

## Restitution as Development?

Three hundred sixty-seven kilometers from Asunción, a nondescript dirt road branches off of Ruta 5. An old wooden gate limits passage near the highway's edge. Seemingly countless similar roads lead off the highway. Some of them are hundreds of kilometers long, but most just lead deep into ranches that span thousands of hectares. I had been keeping an eye out for this dirt road since the bus made the turn east off the Trans-Chaco Highway at Pozo Colorado. The dirt road enters Estancia Michi, which is part of the 14,404 hectares that members of Sawhoyamaxa had been trying to reclaim for years. As I peered out through the dusty bus window, I could see a retiro with faded white walls, adorned in red trim, and a large wrap-around screened porch. A corral just east of the building looked ready for use, but tall weeds signaled that it had not seen cattle for quite some time. There were also some small houses a hundred meters or so from the retiro that looked like they had been recently constructed, with a handful of people sitting in front of them drinking *tereré* in the waning sun. Speeding past the entrance to Michi, as it is locally called, I knew that Sawhoyamaxa Central was close, so I readied my bag and headed to the front of the bus to depart. Minutes later, the bus decelerated on the degrading asphalt, kicking up red dust that mixed with the warm colors of the setting sun to let me off in front of the roadside market where I was to meet Leonardo.

Ruta 5 runs east to west, bisecting Sawhoyamaxa's land as it does Yakyé Axa. Though a vital transportation link, the highway has long been considered a space that robbed vitality from Sawhoyamaxa. For decades, the highway hemmed Sawhoyamaxa into its margin as the community fought for land rights in a history like that of Yakyé Axa. In both communities, watching traffic pass was a big part of daily life on the side of the highway. Bascilio once told me, "What else is there to do when you live in that little area between the fence and the road? The majority [of people] had no work, no place to go. Sometimes they would sit all day watching buses, cattle trucks, and cars pass. . . . The traffic passes here fast. Sometimes people got hit. Sometimes they [traffic] killed one of our animals. The road is



FIGURE 10. The entrance to Sawhoyamaxa. Community members painted over the sign that once read, “Estancia Michi,” to proclaim the lands recovered. The retiro that ranchers refused to cede and that was used to surveil community actions can be seen at the right. Photo by author, February 2016.

dangerous.”<sup>1</sup> Despite its latent threat, Ruta 5 now has a different character. After reoccupying their lands in 2013, almost everyone in Sawhoyamaxa moved away from the roadside, although a few stayed to operate small stores. Whereas many people once viewed the roadside as a carceral space, for many in Sawhoyamaxa it is now a shared space for social exchange and diversion.

The roadside was full of life when the bus left me in a cloud of dust and exhaust. It was early evening, and crowds had gathered to hang out at the end of the day. Loud *kachacka* music played from the speakers of a car parked in front of the main store. People gathered to watch a game of volleyball and wait their turn to play on a court where a wire fence that once forbade entry to the land had stood. Teenagers congregated on the road in groups, talking, laughing, and checking out the scene. The smell of frying empanadas and wood smoke lured some folks to a small shop. Among those watching volleyball, Leonardo saw me depart the bus and waved me over. After shaking hands, I jumped on the back of his motorcycle, and we drove to Santa Elisa, one of Sawhoyamaxa’s aldeas.

It was dark by the time we arrived but still hot, so we sat and drank *tereré* on the front porch of Leonardo’s house—a brick and tile building painted red, in the color of the Loma Porã ranch. We first met in 2014 while waiting to attend a pretrial hearing at the Supreme Court in Asunción. That day, the former president

of INDI, Rubén Quesnel, was awaiting trial for embezzling roughly \$500,000 destined for community development projects in Sawhoyamaxa and Yakye Axa. The funds were part of the IACHR rulings on behalf of each community's case against the Paraguayan state. Both communities worked independently with Tierraviva to petition the Inter-American Commission on Human Rights in the 1990s to negotiate land restitution from the Paraguayan state after having exhausted all domestic legal options to recover their ancestral territories via the state's Indigenous rights framework (see table 1 for a summary). After several years and complex legal proceedings that I detail later in the chapter, the IACHR ruled in favor of each community. Yet, despite the unprecedented legal victories in 2005 and 2006, community members are still fighting the state to ensure implementation of the rulings. That day at the Paraguayan Supreme Court was just one of countless efforts taken over decades of struggle to advance restitution. Unfortunately, however, Court officials postponed the pretrial hearing for a future date due to a "technicality." Little did we know then that that would be one of nineteen postponements before Quesnel would be tried and found guilty in 2018. Such routine breaches of justice in the Enxet and Sanapaná cases discussed throughout the book are indicative of how legal abandonment is manifest through neglect, something Leonardo lamented about the stalled land expropriation.

The Paraguayan Congress passed Law 5194 in 2014 to expropriate 14,404 hectares of land to Sawhoyamaxa after nearly three decades of legal struggles. Nevertheless, state officials had yet to fully enforce the law more than a year after its passage. "How can there be two landowners?" Leonardo asked. "They [state officials] approved the expropriation and say that the land is ours, but Rodel's people won't leave the retiro. He still has the title." Leonardo's new home—formerly a Loma Porã ranch retiro owned by an influential landholder in Paraguay—was a testament to the quandary. More surprising was the fact that neither state officials nor company employees used physical force to remove the people of Sawhoyamaxa from the lands.<sup>2</sup> Given the history of political patronage driven by tight relationships between landed elites and elected officials, it was hard to fathom how Sawhoyamaxa could have taken *de facto* control of the land while Rodel's company had not ceded ownership. The quandary exemplifies various forms of legal liminality that beset Enxet and Sanapaná land struggles.

Here I use the notion of legal liminality to draw attention to the spaces and situations produced through legal processes that lie simultaneously within and outside the law.<sup>3</sup> Such spaces and situations are liminal in the literal meaning of the word: "occupying a position at, or on both sides of, a boundary or threshold" or "relating to a transitional process."<sup>4</sup> The condition of legal liminality is charged with political potential but always oppressed by unpredictability, an inherent effect of the limits of settler law to advance Indigenous justice.<sup>5</sup> The predictable unpredictability created by legal liminality, like waiting for food deliveries that may not arrive or having constitutional rights written that may or may not manifest

TABLE 1 Summary of main legal proceedings that precipitated the IACHR judgments

	Yakye Axa	Sawhoyamaxa	Xákmok Kásek
<i>Year of state recognition</i>	1996, though petition was initially filed in 1993.	1993, though petition was initially filed in 1991.	1986
<i>Year land claim began</i>	1993	1991	1986
<i>Area of initial land claim</i>	18,188 hectares	8,000 hectares. Claim expanded to 15,000 hectares after recognition.	200 hectares, but evolved to 6,900 hectares, then to 20,000 hectares.
<i>Major domestic legal proceedings</i>	After exhausting all legal options during 6 years, an appeal to Congress for land expropriation was denied in 1997. A state of emergency was declared in 1999.	After exhausting all legal options during 6 years, an appeal to Congress for land expropriation was denied in 1997. A state of emergency was declared in 1999.	After exhausting all legal options during 13 years, an appeal to Congress for land expropriation was denied in 1999. A state of emergency was declared in 1999.
<i>Petition to Inter-American Commission</i>	2000	2001	2001
<i>Inter-American Commission findings</i>	IACHR recommended land restitution and other measures in 2003.	IACHR recommended land restitution and other measures in 2003.	IACHR recommended land restitution and other measures in 2008.
<i>Year IACHR judgment issued</i>	2005	2006	2010

in practice, is a hallmark of the epistemic violence of selective neglect in liberal states. Bureaucratic procedures that produce legal liminality rather than resolve legal disputes regarding Indigenous self-determination legitimate the denial of Indigenous sovereignty.<sup>6</sup> An iterative process often ensues: legal liminality creates the condition for new legal processes that intend to alleviate problems that legal abandonment created.

This is evident in Paraguayan state implementation of the IACHR judgments mandating land restitution for the Yakye Axa, Sawhoyamaxa, and Xákmok Kásek communities. These cases demonstrate how legal liminality plays a dual function in settler-state governance of Indigenous life. First, legal liminality is a central, though tacit, strategy settler states use to manage Indigenous dispossession—a strategy that attempts to assuage concerns about the forms of neglect I discussed in chapter 3 by shifting attention to bureaucratic legal processes.<sup>7</sup> Take, for example, the requisite processes that Indigenous peoples must comply with to gain state recognition or to change official leadership within communities. In practice, the acts create barriers to resolving land claims because they require INDI officials with scant resources to be present in communities or community members with even fewer resources to travel to the capital city, Asunción, to follow up on administrative processes. Land restitution guaranteed in the law is delayed, but this is

done in such a way that allows state officials to suggest such delays are a matter of process rather than structural limitations. Second, legal liminality naturalizes Indigenous dispossession by foregrounding bureaucratic processes instead of addressing actual conditions that undermine Indigenous well-being. Throughout the published IACHR judgments on each of the Sawhoyamaya, Yakye Axa, and Xákmok Kásek cases, a common state narrative is evident. State officials repeatedly claimed that they are complying with Paraguay's legal procedures that uphold private property rights and that Enxet and Sanapaná claimants should choose alternative lands within their ancestral territories. Such a position effectively shifts the blame for protracted Indigenous dispossession onto communities themselves by suggesting they are refusing an equivalent resolution by taking other lands. Despite IACHR's intentions to remedy the state's rights violations against members of the Sawhoyamaya, Yakye Axa, and Xákmok Kásek communities, the politics of implementing each IACHR judgment make clear that social-spatial relations of settler colonialism cannot be undone by law alone.

#### IACHR JUDGMENTS: PROPERTY AND DEVELOPMENT AS HUMAN RIGHTS

Since issuing the "landmark decision" in favor of the Mayagna (Sumo) Awas Tingni community versus the state of Nicaragua in 2001, the IACHR has played an increasingly important role arbitrating Indigenous territorial claims in Latin America.<sup>8</sup> The IACHR's judgments produce jurisprudence widely used to support Indigenous peoples' collective property rights. In the Awas Tingni case the IACHR argued, "The concept of 'property' as articulated in the American Convention includes communal property of Indigenous peoples that is defined by their customary land tenure."<sup>9</sup> The Awas Tingni decision consequently created new opportunities for Indigenous communities across the Americas to advance land claims by articulating property as a communal, not solely individual, right. At the time of this writing, jurisprudence established in the Awas Tingni case has influenced at least eleven subsequent IACHR decisions in favor of collective property rights for Indigenous peoples of Latin America, three of which pertain to communities in Paraguay.<sup>10</sup>

The IACHR has the authority to arbitrate cases of alleged human rights abuses between victims and countries party to the American Convention on Human Rights.<sup>11</sup> However, the Court's mandate does not provide a mechanism to enforce the implementation of judgments. Thus the IACHR relies on the political will of guilty states to implement judgments in favor of victims of human rights abuses. The structure of issuing legally binding judgments with no enforcement mechanism other than voluntary state action is, in and of itself, a liminal legal arrangement. Because of this, moving from the issuance of an IACHR judgment to its implementation in situ has been a persistent challenge for Indigenous communities

that have received favorable decisions from the Court.<sup>12</sup> Paraguay is not an outlier in this problematic trend of state resistance to IACHR authority but an emblematic case of chronic malfeasance.<sup>13</sup>

In each judgment, the IACHR argued that the protracted denial of communal property rights violated Article 21 of the Inter-American Convention on Human Rights, which enshrines the right to property.<sup>14</sup> The state's violation of Article 21 resulted in several subsequent human rights violations against members of Yakye Axa, Sawhoyamaya, and Xákmok Kásek: denial of the right to life, humane treatment, personal integrity, and a guarantee of rights without discrimination, among others (table 2). The IACHR found that state officials knowingly perpetuated the dire living conditions of community members by refusing to remedy their land claims effectively. It is, therefore, through the prism of private property rights that the IACHR viewed all other human rights violations against the three Enxet and Sanapaná communities.<sup>15</sup>

The IACHR works from a premise of universal human rights but employs a pluralistic approach to adjudicating Indigenous land cases by working with Indigenous legal traditions and norms.<sup>16</sup> Given this, IACHR interpretations of human rights law and the reparations often required by IACHR judgments can be used to challenge the political-juridical norms of settler states that govern Indigenous rights. This is by no means a guaranteed outcome or the express intent of the IACHR, but it has created a new field of political possibility for Yakye Axa, Sawhoyamaya, and Xákmok Kásek. In each judgment, the IACHR ordered that Paraguay restitute land to Enxet and Sanapaná peoples and accompany land restitution with development measures that ultimately advance environmental justice. The IACHR's role in advancing Indigenous land rights across Latin America creates political-juridical openings that many communities with favorable rulings use to challenge extractive development. In this regard, the IACHR judgments on Indigenous land rights cases have been polemic, with many Latin American states and affected private industries resisting the Court's reach and its recommendations for land restitution and rights-based development.

Aside from the IACHR, NGOs and other international human rights organizations have increasingly promoted rights-based approaches to development in the past two decades.<sup>17</sup> The UN's Millennium and Sustainable Development Goals (SDGs) are arguably the most well-known efforts to promote the human rights–development nexus by creating a purportedly inclusive and environmentally benevolent vision of development. Skeptics argue that a focus on growth-oriented development lacks a meaningful vision of justice and, therefore, will fail to mitigate inequality, broadly construed.<sup>18</sup> However, the IACHR judgments on the Yakye Axa, Sawhoyamaya, and Xákmok Kásek cases chart a vision that attempts to rework the human rights–development nexus by squarely focusing on

TABLE 2 Summary of the IACHR judgments on the Yakye Axa, Sawhoyamaxa, and Xákmok Kásek cases

Community	Judgment Year	American Convention on Human Rights: Articles Violated	Deaths Attributed to the State by IACHR
Yakye Axa	2005	1(1), 2, 4(1) 21 2; 8(1), 8(2 d-f), 25	16
Sawhoyamaxa	2006	1, 1(1), 2, 3, 4(1), 5(1), 8, 19, 21, 25	18
Xákmok Kásek	2010	8(1), 21(1), 25(1), 1(1), 2, 4(1), 5(1), 19	14

Details About Convention Articles

- Article 1(1): Obligation to respect and guarantee rights without discrimination
- Article 2: Domestic legal effects
- Article 3: Right to juridical personality
- Article 4: Right to life
- Article 5: Right to humane treatment
- Article 5(1): Right to personal integrity
- Article 8: Right to a fair trial
  - (2) d–f: Innocence until proven guilty. Accused have right to defend against accusations; state will provide free legal counsel; defense may examine witnesses and call expert witnesses
- Article 19: Rights of the child
- Article 21: Right to property
- Article 25: Right to judicial protection

NOTE: The IACHR provides publicly available records about its cases via the “Jurisprudence Finder” on its website: <http://www.corteidh.or.cr/cf/jurisprudencia2/index.cfm?lang=en>.

actions that support Indigenous environmental justice—specifically, though not exclusively, through land restitution.

Every Indigenous land rights case the IACHR has ruled on to date—from Argentina to Honduras—shows a similar strategy that I call *restitution as development*. Rather than merely find states guilty of human rights violations against Indigenous peoples in instances such as these, the IACHR requires that states title land and couple it with other forms of development. The core goal is to end Indigenous dispossession by returning stolen lands to each community per the law. There is an important caveat, however. The IACHR recognizes that land restitution alone will not assuage the social, economic, and political marginalization that drives human rights violations. The approach in these cases asserts that development initiatives must accompany land restitution to support Indigenous self-determination and the pressing health, education, and housing issues created by sustained land dispossession. Restitution then becomes more than a question of merely returning land but one of enabling Indigenous communities to harness what Engle calls “the elusive promise of Indigenous development.”<sup>19</sup> While development drove and perpetuated Indigenous land dispossession in each of the cases, it seems IACHR judges view restitution as development as a path to ensure Indigenous self-determination.



Restitution as development is not without contentiousness. Indigenista NGOs in the 1980s and 1990s, including Tierraviva, embraced a “hunter-gatherer paradigm” to argue “that only large tracts of land could ensure the maintenance of this indigenous way of life and, in addition, ensure the protection of the environment.”<sup>20</sup> Based on historical fact, the leaders of Yakye Axa, Sawhoyamaya, and Xákmok Kásek leveraged this hunter-gatherer paradigm, a strategic essentialism, to file claims for lands within their respective ancestral territories. Such essentialisms do not come without drawbacks, even though they can work as a legitimate legal strategy. Not surprisingly, state officials and area ranchers objected vehemently, arguing that the claims were predicated on an expanse of land necessary to support hunter-gatherers, not settled Indigenous communities. The ARP began a concerted counter-effort that advocated assimilation and agrarian development to deal with the Chaco “indian problem.”<sup>21</sup> ARP members, many of whom are elected state officials, argued, and some still do, that the Indigenous peoples of the Bajo Chaco live as peons who do not need access to large areas of land based on historical occupation and use. This logic reduces life to a class relation mediated through property (i.e., peons don’t need land) rather than understanding life as based on dynamic relations that supersede the limits of class relations.

One former head of the ARP Indigenous Affairs Commission and co-owner of Estancia Salazar told me, “There is no need to purchase large tracts of land for the indians! They are not hunter-gatherers and do not need large extensions of land. They are peons! Campesinos! If anything, INDI should teach them how to work, buy some cattle, and find a small piece of land to make a community where they can live. They can work on ranches or do other things to make money. The indians would take that, but the NGOs won’t let them because they make money off of indian suffering!” After our extended interview, he lent me a photocopy of an old presentation that he regularly gave in the 1990s and early 2000s. Comprising 108 slides, the presentation argues for assimilation. One of the slides is titled with the question, “Can they return to the forest?” and displays an Indigenous man on horseback in front of an estancia building. The notes below the image state that the man depicted is an “Indigenous office worker” who, like his colleagues, “wears Adidas shoes” and “dances in the best discos of the capital city.” By asking, “Can they return to the forest?,” the author suggests a teleological notion of social change inferring that the Enxet and Sanapaná peoples who labored on his ranch were bound to wage labor as the basis for social reproduction instead of other pathways community members might choose for themselves if given the opportunity.<sup>22</sup>

The influence of the ARP and its arguments about hunter-gatherers on state responses to Enxet and Sanapaná land claims is evident in the proceedings of the IACHR judgments. The state’s legal counsel argued against returning the lands specifically claimed by Yakye Axa and Sawhoyamaya because they were occupied



by ranches. Instead, the counsel suggested the mobile traditions of many hunting and gathering societies negate their rights to claim any specific site and that they should accept any land within their broad territories.

It is remarkable that while both Yakye Axa and Sawhoyamaya indigenous communities belong to the same ethnic group, the Enxet-Lengua,<sup>23</sup> they each claim territories so very distant from each other. When each group separated from the other to form a different community, they “chose” particular land spaces as belonging to “their ancestors,” based on little more requirements than their own whim. Historically, the areas they moved about cover a much larger area within the Chaco territory, for which reason their stubbornness in claiming estates that have been declared rationally exploited and held under lawful property title is a token of intolerance and shows their willingness to hinder the endeavors of Paraguay.<sup>24</sup>

I want to underscore several points made by the state’s legal counsel in the Sawhoyamaya hearing. First, the argument rejects the material fact that the lands claimed by Enxet peoples of Sawhoyamaya and Yakye Axa have specific historical and cultural importance to community members, a core premise of Indigenous rights in domestic and international law. Enxet land claims evoke the multiple relationalities that community members have with specific sites, something lost in the state’s purely political economic rationale. Second, the dismissive language suggesting that the claims are merely stubborn, whimsical, or intolerant map onto racist tropes used to frame Indigenous peoples as acting without intentionality or purpose. Third and finally, how the state’s language about Enxet mobility hindering development resonates with early Anglican missionary imperatives to stem the “wandering instincts” of Indigenous peoples through the imposition of private property to facilitate ranching.<sup>25</sup>

In its ruling on the Sawhoyamaya case, the IACHR roundly refuted the state’s arguments: “The Court considers that the fact that the claimed lands are privately held by third parties is not in itself an ‘objective and reasoned’ ground for dismissing *prima facie* the claims by the Indigenous people. Otherwise, restitution rights would become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations.”<sup>26</sup> Further, the IACHR elaborated on the fact that Enxet peoples had not voluntarily ceded their lands or made the lifestyle changes they had adapted to but were forced to make them given the colonization of the Bajo Chaco and near-total usurpation of their territories by settlers. Following a similar legal argumentation in the Yakye Axa, Sawhoyamaya, and Xákmok Kásek cases, the IACHR thus ordered Paraguay to demarcate each community’s land, transfer property titles, and then implement a series of measures within three years of titling to meet specific goals: the payment of predetermined community development funds alongside the provision of basic medical services,

TABLE 3 Summary details about restitution measures ordered by IACHR

Community	IACHR Judgment Year	Compliance through 2022	Community Development Funds to Be Paid	Other Notable Reparations
Yakye Axa	2005	Partial	US\$950,000	No payment issued for death of community members.
Sawhoyamaxa	2006	Partial	US\$1,000,000	Land demarcation and title to be issued within three years of judgment. US\$380,000 paid for the deaths of 17 community members. Provide identity documents to all community members.
Xákmok Kásek	2010	Partial	US\$700,000	US\$260,000 paid for the deaths of 14 community members. Provide identity documents to all community members. State will incur a US\$10,000 fine for each month of delay, to be paid to community members. Construct community health center.

NOTE: In all three communities, the IACHR ordered Paraguay to provide delivery of potable water and food rations, basic medical services, protection of the claimed lands until claims could be resolved, and public admissions of guilt by state officials, among other measures.

potable water, and food rations until state officials could satisfy the demands for land restitution (table 3).

That the IACHR employs a vision of Indigenous well-being that is more comprehensive than land restitution or economic development is laudable. Despite these intentions, the actual implementation of restitution as development by Paraguayan state officials is highly problematic. The temporal condition of restitution as development—that the state should implement all measures within three years—intends to create dramatic change over a short time frame. The three-year window also created an expectation in the three communities that their long-standing dispossession of land would soon be resolved. Yet at the time of this writing more than fifteen years have elapsed since each judgment, and restitution as development is still unresolved. This protracted process of legal abandonment produces spaces and situations of liminality in which rights-bearing subjects are denied those rights yet always promised that resolution will soon come, ensnaring Indigenous peoples in veritably endless bureaucratic and juridical processes that deny the ability to live without everyday forms of environmental violence.

### RATIONAL EXPLOITATION AND RACIAL GEOGRAPHIES

In March 2013, after twenty years on the margin of Ruta 5, the people of Sawhoyamaxa cut the fence and crossed onto the lands they had long claimed. Carlos, the longest-serving leader of Sawhoyamaxa, reflected on the decision during a workshop Tierraviva facilitated in Xákmok Kásek that brought leaders from Yakye Axa, Sawhoyamaxa, and Xákmok Kásek together to share lessons learned. Sitting under a grove of algarrobo trees on newly constructed benches, Carlos, Anivel, Clemente, and Serafin talked candidly about their luchas. In total, about forty people from Xákmok Kásek sat and listened to the conversation that Óscar, a lawyer for Tierraviva, facilitated. Talking with Anivel about the fact that Yakye Axa remains on the margin of Ruta 5, Carlos said, "For me, living on the side of the road for over twenty years was prison. Until we reoccupied our land, we lived in prison." His words echoed those of Belfio, whose entire life has unfolded on the margin of the highway. "People got sick. They died. We suffered. . . . The state didn't do anything. We had to reoccupy our land. We don't have the title yet, but now we are free from the road."<sup>27</sup>

The reoccupation was a risky but well-calculated strategy to pressure state officials to implement restitution as development. As Ireneo, a former Tierraviva lawyer, once told me, the community grew tired of waiting and decided to "implement the [IACHR] judgment themselves."<sup>28</sup> Self-implementation was an act of self-determination intended to change the liminal state of being on the side of the road that had long plagued Sawhoyamaxa. The reoccupation contests the normative social-spatial order of cattle ranching while impelling the Paraguayan state to adjudicate the law—either in favor of the community or in favor of the ranchers. One year after the reoccupation, the Paraguayan Senate voted to approve Law 5194/14, the expropriation of 14,404 hectares to Sawhoyamaxa in the name of "public interest." The expropriation was a historic act. Indigenistas hailed it as a watershed moment for Indigenous rights in Paraguay.<sup>29</sup> Never before had state officials moved to force a Chaqueño rancher to cede private property in favor of an Indigenous community. An irrefutable crucial legal victory, it also unexpectedly created new legal liminality.

The 14,404 hectares expropriated to Sawhoyamaxa are part of a 60,000-hectare ranch owned by Kansol S.A. and Roswell S.A., subsidiary companies of Grupo Liebig, a Paraguayan cattle ranching, timber, and real estate consortium with landholdings across the country. At the time of my field research, however, state officials had yet to enforce the expropriation fully or issue title to Sawhoyamaxa. The resulting condition is persistent uncertainty that draws ranch staff and the Sawhoyamaxa community into conflicts over land control. Beyond merely reoccupying the land, community members built homes, gardens, and soccer fields, and each aldea has a small schoolhouse with state-licensed teachers. Each aldea

purchased a small herd of cattle using some of the community development funds awarded in the IACHR judgment. Without doubt, Sawhoyamaxa is a lively community of several hundred people who are actively working to rebuild relations with their land. However, at the time of this research Kansol and Roswell still owned the property, technically. The company had not ceded title, refused to accept payment, and, through early 2019, still occupied the main retiro at the former Estancia Michi. Sawhoyamaxa is now the *de facto* landowner, yet does not legally own the land because the community does not hold the title.

The situation draws to light ambiguities in Paraguayan property law that produce legal liminality. The 1964 Agrarian Statute that dictates the governance of property rights in Paraguay vis-à-vis Article 109 of the Constitution states that “rationally exploited” land cannot be expropriated without landowner consent. Land actively used for economic gain, particularly livestock and agricultural production, is the crown jewel of so-called rational exploitation in Paraguay, but so are lands with “improvements.”<sup>30</sup> In this view, improving land means making investments by building infrastructure or enacting other activities geared to generating income. Without explicitly stating as much, this constitutional clause fundamentally enshrines property rights along class-based and, therefore, racialized lines by establishing a principle of economic production as the pinnacle of rights to property in land. The dispossession of Enxet and Sanapaná coupled with efforts to produce a landless, disposable labor force to work on ranches all but ensures that Indigenous peoples of the Chaco are excluded from the economic means to purchase land, let alone invest in extensive “improvements.” The structure of property rights as such ensures the recursive dispossessions that juridically and spatially situate Indigenous peoples simultaneously within and outside the protection of the law.<sup>31</sup>

Unsurprisingly, Kansol and Roswell representatives have long contested the law of expropriation, arguing that the land is rationally exploited, thus not subject to usurpation without consent to sell. During an interview, the company’s then-acting chief administrator and legal representative explained to me how the company identified an alternative parcel of land, Estancia Pedernal, owned by the Paraguayan military, that his company wanted Sawhoyamaxa to accept instead of the land at Michi and Santa Elisa. Citing Law 904/81, the administrator argued Pedernal would be easy to transfer because it is state-owned land, whereas Michi was “rationally exploited, productive land.” He gave me several documents detailing the investments that the company had made to “improve” the land by constructing stock ponds, fencing, pastures, and retiros.<sup>32</sup> As we discussed the case, the administrator grew increasingly animated, his voice rising in frustration. “The anthropologists say that the people of Sawhoyamaxa are Chanawatsan ‘of the river’ with a 250,000-hectare territory. Pedernal is 12 kilometers from the river, where they can fish. Michi is 40 kilometers from the river and is ranching land. The only reason they are there is because NGOs trucked them there in the nineties and manipulate

them to make money.” His last point reiterates a common talking point about the Enxet and Sanapaná land claims—that they were only made because NGOs guided the process and prolonged Indigenous dispossession to make money. The administrator then pivoted: “We are not against the rights of the Indigenous but are against an expropriation that we view as a breach of justice. How is it just to expropriate rationally exploited land the national constitution of the Paraguayan Republic states is inviolable?” The administrator’s argument echoes those that the state’s legal counsel made in the IACHR hearings—that the selection of Michi and Santa Elisa is arbitrary and thus all lands within the territory are interchangeable.

IACHR interpretations of Indigenous rights, however, challenge the supremacy of private property over the collective property rights of Indigenous peoples, if upholding the former violates the latter. In its interpretation of Paraguayan property law and the rights guaranteed by the American Convention on Human Rights, the IACHR unambiguously rejected the notion that privately held land cannot be expropriated to Indigenous communities: “This argument [about rational exploitation] lodges the idea that Indigenous communities are not entitled, under any circumstances, to claim traditional lands when they are exploited and fully productive, viewing the Indigenous issue exclusively from the standpoint of land productivity and agrarian law, something which is insufficient for it fails to address the distinctive characteristics of such peoples.”<sup>33</sup>

Without saying as much, the judgment flags the racialized and classist logics that privilege economic production and assume that Indigenous peoples use land irrationally—a long-standing trope employed to undermine Indigenous land claims across Latin America.<sup>34</sup> “Rational exploitation” concerning Indigenous land claims operates on a discursive register that situates Indigenous peoples outside of activities that are, or could be, economically productive, a reductionist stereotype that effectively frames Indigenous peoples as prior to capitalism to justify a politics of exclusion.<sup>35</sup> The notion of rational exploitation also erases the history, and present, of Indigenous labor in such so-called productive systems. This is precisely why I focused on the role of Indigenous labor exploitation in earlier chapters of the book. On its face, the discourse of rational exploitation upholds the “productive pioneer” and “intolerant” Indigenous trope so often used to justify taking Indigenous lands. The IACHR judgment can be read as charting an alternative legal geography of property that exposes the reticence of Paraguayan law to reconcile the liberal rationalities of “productivity” used to defend racialized regimes of land control and dispossession.

Tensions between interpretations of property as an economically productive resource or as a communal good in Paraguayan law intersect with what Stocks argues is a significant obstacle to Indigenous land restitution in Latin America, that it is seen as “too much [land] for too few [people].”<sup>36</sup> While working in Sawhoymaxá, however, I frequently heard community members ask a rhetorical question that evokes the inverse of the problem Stocks discusses: “Why does one

[white] man need 60,000 hectares of land when we are a community of over one hundred families that have no land?" The notion of rational exploitation, in this case, frames Indigenous communities as actors not worthy of the land rights they are legally guaranteed, further upholding the primacy of settler land control while exacerbating legal liminality for Sawhoyamaxa. The lack of resolution regarding expropriation has led to physical violence, to which I now turn.

The morning of June 17, 2015, was gray and brisk, like many winter days in the Bajo Chaco. The cold, damp weather made it difficult to leave the tent where I was staying in Xákmok Kásek. However, Serafin and two journalists had to make it to Pozo Colorado by 8:30 a.m. to meet with folks from Tierraviva who were headed to Sawhoyamaxa for meetings about the expropriation. The four of us soon loaded in the little-used SUV I had recently purchased and set off, talking about the progress of both communities' ongoing land claims. We met with Ireneo in Pozo Colorado, where Serafin and the journalists got out of my truck, then loaded into the Tierraviva pickup to head off for Sawhoyamaxa. I returned to Xákmok Kásek to attend a meeting I had been asked to record. During the meeting, Serafin texted to say that things had not gone well in Sawhoyamaxa.

Accompanied by their legal counsel and Paraguayan police officers, two Sawhoyamaxa leaders, Carlos and Bascilio, approached the retiro at Michi to request that the ranch staff who were occupying the building vacate the property. During the exchange, the manager of the Loma Porã ranch owned by Kansol and Roswell drew his pistol, aimed it point-blank at Bascilio, and refused to leave. Fortunately, he did not pull the trigger, and the event was captured on film by one of the journalists that accompanied Serafin. Yet despite more than forty witnesses and the video recording of the lethal threat, the police did nothing to reprimand the ranch manager. Moreover, the local district attorney never pressed charges against the administrator, despite community requests and ample evidence.<sup>37</sup>

The incident clearly shows the impunity with which many ranchers in Paraguay's Chaco violate state law by creating their own social-spatial order based on the logic that rational exploitation foment. <sup>38</sup> Law 5194/14 upholds communal property as the assumed solution to Enxet dispossession. But expropriation in and of itself fails to alter the underlying power relations that perpetuate the legal abandonment of Sawhoyamaxa and supports settler colonialism and white supremacy. State authorities claimed they had done "everything possible" to advance the case by passing Law 5194/14, upholding the constitutionality of the law, and arguing that Liebig is responsible for accepting payment and ceding the property title.<sup>39</sup> I disagree. State officials have not enforced the expropriation because many of them seek to maintain a social-spatial order amenable to landed patrones. Indeed, many elected state officials have direct ties to the ranching and soybean industries. Failing to enforce the expropriation maintains legal liminality where Sawhoyamaxa rights are unstable, the Janus face of inclusion/exclusion on which legal abandonment operates.

When I visited Sawhoyamaxa for this research, particularly between 2015 and 2017, many community members would ask if I thought the state or Kansol

and Roswell staff would forcibly dispossess them of the land again. I never had a ready reply. The question had long been an open one, with little to indicate any sort of viable resolution on the horizon. The state's failure to uphold the law of expropriation or resolve either party's claim to the land produced uncertainty and the de facto suspension of Sawhoyamaya rights. At the same time, failure to expropriate the land emboldened Kansol and Roswell by tacitly indicating their claim to the land was valid despite the ratification of Law 5194/14. The situation resulted in two parties each with a legal position to claim ownership, both entitled to own the land but neither being able to fully use it as they intended. In many ways, the Yakye Axa community has navigated a similar type of legal liminality, simultaneously owning land but not being able to access or use that land and thus remaining incarcerated on the margin of Ruta 5.

#### "AN ISLAND SURROUNDED BY PRIVATE PROPERTY"

Members of the Yakye Axa community first learned to be ranch laborers on the Anglican mission station El Paso that was established on these lands before they changed hands to become the Loma Verde and Maroma ranches. Despite this long connection with the land, armed men patrolled the boundaries of Loma Verde in the 1990s after the community claimed the lands. Inocencia Gómez recalled these men in her testimony to the IACHR: "At Loma Verde estate, an individual was stationed as the place's 'matador,' who walks alongside the wire fence with a shotgun, threatening the children and women, because he is under orders to not allow anyone to enter for firewood or water."<sup>40</sup> The *matadores*—literally, "killers"—no longer patrol the fences. Yet memories of that violence haunt community members, who still need to cross the fence to get drinking water from stock ponds, collect firewood, or hunt game on the ranch property. "We suffer on the side of the road. We used to suffer even more because they prohibited us from entering the private lands to get water or hunt," Veronica Flores explained. "They would shoot in the air over our heads if we entered their land. We could not get water or even wash clothes. They made us stay on the side of the road. It is so painful some people cannot even think of it."<sup>41</sup> Crossing the fence is a necessity because there is no viable agricultural land, no place to hunting or to collect firewood, let alone get drinkable water, on the highway's margin.

Yakye Axa is only 56 kilometers from the Paraguay River as the *tuyuyú* flies.<sup>42</sup> The entire area that comprises this part of the Chaco is a vast, flat alluvial plain that is subject to seasonal flooding and droughts. Consequently, Ruta 5 is constructed on a small levee to protect it from the floods that regularly inundate the region. The marked differences in precipitation regimes between the wet and dry seasons convert the predominantly clay soils to a surface that is either baked rock hard by the relentless sun or quickly turned to slick mud by rain. The elevated road ensures that traffic can pass during the rains but effectively limits the flow of surface water, exacerbating flooding along the side of the highway. The homes built in the margin





FIGURE 11. The fence that separates members of Yakye Axa from the lands that contain the site of yakye axa. Photo by author, July 2016.

are regularly flooded. On one wet day, I spoke with Inocencia, who described the effect of the rains: “You see? When it rains, there is mud everywhere. My house fills with mud. Just like pigs. That is how they [state officials] think of Indigenous people, like we are animals. They leave us here to suffer instead of giving us what the law says is ours, our land.”<sup>43</sup> The cargo trucks that careen down Ruta 5 hauling cattle, *carbón*, and contraband pose a lethal threat to the people of Yakye Axa. Passing traffic has struck, killed, and maimed several people during Yakye Axa’s tenure on the margin. Unlike the fast-moving traffic, there is a commonplace slow violence. Basic illnesses become grave threats. The promise of leaving the road one day brings hope but also the enduring trauma of uncertainty. Despite the urgency of the challenges that confront Yakye Axa, which are well known, state authorities have only haltingly implemented restitution as development.<sup>44</sup>

#### ALTERNATIVE LAND FOR WHICH THERE IS NO ALTERNATIVE

Following the 2005 IACHR judgment, the Paraguayan state repeatedly failed to negotiate the purchase of the Loma Verde ranch for Yakye Axa. The IACHR foresaw this as a contingency, stating: “If for objective and well-founded reasons the claim to ancestral territory of the members of the Yakye Axa Community is not possible, the State must grant them *alternative land*, chosen by means of a consensus with the community, in accordance with its own manner of consultation

and decision-making, practices and customs.”<sup>45</sup> Seven years after the IACHR judgment, in 2012, members of Yakye Axa had grown weary of waiting on the margin of Ruta 5 and agreed to accept an alternative parcel of land to resolve their claim because Loma Verde ranch owners would not sell and the Senate would not vote to expropriate. “It was a hard decision,” Veronica Flores lamented. “But the Loma patrón did not want to sell. . . . We agreed to take the land because the state said they would build us an access road. Life on the highway is hard, and we suffer a lot here, so we decided to accept the alternative land.”<sup>46</sup>

In annual reports to the Inter-American System, Paraguayan authorities touted the purchase of the land as part of their compliance with the IACHR judgment.<sup>47</sup> Yet state reports did not mention that the alternative land is 60 kilometers from where Yakye Axa is located on the side of the highway. The only way to access the alternative land is by private roads that cross a patchwork of ranches demarcated by a grid of fences with locked gates that render the new site for Yakye Axa effectively inaccessible. If the community were to relocate to the land without the construction of a public access road, they would not be able to leave, because at least 20 kilometers of private property enclose the land in every direction. As Marciano, the man whom I later took to the hospital because his arm had been crushed in a logging accident, told me in March 2015, “In the Enxet language *yakye axa* means ‘palm island.’ The state couldn’t buy us the land we originally claimed where Yakye Axa is, so now we have a different island. It is an island surrounded by private property.”<sup>48</sup>

In March 2015, I was invited to join leaders of Yakye Axa along with a handful of other community members and two lawyers from Tierraviva on a trip with state officials to investigate and map a potential route to construct an access road to the alternative land.<sup>49</sup> After departing Ruta 5, it took three hours to complete the remaining 35-kilometer trip. Subject to flooding and only transited by ranch staff traveling on motorcycle or horse, the forest closed in around most of the roads. Our trip required crossing through five locked gates, a feat we could only achieve because of court orders mandating the investigation. To pass through each gate, we had to stop, then search for and negotiate with someone who had the keys. Ranch gatekeepers were hesitant to give us passage because the presence of state officials or anyone not associated with the ranches is rare in these parts.

The final ranch we needed to cross to access the Yakye Axa land, Tamarindo, was the most resistant to our requests. The Tamarindo patrón argued with Tierraviva lawyers for an hour as we all stood in the sweltering sun. He threatened to deny us passage and proclaimed he was the authority in the area—not the state. Extolling his rights as a private property holder, he declared that he would fight the construction of an access road across his property at all costs. Throughout the conversation, our police escorts were silent. Their silence echoed loudly. It reflected the legal abandonment of Enxet rights as the police seemed ambivalent about enforcing the court orders that granted us unimpeded access to the Yakye Axa property; instead, they relied on community leaders and their legal counsel

to negotiate passage. Eventually, the patrón conceded, with the condition that his lawyer, who happened to be at the ranch, accompany us. Before we left, the patrón declared that he would not give “indios, indigenistas, or anyone else” permission to cross his land in the future no matter what state authorities said. The patrón’s defiance underscored the fact that ranchers have for the most part operated with little state interference since the Anglican-led colonization of the Bajo Chaco. While many people decry the absence of the Paraguayan state in the Chaco, ranching patronages have long established and operated through their own social-spatial order. Challenging that order is always a fraught act.

With the patrón’s lawyer joining our group, we drove the final 12 kilometers across the ranch to the southern boundary of the alternative land. Aside from the two leaders of Yakye Axa, this was the first time the other community members on the trip had set foot on the alternative land. The mood was a mix of excitement, anxiety, and procedural banality as we walked a couple of kilometers from our trucks to the property line, then crossed onto the alternative land and made our way to an old retiro. The site was overgrown with waist-high grasses and the material traces of bygone infrastructure erected by conscripted Indigenous labor in the service of cattle capitalism. Taking refuge from the sun in the shade of the porch, Anivel and Anibal discussed the logistics of building the road to the land with representatives of the Ministry of Public Works and Communications (MOPC), INDI, and their legal counsel. At the same time, other community members surveyed the surroundings and dreamed about how to rebuild the community in that place unknown to them. A couple of us walked about the area surveying old fruit trees and speculating about the quality of the soil for gardening. Community members talked with cautious excitement about finally being liberated from the margin of Ruta 5. Though the trip was years in the making and took hours to complete, the quickly fading sun cut our time short.

On the return to Ruta 5, I sat in the back of a pickup with a couple guys from Yakye Axa. We bounced down the dusty dirt track in silence, tracing our path across ranch after ranch. Unspoken but likely on all our minds was the question of when the community would be able to occupy their land. Three years had already passed since the state bought the land, leaving Yakye Axa stranded not on an island but on the margin of Ruta 5, where a generation of children had grown up watching cars pass but having nowhere to go themselves. The visit to the alternative land was a clear reminder of how “the practices of legal abandonment do not simply happen anywhere; they are always accomplished through particular material and symbolic geographies.”<sup>50</sup> The physical spaces of exclusion on the margins of cattle ranches and the laws that the state itself regularly violates contradict the symbolic geographies and imaginaries of liberal democratic states that protect their Indigenous citizens through multicultural policies. The valences of legal abandonment are multiple, connected across counter-topographies of ethnicity, labor, and racism across the Americas.<sup>51</sup>

Several months after our visit to the alternative land, in July 2016, I sat with a group of eighteen people on the side of Ruta 5 in Yakye Axa.<sup>52</sup> The goal of the



FIGURE 12. Walking from the trucks to the alternative land. Photo by author, March 2015.

discussion was to consider how things have changed for community members since the IACHR issued its judgment in 2005. At one point in the conversation, people reported that since the state purchased the alternative land, several community members have died or been seriously injured as a result of living conditions on the roadside. Throwing her arms in the air, Jorgelina Flores made this clear: “We set up here because we thought that we would get the lands that are truly ours. But now we have to go to another place. That is what hurts me. I am no longer at peace because our family members who have died are here. There are many. Many are in our cemetery here. That is why we don’t want to let this go, that is why I don’t want to let this land go.” Her voice cracked as she spoke, until she began sobbing. “My father died here. I can’t do it!” Jorgelina yelled. “How can I leave my father here on the side of the road? To this day I hurt so bad just thinking of it. I will not go once the community moves because I cannot leave him here. That is why I don’t want to go to another place! There is no cure for the *patrones* [Ndairemediio pa la patrónkuera]. They just want to take the Indigenous lands!”<sup>53</sup>

With each passing year that state officials do not comply with the IACHR or implement restitution as development, feelings of neglect, destitution, and indignity among affected community members grow. Another participant proclaimed, “They [state officials] bought us land but never built a road. We watch them drive by on the highway all the time while we are here on the side of the road. . . . One thing that we have learned is that they do not care about the poor or the Indigenous. If they did, they would have built the road a long time ago.”<sup>54</sup> That the Paraguayan state has not dedicated the resources necessary to complete the road



is more than bureaucratic malfeasance. It is a pedagogy with a clear lesson: Indigenous lives matter less to the state than the political economy of cattle ranching and export-oriented development that many other roads in the Chaco facilitate.

Over the years I have worked with Enxet and Sanapaná peoples, it has also become clear that the psychological and emotional toll of having rights while being continuously denied those rights is often more pernicious than direct physical violence. Legal abandonment exacerbates this violence by ensnaring Enxet and Sanapaná peoples in perpetual states of liminality, without resolution: people live as the dispossessed owners of land, on margins between roads and fences, and with rights at the heart of the nation's founding creed that are never guaranteed. Frantz Fanon's *Black Skin, White Masks* elucidates the epistemic, embodied violence of colonialism in its operation on the psyche of the colonized. Building on that work, Fanon later argues, "The colonized world is a world divided in two."<sup>55</sup> Settler colonization produces racial geographies that delimit different worlds where a constant but unresolved tension between inclusion and exclusion marks the condition of being a subject of rights whose rights are actively denied.

The recognition of rights and the constant denial of those rights produce suffering and shame, exemplified by Inocencia's assertion, "That is how they [state officials] think of Indigenous people, like we are animals." The indignity illustrated by such statements is accompanied by shame when people cannot live a dignified life or practice vital acts like burying their family members in accordance with their traditions because land dispossession prevents them from doing so. Shame is a tool, and product, of colonization. As Bessire observed of the colonization of Ayoreo territories in northern Paraguay, "Shame was . . . the testament to the fact that the conditions of life and being were never quite possible."<sup>56</sup> Occupying epistemic and ontological spaces between in/humanity and being the subject of rights whose status as such is never guaranteed is the dilemma of legal liminality and the aporia that the condition presents.

#### ARRESTED

In June 2016, MOPC began building a crossroads that links Yakye Axa and Sawhoyamaxa in new ways. "Crossroads" is often used to indicate a metaphorical conjuncture where change is imminent, albeit unknown. But it is also a synonym for an intersection. Postcolonial feminist geographers argue that intersectionality reveals how difference and oppression operate spatially.<sup>57</sup> The new road construction materially links Yakye Axa and Sawhoyamaxa land struggles to render visible intersections between legal liminality and environmental racism.

Instead of building on the route we investigated in early 2015, the new road bisects the land expropriated to Sawhoyamaxa. MOPC officials suggested the new route would be quicker to construct because it bisects Sawhoyamaxa, a community sympathetic to the Yakye Axa struggle, as opposed to the Tamarindo patrón.

Although promised to be completed in three months, construction of the Yakye Axa access road has proceeded at an excruciatingly slow pace. At the time of this writing, MOPC has yet to complete the road. The Payseyamexempa'a and Kelyenmagategma Enxet communities that border Yakye Axa's alternative land also stand to benefit from the access road. The annual rainy season regularly cuts both communities off from accessing needed services. Several people, notably children, from Payseyamexempa'a have died in recent years because they could not secure necessary medical attention due to the absence of passable roads during the rainy season.<sup>58</sup> For this reason, the Yakye Axa community refuses to occupy the alternative land prior to completion of the access road. Construction of the access road also sheds light on the liminal legal status of the Sawhoyamaxa expropriation. When initiated, it bolstered Sawhoyamaxa's *de facto* rights to the contested 14,404 hectares by legitimating expropriation insofar as the construction occurred with community approval and in opposition to Roswell and Kansol. The road opens new ways for Sawhoyamaxa community members to access hunting and fishing grounds deep within the property. However, the new road runs in front of the house that ranch staff occupied, allowing them to monitor and catalog Enxet activities the company deemed illegal in continued efforts to overturn the expropriation. Restitution as development is the IACHR's attempt to bridge the gap between *de jure* and *de facto* rights. In theory, this gap can be closed by new jurisprudence and requiring that guilty states make reparations and policy changes to improve the material conditions of life for victims of human rights violations.<sup>59</sup> Yet the piecemeal implementation of restitution as development is akin to what Radcliffe calls the "crumbs from the table" of poorly devised and practiced policies of participation, so often used to paper over development interventions on Indigenous territories.<sup>60</sup>

This chapter's title poses a question: Restitution as development? It is a question on the minds of many people who live in Yakye Axa, Sawhoyamaxa, and Xákmok Kásek. Anibal once noted, "It has been eleven years since the Court [IACHR] made the judgment. We are still here on the side of the road, suffering, waiting for the state to respect our rights."<sup>61</sup> Many years have passed since Anibal spoke those words. Meanwhile, the state has garnered nearly \$2 billion in financing to construct new roads in the Chaco with much fanfare around the "Bi-oceanic highway" that will bisect the region from east to west, a duplication of the Trans-Chaco Highway, and the reconstruction of Ruta 5 that runs through Yakye Axa. MOPC pushed these new projects around the clock, even during the height of the COVID-19 pandemic. Meanwhile, construction of the short dirt road to Yakye Axa's alternative land has been arrested for over a year, just as the lives of those who have lived in the margin of Ruta 5 have been arrested for more than a generation.