universal and unambiguous definition . . . since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances.’<sup>40</sup> From the onset, the Commission expressed its awareness of the political connotations that these concepts carry.<sup>41</sup> In responding to the government’s questions, the Commission

33 Ibid., at para 164.

34 Ibid., at para 165.

35 Ibid., at para 166.

36 Ibid., at para 167.

37 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ACommHPR (2010).

38 Ibid., at para 145. The Kenyan government urged the Endorois to prove their distinction from the Tugen sub-tribe or the larger Kalenjin tribe. Ibid., at para 146.

39 Ibid., at footnote 71 and para 161.

40 Ibid., at para 147.

41 Ibid., at para 148–149. The Commission noted that ‘while the terms “peoples” and “indigenous community” arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies’. It added that ‘the term “indigenous” is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities’.

referred extensively to the opinions of experts specialised in indigenous peoples' rights, and to the specialised sources of law they mentioned. It referred in specific to two Reports of the African Commission's Working Group of Experts on Indigenous Populations/Communities;<sup>42</sup> the ICCPR and the ICESR;<sup>43</sup> the ILO Convention 169;<sup>44</sup> several reports of former UN Special Rapporteur on the rights of indigenous peoples;<sup>45</sup> a report of the Rapporteur of the OUA on the ACHPR;<sup>46</sup> several recommendations of UN Treaty Bodies;<sup>47</sup> as well as extensive jurisprudence of regional human rights courts addressing issues relating to indigenous peoples' rights in other jurisdictions.<sup>48</sup>

Based on all these sources, the Commission concluded that the Endorois can be defined as a distinct tribal group whose members enjoy and exercise certain rights, such as the right to property, in a collective manner distinct from the Tugen sub-tribe or indeed the larger Kalenjin tribe.<sup>49</sup> In contrast to the government's legal representatives, the Commission interpreted the Endorois' concerns from a bottom-up perspective and emphasised that 'the question of whether certain members of the community may assert certain communal rights on behalf of the group is a question that must be resolved by the Endorois themselves in accordance with their own traditional customs and norms and not by the State.'<sup>50</sup> Consequently, the Endorois, as a people, were entitled to benefit from the provisions of the ACHPR that protect their collective rights, including communal property. The Commission concluded that 'the alleged violations of the African Charter are those that go to the heart of indigenous rights—

42 Ibid., at paras 147–150. It referred *inter alia* to the four criteria set by the Working Group for identifying indigenous peoples, namely 'the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination'. Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (one published jointly by the ACHPR/IWGIA in 2005; the other adopted at the Twenty-eighth Session in 2003).

43 Ibid., at para 147, noting that '[t]he ICCPR and the ICESR do not define "peoples"'.

44 Ibid., at paras 153–154. Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169), 72 ILO Official Bull. 59 (1991), Article 1(1)(b).

45 Ibid., at para 154. Report of the Special Rapporteur Rodolfo Stavenhagen on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on Implementation of General Assembly Resolution 60/251 of 15 March 2006, A/HRC/4/32/Add.3 (2007): 'Mission to Kenya' from 4 to 14 December 2006; and Report of the Special Rapporteur Rodolfo Stavenhagen on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Commission on Human Rights, UN Doc. E/CN.4/2002/97 (2002); Special Rapporteur Jose Martinez Cobo, Study of the Problem of Discrimination Against Indigenous Populations, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

46 Ibid., at footnotes 47. Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples' Rights held in Banjul, The Gambia, from 9 to 15 June 1980 (CAB/LEG/67/3/Draft Rapt. Rpt (II)).

47 Ibid., at footnote 67 and 72. Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth Session, 1990), UN Doc. A/45/18 at 79 (1991); and Human Rights Committee, General Comment 22, Article 18 (1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

48 Ibid., e.g. at paras 159–162, in reference to *Saramaka People v Suriname* IACtHR Series C 172 (2007); and at para 93 in reference to *Mayagna (Sumo) Awas Tingni Community vs Nicaragua* IACtHR Series C 79 (2001). The Commission also cited domestic cases stemming from Canada, Australia and South Africa.

49 Ibid., at para 161.

50 Ibid., at para 162.

the right to preserve one's identity through identification with ancestral lands.<sup>51</sup> Once again, the Commission denied the existence of a trade-off between indigenous peoples' presence on their ancestral lands and nature conservation purposes, and applied instead a synergistic frame to this relationship by defining the two objectives as compatible.

The implications of the *Endorois* decision were far-reaching and significantly contributed to international jurisprudence by recognising that mere *de facto* access to ancestral lands was not sufficient and 'only *de jure* ownership can guarantee indigenous peoples' effective protection.'<sup>52</sup> The fact that the *Endorois* complaint was introduced by two human rights NGOs on behalf of the Endorois community—the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG)—and that a third NGO—the Centre on Housing Rights and Evictions (COHRE)—supported their complaint with an *amicus curiae* brief, certainly accentuated the human rights pertinence of the complainants and the 'semantic authority' of their arguments.<sup>53</sup> I am not the first scholar noticing the links between the Endorois community and international NGOs. Some have argued that the takeover of the case by international NGOs contributed to a form of 'constructed indigeneity'. According to Lynch, the 'strategy of "becoming indigenous" has been highly successful in a global context in which everyone "seems concerned about the plight of indigenous peoples":<sup>54</sup> For Lynch, this positioning and articulation risks becoming a way to package or brand identity for a global judicial audience—or a 'means of mobilising resources through an (often unequal) relationship with external actors'—which might lead to unintended consequences.<sup>55</sup> As she puts it, the 'modern obsession' with the 'politics of recognition'—which tend to focus on cultural and spiritual connections between indigenous peoples and their lands—while popular at the global level, casts a shadow over the original problem of wealth and power distribution, as observable in the *Endorois* communication.<sup>56</sup>

Following the Endorois' complaint, other minorities in Kenya started legal proceedings against the state, especially in relation to protected areas. Only 11 days before the Commission issued its communication regarding the Endorois people, the two human rights NGOs that brought the Endorois' complaint to the attention of the Commission—CEMIRIDE and MRG—introduced a new communication against

51 Ibid.

52 Ibid., at para 205.

53 The purpose of 'semantic authority', as Venzke argues, is 'to elucidate whose voice is particularly influential in international legal discourse'. As such, it refers 'to an actor's capacity to find acceptance for its interpretative claims or to establish its own statements about the law as content-laden reference points for legal discourse that others can hardly escape'. Venzke, 'Semantic authority' in d'Aspremont and Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (2019) 815–826, at 815. In his monograph, Venzke did not address the 'semantic authority' of NGOs but focused his analysis on that of international courts and IOs. He admits, however, that NGOs 'throw their weight into struggles about what the law means and thereby partake in its making'. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012) at 67.

54 Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 *African Affairs* 24–45, at 30.

55 Ibid., at 31.

56 Ibid., at 44–45. For Lynch, the overall attention paid to the refusal or acceptance of a people's right to belong to an indigenous minority or right to be distinct from others detracts from potentially more productive forms of political mobilisation and protest that tackle politics of redistribution.

Kenya on behalf of the Ogiek people concerning the protected area in the Mau Forest discussed above.<sup>57</sup> In its judgment regarding the Ogiek people, the ACtHPR referred extensively to the *Endorois* precedent.<sup>58</sup> Gilbert, the expert witness who intervened in the *Kaliña and Lokono* case, is himself a member of MRG's Advisory Board on their Legal Cases Programme.<sup>59</sup> In the *Ogiek* case, Gilbert acted as a legal researcher for Lucy Claridge, former Head of Law at MRG and lead advocate in the *Ogiek* case, who intervened both in the written and oral proceedings as one of the original complainants in the Communication filed before the Commission in 2009 on behalf of the Ogiek community, together with CEMRIDE.<sup>60</sup> Stavenhagen, the former UN Special Rapporteur on the rights of indigenous peoples who intervened through expert testimony in the *Xákmok Kásek* case and whose reports were referred to at length in the *Endorois* communication, also served on MRG's Council and its Legal Advisory Committee from 2011 to 2015.<sup>61</sup> Meanwhile, other NGOs got actively involved in representing indigenous peoples in Kenya.<sup>62</sup> In 2016, the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative filed a complaint on behalf of the Nubian community against the Kenyan government before the Commission.<sup>63</sup> In the domestic proceedings, the Nubian community was represented by CEMIRIDE, the same NGO that filed the communications and represented the Endorois and the Ogiek peoples in the cases mentioned above.<sup>64</sup> In the *Nubian* communication issued in May 2016, references to the *Endorois* precedent played a pivotal role in defining the Kibera slums as the Nubian's 'ancestral homeland'.<sup>65</sup> Clearly, the ability of experts involved in adjudicative processes to invoke the 'spell' of judicial precedents can grant further 'semantic authority' to the arguments at stake.<sup>66</sup> In the next section, we will see how the management of expertise by the Inter-American

57 *Ogiek* case, supra n 28 at para 3. The *Ogiek* complaint was filed by CEMIRIDE and MRG on 14 November 2009 and the *Endorois* communication was issued on 25 November 2009. Noteworthy, on 19 June 2009, MRG intervened in the *Chagos* case together with Human Rights Watch (HRW) on behalf of the Chagossian people. See *Chagos Islanders v United Kingdom* No 35622/04, 11 December 2012, para 55. See their intervention at [minorityrights.org/wp-content/uploads/2016/11/Chagos-Submissions-Final.pdf](http://minorityrights.org/wp-content/uploads/2016/11/Chagos-Submissions-Final.pdf) [last accessed 31 December 2020].

58 *Ogiek* case, supra n 28 at paras 147, 153 and 170.

59 See Gilbert's profile, at [hur-mur.eu/person/jeremie-gilbert](http://hur-mur.eu/person/jeremie-gilbert) [last accessed 1 December 2020].

60 See *Ogiek* case, supra n 28 paras 3, 14, 27 and 29. Gilbert was contacted by Lucy Claridge as Board member of MRG to help her integrate international legal concerns in her argumentation, revise the different pieces of evidence and support some activities between the legal team and the Ogiek people in the case's preparation.

61 MRG's press release at [minorityrights.org/2016/11/08/mrg-mourns-passing-legendary-indigenous-peoples-rights-activist-rodolfo-stavenhagen](http://minorityrights.org/2016/11/08/mrg-mourns-passing-legendary-indigenous-peoples-rights-activist-rodolfo-stavenhagen) [last accessed 1 December 2020]. See also *Xákmok Kásek* case, supra n 11 and *Endorois* communication, supra n 37.

62 For a compelling overview, see Gilbert, 'Indigenous Peoples and Litigation: Strategies for Legal Empowerment' (2020) *Journal of Human Rights Practice* 1; and Gilbert, 'Litigating Indigenous Peoples' Rights in Africa: Potentials, Challenges and Limitations' (2017) 66 *International and Comparative Law Quarterly* 657. With regard to MRG, see the section 'Strategy to Support Implementation of the Endorois Decision' at 682–683, on the proactive role it continues to play in holding strategic meetings, organising workshops with communities' leaders, conducting surveys on implementation, organising paralegal trainings and supporting the community's outreach.

63 317/06, *The Nubian Community in Kenya v The Republic of Kenya* (2016).

64 *Ibid.*, at paras 28–34.

65 *Ibid.*, at paras 87–92.

66 As Venzke notes, '[h]aving been right in the past supports an actor's semantic authority' and, fundamentally, '[r]ightness here is the product of the legal discourse itself. Venzke (2019), supra n 53 at 824. See also

and African human rights courts in cases involving indigenous communities widely differs from the European Court of Human Rights (ECtHR)'s reliance on experts' insights in cases dealing with Roma minorities' rights and land preservation, despite the experts' use of similar discursive strategies and normative aspirations.

### 3. CONTESTED 'TRADITIONALITY'

The environmental jurisprudence of the ECtHR includes a number of cases that involved indigenous peoples.<sup>67</sup> Yet, most of these cases were considered inadmissible by the court.<sup>68</sup> A number of cases, however, concern the protection of Roma communities who found their right to live in line with their cultural traditions violated by landscape preservation policies. Although Roma people do not self-perceive and are not recognised as indigenous peoples, they have encountered forms of eviction from the land they lived on following specific environmental policies on landscape preservation in Europe that justify comparative reflections on those two distinct situations. Far from claiming that Roma peoples' histories, cultures and legacies are in any way to be equated to those of indigenous peoples, the cases decided by regional human rights courts that deal with, on the one hand, environmental protection policies and, on the other hand, indigenous and Roma peoples' rights, share certain similarities in terms of legal and cultural pluralism that make comparisons between these two sets of cases relevant and informative. Indeed, both communities 'exist separately from the geographic nation they are part of: they 'retain independence from [its] dominant [legal] regime and share an identity that is unlike that of the host society.'<sup>69</sup> As such, both can be regarded as 'encapsulated communities'.<sup>70</sup>

The European Convention on Human Rights (ECHR) contains no minority rights provision akin to Article 27 of the International Covenant on Civil and Political Rights, nor does it recognise a 'right to culture' or a right to take part in cultural life, unlike other international human rights treaties.<sup>71</sup> What is more, under the ECHR, the right to property is based on the legal premises of individuality and exclusivity, deriving its

von Bogdandy and Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals' in Romano, Alter and Shany (eds), *The Oxford Handbook of International Adjudication* (2013) at 503–522.

67 *Tage Östergren and others v Sweden* No 13572/88 (1 March 1991); *Könkämä and 38 others Saami Villages v Sweden* No 27033/95 (25 November 1996); *Noack and others v Germany* No 46346/99 (25 May 2000); *Muonio Saami Village v Sweden* No 28222/95 (January 2001); *Johtti Sapmelacatry and others v Finland* No 42969/98 (18 January 2005); *Hingitaaq 53 and others v Denmark* No 18584/04 (12 January 2006); *Handölsdalen Sami Village and others v Sweden* No 39013/04 (30 March 2010); *Chagos* case, *supra* n 57.

68 The *Handölsdalen* case is the only one that met the admissibility criteria set under the ECHR. See also Otis and Laurent, 'Indigenous Land Claims in Europe: The European Court of Human Rights and the Decolonization of Property' (2013) 4 *Arctic Review on Law and Politics* 156; and Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospects and Prospects' (2011) 18 *International Journal on Minority and Groups Rights* 1.

69 Szalai, 'Minorities, Indigenous, Roma—Introductory Remarks and Definitions', in *Protection of the Roma Community under International and European Law* (2015) 1.

70 Banach, 'The Roma and the Native Americans: Encapsulated Communities within Larger Constitutional Regimes' (2002) 14 *Florida Journal of International Law* 353.

71 According to Article 27, '[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities should not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. UN International Covenant on Civil and Political Rights, Treaty Series, vol. 999, p. 171 (16 December 1966).

legitimacy from state granted titles.<sup>72</sup> The right to private property, in other words, does not cater easily with non-exclusive, (semi-)nomadic land use and mobile occupation patterns. As such, the Roma traveller lifestyle fits uncomfortably with the concept of individual, permanent, exclusive and sedentary ownership that is engrained in most (Western) property paradigms, including the ECHR.<sup>73</sup> Entrenched prejudicial stereotypes and hostile public opinion about land deterioration by Roma occupation have also long prevailed and are embedded in more structural forms of intersectional discrimination.<sup>74</sup> Combined, this has led Europe's largest ethnic minority to be among the most disenfranchised minorities in Europe today.<sup>75</sup> In 2015, the former UN Special Rapporteur on minority issues observed that 'although there have been a number of high-profile Roma rights cases at the [ECtHR], there have been relatively few such cases when considered in relation to the significant disadvantages Roma in Europe face.'<sup>76</sup> Arguably, the early Roma jurisprudence of the ECtHR contributed to further marginalise this community.<sup>77</sup> In 2004, however, the ECtHR recognised for the first time that the lack of security of tenure for Roma people was in violation of Article 8 of the ECHR.<sup>78</sup> This attests to a gradual shift towards an approach more sensitive to and respectful of the particular problems that Roma people face, including in relation to environmental policies.<sup>79</sup> The European Roma Rights Centre (ERRC), founded in 1996, played an important role in contributing to trigger this shift.<sup>80</sup>

In the late 1990s and early 2000s, the ECtHR was called upon to decide a series of cases concerning the impact of UK environmental planning regulations on the

- 72 On the fundamental ontological and epistemological dissonances between the hegemonic Western property paradigm and alternative plural visions of social and spatial forms of ownership and modes of living, see the second issue of the third volume of the *Journal of Human Rights and the Environment* (2012) on 'Rights and Property Paradigms: Challenging the Dominant Construct Hegemony'. See also Warnock, *Critical Reflections on Ownership* (2015). None of these references, however, touch upon Roma's relations to land occupation.
- 73 Article 1, Protocol 1, of the ECHR reads as follows: '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.
- 74 Dobrushki and Alexandridis, 'International Housing Rights and Domestic Prejudice: The Case of Roma and Travellers' in Langford, Rodríguez-Garavito and Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (2017) 436–472 at 438.
- 75 The term Roma encompasses diverse groups including Gypsies, Travellers or *Gens du Voyage*, Manouches, Ashkali, Sinti and Boyash. An estimated population of 10 to 12 million Roma lives in Europe today. See EU Agency for Fundamental Rights, at [fra.europa.eu/en/theme/roma](http://fra.europa.eu/en/theme/roma) [last accessed 1 December 2020]. Roma are perceived as 'the most unpopular' and 'despised minority' in Europe. Dobrushki and Alexandridis, *supra* n 74 at 465.
- 76 Report of the Special Rapporteur on minority issues, Rita Izsák, 'Comprehensive Study of the Human Rights Situation of Roma Worldwide, with a Particular Focus on the Phenomenon of Anti-Gypsyism', A/HRC/29/24 (2015) at para 79.
- 77 The first Roma case was brought to the ECtHR in 1990. On this 'early' jurisprudence, see Dobrushki and Alexandridis, *supra* n 74 at 456–458.
- 78 See *Connors v The United Kingdom* No 66746/01 (27 May 2004). This was the first successful Roma case decided by the ECtHR. It took the UK nine years, however, to implement this decision. It would have taken longer had it not been for the active and persistent lobbying and advocacy by Roma organisations and their supporters. Dobrushki and Alexandridis, *supra* n 74 at 459–460. See also Johnson, Ryder and Willers, 'Gypsies and Travellers in the United Kingdom and Security of Tenure' (2010) *Roma Rights Quarterly* 45.
- 79 Dobrushki and Alexandridis, *supra* n 74 at 438. The authors admit, however, that this shift does not appear to be equally reflected in the implementation phase of these decisions.
- 80 See the website of ERRC, at [www.errc.org](http://www.errc.org) [last accessed 1 December 2020].

right to private property and family life of British nationals of Roma descent.<sup>81</sup> All cases concerned the refusal by British authorities to authorise Roma families to live in caravans parked on land they had acquired for that purpose.<sup>82</sup> In the *Chapman* case, for example, while the ECtHR recognised that the occupation of caravans forms an integral part of the Roma ethnic identity and reflects their long tradition of following a travelling lifestyle, it also recognised that the government's planning regulations 'pursued the legitimate aim of protecting the "rights of others" through preservation of the environment.'<sup>83</sup> The ERRC intervened by submitting an *amicus curiae* brief to draw the court's attention to the particular vulnerability of Roma people.<sup>84</sup> In the latter, the ERRC mentioned the report published in 2000 by the OSCE High Commissioner on National Minorities on the situation of Roma and Sinti in the OSCE area.<sup>85</sup> In light of this report, the ERRC submitted that a growing consensus had emerged among international organisations about the need to take specific measures to address the position of Roma, including their accommodation and general living conditions.<sup>86</sup>

Against this background, the applicants urged the ECtHR to duly consider these recent international developments, especially the Framework Convention for the Protection of National Minorities that had been adopted in 1995 and entered into force in 1998,<sup>87</sup> so as to reduce the margin of appreciation of the UK in handling environmental policies affecting the rights of Roma people to practice their cultural traditions.<sup>88</sup> While the ECtHR recognised the 'existence' of an emerging consensus amongst the Contracting States of the Council of Europe regarding the special needs of national minorities and an obligation to protect their security, identity and lifestyle,<sup>89</sup> it rejected the 'concreteness' of this consensus and claimed that it could not 'derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation.'<sup>90</sup> Despite recognising that the Framework Convention set out general principles and goals, in other words, the ECtHR interpreted it as remaining silent on means of implementation.<sup>91</sup> On these grounds, the ECtHR refrained from narrowing

81 *Buckley v The United Kingdom* No 20348/92 (20 September 1996); and *Chapman v The United Kingdom* No 27238/95; *Beard v The United Kingdom* No 24882/94; *Coster v The United Kingdom* No 24876/94; *Lee v The United Kingdom* No 25289/94; *Jane Smith v The United Kingdom* No 25154/94 (18 January 2001). All five cases were joined by the Grand Chamber when delivering its judgment. I concentrate on these cases as those are the ones with an environmental dimension. For an overview of cases decided by the ECtHR concerning Roma rights more broadly, see 'European Court of Human Rights: Housing Jurisprudence' in Dobrushin and Alexandridis, supra n 74 at 455–466.

82 In *Buckley*, and in contrast to the other cases, '[t]he area in question had not been singled out for special protection, whether as a national park, as an area of outstanding natural beauty or as a green belt'. *Buckley* case, *Ibid.*, at para 72.

83 *Chapman* case, supra n 81 at paras 73 and 82.

84 *Ibid.*, at para 89.

85 *Ibid.*, at para 89.

86 According to the ERRC, Articles 8 and 14 of the ECHR should therefore be interpreted in light of the 'clear international consensus about the plight of Roma and the need for urgent action'. *Ibid.*

87 Council of Europe, Framework Convention for the Protection of National Minorities, ETS 157 (1 February 1995).

88 *Chapman* case, supra n 81 at para 93.

89 *Ibid.*

90 *Ibid.*, at para 94.

91 *Ibid.*

UK's margin of appreciation and instead recalled its own strictly supervisory role.<sup>92</sup> This time, the lack of engagement from the ECtHR with the human rights expertise that was brought to its attention by the ERRC and referred to by the applicants was strongly contested by the seven dissenting judges, who argued that 'aesthetic environmental concerns' not protected under the ECHR could not legitimately outweigh the cultural rights of Roma people whose protection had recently crystallised in a legally binding instrument.<sup>93</sup>

Interestingly, we observe similar dynamics in terms of Roma's representation in these cases to those present in the cases analysed in the preceding section concerning indigenous peoples. In the *Chapman* case, for example, the 'traditionality' of the applicant's claims were contested by the respondent state and recast in a mould of modernity. The British government urged the ECtHR to 'tak[e] into account that the applicant had made two applications for bungalows, indicating that she was willing to live in settled, conventional accommodation.'<sup>94</sup> It further emphasised that the applicant 'took up residence on her own land by way of finding a long-term and secure place to station her caravans', and that therefore, '[i]t would appear that the applicant does not in fact wish to pursue an itinerant lifestyle'. The government's legal representatives claimed, on these grounds, that 'the present case is not concerned as such with the traditional itinerant Gypsy lifestyle.'<sup>95</sup> And in case the applicant would have wanted to pursue a traditional lifestyle, the government pointed out that 'other sites elsewhere in the county do exist and that the applicant was free to seek sites outside the county'.<sup>96</sup>

The applicant strongly refuted these accusations, which turned the case into a dispute concerning the 'traditionality' of Roma's lifestyles. According to her, the domestic legislation and environmental planning policy and regulations disclosed a lack of respect for her rights as they 'effectively made it impossible for her to live securely as a Gypsy: either she was forced off her land and would have to station her caravans unlawfully, at the risk of being continually moved on, or she would have to accept conventional housing or "forced assimilation"'.<sup>97</sup> Her sense of forced assimilation clearly points to a desire to live in alignment with her ethnic identity and the impossibility to do so in practice. She further mentioned that it was '[d]ue to harassment while she led a travelling life, which was detrimental to the health of the family and the education of the children, [that she] bought a piece of land in 1985 with the intention of living on it in a mobile home . . . to enable the children to attend school immediately'.<sup>98</sup> No mention was made of abandoning the Roma lifestyle. On the contrary, the applicant deplored 'the legal system's failure to accommodate Gypsies' traditional way of life, by treating them in the same way as the majority population, or disadvantaging them relatively to the general population'. In her view, this amounted to 'discrimination in the enjoyment of her rights under the Convention based on her status as a member

92 Ibid.

93 Ibid., at 35–43.

94 Ibid., at para 88.

95 Ibid., at para 105.

96 Ibid., at para 111.

97 Ibid., at para 76.

98 Ibid., at paras 12 and 13.

of an ethnic minority.<sup>99</sup> While the applicant clearly felt constrained to inquire about conventional housing options following the authorities' repetitive refusals to allow her to live in caravans on her land, the government instrumentalised these proceedings and translated them into an alleged desire from her part to abandon a traditional itinerant lifestyle. In doing so, the government attempted to deprive the applicant from the special legal protection she claimed as a member of the Roma ethnic minority, so as to favour a strict application of its environmental planning policies.

Throughout the case, the ECtHR refrained from substantively engaging with the Framework Convention on National Minorities, despite it being referred to by the ERRC and the applicant.<sup>100</sup> It did, however, extensively refer to the two public inquiries carried out during the domestic proceedings by inspectors qualified as independent experts. Both inspectors found that the applicant's occupation of her land was 'detrimental to the rural character of the site situated in the Green Belt and that this outweighed her interests.'<sup>101</sup> More precisely, the first inspector had regard to the location of the site in the Metropolitan Green Belt and found that the planning considerations, both national and local, outweighed the needs of the applicant.<sup>102</sup> The second inspector found that the use of the site for the stationing of caravans was 'seriously detrimental to the environment' and would 'detract significantly from the quiet rural character' of the site.<sup>103</sup> Yet, these two inspections were held in 1987 and 1994, respectively, namely before the Framework Convention was adopted in 1995 and entered into force in 1998. There is, therefore, an imbalance in the ECtHR's due consideration of the expertise it was presented. While the ERRC's arguments on the 'clear consensus' that emerged following the entry into force of the Framework Convention were only acknowledged by the court without being substantively reviewed,<sup>104</sup> the independent experts' inspections that were carried out *before* the Framework Convention was even adopted were extensively referred to.<sup>105</sup>

Such bias in favour of one expertise over another was also deplored by Judge Pettiti in his dissenting opinion in the *Buckley* case, decided five years before *Chapman*.<sup>106</sup> According to Judge Pettiti, the Report of the European Commission on Human Rights in 1995 had only quoted extracts from the inspector's report that were favourable to the government's case while 'there [were] other passages in the report that support the applicant's case' that were intentionally overlooked. He further noted that 'the passages

99 Ibid., at para 127. She further argued that 'Gypsies alone were singled out for special treatment by the policy which declared that Gypsy sites were inappropriate in certain areas, and unlike house dwellers, they did not benefit from a systematic assessment of and provision for their needs. Further, the application to them of general laws and policies failed to accommodate their particular needs arising from their tradition of living and travelling in caravans.'

100 According to the applicant, the Framework Convention supported an obligation on the UK to 'adopt measures to ensure the full and effective equality of Gypsies'. Ibid.

101 Ibid., at para 88.

102 Ibid., at para 14.

103 Ibid., at para 17.

104 Ibid., at paras 92–94.

105 Ibid., at paras 108–110 and 118–124.

106 *Buckley* case, *supra* n 81. No NGO intervened in *Buckley*, the first case ever initiated by an applicant of Roma descent. The ERRC was created that same year and intervened in all subsequent Roma cases.

relied on were not necessarily the most relevant ones.<sup>107</sup> The Commission's apparent selectivity in partially referring to relevant expertise did not pass unnoticed.<sup>108</sup> As is evident from both the *Buckley* and the *Chapman* cases, the ECtHR seems to engage more thoroughly with the expertise that favours its pre-determined decision and less with the one that would legitimise a different outcome. This manifests a managerial approach to conflict adjudication, where optimal outcomes are determined by reconciling the conflicting objectives in the most efficient way in accordance with pre-established political and normative preferences.<sup>109</sup> This observation hints to particular dynamics at play when courts rely on experts' interventions on behalf of vulnerable peoples against environmental policies. In the next section, I reflect on what advantages and disadvantages these experts' interventions have for indigenous and minorities' rights protection in relation to environmental concerns.

#### 4. THE BRIGHT AND DARK SIDES OF EXPERT INTERVENTION IN STRATEGIC LITIGATION

The case-law analysis of the preceding sections reveals how various UN Special Rapporteur on indigenous peoples' rights,<sup>110</sup> UN independent experts,<sup>111</sup> NGOs,<sup>112</sup> legal anthropologists and human rights scholars,<sup>113</sup> intervened to urge regional human rights courts to protect indigenous peoples' and cultural minorities' rights impaired by environmental protection concerns. While the involvement of experts speaking on behalf of indigenous and minority groups can bolster their legal protection, the experts' 'shared assumptions, style and sensibility' can also trigger unintended consequences for the identity and (self-)perception of the people they

107 Indeed, the passages from the report quoted by the applicant mention that on the one hand, '[t]here had been reports of crime and violence [in the official site suggested by the government] and the inspector's report of May 1995 had noted that [this] site was bleak and exposed' and, on the other hand, 'the same report had noted that the applicant's site was well maintained [and] could also be adequately screened by vegetation, which would lessen its visual impact on the countryside'. *Ibid.*, at para 65. See also Dissenting Opinion of Judge Pettiti, *Buckley* case, supra n 81 at 30–31.

108 Former judge Loucaides mentions the *Buckley* and *Chapman* cases as clear evidences of a 'tendency of the Court not to harm serious interests of respondent States'. Loucaides, 'Reflections of a Former European Court of Human Rights Judge on his Experiences as a Judge' (2010) 1 *Roma Rights Quarterly* 61 at 64.

109 For a critical assessment of this management style by the CJEU, see Petersmann, 'Rights and Expertise: Assessing the Managerial Approach of the Court of Justice of the European Union to Conflict Adjudication' in Baetens (ed), *The Legitimacy of Unseen Actors in International Adjudication* (2019) at 297–320.

110 Victoria Tauli-Corpuz intervened as UN Special Rapporteur on the rights of indigenous peoples in the *Kaliña and Lokono* case, supra n 11. In the *Endorois* communication, supra n 37, references were made to Rodolfo Stavenhagen, as former UN Special Rapporteur on the rights of indigenous peoples, and to Jose Martinez Cobo, as former UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

111 In the *Endorois* communication, supra n 37, references were made to Arjun Sengupta, as former UN's Independent Expert on the Right to Development.

112 The CEMIRIDE, MRG and COHRE intervened in the *Endorois* communication, supra n 37; the CEMIRIDE and MRG intervened in the *Ogiek* case, supra n 28; MRG, together with Human Rights Watch, intervened in the *Chagos* case, supra n 57; and the ERRC intervened in the *Roma* case, supra n 81.

113 Jérémie Gilbert, Professor of Human Rights Law at the University of Roehampton in the UK, intervened in the *Kaliña and Lokono* case, supra n 15; Lucy Claridge, former Head of Law at MRG, and Dr. Liz Alden Wily, an independent researcher and practitioner specialised in land tenure issues, intervened in the *Ogiek* case, supra n 30 and 69; Stuart Kirsch, Professor of Anthropology at the University of Michigan in the US, intervened in the *Kaliña and Lokono* case, supra n 11 and infra n 137.

represent.<sup>114</sup> With this concern in mind, three main observations are drawn from the case studies and critically unpacked.

First, to qualify as legitimate before courts, expert-based arguments must fit a specific legal format. When intervening in judicial proceedings involving marginalised communities, Wainwright and Bryan recollect, '[w]e formally work *on behalf of the indigenous communities* who are the claimants, though in practice we often work *for the lawyers* who produce the case.'<sup>115</sup> Specific legal, argumentative and epistemic strategies are set in motion to ensure courtroom success. For Gilbert, who acted as expert witness in the *Kaliña and Lokono* case, one of the main challenges in intervening on behalf of indigenous communities before regional human rights courts is 'to get their rights to land recognised under a dominant Western legal system [by] relying on formal and written evidence.'<sup>116</sup> He reckons, however, that 'often indigenous peoples' customs, traditions and land laws are oral and not formally written.'<sup>117</sup> Yet, applicants' claims based solely on practices or beliefs that were passed on through oral forms that can only be proven on the basis of oral testimonies tend to be contested as unfounded by the respondent party. Indeed, in his capacity as expert witness in the *Awás Tingni* case, Hale recalled how a lawyer of the Nicaraguan government tried to delegitimise the claims of the *Awás Tingni* by holding that '[t]he only proof in support of the supposed ancestral occupation of these lands that they claim is a document constructed solely on the basis of oral testimonies of the interested parties, a study that has no documented source, no archaeological evidence, not even testimonies of the neighbouring communities.'<sup>118</sup> Consequently, in litigation processes, counsels and experts can face the challenging task of having to translate the oral evidence invoked by indigenous peoples or cultural minorities into formally written juridical materials.

Against this backdrop, and to prove their cultural, spiritual and subsistent connections to their ancestral lands, the delineation and mapping of territories by experts intervening in support of indigenous peoples' land claims has become a common litigation strategy.<sup>119</sup> The exercise of indigenous map-making is intricately related to the articulation of their legal claims and remains oriented by the spatial configuration

114 Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 *Humanity* 47 at 51. Applied to a different context, Kennedy warns about human rights experts' 'shared assumptions that provide a frame within which argument takes place: assumptions about things like ... what human rights are and why they are important. They also share what might be called a style or sensibility: a way of approaching their role, a sense of audience and tone, which gives a sense of coherence to divergent engagements'. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2016) at 154.

115 Wainwright and Bryan, 'Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize' (2009) 16 *Cultural Geographies* 153 at 162.

116 Gilbert and Begbie-Clench, 'Mapping for Rights': Indigenous Peoples, Litigation and Legal Empowerment' (2018) 1 *Erasmus Law Review* 6 at 7

117 Ibid.

118 Hale, 'Activist Research v. Cultural Critique: Indigenous Land Rights and the Contradictions of Politically Engaged Anthropology' (2006) 21 *Cultural Anthropology* 96 at 107. See *Awás Tingni* case, supra n 48. The case concerned Nicaragua's failure to demarcate and protect the ancestral lands and natural resources of the *Awás Tingni* and the violation of their rights by granting a concession to a company on their ancestral territories.

119 Gilbert and Begbie-Clench, supra n 116. The authors analysed the importance of mapping indigenous territories in support of indigenous peoples' land claims in litigation processes and the impact of cartographies beyond the courtroom in relation to indigenous peoples' self-perceptions.

of modern (Western) politics revolving around territory and property rights. This ‘cartographic-legal strategy’ creates fixed bounded territories, which ‘invariably reduces the complexity of the world to produce an effective abstraction of some set of spaces and relations.’<sup>120</sup> Other tactics to describe and depict indigenous peoples’ lands in strategic litigation include photographs and videos of the communities’ milieu, their traditional knowledges and cultural practices. Claridge recalls, for example, how in the *Ogiek* case, for MRG’s legal team to establish the role of Ogieks as conservationists of the Mau Forest, ‘[p]hotos of indigenous plants well known to the Ogiek and the role that these play in Ogiek customs were collected and submitted to the [ACtHPR], demonstrating Ogiek traditional knowledge and their keen awareness of how to conserve their ancestral surroundings.’<sup>121</sup> The Ogiek Peoples’ Development Program and MRG also produced a film of the Ogieks’ land and cultural practices, which was submitted as video evidence to the ACtHPR, thereby ‘giving the judges the opportunity to witness firsthand the traditional Ogiek way of life.’<sup>122</sup> The usage of such mediums participates in defining the community, not only spatially but also ontologically, in establishing how they ought to be, live and act in the world, in relation to or rather in contrast with Western ontologies and epistemologies. A two-way process of ‘translation’ is thereby put in place,<sup>123</sup> with experts applying Western legal procedures, concepts and tools to indigenous peoples’ local realities on the one hand, and indigenous peoples learning to ‘speak the language of Western environmentalism and reframe their cosmological and ecological systems in terms of Western concepts like . . . “protecting biosphere diversity” . . . to position themselves politically’,<sup>124</sup> on the other hand. This two-way process of translation mobilises a specific human rights idiom, narrative and frame in which indigenous peoples’ and minorities’ concerns must fit. An additional—and literal—problem of translation can further arise when applicants’ statements are translated, often multiple times, from a non-dominant indigenous language to that of the governing state and into English and/or Spanish for the courts’ own assessments. Throughout this process, claims can be mistranslated, and the ‘receiving’ language may lack the needed vocabulary to accurately reflect a statement by the community. This may give rise to or accentuate existing forms of ‘epistemic [testimonial or hermeneutical] injustices’, with marginalised peoples additionally suffering from unequal access to or lack of participation in knowledge practices.<sup>125</sup> As a result, when indigenous and minorities’

120 Wainwright and Bryan, *supra* n 115 at 155.

121 Claridge, ‘Litigation as a Tool for Community Empowerment: The Case of Kenya’s Ogiek’ (2018) 1 *Erasmus Law Review* 57 at 64.

122 *Ibid.*

123 The concept of ‘translation’ is borrowed from Merry, for whom ‘[i]ntermediaries such as community leaders, nongovernmental organization participants, and social movement activists play a critical role in translating ideas from the global arena down and from local arenas up’. She distinguishes between processes of ‘translation by replication’ and ‘hybrid or interactive translation’ and advocates a balance between the two. Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (2006) 108 *American Anthropologist* 38. Against the ‘verticality’ of the process of translation and for a process of ‘circulation’ of legal arguments, see also Kroshus Medina, ‘The Production of Indigenous Land Rights: Judicial Decisions across National, Regional, and Global Scales’ (2016) 39 *Political and Legal Anthropology Review* 1.

124 Conklin, ‘Body Paint, Feathers, and VCRs: Aesthetics in Authenticity in Amazonian Activism’ (1997) 24 *American Ethnologist* 711 at 712. Conklin refers to this process as a ‘greening of indigenist politics’.

125 Tsosie, ‘Indigenous Peoples, Anthropology, and the Legacy of Epistemic Injustice’ in Kidd, Medina and Pohlhaus (eds), *The Routledge Handbook of Epistemic Injustice* (2017).

rights claims cannot properly be articulated and ‘subject to variation from place to place’ according to the communities’ particular worldview, the spectrum of legal pluralism is inexorably reduced.<sup>126</sup>

In the cases referred to above, the analysis demonstrated how a specific human rights frame that posits indigenous peoples as guardians living ‘in harmony with nature’ was frequently invoked in parties’ argumentation. An ideal of ‘traditional lifestyle’ lies at the centre of this constructed legal imaginary, and it tends to be around concerns of ‘indigeneity’ and ‘traditionality’ that contested arguments and expertise revolve in litigation processes. As Wolfe warned more than two decades ago, when communities must prove that their ‘authentic’ ways of being, knowing and living in the world are in ‘harmony with nature’ in order to fit their concerns into a fixed human rights mould that enables them to get their rights legally protected, the use of this particular idiom can lead to forms of ‘repressive authenticity’.<sup>127</sup> Expert-based pro-indigenous activism can unintentionally replicate symbolic constructs that perform important legal and political implications for affected communities. On the one hand, by framing their concerns as ‘traditional’ rights, they are granted stronger legal protection in light of their ‘indigeneity’ or ‘cultural traditionality’. On the other hand, however, recourse to representational legal discourses associates them to pre-fixed ideals. Not only do these exotic ideals draw on socially constructed imaginaries—which inevitably echo Redford’s critique of the ‘ecologically noble savage’<sup>128</sup>—they also risk binding and foreclosing communities’ permitted lifestyles and development under international law to an artificial binary of ‘traditional’ *versus* ‘modern’.

By way of illustration, much ink has been spilled on the use of modern technology within traditional indigenous hunting activities. The UN Human Rights Committee recognised that modern practices adopted by indigenous peoples do not prevent them from invoking Article 27 of the ICCPR, which not only protects traditional means of livelihood of minorities but also allows for adaptation of those means to modern way of life and its ensuing technology.<sup>129</sup> With regard to aboriginal whaling, for example, the International Whaling Committee argued that ‘[i]mproved technology makes whaling safer, more efficient and more humane, but it may be seen by some

126 Provost and Sheppard, ‘Human Rights Through Legal Pluralism’ in Provost and Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (2013) at 4. On the inequity of liberal forms of multiculturalism, see Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (2002).

127 Cf. Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (1999).

128 For Redford, the concept of ‘Noble Savage’ has been extended and re-defined into the ‘Ecological Noble Savage’ by both conservationists and anthropologists. Redford did not question that indigenous peoples *have* deep and intimate knowledges of their environments, but warned that it does not necessarily follow, and has not been empirically demonstrated, that they use their knowledges to maintain any sort of equilibrium with their environments or to conserve the resources they use. ‘We must face the fact that in many cases, when we dream of the ecologically noble Indian whose knowledge will save us from the consequences of modern development, we dream an old dream, whose roots stretch back to the Garden of Eden and beyond’. Redford, ‘The Ecologically Noble Savage’ (1991) 15 *Cultural Survival Quarterly* 1 at 46–48.

129 On Article 27 of the ICCPR, see *supra* n 71. See also *Ilmari Lämsman et al. v Finland* CCPR/C/57/1 (1996). This understanding is commonly referred to as a ‘non-frozen’ rights approach to the meaning of cultural practices and ‘authenticity’. See ‘Cultural Rights and Natural Resources’ in Gilbert, *Natural Resources, Human Rights and International Law: An Appraisal* (2018) at 122.

to compromise aboriginal authenticity.<sup>130</sup> The allegedly ‘non-modern’ romanticised ideal projected upon indigenous ways of being is captured in the dilemma posed by Stoett, who recognises that ‘[t]oday’s aboriginal whaler has recourse to shotguns and other technically expeditious devices, minimising the pain and suffering of the captured whale’, but wonders ‘when does a traditional hunt end and modern one begin?’<sup>131</sup> The Inuit exemption for selling seal products on the EU market is also conditioned by ‘traditional hunting methods’. Article 3(1) of the Council Regulation provides indeed that ‘[t]he placing on the market of seal products shall be allowed *only* where the seal products result from *hunts traditionally conducted by Inuit and other indigenous communities* and contribute to their subsistence.’<sup>132</sup> Against such imposed framings of ‘ontologised indigeneity’, a so-called ‘non-frozen rights’ approach emerged to guarantee the choices indigenous peoples make for themselves to ‘sustainably self-determine’ the use of their ancestral lands and the development of their cultural activities, detached from Western pre-conditions embedded in pre-established, determined and reductive binaries of ‘authentic’ *versus* ‘modern’ cultural traditions.<sup>133</sup>

Such tensions were observed in all the cases relating to indigenous peoples’ and cultural minorities’ rights analysed in the preceding sections. In the *Chapman* case, we saw how the claimant’s application for conventional housing was instrumentalised by UK authorities as supposedly demonstrating her will to abandon her traditional Roma lifestyle and imply that the case was ‘not concerned as such with the traditional itinerant Gypsy lifestyle.’<sup>134</sup> In the *Ogiek* case, we saw how the conversion to Christianity by some members of the community was used by the Kenyan government as an argument against the traditional religious rites of the Ogiek people.<sup>135</sup> In the *Kaliña and Lokono* case, the temporary participation of some members of the Kaliña and Lokono people in commercial sale of turtle eggs was used by the Suriname government to question their ‘traditional life in harmony with nature.’<sup>136</sup> Such situations can also prove challenging for expert witnesses invited by indigenous peoples to intervene in a case. Kirsch recalled the political dilemma he faced in reconciling his support for the Kaliña and Lokono’s land rights on the one hand, and his concern about their participation in the commercial sale of turtle eggs on the other hand.<sup>137</sup> In discussing this issue with Captain Pané, the leader of one of the Kaliña and Lokono communities, Pané claimed that the practice

130 Fitzmaurice, ‘Indigenous Peoples and Intergenerational Equity as an Emerging Aspect of Ethno-Cultural Diversity in International Law’ in Pentassuglia (ed), *Ethno-Cultural Diversity and Human Rights: Challenges and Critiques* (2018) 188 at 220.

131 Stoett, ‘Of Whales and People: Normative Theory, Symbolism and the IWC’ (2005) 8 *Journal of Wildlife Law and Policy* 151 at 170.

132 Council Regulation (EC) 1007/2009 on Trade in Seal Products [2009] OJ L 286 (emphases added).

133 On the ‘non-frozen’ rights approach to cultural activities, see Gilbert, *supra* n 129. On ‘sustainable self-determination’, see Corntassel, ‘Towards Sustainable Self-Determination: Rethinking the Contemporary Indigenous Rights Discourse’ (2008) 33 *Alternatives: Global, Local, Political* 1.

134 *Chapman* case, *supra* n 81 at para 105.

135 *Endorois* communication, *supra* n 37.

136 When the Wia Wia and Galibi Nature Reserves were established in the late 1960s, the government authorities reached an agreement with the Kaliña and Lokono communities under which the residents were authorised to extract turtle eggs for their personal consumption, which formed part of their traditions, and to sell eggs under the supervision of the state authorities. *Kaliña and Lokono* case, *supra* n 11 at para 77.

137 See ‘Dilemmas of an Expert Witness’ in Kirsch, *Engaged Anthropology: Politics Beyond the Text* (2018) at 180–215.

of eating sea turtles was today considered a ‘traditional taboo’.<sup>138</sup> This situation led Kirsch to warn about the ‘risk of political backlash when reproducing essentialised representations of indigenous attitudes toward the environment’.<sup>139</sup> This anxiety over political backlash finds resonance in Spivak’s concept of ‘strategic essentialisation’, and how she reconciled the necessity to make ‘strategic choices’ when intervening politically through essentialised discourses if this is the language in which political debates are conducted, even if those choices imply going against what would be required from an intellectual or theoretical integrity perspective.<sup>140</sup> At times, she argues, a strategic replication of essentialised discourses that enjoy an influential semantic authority can override the risks implied by reproducing a form of ‘repressive authenticity’.<sup>141</sup> This is, of course, also true for affected communities themselves.<sup>142</sup>

Besides these risks of epistemic injustices and the tentacular implications they entail, a second main concern regarding expert witnesses involved in representing indigenous peoples in litigation processes relates to issues of validity when making general claims based on particular contexts and facts. When courts refer to experts’ findings induced from one specific context and stretch their validity across historical, socio-cultural and spatial divides, they universalise particular realities. Hale, who acted as expert witness before the IACtHR, warns that over the past three decades, we witnessed a ‘strong trend in the sociology of knowledge, in the philosophy of science, in critical scrutiny of social science epistemologies, as well as in culture theory, toward the acknowledgment that all forms of data collection, and the knowledge claims that derive from them, are “situated”’.<sup>143</sup> Applied to legal anthropology, the ‘situatedness’ of experts’ findings would limit the latter’s validity to the specific context they derive from. This observation, however, fits uncomfortably with the circulation of expert-based ‘situated’ legal arguments observed in regional human rights jurisprudence. In the cases analysed above, we saw how arguments made and conclusions reached in the *Saramaka* and *Awas Tingni* cases decided by the IACtHR were, for example, extensively referred to in the *Endorois* communication by the African Commission, or how the *Endorois* communication was extensively referred to in the *Ogiek* case by the ACtHPR.<sup>144</sup> Through jurisprudential cross-references of contextual claims arising from localised anthropological evidence, a form of ‘mainstreaming’ of a particular, context-dependent and situated relationship between indigenous peoples and their ancestral lands is thereby taking place. While this ‘anthropological cherry-picking’ or ‘mainstreaming’ process can come with

138 Ibid., at 185.

139 Ibid., at 220.

140 Spivak, *The Postcolonial Critic: Interviews, Strategies, Dialogues* (1990) at 10–11. On whether, in so doing, one risks winning the immediate particular argument whilst legitimising the broader structures that one wishes to undermine in the first place; and whether thereby ‘strategic essentialism’ collapses into mere ‘essentialism’, see Knox, ‘Strategy and Tactics’ (2010) 21 *Finnish Yearbook of International Law* 194 at 194.

141 Ibid., at 11. On ‘repressive authenticity’, see Wolfe, *supra* n 127.

142 For Suárez-Krabbe, ‘[t]he idea of the ecological native has been elaborated mainly through “transnational indigenist environmental movements” and NGOs, and their interrelations with indigenous peoples. . . . [This] idea . . . has been incorporated into indigenous peoples’ identity, sometimes in order to obtain funding, and at other times as a political strategy—that is, as identity politics or strategic essentialisms’. Suárez-Krabbe, *supra* n 6 at 166.

143 Hale, *supra* n 118 at 100.

144 See *supra* n 48 and 58.

certain advantages in terms of strengthened legal protection of indigenous peoples and minorities' rights, it also entails important disadvantages as the specificities of particular peoples, cultures and histories get lost in generalised legal frames.<sup>145</sup>

Finally, the case-law analysis unravelled the existence of alliances between external actors that file and/or intervene in cases before regional human rights courts that present similar legal issues. International networks of specialised experts—or groups of experts, whether anthropologists providing key historical and ethnographic evidence or human rights lawyers providing technical international and comparative legal arguments—often affiliated to specific I(NG)Os, intervene in cases involving indigenous peoples' and cultural minorities' rights in light of nature conservation and landscape preservation concerns. These experts' interventions are 'tactical' and purportedly 'strategic'.<sup>146</sup> The members of these networks master the best litigation strategies, share a common legal discourse and know the latest developments across the field and jurisdictions.<sup>147</sup> They are proficient in the human rights vocabulary and skilful players with the 'spell' of judicial precedents.<sup>148</sup> In navigating these complex, time-consuming and expensive legal processes, experts intervening for the protection of vulnerable and marginalised groups make certain 'these peoples' voices are heard and not distorted' in what can be rather technical juridical settings.<sup>149</sup> Experts must also ensure that the collective interests of the communities they represent are (made) fit for formalist international human rights mechanisms. The technicality of the legal jargon and practices employed in (international) judicial proceedings can indeed prove ostracising for remote communities whose worldviews and practices do not align with those required by courts. The 'vertical', adversarial and self-interested nature of judicial proceedings risks alienating applicants not used to such antagonistic models of justice, who might prefer 'horizontal', collective and relational approaches

145 d'Aspremont defined the term 'mainstream' as commonly referring to 'either a dominant group of professionals that adhere to an orthodox reading of the law or a dominant type of argumentation that is shaped by the reliance on orthodox methods and concepts'. d'Aspremont, 'Martti Koskenniemi, the Mainstream, and Self-Reflectivity' (2016) 29 *Leiden Journal of International Law* 625 at 627. I use 'mainstream' not as a noun but as a verb, or an active process by which a specific frame is brought into the 'mainstream', in line with Koskenniemi, supra n 114. On 'anthropological cherry-picking', see supra n 8.

146 'Tactical' is understood as 'an essentially pragmatic intervention focused on winning the debate in the short term' whilst 'strategic' refers to 'one's longer term, structural objectives'. See Knox, supra n 140 at 194. Knox argues that short-term, conjunctural, tactical considerations in political debates are too frequently branded as 'strategic' interventions, thereby foreclosing the possibility of an actual long-term, structurally strategic intervention. Short-term interventions might ultimately prove disadvantageous for a longer-term goal, he warns.

147 The generic reference to 'networks' is oversimplifying as it projects an image of monolithic and uniform groups of experts. The existence of sub-networks with a wide variety of research agendas is acknowledged. At times, a sense of distrust, lack of communication and disagreement among experts is also lingering within these 'networks'. Yet, the analysis revealed institutional ties, shared political objectives and particular (legal) discourses that unite the experts referred to in this article.

148 On the 'spell of precedents', see von Bogdandy and Venzke, supra n 66.

149 On 'giving a voice to the voiceless' and thereby turning indigenous peoples from victims to actors, see Gilbert, supra n 23. On the need to find institutional, legal and political arrangements that maximise 'true legal agency'—instead of mere access to justice—based on autochthonous, community-controlled or non-state justice systems, see Brinks, 'Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin America' (2019) 55 *The Journal of Development Studies* 348.

to resolving tensions.<sup>150</sup> This sense of alienation further risks being amplified through processes of ‘semantic intimidation’ observable in cases, when opposing parties attempt at destabilising adversarial arguments through the use of ‘semantic weaponries’ in the interpretative competition for ‘naming’, describing and delineating what can be considered legitimate practices and ‘rights’ claims.<sup>151</sup> Throughout the process, experts must make sure that communities are not ‘silenced’ when translating their claims and interests into Western legal concepts and procedures.<sup>152</sup> While experts’ interventions are thus crucial for the delivery of ‘justice’ and overall functioning of regional human rights judicial settings that involve disenfranchised communities with subaltern (legal) cultures, experts’ interventions can come with unintended consequences when specific tropes and narratives are (re)produced by courts and formalise the language, collective identities and communal interests of communities into ‘rights’, thereby reducing the scope of possibilities for alternative worldviews, lifestyles and (legal) normativities.

## 5. CONCLUSION

The article explored how experts affiliated with particular IOs and NGOs intervene in cases before regional human rights courts to defend the interests of indigenous peoples and cultural minorities affected by environmental policies, and which (legal) consequences this can bear on the communities they represent. Characteristic of these networks of experts are the particular institutional ties that their members share, the articulation of common normative aspirations in a specific strategic (legal) discourse and the cross-referencing to context-specific judicial precedents across jurisdictional and socio-cultural settings. By delving into well-known indigenous cases decided by the Inter-American and African human rights mechanisms and lesser-known Roma cases decided by the European Court of Human Rights, the article unpacked the expert-based argumentation in conflict adjudication of cases involving marginalised peoples in light of environmental concerns. The analysis evidenced how experts’ interventions can lead to desirable outcomes in supporting indigenous peoples’ and cultural minorities’ requests to preserve their traditional knowledges and practices and translating them into actionable (Western) legal discourses before courts. Yet, the article also showed how expert-based argumentations can (re)produce essentialised frames of authentic and traditional living conditions set against secular understandings of ‘modern’ ways

150 Hendry and Tatum, ‘Human Rights, Indigenous Peoples, and the Pursuit of Justice’ (2016) 34 *Yale Law & Policy Review* 351 at 361–362. As Porter writes, ‘the social field of rights-based struggle becomes struck in a mode that seeks parity only within the frame of liberal “possessive individualism”’. Porter, ‘Possessory Politics and the Conceit of Procedure: Exposing the Cost of Rights under Conditions of Dispossession’ (2014) 13 *Planning Theory* 387 at 394 (cited in Chandler and Reid, *supra* n 9 at 33).

151 On the notion of ‘semantic intimidation’, see d’Aspremont, ‘Wording in International Law’ (2012) 25 *Leiden Journal of International Law* 575 at 595. d’Aspremont defines this process in the context of adversarial legal argumentation in international legal scholarship, which differs from the process that I am describing here.

152 Townsend, for example, has shown how courts interpret the ‘worldviews’ of indigenous applicants not as ‘descriptions’ of the environment—as indigenous peoples intend it—but as mere ‘cultural beliefs’, thereby creating forms of ‘illocutionary silencing’. She further showed how the descriptions of external, technical experts that intervene in the cases are *not* taken as expressing their beliefs but as describing the ‘environment’. In doing so, ‘the [IACtHR] treats expert claims as claims that speak to some objective reality and indigenous claims about the state of the environment as being, exclusively, claims about a belief system’. Lupin Townsend, ‘Silencing, Consultation and Indigenous Descriptions of the World’ (2019) 10 *Journal of Human Rights and the Environment* 193 at 203–204.

of life. On the one hand, thus, by fitting the applicants' concerns into specific moulds of indigeneity and traditionality, affected minorities can be granted stronger legal protection in the dominant legal systems that enclave them. On the other hand, however, these representational legal schemes reduce indigenous peoples and cultural minorities to ideals that draw on socially constructed imaginaries and risk binding their permitted lifestyles to an artificial binary of 'traditional' *versus* 'modern'. The use of specific representational and reductive tropes to fit the applicants' concerns into pre-determined Western legal moulds further increases the risks of epistemic injustices whenever the indigenous peoples or cultural minorities' concerns cannot appropriately be captured or translated into cross-institutionally shared legal discourses. Finally, the analysis revealed a lingering concern for the validity of expert-based arguments before courts, when particular anthropological findings are generalised and transposed to other cross-cultural and cross-continental human rights judicial mechanisms. Since data collection and the knowledge derived from it is always situated, the validity of expert findings is limited to the context they are derived from. This observation, however, fits uncomfortably with the increasing judicial cross-referencing witnessed in the cases. Against this backdrop, the analysis highlighted both bright and dark sides of expert-based conflict adjudication in cases of delicate trade-offs between competing interests that form part of a shared political agenda for social and ecological justice, where well-crafted and strategic arguments have far wider repercussions than the settlement of specific disputes by regional human rights courts. Let us end this article by going back to Édouard Glissant's invitation to 'displace all reduction' and, '[f]or the time being, perhaps, give up this old obsession with discovering what lies at the bottom of natures'.<sup>153</sup>

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153 Glissant, *Poetics of Relation* (1997) at 190, and *supra* opening quotation.