3-8-2021

Self-determination as resistance to legal violence: Jurisdiction, property, and the geographies of conflict in Unistoten and Xolobeni

Daniel Luke Huizenga
Osgoode Hall Law School of York University (Student Author)

Self-determination as resistance to legal violence: Jurisdiction, property, and the geographies of conflict in Unistʼotʼen and Xolobeni

Daniel Huizenga

A Thesis submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Master of Laws

Graduate Program in Law
York University
Toronto, Ontario

November 2020

Abstract

Indigenous peoples' struggles of the right to self-determination are often framed as claims against a unified state. However, explanation of the forces inhibiting the expression of Indigenous self-determination should not settle with an understanding of the imposing power of the state. As I show, the realization of self-determination is undermined by the cumulative effects of legal practices and knowledges that contribute to the division of collective autonomies and disruption of their governance practices. In this transnational and comparative work on the emerging 'right to consent' to resource extraction in South Africa and Canada, I argue that we might understand these dynamics by examining self-determination as a response to legal violence. I explain that legal violence in contemporary post-colonial conditions is expressed spatially through the categories of property and jurisdiction. One of the effects of conditions of legal violence is not only dispossession, but that Indigenous peoples' assertions of self-determination and autonomy face settler counter-claims decrying 'internal conflict' as evidence of subaltern political instability and inferiority. The analysis covers local contexts, national jurisprudence, and transnational norms related to the right to consent in both countries.

Acknowledgements

This thesis was written while living in the City of Toronto. Aside from a few landmarks, this urban landscape nearly completely erases from view the traditional territories of the Mississaugas of the Credit, the Anishnabeg, the Chippewa, the Haudenosaunee, and the Wendat peoples. Treaty 13, signed with the Mississaugas of the Credit, as well as the Williams Treaties signed with multiple Mississaugas and Chippewa bands, also overlay this space, despite their acknowledgement in text only. Yet, the histories, cultures, and lifeways of First Nations on this territory and beyond are beginning to inform the city in more significant ways, including (in one example relevant to this work) through protests demanding recognition of Indigenous sovereignty. The practice of writing this thesis was one quiet way that I have been able to acknowledge the history of First Nations in the specific urban place where I live, in Canada more widely, and internationally. The acknowledgement is an ongoing practice.

I am very grateful for the Graduate Program in Law at Osgoode Hall Law School for providing me with the space, support and community needed to complete the research and writing for this thesis. My supervisor, Ruth Buchanan, offered patient support and direction as I developed the arguments in this work. She maintained a sense of space for creative exploration while also helping me identify and explain the foundations for my arguments before they became too unwieldy. Early in my degree Ruth asked me to identify the ‘stone in my shoe’ as I tried to focus the project. The problem, however, that I was not warned of, was that once I identified the stone it did not diminish, it enlarged and became more consuming. I am forever grateful for the advice. Thanks to my reader Dayna Scott and my external examiner Anna Zalik for their engaging and discerning criticisms and comments on the work. I am also grateful for financial support from the Nathanson Centre on Transnational Human Rights, Crime, and Security from September 2018-April 2019 and the community it offered during my research.

Table of Contents

Chapter 1: Self-determination as resistance to legal violence

Introduction

We are witnessing an Indigenous resurgence in Canada and South Africa. Two cases, happening nearly in parallel, are illustrative of the power struggles between the state and Indigenous peoples' rights to land and territory in both countries. In Canada, the Wet'suwet'en Hereditary Chieftaincy has inspired people across the country to join mass protests and blockades of railways in support of their efforts to uphold Indigenous laws in the context of a natural gas pipeline being built across their unceded territory. In South Africa, the Amadiba Crisis Committee (ACC) has celebrated a court victory declaring their 'right to say no' to resource extraction on their land in Xolobeni, a statement that has inspired protests and social movements across the country and region.[1] In both countries those on the front lines have unmasked colonial-era power and left states scrambling to maintain the legitimacy of laws that are directly linked to, or reflect, colonial strategies of land dispossession and control of natural resources.

In both cases we are witness to national reconciliation narratives punctuated by localized violence. The Wet'suwet'en Hereditary Leadership and its supporters, as well as leaders from the Xolobeni community, condemn the efforts of state and corporate actors by referring to their violent effects. Their assertions of self-determination and collective autonomy are narrated through a language of conflict. 0They refer, as I show throughout the thesis, to both the violence

[1] See Amandla Media, 'We Communities Have Been Saying No!' https://www.youtube.com/watch?v=SemHA4uhM90 (2020); WOMIN Collective (2020) *Beyond Extractivism: Reclaiming Peoples Power, Our Right To Say No!* At: https://womin.org.za/our-work/main-support-activities/beyond-extractivism-reclaiming-peoples-power,-our-right-to-say-no.html; Thematic Social Forum (2020) 'Resisting mining and extractivism: The Right to Say No Campaign'. At: https://www.thematicsocialforum.org/resisting;

of imposed resource development, as well as to the conflicts that have emerged within and between their communities as a result of the resource development projects.

In fascinating parallel, in Unist'ot'en and Xolobeni, disagreements and power struggles are represented as revealing a conflict between hereditary leadership, elected and state recognized indigenous leadership, state actors, and corporations. The simple narrative goes something like this – the majority and elected Indigenous leadership agree to the proposed resource extraction, there is a small group of peoples following the lead of unelected hereditary leadership, supported by protestors, who are illegally stopping the projects. The state is simply, and neutrally, upholding the law and protecting the rights of the corporations to continue their work. This simple narrative of actors and their conflicts is repeated in popular media and commentary in both countries. It fits the narrative of the 'criminalization of protest', one that is widely used in human rights reporting internationally. Indeed, the criminalization of land defenders, and Indigenous land defenders more specifically, is on the rise internationally.[2] Criminalization often involves the targeting of specific individuals, however it has much wider impacts on collectivities.[3] It does powerful material work in conditions of settler-colonialism. As I show, there is an important and widely unacknowledged relationship between law and the production of knowledge about the conflicts in both countries. More specifically, law works through jurisdiction and property to both narrate conflict and legitimate violence.

The parallel temporal unfolding of events in Unist'ot'en and Xolobeni, in Canada and South Africa respectively, is compounded by a number of characteristics that make for an ideal

[2] *Defending Tomorrow: The climate crisis and threats against land and environmetnal defenders*, by Global Witness (2020); *Criminalization of Human Rights Defenders*, by Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 49/15 (2015).

[3] *Report of the Special Rapporteur on the rights of indigenous peoples*, Report to the Human Rights Council, Thirty-ninth session, Report to the Human Rights Council, Thirty-ninth session A/HRC/39/17 (2018).

opportunity to examine, in a transnational and comparative way, the relationships between law, jurisdiction, property, and self-determination in contexts of transitional justice. These 'local' conflicts are situated within a broader context of constitutionalism oriented toward transitional justice, and the emerging legal space of consultation and consent in the context of resource extraction.

The structural legal characteristics that frame each comparison include a Constitutional entrenchment of human rights along with a commitment to transitional justice for previously colonized peoples. In Canada the Charter of Rights and Freedoms became part of the Constitution through the 1982 Constitution Act, where, in Section 35(1), Aboriginal and treaty rights are recognized and affirmed, thus representing a recognition of Indigenous presence in Canada prior to the arrival of settlers and the legitimacy of Indigenous legal orders and claims to territory.[4] In South Africa, customary law is protected in the 1996 Final Constitution. In the landmark *Richtersveld* Constitutional Court judgement in South Africa, customary law is recognized as a constitutionally protected and independent source of law on par with, however distinct from, common law. The South African Constitution has been challenged, therefore, to struggle with both formal and informal orders of law, contributing to possibly progressive developments in 'living law'.[5]

In addition to the Constitutional contexts that make for a productive comparison, the pace of contemporary developments in law and policy on indigenous and rural peoples land rights is extraordinary in both counties. In Canada, the Liberal government led by Justin Trudeau

[4] See Patrick Macklem & Douglas Sanderson, "Introduction: Recognition and Reconciliation in Indigenous-Settler Societies" in Patrick Macklem & Douglas Sanderson, eds, *From recognition to reconciliation: essays on the constitutional entrenchment of Aboriginal and treaty rights* (Toronto ; University of Toronto Press, 2016) 1.
[5] Cornell, Drucilla. *Law and revolution in South Africa: uBuntu, dignity, and the struggle for constitutional transformation*, 1st edition ed, Just ideas (New York: Fordham University Press, 2014).

announced that reconciling the nation-to-nation relationship between First Nations and the Canadian state is a key priority in 2015 and 2019; the research centre the Yellowhead Institute has referred to the Trudeau Liberals as "the most active government on Indigenous issues in 100 years".[6] In South Africa post-apartheid legislation on mining, communal land rights, and tenure reform are all currently being proposed, while social movements condemning the introduction of legislation that they argue undermines rural land rights have organized protests attracting thousands of people in early 2019.[7] Resistance to newly introduced legislation in both places reveals two states scrambling to contain indigenous resurgence and to maintain their control over resources, territory, and the authority of law.

In both cases those resisting state-imposed extractive development are demanding that their own forms of indigenous governance are respected on par with state-recognized forms of government. 'Traditional territories' and 'traditional councils' (as protected by the 2003 Traditional Leadership and Governance Framework Act in South Africa) are challenged by the peoples of Xolobeni. In Unist'ot'en, the Wetsu'wet'en Hereditary chieftaincy continues their 150-year struggle to gain state recognition as separate from the jurisdiction of band councils, as authorized by the *Indian Act* in Canada. In both Unist'ot'en and Xolobeni, peoples leverage international Indigenous rights norms and link themselves with international movements as they resist state-endorsed land dispossession for extractive activities. Thus the struggles for self-determination and rights over territory in Unist'ot'en and Xolobeni are illustrative of the contemporary politics of indigeneity whereby previously colonized peoples are demanding collective sovereignty and governance over territory through engagement with local, state, and

[6] Yellowhead Institute, "Legislation Affecting Indigenous Peoples: An Overview of the Liberal Record". Policy Brief 33, 28 June 2019. Available at www.yellowheadinstitute.org

[7] See, for example, www.stopthebantustanbill.org (Cape Town, South Africa) and www.customcontested.co.za (Cape Town, South Africa) for reporting on these movements.

transnational law.[8] By comparing the two struggles we can identify some of the characteristics of emergent Indigenous and rural peoples rights to land and natural resources, and illustrate the articulation of different human rights norms as they relate to assertions of collective rights to territory.

What is specific about both of these case studies is the struggle over consultation and 'the right to consent' – a legal principle informed by national and transnational law and Indigenous peoples' laws; a site of possibility, and a spatialized performance of proprietary relationships. It is through the work of consultation that the state both facilitates resource extraction and purportedly protects those impacted from its most harmful effects. Whereas both countries promote land reform as a means of transitional justice and reconciliation, they also continue to facilitate the definitive violence of the colonial period: dispossession. The role of law in these processes is to cast the violence outside of itself and in the process normalize it. As this study demonstrates, and as I explain in my methods, in conditions of Constitutional recognition of Indigenous and customary land rights, purported political commitments to amend existing legislation towards the goal of transitional justice, and the specific articulations of consultation and consent, violence, jurisdiction, and property emerge as important concepts to examine empirically. This thesis is an attempt to unpack the continuities and path dependencies between the historical violence of settler colonialism and the new forms of violence that are performed and experienced in the 21st century.

[8] See Emily T Yeh & Joe Bryan, "Indigeneity" in James McCarthy, Gavin Bridge & Thomas Albert Perreault, eds, *Routledge Handb Polit Ecol* Routledge international handbooks (Abingdon, Oxon ; New York, NY: Routledge, 2015) 531; See also Sarah A Radcliffe, "Geography and indigeneity I: Indigeneity, coloniality and knowledge" (2017) 41:2 Prog Hum Geogr 220–229.

Thesis roadmap

This thesis is composed of four chapters. In the first chapter I introduce briefly the struggles in Xolobeni and Unist'ot'en and describe in detail the theoretical framework and methodology developed through this research. The two chapters that follow are organized by country, Canada and South Africa. The chapters have a general similarity in their organization, to the extent that the first half of each is dedicated to explaining the legal architecture of 'the right to consent' to resource extraction in each country. I explain the constitutional basis and provide a brief overview of the jurisprudence that informs and undergirds these struggles. In Canada, I focus on Aboriginal title and the duty to consult and accommodate respectively, and in South Africa I focus on customary law and the emergent 'right to say no'. The second half of each chapter focuses on my case studies in Unist'ot'en and Xolobeni. I describe in each of the two chapters the different ways that property is formulated in relation to jurisdiction, examine the constitutive forms of legal violence in relation to both.

The law and politics of self-determination

Self-determination is an international human right recognized in Article 1(1) of both the International Covenant on Civil and Political Rights, and the International Covenant on Social, Economic and Cultural Rights, where it states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". It is both the means by which states are identified and organized as sovereign states in relation to one another in International law, and a

concept through which Indigenous and subaltern peoples have been identified as 'savage' or 'other' and marginalized through colonization.[9]

Self-determination in international law is concerned with social beings, engaged in the constitution of communities, rather than human beings as autonomous subjects.[10] As Anaya explains, the term 'peoples' is often understood in narrow, state-centric terms whereby 'peoples' are understood in dichotomous and mutually-exclusive ways in relation to the state. This limited concept of 'peoples' "largely ignores the multiple, overlapping spheres of community, authority, and interdependency that actually exist in the human experience".[11] He continues to explain, "[t]he values of freedom and equality implicit in the concept of self-determination have meaning for the multiple and overlapping spheres of human association and political ordering that characterize humanity".[12] Finally, he makes an important distinction between constitutive and remedial self-determination. Constitutive self-determination involves aspects of state building and is owed to all peoples and their groups, and is therefore constitutive of state-building itself. Remedial aspects of self-determination are meant to highlight that the right to self-determination is for peoples who have been historically marginalized and therefore deserve remedial measures. It is through the commitment to remedial self-determination that the politics of 'recognition' are negotiated.

Struggles for self-determination are ridden with tensions. For some, self-determination is simply another means by which the settler state determines the bounds within which 'acceptable' difference is defined. Self-determination is representative of liberal 'recognition' politics

[9] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2005).
[10] James Anaya, *Indigenous peoples in international law* (Oxford University Press, 2004) at 100.
[11] *Ibid*. at 101.
[12] *Ibid*. at 103.

wherein the ‘harms’ of misrecognition are responded to and alleviated by the state on terms determined by the state.[13] Elizabeth Povinelli argues that liberal multicultural law and policy in Australia further entrenches settler occupation by providing the limits of what is acceptable cultural difference, and demanding that indigenous peoples represent their culture and their history in ways that are considered legitimate to the Australian state and public.[14] In her account, law is one articulation of colonial sensibilities in the social and political realm; it participates in and reaffirms discourses and textual practices that undermine Indigenous sovereignty. In the context of liberal multiculturalism, Indigenous Peoples are drawn into the impossible position of assuming an 'authentic' Indigenous subject position, hence the 'cunning of recognition'.[15]

State focused or governmentality approaches to recognition, such as Povinelli’s, however, should not lead to a dead end whereby all struggles for recognition inherently lack emancipatory potential; "we are likely to miss the most promising sources of the transformative power of recognition if we focus... on the state as the agent of recognition and the subaltern group as its recipient".[16] Moreover, such an approach tends to assume that misrecognition leads to a damaged subjectivity of subaltern groups, who in turn are struggling primarily for the recognition of a state that has historically discriminated against them – in other words, those misrecognized desire recognition in order to be full citizens in a polity.[17]

[13] See Charles Taylor, Amy Gutmann & Charles Taylor, *Multiculturalism: examining the politics of recognition* (Princeton, N.J: Princeton University Press, 1994).
[14] Elizabeth A Povinelli, *The cunning of recognition indigenous alterities and the making of Australian multiculturalism*, Politics, history, and culture (Duke University Press, 2002).
[15] *Ibid*.
[16] Melissa S Williams, “Introduction: On the use and abuse of recognition politics” in Avigail Eisenberg et al, eds, *Recognit Self-Determ Dilemmas Emancip Polit* Ethnicity and democratic governance series (Vancouver, BC : UBC Press, 2014) at 10.
[17] *Ibid*. at 16.

Glen Coulthard, of the Yellowknives Dene First Nation, argues that liberal politics of recognition in Canada reproduce colonial logics aimed at dispossession of land. The politics of recognition in the context of Canada, he argues, refers to "the now expansive range of recognition-based models of liberal pluralism that seek to 'reconcile' Indigenous assertions of nationhood with settler-state sovereignty via the accommodation of Indigenous identity claims in some form of renewed legal and political relationship with the Canadian state".[18] This broad range of practices are entangled with settler-colonial power.

Self-determination is an important site of resistance, however, and is being re-cast and re-defined through Indigenous resistance to ongoing forms of colonization. Audra Simpson argues that there is an alternative to 'recognition', which is 'refusal'. Simpson explains that refusal is a "political and ethical stance that stands in stark contrast to the desire to have one's distinctiveness as a culture, as a people, recognized. Refusal comes with the requirement of having one's political sovereignty acknowledged and upheld".[19] Moreover, Simpson, along with her collaborator Andrea Smith, argues "The politics of recognition entails a claim to uniqueness that justifies recognition by the state... By contrast, the politics of decolonization requires the building of mass movements capable of dismantling settler colonialism, white supremacy, and capitalism".[20] Coulthard argues that assertions of indigenous culture, as a 'mode of life', might be central to struggles for indigenous sovereignty. One of the issues with the politics of recognition is a reductionist understanding of 'culture', whereby 'culture' is understood in a way similar to how Marxists understand class – as something to be transcended in the struggle for

[18] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: Univ Of Minnesota Press, 2014) at 3.
[19] Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press: Duke Univ Pr, 2014) at 11.
[20] Audra Simpson & Andrea Smith, "Introduction" in Audra Simpson & Andrea Smith, eds, *Theor Native Stud* (Durham ; Duke University Press, 2014) at 10.

emancipation.[21] He argues that cultural recognition has been central to Dene assertions of their land rights, for example, explaining that Dene land claim proposals sought to protect a "mode of life; a life on/with the land that stressed individual autonomy, collective responsibility, non-hierarchical authority, communal land tenure, and mutual aid".[22] I focus on law as one important venue through which self-determinations' recognition politics are revitalized. I am interested in how the struggle for self-determination takes place in conditions of legal pluralism. I am not denying the power of the state in perpetuating forms of settler-colonialism, I am emphasizing the constitutive relationship between legal struggles and emergent forms of self-determination and collective autonomy.

Understanding contemporary struggles for self-determination demands interrogating the cumulative impacts of the legal processes that function through both a logic of erasure and through processes of disaggregating the asserted authority of indigenous peoples. Through this research I have come to understand self-determination – as a socio-legal positioning - as forged through legal violence. This perspective is informed by each impacted community's reporting of violence and literature on legal violence in post-colonial conditions. Processes of erasure, division and disruption are accomplished, in different ways, through the legal categories of property and jurisdiction. One of the fundamental challenges to self-determination, I argue, is not the imposing power of the state or a unified law, but rather the cumulative effects of legal practices, discourses and ideologies that serve to divide and agitate, and to accomplish this in such a way that the 'divisions' are the fault of Indigenous peoples and their communities.

The struggle for self-determination takes different forms and has different political implications in particular places. In Canada, as I show, important legal categories through which

[21] Coulthard, *supra* note 14 at 153.
[22] *Ibid*. at 65.

the international right of self-determination for Indigenous peoples is articulated include Aboriginal rights and title and the duty to consult and accommodate. In South Africa there are a range of collective rights claims that are informed by the right to self-determination, such as group rights, the rights of Peoples, the right to autonomy, the right to development, and, importantly, the constitutional protection of customary law. In both cases the international legal norm of free, prior, and informed consent (FPIC) contained in the UNDRIP is articulated in important ways to affirm rights over land and resources. The political contexts of the assertion of the right to self-determination is explained in the respective country chapters. In this project I often refer to both self-determination and collective autonomy to acknowledge that in South Africa, due to the particular history and governance strategies used in the colonial and apartheid eras, collective struggles for land and resource rights don't often explicitly use the language of self-determination. However, important legal categories, such as Aboriginal title and FPIC, are used across both cases, indicating a common struggle against the contemporary state and its logic of dispossession for resource extraction.

As I further explain below, legal violence against Peoples (as a collective) can be identified through struggles over jurisdiction and property, which take place at multiple scales and through many different actors. The contours and dynamics of self-determination are being defined in these conditions. Indigenous peoples expose the settler-colonial logic still inherent in legal processes, even in conditions of transnational legal pluralism wherein state law is not the only authority, and through their work make significant gains in their claims to sovereignty.

Indigenous peoples often explain their encounter with the Canadian state and with Canadian law as characterized by violence. While I provide evidence of this in both of the case studies below, an innate violence in Canadian constitutionalism as described by Anishinaabe law

professor Aaron Mills is a useful starting point. Liberal constitutionalism, explains Mills, is generated through a lifeworld characterized by earth-alienation. Mills argues that "[b]ecause of liberalism's view of persons as autonomous and because of its anthropocentric view that only humans are persons, from my perspective it's a worldview irredeemably committed to violence".[23] This "violent constitutional foundation is hegemonic" argues Mills, limiting the ability of Canadian law schools to engage in productive discussion beyond its grasp.[24] This thesis represents my efforts to understand empirically how forms of legal violence are manifest in specific struggles and how Indigenous peoples assert their self-determination in response.

From 'law's violence' to 'legal violence' in conditions of legal pluralism

Through my analysis of the ongoing struggles in Unist'ot'en and Xolobeni I have learned that in both contexts the impacted communities routinely articulate that their experience with the state and with state law is characterized by violence and conflict. The Wet'suwet'en hereditary chiefs as well as the Unist'ot'en camp describe being in conflict with the law and legal processes; they explain the violence they have endured at the hands of Coastal Gas Link (CGL) and the government. In Xolobeni spokespeople for the ACC explain that the state parties and the Australian mining company have caused irreparable harm and conflict in their community. They mourn and remember community activists who have been assassinated in the struggle. By explaining and articulating the violence they are subjected to, they are asserting their collective rights and dignity and, I argue, affirming their collective identities against the violence they experience. Their assertions of self-determination have a constitutive relationship with law's

[23] Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill Law J Rev Droit McGill at 865.
[24] *Ibid*.

contemporary violence. In order to understand the nature of this violence I explain below both foundational literature on law and violence, and describe how I have come to understand expressions of law and violence in conditions of legal pluralism. Jurisdiction and property, I argue, are key categories via which law's violence is expressed and spatialized, and therefore important concepts in the present articulations of self-determination.

Jacques Derrida identifies violence in the very founding moment of law and describes how violence is central to the performance of justice. He argues that no law exists without the presumption of its enforcement, and further argues that this is the violent characteristic of law. The reality of the relationship between law and enforcement tells us something about the relationship between law and justice: to say that there is something called just, implies that it will be followed up, enforced – "a powerless justice is not justice… justice without force is contradictory".[25]

Derrida also discusses a performative power to the inauguration of law. This is what he calls mystical in the foundation of law:

> *The very emergence of justice and law, the founding and justifying moment that institutes law implies a performative force, which is always an interpretative force: this time not in the sense of law in the service of force, its docile instrument, servile and thus exterior to the dominant power, but rather in the sense of law that would maintain a more internal, more complex relation with what one calls force, power or violence.*[26]

Derrida's argument opens up the opportunity to study how the relationship between law, justice and violence is sustained, or as he calls it, conserved, through the ongoing actions of state institutions. In addition to violence in the founding moment of law, he identifies a conserving

[25] Jacques Derrida, "Force of Law: The 'Mythical Foundation of Authority'" in Drucilla Cornell et al, eds, *Deconstruction Possibility Justice* (New York: Routledge, 1992) at ll.
[26] *Ibid*. at 13.

violence in the maintenance that ensures the permanence and enforceability of law.[27] He explains that police mix these two forms of violence: “the police are no longer content to enforce the law, and thus to conserve it; they invent it, they give public ordinances, they intervene whenever the legal situation isn’t clear to guarantee security”.[28] He refers to the conserving aspect of law’s violence as iterative. Iteration, he explains, preserves the foundation of law. For example, in case law, law is always re-iterated, and through this act the very foundation of law, including the violence, forceful, foundation of law, is re-created.[29] He argues, "this law of iterability that insures that the founding violence is constantly represented in a conservative violence that always repeats the tradition of its origin and that ultimately keeps nothing but a foundation destined from the start to be repeated, conserved, reinstituted".[30]

Law’s violence operates performatively and iteratively through the ways that peoples make sense of, justify, and interpret the violence of law in its enforcement. Law’s violence is not a specific, self-contained moment (however it may come into sharp focus at particular moments), but an ongoing process, a practice. Peter Fitzpatrick argues that modern law is myth that is lived, performed, and practiced, and, importantly, sustained through a narrative myth of progression. It is through (in part) narratives of linear progress that ‘the West’ has created the mythology of modern law. Fitzpatrick explains: “narrative is a simple mode of mastery characteristic of the West. Through narrative, in mythic style, order is created and sustained in tightly linear and irreversible sequences flowing from an origin or an original transition. Through narrative, progressive domination and hierarchy integrally correspond to the sequence’s forward thrust”.[31]

---

[27] *Ibid*. at 40.
[28] *Ibid*. at 42.
[29] *Ibid*. at 43.
[30] *Ibid*. at 55.
[31] Peter Fitzpatrick, *Modernism and the grounds of law*, Cambridge studies in law and society (Cambridge ; New York: Cambridge University Press, 2001) at 42.

Law's violence is thus justified by the myth that its enforcement is necessary for the imagined movement of progress. It is partly this pairing of law and progress that aligns so easily with the belief in the 'rule of law' in the context of resource extractive development.

A few key authors demonstrate how law's violence can be studied through the practices and discourses of the legal system; their insights are important for developing an understanding of how to study legal violence empirically. Robert Cover explains how law's violence is carried out, sustained, through the work of a range of actors – indeed the coordinated work of a range of actors allows for the dispersion of law's violence to the extent that it is difficult to pinpoint and bracket a particular agent in the expression of law's violence. The social organization of violence is structured in such a way that in order to carry out law's violence "safely and effectively, responsibility for the violence must be shared; law must operate as a system of cues and signals to many actors who would otherwise be unwilling, incapable or irresponsible in their violent acts".[32] He identifies violence in the interpretive work of judges; which, however central to law's violence, is disconnected from the violence needed to enforce a judgement – "we have rigidly separated the act of interpretation – of understanding what ought to be done – from the carrying out of this "out to be done" through violence".[33] Again, we see how law's violence is revealed and conserved through the continuing acts and practices of law.

Austin Sarat studies how law's violence is articulated through legal discourse. He describes that the language of law does a double deed: First, it identifies in detail and clarity the violence that is outside of it; that which demands retribution. Second, it mutes other kinds of violence – ie structural violence, and racialized violence. Sarat focuses on the representational practices and discursive modes used to "speak about violence inside and outside the law". He

[32] Robert M Cover, "Violence and the Word" (1986) 95:8 Yale Law J at 1628.
[33] *Ibid*. at 1627.

argues: "violence is put into discourse, and distinctions between the violence of law and violence outside the law are richly marked".[34]

One of the significant limits of these accounts of law's violence for the present purposes is that they tend to focus on law and violence in the criminal justice system, and in particular on law and violence as it is realized in trials against individuals. What makes the relationship between law and violence significant in the post-colonial context is the fact that it is expressed at a collective, not only individuals. Law, in other words, is central to the ongoing project of settler-colonialism. Patrick Wolfe develops a theory of settler colonialism that focuses on its structural and ongoing characteristics. He argues that settler colonialism is not a singular event, but rather an ongoing social formation motivated by a logic of elimination. He describes settler colonialism "both as complex social formation and as continuity through time… a structure rather than an event".[35] Narrating contemporary conditions of settler colonialism, explains Wolfe, "involves charting the continuities, discontinuities, adjustments, and departures whereby a logic that initially informed frontier killing transmutes into different modalities, discourses and institutional formations as it undergirds the historical development and complexification of settler society. This is not a hierarchical procedure".[36] The violence of settler colonialism is precisely in the logic of elimination, the primary motive for which is territory: "territoriality is settler colonialism's specific irreducible element".[37]

As a settler researcher and academic, studying law's violence is a way for me to understand how a legal system and government perpetuates violence against First Nations. By understanding contemporary articulations of legal violence, I can also understand how

[34] Austin Sarat, "Speaking of Death: Narratives of Violence in Capital Trials" (1993) 27:1 Law Soc Rev at 20.
[35] Patrick Wolfe, "Settler colonialism and the elimination of the native" (2006) 8:4 J Genocide Res at 390.
[36] *Ibid*. at 402.
[37] *Ibid*. at 388.

Indigenous peoples are asserting and identifying themselves against this violence. I might gain a deeper understanding of the contours of self-determination in conditions of settler-colonialism.

Defining legal violence in a paragraph

Legal violence refers to instances where harm against collectivities is legitimated by law. It is not an innate force within law. It is structural violence that is realized against Indigenous or previously colonized peoples who assert their own forms of law against 'modern' state law. Legal violence is derivative of the colonial encounter, whereby modern law was used to distinguish the presumed savage other from colonizers. Legal violence exists in conditions of legal pluralism and therefore is not tied to a view of a homogeneous state. In this thesis it is realized and expressed through legal presumptions of jurisdiction and articulations of property.

Geographies of legal violence: Jurisdiction, property, and 'inter-communal' conflict

Settler-colonialism has a key geographical element. As I demonstrate empirically in the case studies of Unist'ot'en and Xolobeni, law's colonial violence is expressed geographically through jurisdiction and property. Struggles over property are also territorial. I elaborate on these concepts individually below. Jurisdiction and property are means via which law's historical colonial violence is re-articulated, or iterated to use Derrida's term, today. Property and jurisdiction, I argue, are useful for understanding the different ways the constitutive relationship between self-determination and law's violence is realized in conjuncture. Below I briefly explain my approach to both property and jurisdiction. I return to both concepts throughout the thesis, when they emerge as useful through the archive.

Jurisdiction

Jurisdiction is often assumed to be a mundane aspect of law and governance and often escapes rigorous critique. Many, in Canada for example, will understand jurisdiction in relation to tiers of government: municipalities, provinces, and the federal government are imagined in a hierarchical structure whereby different responsibilities are distributed over specific demarcated spaces. In international law, jurisdiction refers most generally to the territorial sovereignty of nation-states. Jurisdiction however is a concept that has been gaining currency in critical legal scholarship in the past decade. Studies of jurisdiction unsettle the idea that jurisdiction is a naturalized fact - a technical register that represents a true 'anti-politics machine' – and examines the often unquestioned means by which jurisdiction differentiates and organizes "the where, the who, the what, and the how of governance".[38] Jurisdiction is indeed a site of contestation and, as the authors reviewed below demonstrate, there are a number of different ways to interrogate what often goes unquestioned about the origins and contemporary role of jurisdiction and its relationship to legal practices.

Jurisdiction can be understood in two parts, as the legal rule (juris), and as a speech act (diction), the later of which inaugurates law through the act of claiming. In this way it is continuously performed into being. Legal philosopher Costas Douzinas explains jurisdiction as an ongoing speech-act that both creates and perpetuates the assumed natural legitimacy of jurisdiction: "As a double generative, jurisdiction, law's speech, has two aspects, which are inescapably intertwined. It refers both to the diction that speaks the law - law's inauguration through words - and law's speech - what the inaugurated law says".[39] Shaunnagh Dorsett and

[38] Mariana Valverde, "Jurisdiction and Scale: Legal `Technicalities' as Resources for Theory" (2009) 18:2 Soc Leg Stud at 144.
[39] Costas Douzinas, "The metaphysics of jurisdiction" in Shaun Mcveigh, ed, *Jurisprud Jurisd* (London, UNITED STATES: Taylor & Francis Group, 2007) at 22.

Shaun McVeigh describe jurisdiction, in terms of a foundational proclamation, in a similar way to Douzinas. They explain that jurisdiction "connotes authority", and argue that "it is an act of speaking – of declaring law".[40] By 'act of speaking', the authors are referring to a wide spectrum of knowledges and practices of law. To explain the net effect of jurisdiction, they refer to it as an "idiom" and a "language and style of talking about law".[41]

By attending to jurisdiction, argues legal anthropologist Justin Richland, researchers are "redirected toward understanding sovereignty as an active undertaking and moreover one that is getting (re)constituted in the unfolding, unstable pragmatics of the present".[42] Jurisdiction is constituted through the relation between law and language, which generate a "narrative time-space" that Richland refers to as "law's perpetuity",[43] referring to the production of an a-political and a-historical character of jurisdictional claims. Thus, jurisdiction can be understood as the founding moment of the authority of law as well as its ongoing articulation.

Despite the draw to develop a 'theory' of jurisdiction, such an attempt will produce diminishing returns as the processes and practices through which jurisdiction can be studied are multiple and beyond generalization. For example, 'speech acts' are only one means by which jurisdiction is constituted. Dorsett and McVeigh describe the practice of jurisdiction through a number of different means. They refer to jurisdiction as a technology of law, a practical and technical activity that can be thought of "as practice, device, technique and organizational strategy".[44] More specifically, they refer to the many technical and material forms of jurisdictional practice and their relationship to the production and constitution of "lawful

[40] Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction*, Critical approaches to law (Abingdon, Oxon ; New York, NY: Routledge, 2012) at 4.
[41] *Ibid*. at 5.
[42] Justin B Richland, "Jurisdiction: Grounding Law in Language" (2013) 42:1 Annu Rev Anthropol at 213.
[43] *Ibid*. at 219.
[44] Dorsett & McVeigh, *supra* note 40. At 14.

relations".[45] Rather than developing a theory of jurisdiction, the authors examine the enactments and practices of jurisdiction; they organized "the repertoires of jurisdiction into a form of jurisprudence – a way of approaching law as a technology or as a material engagement of lawful relations".[46]

Jurisdiction represents a site of struggle wherein there are a plurality of forms of jurisdictional orders.[47] The study of jurisdiction is a study of practice, "a way of doing things rather than a completed or idea form"[48] through which "we need to be attentive to the nodes of connection where authorities meet and where conflict may or may not be reconciled".[49] A key point is that whatever the 'scale' of analysis – from international law to municipal governance – claims to jurisdiction represent assertions of the authority to identify and inaugurate law. Studies of jurisdiction examine jurisdiction as a practice, such as the daily legal technicalities by which jurisdiction is adhered to and produced.

Work by international law scholar Sundhya Pahuja is instructive. In her article, *Laws of encounter: a jurisdictional account of international law*,[50] Pahuja suggests that resource conflicts involving communities, mining companies, non-governmental organizations, and states might be read as conflicts between rival jurisdictions, rather than social, economic, or political conflicts. One of the methodological and conceptual gains of this perspective is to bring into focus "the conduct of those exercising jurisdiction in the present", which includes the ongoing actualization

[45] *Ibid*. at 34.
[46] *Ibid*. at 132.
[47] Shaunnagh Dorsett & Shaun McVeigh, "Jurisprudences of jurisdiction: matters of public authority" (2014) 23:4 Griffith Law Rev 569–588.
[48] Dorsett & McVeigh, *supra* note 40. at 26.
[49] Shiri Pasternak, *Grounded authority: the Algonquins of Barriere Lake against the state* (Minneapolis ; University of Minnesota Press, 2017) at 149.
[50] Sundhya Pahuja, "Laws of encounter: a jurisdictional account of international law" (2013) 1:1 Lond Rev Int Law 63–98.

of statehood and the sovereign claim of the nation-state .[51] For Pahuja, jurisdiction is an orientation, a way of reading a conflict, not a framework or theory. It therefore "invites showing, not telling, doing, not definition".[52] What she calls 'jurisdictional thinking' is also helpful in that it allows us to be "agnostic about the normative basis on which the claim to authority rests. Its primary concern is with how - the ways in which , the practices by which, and the technical means by which - that authority is exercised and lawful relations are conducted".[53] In this formulation practice is the focus of the examination of lawful relations between rival jurisdictions.

Jurisdiction emerges as an important optic by which to understand the emergence of struggles over territory and assertions of self-determination throughout this thesis. My approach here is to understand the conditions in which jurisdiction is an important front in struggle, and to interrogate the ways that peoples in Xolobeni and Unist'ot'en resist state assertions of jurisdictions, and in response affirm their own jurisdictions, and the forms of self-determination that are declared in response.

Property

Property, I argue, is articulated in different ways in each case study in relation to assertions of jurisdiction. A 'classical' conception of property aligns closely with a formalist legal perspective, to the extent that it is imagined as a stable category defined by, and protected by, a formalist rule-based legal system. The classical conception focuses on the property rights of owners, determines their relations to others regarding particular objects of value. This conception often uses the metaphor of a 'bundle of rights' to describe the various rights and responsibilities

[51] *Ibid* at 67.
[52] *Ibid* at 69.
[53] *Ibid* at 70.

ascribed to owners.[54] The problem with dominant or centralized property paradigms are that "these focal points have all too often kept us from viewing property from those subject positions that the formal laws of property treat as secondary or ill defined".[55] Researchers in the social sciences, particularly in anthropology and geography, challenge the classical conception that prioritizes owners and their 'bundle of rights' to consider property as sets of relationships that are negotiated and contested, unstable and influenced by the claims and struggles of the non-owners; of those usually marginalized or overlooked in the classical conception. A socio-legal approach to real property in land (the disciplinary approach developed in this thesis) draws from law and engages with a broad interdisciplinary set of scholarship. It is work that is both theoretically and empirically informed, examines the ways that property is co-constituted through law, and considers as a primary concern the power relations that contribute to the constitution of property regimes.[56]

Anthropologists von Benda-Beckman et al. provide a broad description of property and focus more specifically on the categories that can be used to examine property relations, and their shifting character from multiple perspectives, empirically. For the authors, "property concerns the organization and legitimation of rights and obligations with respect to goods that are regarded as valuable".[57] Approaching property as an empirical site, they find that "Property regimes... cannot easily be captured in one-dimensional political, economic or legal models".[58] Property is best understood as an analytic category that can be divided into for different and

[54] See Joseph William Singer, *Entitlement: the paradoxes of property* (New Haven, CT: Yale University Press, 2000).
[55] Patrick J L Cockburn et al, "Introduction: Disagreement as a window onto property" in Maja Hojer Bruun et al, eds, *Contested Prop Claims What Disagreement Tells Us Ownersh* Social justice (Abingdon, England) (Abingdon, Oxon ; Routledge, 2018) at 7.
[56] Sarah Blandy, "Socio-Legal Approaches to Property Law Research" in (2016) 24.
[57] Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Melanie Wiber, *Changing properties of property* (New York: Berghahn Books, 2009) at 2.
[58] *Ibid*.

overlapping layers: ideologies, legal systems, actual social relationships, and social practice.[59] Breaking down property in this way contributes some empirical nuance to the proverbial 'bundle of rights' that is often used to describe property relations. They consider how rights in relation to objects are imagined, practiced, and institutionalized. This introduces sub-themes within studies of property and highlights that property can be approached in many ways and at different theoretical levels. These are the basic layers, they argue, that help us understand property in conditions of legal plurality. In these conditions, changes in property relations at different layers are constitutive of changes at others; change may be initiated at a specific layer, but that change will feed back into other layers leading to "imbricated adjustments": "once we have understood the characteristics of these loops of influence within the layers of property regimes and in their wider contexts, we can begin to understand the relationship between specific property categories and political, economic or ecological change".[60] This perspective of changes in property is key to understanding contested property regimes as an empirical site.

As I argue and demonstrate throughout this thesis, law's violence is articulated and materialized through property, and more particularly, real property in land. Prominent legal geographer Nicholas Blomley argues in a seminal article that "violence plays an integral role in the legitimation, foundation, and operation of a regime of private property" and further argues "that there is an intrinsic and consequential geography to law's violence as it relates to private property".[61] For Blomley, violence is intrinsic to the realization of law: "The establishment of a Western liberal property regime was both the point of these violences and the means by which violent forms of regulation were enacted and reproduced. Space, property, and violence were

[59] *Ibid at 3*.
[60] *Ibid at 30-31*.
[61] Nicholas Blomley, "Law, property, and the geography of violence: the frontier, the survey, and the grid" (2003) 93:1 Ann Assoc Am Geogr at 121.

performed simultaneously".[62] In support of his argument he focuses on three spatializations – the frontier, the survey, and the grid – and explains how each of these spatializations are central to the unfolding of colonization and the introduction of exclusive private property through violence means. The frontier, the survey, and the grid, as specific spatializations, are "contextual and contingent, rather than a transcendental force".[63]

The materiality of law's violence is expressed through real property. In consideration of the fact that we are all always suspended in some kind of property relationship,[64] and that these relationships can be understood along a hierarchical spectrum of property rights,[65] the relationship between violence and property is dispersed and uneven. The conceptual nuance added to a centralized property paradigm is key here, and I unpack it in my discussion of Aboriginal title and the duty to consult in chapter two. I am not concerned primarily with a singular act of dispossession whereby peoples are physically forced from their lands. Indeed, in each of my case studies the threatened peoples have not been dispossessed. Yet there are multiple ways by which property rights are undermined, limited, or degraded, contributing to conditions of insecurity whereby dispossession is a constant possibility.

These conditions are well illustrated by Robert Nichols, who argues that dispossession is realized through a recursive process constituted by micro-acts that build on one another over time. He explains of the colonial period in the Americas, "[d]ispossession did not proceed through macro assertions of sovereignty but through microlevel practices that worked to dismantle one infrastructure of life and replace it with another" (Nichols 2020, 45).

---

[62] *Ibid*. at 129.
[63] *Ibid* at 126.
[64] Nicholas Blomley, "Precarious Territory: Property Law, Housing, and the Socio-Spatial Order" (2020) 52:1 Antipode 36–57.
[65] A J (Andries Johannes) Van der Walt, *Property in the margins: AJ van der Walt* (Oxford: Hart Pub., 2009).

Dispossession refers to "a process in which new proprietary relations are generated by under structural conditions that demand their simultaneous negation" (Nichols 2020, 8). I am concerned with identifying legal violence before (and often leading to) property dispossession.

Territorializing conflict

In the following analysis it is important to make a distinction between jurisdiction and territory. In their work on jurisdiction, Dorsett and McVeigh use a concept of territory that is often inseparable from jurisdiction; rather, territory refers to a specific spatial expression of jurisdiction rather than a form of authority and governance that might exist as distinct from processes and practices of jurisdiction. More specifically, territory is used as a strictly legal concept which gives spatial form to law.[66] While their understanding of territory is useful for their purposes, it has limits as soon as you move beyond the state and consider transnational or non-state jurisdictional claims (points I elaborate at the end of chapters two and three on 'alternative legal geographies'). The concept of 'territory' is helpful in this regard.

In a landmark paper, geographers Peter Vandergeest and Nancy Peluso unsettle assumptions about state territory as uniform and focus instead on processes and practices of internal forms of territorialisation whereby the state uses different administrations to determine the distribution of resource access rights. They introduce the study of territoriality to examine the governance of people and resources within particular spaces.[67] Scholars have expanded on this concept to investigate processes of territorialisation beyond the state, referring to a deepening of administrative and governance authority by a range of actors, both internal state actors and non-

[66] Dorsett & McVeigh, *supra* note 40, at 40.
[67] Peter Vandergeest & Nancy Lee Peluso, "Territorialization and State Power in Thailand" (1995) 24:3 Theory Soc 385–426.

governmental organizations, within specific spaces.[68] Importantly, some understand territorialisation as not only about the control of resources within a demarcated space, but also about the production of the authority to determine access to resources.[69] Political ecologists argue that territorialization "is no less than power relations written on land" whereby a claim is made to land; "not always a state claim, but a collaborative claim".[70] These approaches are distinct from understanding territory as a clearly defined and unchanging space claimed by a monolithic state.

Practices of jurisdiction, and the lawful relations that characterize the encounter between rival jurisdictions, are a means by which different authorities are granted degrees of control over particular decisions within a demarcated space. In relation to legal violence and the narrativization of conflict, state jurisdictions can be legitimated and authorized through the territorialization of conflict to the extent that the identification of an 'inter-communal conflict' justifies (to the state) violent interventions. Therefore, the concern is not only a clash of jurisdictional claims to authority, it is the territorializing effects of power relations that legitimate particular legal responses and the ways that conflict is territorialized as 'internal' to the groups threatened with dispossession. The phrase 'inter-communal conflict' is a rendering of conflict as emergent from a localized collectivity. The localization of conflict as 'inter-communal' is an effect of law's claim to sovereignty and authority over state territory. It is a narrative rendering of conflict as derivative from a specific locale, rather than as a consequence of a cross-territorial

[68] See William D (William Donald) Coleman, *Property, territory, globalization: struggles over autonomy*, Globalization and autonomy (Vancouver: UBC Press, 2011).
[69] Thomas Sikor & Christian Lund, eds, *The Politics of Possession: Property, Authority, and Access to Natural Resources* (Chichester, West Sussex, U.K. ; Malden, MA: Wiley-Blackwell, 2010).
[70] Nancy Lee Peluso & Christian Lund, "New frontiers of land control: Introduction" (2011) 38:4 J Peasant Stud at 673.

infrastructure development. In other words, 'inter-communal conflict' emerges within a wider legal geography of state claims to jurisdiction.

Method in three parts:

1) Contested property regimes as an empirical site

In their edited volume, Patrick J.L. Cockburn et al. (2018) focus on 'contested property regimes' in an effort to consider how property relations, and the power relations that protect and reproduce colonial property relations, are contingent. They explain, "property regimes do not always run smoothly. They are not merely accepted but also contested, ignored, circumvented, and strategically manipulated".[71] For the authors, contested property regimes refer to "attempts to mobilize a vision of property in order to reproduce or reorganise property relations".[72] The concept is based on two key ideas, explain the authors: "the idea that property is established via processes of communication between social actors" and "this communication can be, and often is, deeply confrontational and does not always lead to mutual recognition".[73]

The authors however focus almost exclusively on specific property struggles within national context, and largely ignore the extent to which localized property struggles are often also connected to networks of transnational capital and transnational legal norms, including human rights and indigenous rights norms. Similarly focusing on property contestations, Scott Prudham and William Coleman, as well as their collaborating authors, focus on property regimes at crisis points in global context, and examine specifically the articulations of collective autonomy and territorial control that emerge through property contestations. They explain,

[71] Cockburn et al, *supra* note 56 at 1.
[72] *Ibid* at 2.
[73] *Ibid* at 2.

"Property regimes at crisis points are sites of friction, conflict, and resistance in which global capitalism and international authority supported by global law are engaged by local actors through a politics of place".[74] The collaborating authors in the book "approach property as relational sets of rights distributed among individuals and groups in ways that make existing property regimes and claims specific, limited, and frequently, shared. We therefore view the assertion of property claims by individuals or groups as being central to notions of autonomy".[75] Thus it is through property contestations that peoples assert and define their autonomy.

2) Documenting consultation

My empirical analysis of these ongoing struggles includes examining jurisprudence on 'the right to consent', state policy, reports by non-governmental organizations, websites and public statements published by the impacted communities, court submissions in litigation, and news reports and commentary. For this research I have assembled contemporary archives of the struggle in the qualitative research software Nvivo. Archives include new reports, government legislation and policy, jurisprudence, statements from Indigenous led and non-Indigenous non-governmental organizations, as well as my own 'field notes' taken during my research in Xolobeni (during my dissertation field work) and during my participation in public protests in support of the Wet'suwet'en hereditary chiefs in Toronto.

The similarity – in terms of language, legal norms and indicators - of the archives of material that I have assembled about the struggles in Xolobeni and Unist'ot'en is revealing. These archives about specific places are transnational in that they are constituted by legal norms

[74] Scott Prudham & William D Coleman, "Introduction: Property, Autonomy, Territory, and Globalization" in William D Coleman, ed, *Prop Territ Glob Struggl Auton* Globalization and autonomy (Vancouver: UBC Press, 2011) at 8.
[75] *Ibid*.

and legal knowledges that do not belong to specific territorialized states. The actors who constitute the archives are often not national actors – they are actors from many different places who have learned to use the language of law in a way that is specific to the area that it is practiced. Reading these two archives together reveals different paradigms of settler-colonial and post-colonial struggle. That is, different ways that those resisting extraction identify themselves and describe their relationships to land. The nature of autonomy, I show, is distinct.

Through my research I am continuously curating an archive. Collecting news stories. Examining legal documents. Reading transcripts from debates about legislation. The process of building an archive never stops. These documents are a rich archive of material and are used in this research in an attempt to elevate the voices and experiences of the people at the centre of the struggle. I use qualitative research software Nvivo to code the material, however my engagement is better characterized as an "ethnographic imaginary" as I probe the conjuncture of forces present in the study.[76] I draw from community descriptions of tactics and practices used to assert their collective solidarity, as well as their reporting of violence. Critically reading these archives reveals deeply contested government practices, precarious claims to jurisdiction, and, importantly, narratives of conflict and violence.

3) Transnational and comparative

While struggles for self-determination are emergent through transnational organizing, and constitutive of transnational legal norms (such as FPIC), they are articulated in relation to particular property norms in specific places. In this respect the framework developed by Ananya

[76] See Brady, Michelle. 2016. "Neoliberalism, Governmental Assemblages, and the Ethnographic Imaginary." In Governing practices: neoliberalism, governmentality, and the ethnographic imaginary, edited by Michelle Brady and Randy K. Lippert, 3-31. Toronto: University of Toronto Press.

Roy, in her article 'Paradigms of Propertied Citizenship', is insightful. Roy uses a transnational framework to re-direct questions traditionally used in scholarship in the 'Third World' to 'First World' case studies, "thereby interrogating norms of citizenship and making possible new intellectual and political pathways".[77] She draws from the seminal work by geographer Doreen Massey who describes places as "articulated moments in networks of social relations and understandings".[78] Transnationalism, argues Roy, can be an "interrogative technique that reworks the interface of First and Third Worlds".[79] Roy identifies for example how squatting in Calcutta, India, has associated with it alternative paradigms of propertied citizenship, whereby peoples feel that they have the right as citizens to build their homes in informal settlements. Squatting in the US, however, is associated with a different paradigm of citizenship, the structure of rights and associated meanings cast peoples outside of the realm of citizenship.[80]

Roy's comparative work is used to both distinguish between different property paradigms in India and the US, and to read the tactics of social movements that are responding to the particular grammar and articulations of property in their respective places. She explains the analytical purchase of this comparative work on property and resistance: "By situating such strategies and their hazards in a global context, a transnational framework exposes the scaffolding of norms and meanings that constitute a distinctive American notion of shelter, property, and citizenship. At the same time, it does not guarantee an optimistic alternative that can be effortlessly borrowed from elsewhere".[81] Moreover, "a transnational epistemology

[77] A Roy, "Paradigms of propertied citizenship: transnational techniques of analysis" (2003) 38:4 Urban Aff Rev at 465.
[78] *Ibid* at 466.
[79] *Ibid*.
[80] *Ibid* at 468.
[81] *Ibid* at 485.

provides the cartographic tools for mapping multiple pathways of rights and claims".[82] Thus we are inspired to ask how are social movements articulating their claims to rights in relation to the specific places of their struggles?

The questions are useful for my work in Unist'ot'en and Xolobeni. In previous work I have described what I call the articulations of Indigeneity, customary law, and Aboriginal title in South African land restitution, charting the development of 'custom' in relation to transnational legal norms.[83] In the Xolobeni judgement,[84] which can be identified as one of the most recent significant judgements on what is called 'living customary law' in the South African context, the courts upheld custom because to ignore it would be to re-produce the racist history of common law and its colonial work of distinguishing between the colonized and the colonizer – the modern subject of citizenship and the backward, savage, other. The judgement provides an important opportunity to ask how legal struggles and litigation in Canada might take on a different character if the focus was less on proving historical occupation of territory (a problematic approach that 'freezes' an ahistorical account of indigenous traditions, as explained below) and focuses instead on the identification and transformation of racist ontologies in Canadian law. Following Geographer Gillian Hart, transnational work on property might demonstrate how "bringing diverse but connected historical geographies into tension with one another helps to render taken for granted categories peculiar and open to question, as well as pointing to new connections, claims, and re-articulations".[85] What I attempt in this paper is better understood as a 'cross-contextual analysis' rather than a comparison that seeks to identify simply the different

[82] *Ibid*.
[83] Daniel Huizenga, "Articulations of Aboriginal Title, Indigenous Rights, and Living Customary Law in South Africa" (2018) 27:1 Soc Leg Stud 3–24.
[84] Baleni and Others v Minister of Mineral Resources and Others 2018 73768/2016 (HC)
[85] Gillian Hart, "Denaturalizing Dispossession: Critical Ethnography in the Age of Resurgent Imperialism" (2006) 38:5 Antipode at 996.

ways that each case is similar or different. In the analysis I highlight both difference and linkages; the ways that how the struggles diverge and how there is clear overlap.[86]

Is there really enough ground to justify a comparison between South Africa and Canada? South Africa, for example, is one of the most unequal countries on earth. The disparities in wealth are striking and an assault on human dignity. Homicide rates are the highest of any country not in civil war. Corruption has arguably consumed government (see state capture report). The land reform program is widely understood to have failed and in 2019 the ANC began a process to begin amending the Constitution to allow for the expropriation of land without compensation. While inequalities are rising in Canada and racialized peoples experience poverty at a much higher rate than white people, the disparities are not really comparable. However, if one is to look specifically at the relations between the Canadian state and historically colonized populations – First Nations, Métis, and Inuit – the picture looks much different.

Andrew Orkin, who was born in and spent his early life in apartheid South Africa before moving to Canada and becoming a lawyer to represent Aboriginal peoples, wrote in 2003 about the break down of law in Canada in relation to Aboriginal peoples. He demonstrates that despite Section 35 of the Constitution Act and progressive jurisprudence 'recognizing' Aboriginal treaties and rights, a history of violent dispossession and cultural genocide continues. He explains,

> *Aboriginal peoples have been and are being internally colonized in Canada, through a long, deliberate and ongoing process of cultural suppression, dispossession, breach of promise and trust, legislative and other oppression, as well as state and public discrimination and violence. Fundamentally,*

[86] For an example of a cross contextual analysis of human rights and environmental justice in two countries, see Julian S Yates & Leila M Harris, "Hybrid regulatory landscapes: The human right to water, variegated neoliberal water governance, and policy transfer in Cape Town, South Africa, and Accra, Ghana" (2018) 110 World Dev 75–87.

> *Aboriginal peoples have never freely consented to their collective dispossession through the wholesale taking of their traditional lands and resources across this land, the debilitating effects of which are truly extraordinary in a highly developed country such as Canada.*[87]

Furthermore he argues that "courts' applications of the Rule of Law and the supreme law of the land going into the twenty-first century unfortunately still serves on balance as a very blunt instrument for the dispossession and subjugation of Aboriginal peoples".[88] Orkin therefore finds clear comparisons in histories of racialized dispossession in both countries. Yet, more important than a shared history of colonial violence is a shared history of Indigenous and rural peoples survival against the settler state. Xolobeni and Unist'ot'en are clear examples of this survival. "Assimilation policies failed because Aboriginal people have the secret of cultural survival".[89] It is precisely their survival and resilience that made the analysis in this paper possible.

[87] Andrew Orkin, "When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law" (2003) 41:2 Osgoode Hall Law J at 445.
[88] *Ibid* at 460.
[89] *Ibid,* at 461, citing Coon Come.

Chapter 2: Jurisdiction, property, and conflict in the Wet'suwet'en struggle for sovereignty

Introduction

In this chapter I focus on the ongoing struggle for Indigenous sovereignty in Wet'suwet'en, unceded territory within the boundaries of British Columbia. I illustrate the relationships between legal violence and self-determination, as it is realized through struggles over jurisdiction and property. I further illustrate how knowledge about conflict is produced in relation to these categories. In these conditions, as I show, conflict and violence are imagined to exist outside the state and Canadian law while political disagreements among First Nations groups are rendered as 'inter-communal' conflict. The analysis demonstrates how state actors perpetuate new forms of conflict through alleged attempts at transitional justice and reconciliation. The narrative that I provide of the events and dynamics in Wet'suwet'en positions this ongoing struggle in relation to the context of Constitutional commitments to the recognition and affirmation of Aboriginal rights and title, jurisprudence on the duty to consult, descriptions of violence by the Wet'suwet'en Hereditary leadership, and the state and non-state actors who participate in these legal and political negotiations.

On 31 December 2019, the Federal Court of Appeal released a decision upholding an interlocutory injunction against the Wet'suwet'en, ordering them to remove a blockade at Unist'ot'en. The blockade was built by Wet'suwet'en peoples to stop workers for Coastal GasLinks (CGL) from entering their territory and continuing work on a Natural Gas Pipeline that is being built through their territory. On 4 January 2020 the Wet'suwet'en Hereditary Leadership released a statement that provides an overview of many of the dynamics that characterize the struggle in Unist'ot'en. The statement, below, references the key issues that I address and elaborate beyond this powerful pronouncement, including the Delgamuukw decision, the duty to

consult and Aboriginal title, Wet'suwet'en law and identity, criminalization, traditional territories, FPIC, and UNDRIP:

> *"Canada's courts have acknowledged in Delgamuukw-Gisdaywa v. The Queen that the Wet'suwet'en people, represented by our hereditary chiefs, have never ceded nor surrendered title to the 22,000km2 of Wet'suwet'en territory. The granting of the interlocutory injunction by BC's Supreme Court has proven to us that Canadian courts will ignore their own rulings and deny our jurisdiction when convenient, and will not protect our territories or our rights as Indigenous peoples.*
>
> *Anuc 'nu'at'en (Wet'suwet'en law) is not a "belief" or a "point of view". It is a way of sustainably managing our territories and relations with one another and the world around us, and it has worked for millennia to keep our territories intact. Our law is central to our identity. The ongoing criminalization of our laws by Canada's courts and industrial police is an attempt at genocide, an attempt to extinguish Wet'suwet'en identity itself.*
>
> *We reaffirm that Anuc 'nu'at'en remains the highest law on Wet'suwet'en land and must be respected. We have always held the responsibility and authority to protect our unceded territories. Protection of our yintah (traditional territories) is at the heart of Anuc 'nu'at'en, and we will practice our laws for the future generations.*
>
> *The Wet'suwet'en have always controlled access to our territories. At Unist'ot'en Village, a Free, Prior, and Informed Consent (FPIC) protocol has been practiced over the past ten years whenever access to the territory is requested by someone outside of Dark House membership. Dark House has not been able to implement this protocol since the enforcement of the interim injunction in January 2019. This protocol aligns Wet'suwet'en law with the UN Declaration on the Rights of Indigenous Peoples, which guarantees Indigenous peoples the right to obtain free, prior, and informed consent for development on our territories"* (Unist'ot'en Camp, 4 Jan 2020).

In this statement we read the identification of colonial violence – "The ongoing criminalization of our laws by Canada's courts and industrial police is an attempt at genocide" – as well as a description of Indigenous law that extends beyond the specific place of struggle: Wet'suwet'en law is aligned with UNDRIP. The importance of aligning with the gains and language of the international Indigenous rights movement is clear. By aligning with UNDRIP, the Wet'suwet'en continue the efforts of Indigenous peoples internationally to challenge the state-centred

international legal order whereby in order to have standing one has to take the form of a 'sovereign' nation-state. As Kent McNeil explains, "Indigenous peoples played no part in… formulating the… international law principle that sovereignty is vested in nation states".[90] By aligning with the international legal order under UNDRIP the Wet'suwet'en effectively draw into focus the need to establish nation-to-nation relations between the Wet'suwet'en and the Canadian state.

The statement above is a powerful assertion of Indigenous sovereignty and a rebuke of the settler state and its practices of dispossession. The Wet'suwet'en are inviting Canada into a nation-to-nation relationship, yet the jurisprudence and legal practice operates to cast them as outsiders – and as agitators of disruption and conflict. The chapter is organized as follows: first I explain the legal architecture that has been forming towards the realization of the right to self-determination via Aboriginal title and the duty to consult, then I explain the specific struggle in Wet'suwet'en and the issues that this struggle raises.

The legal architecture of the right to consultation and consent in Canada

The legal architecture built around the right to consultation and consent serves to channel the flow of authority and legitimacy between Indigenous Peoples and the Crown and to render it as either amounting to a right to be consulted, or to consent, which would include the power of Indigenous Peoples to deny and effectively stop projects that they disagree with. The distinction between the right to consent and the right to consultation can be understood through different renderings of these struggles as a concern of property, and therefore amendable to consultation,

[90] Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Michael Asch, John Borrows & James Tully, eds, *Resurgence Reconcil Indig-Settl Relat Earth Teach* (Toronto, UNKNOWN: University of Toronto Press, 2018) at 295.

or as a struggle over jurisdiction, thus demanding a stronger right of consent. As I explain below, while Aboriginal rights and title, as recognized and affirmed in Section 35(1) of the 1982 Constitution Act, are often leveraged by Indigenous Peoples as an issue of jurisdictional authority, they are most often rendered as an issue of property. Constitutional law scholar Jeremy Webber argues that there are different ways that Aboriginal title is understood by different actors. For judges, the issue at stake is a proprietary right over land. For indigenous peoples, however, Aboriginal title concerns self-determination and self-governance. He further explains that the notion that Aboriginal issues in the Constitution concern the issue of rights is misleading. In reality, Aboriginal issues are a question of federalism.[91] This has to do with the fact that Aboriginal title law has historically emerged in Canada with property characteristics and in effect ignores indigenous jurisdiction.[92] As I demonstrate, in assertions of Aboriginal title by the Wet'suwet'en this distinction is apparent. Their concern is not with protecting a specific proprietary interest, it is in asserting their jurisdiction and authority over their territory. Thus, this is a struggle over competing jurisdictions. In this section I describe the contours and contestations around jurisdictional and proprietary interests in the legal architecture of the right to consultation and consent.

Aboriginal title

Critics of Aboriginal title have very different interpretations of its generative capacity – has the legal category been restrained by a colonial path-dependence that will uphold the sovereignty of the Crown and open Indigenous lands for extractive development without fail? Or is Aboriginal

[91] Jeremy H A Webber, *The constitution of Canada: a contextual analysis*, Constitutional systems of the world (Oxford : Hart Publishing, 2015) at 228.
[92] David Yarrow, "Law's Infidelity to Its Past: The Failure to Recognize Indigenous jurisdiction in Australia and Canada" in Louis A Knafla & Haijo Jan Westra, eds, *Aborig Title Indig Peoples Can Aust N Z* Law and society (Vancouver: UBC Press, 2010) 85.

title a fundamental legal category indispensable in the struggle for indigenous sovereignty? John Borrows argues that Aboriginal title jurisprudence in Canada develops and relies on a particular idea of history, whereby the courts rely on a kind of originalism at odds with the living tree doctrine in Constitutionalism. He explains,

> *The agency of Aboriginal communities is disciplined by deeper structural forces that call on history to patrol the borders of our legal imagination. Aboriginal rights have been simultaneously enriched and constrained by a powerful quasi-historical approach to legal interpretation. Originalism privileges ''frozen-in-time'' moments of a problematic past in defining contemporary constitutional protections. Originalism's alternative – living constitutionalism – is pushed aside. Attempts to organically incorporate rolling insights about law's relationship to history are generally not a part of Aboriginal rights jurisprudence.*[93]

Brian Slattery argues the opposite, however, finding that principles of reconciliation are embedded in the Constitution and have emerged through Aboriginal title jurisprudence. Section 35(1), he explains, states that existing Aboriginal and treaty rights are recognized and affirmed, language that points to its reconciliatory orientation. Recognition, he posits, refers to the fact that Aboriginal rights are protected due to their historical existence, however affirmation refers to the future-oriented spirit of the Constitution. 'Affirmation' refers to principles of reconciliation that "govern the legal effects of Aboriginal rights in modern times" and take into account the contemporary expressions of Indigenous cultures and the conditions in which they are being exercised.[94] Through his analysis of jurisprudence he finds that "the Court has placed ever-greater emphasis on the need for Aboriginal rights to be defined by negotiations between parties,

[93] John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Can Hist Rev at 122.
[94] Brian Slattery, "The Generative Structure of Aboriginal Rights" in Patrick Macklem & Douglas Sanderson, eds, *Recognit Reconcil Essays Const Entren Aborig Treaty Rights* (Toronto ; University of Toronto Press, 2016) at 129.

tacitly signalling that Aboriginal rights are flexible and future-oriented, rather than mere relics of the past".[95]

I take the position that Aboriginal title is not encased or exhausted by jurisprudence, however jurisprudence has had a significant structuring effect on how struggles for indigenous sovereignty are articulated in Canada. It is constitutive of contemporary struggles for self-determination. This relationship – between Aboriginal title and self-determination - can be drawn out by identifying the ways that Aboriginal title continues to represent a form of legal violence against First Nations. The argument here is not that Aboriginal title should be singularly understood as a form of colonial violence, rather it is that by paying attention to the ways that First Nations critique, interrogate, and struggle through and over Aboriginal title we can identify the subtle and consequential ways that law's violence remains a tenable and structuring force As I have been arguing throughout this paper, both property and jurisdiction are key sites of the expression and regeneration of law's violence.

As already noted, Aboriginal rights and title are constitutionally protected through Section 35(1) of the 1982 Constitution Act. The Charter does not elaborate on the scope and content of Aboriginal title, leaving the issue of how to define Aboriginal title and what its protections mean up to the courts. Moreover, how Aboriginal rights and title are district from, however related to, the Crown and state law, has been left to the courts to determine. Thus jurisprudence on Aboriginal title is a key site of its development in Canada.

The development of Aboriginal title is said to be one of the most significant historical legal developments in the common-law world that has forced courts to question and limit the

[95] *Ibid* at 103.

assumed sovereignty of the Crown over territory.[96] The efforts of the Wet'suwet'en Hereditary chiefs, as well as the Gitxsan Hereditary Chiefs, have contributed significantly to the legal development of the recognition of Aboriginal title in Canada. The appeal judgement in the Supreme Court of Canada, *Delgamuukw v. Attorney General of British Columbia* in 1997, is a landmark case dealing with Aboriginal title. It represents the first time the courts acknowledged the existence of Aboriginal title. The case began when 35 Gitxsan and 13 Wet'suwet'en Hereditary chiefs submitted a claim for Aboriginal title against the Province of British Columbia. In this case, the Gitksan and Wet'suwet'en hereditary chiefs claimed, individually and on behalf of their houses, portions of 58,000 square kilometres of BC. The area was divided into 133 individual territories, claimed by 71 houses, to represent the large and diverse First Nations. Their claims initially focused on ownership of the territory and jurisdiction over it in the trial court, where they lost. However, on appeal they decided to claim instead Aboriginal title over land and self-government, notions in line with Canada's legal framework for the recognition of First Nations sovereignty. Moreover, on appeal the individual claims were amalgamated into two communal claims, one on behalf of each nation.

The trial in the Supreme Court lasted 397 days, involved 61 witnesses giving detailed evidence of genealogy, anthropology, and history. The trial decision was 394 pages long.[97] Importantly, the plaintiffs lost the case for technical reasons: the pleadings describing Aboriginal peoples' historical political organization were not properly drafted, leading the court to hold that

[96] See Paul G McHugh, *Aboriginal title: the modern jurisprudence of tribal land rights* (Oxford: Oxford University Press, 2011); See also Louis A Knafla, "'This Is Our Land': Aboriginal Title at Customary and Common Law in Comparative Contexts" in Louis A Knafla & Haijo Jan Westra, eds, *Aborig Title Indig Peoples Can Aust N Z* Law and society series (Vancouver, BC) (Vancouver: UBC Press, 2010) 1.

[97] See James I Reynolds, *Aboriginal peoples and the law: a critical introduction* (Vancouver, BC : Purich Books, an imprint of UBC Press, 2018) at 99-100.

this prejudiced the Crown's defence of the Gitksan and Wet'suwet'en claim.[98] The SCC also found that in the trial decision Chief Justice McEachern did not give any independent weight to oral history evidence and preferred evidence of Crown witnesses over the evidence of Indigenous communities.[99] However, while the judgement does not provide a declaration of Aboriginal title and Rights of the appellants, it does provide a comprehensive account of Aboriginal title. The SCC ordered a new trial, which has not happened, and therefore the specific claims of the appellants have not been resolved. In requesting a new trial, however, the courts laid out what was required to determine the existence of Aboriginal title.

Fast forward to 14 May 2020. After years of resistance to continued natural resource extractive development on their lands, which exploded into protests and rail blockades across the country in January and February 2020, the Wet'suwet'en Hereditary Chiefs, the B.C Government and the Federal Government sign a memorandum of understanding (MOU) recognizing Wet'suwet'en rights and title. The MOU states that Canada and B.C. "recognize that Wet'suwet'en rights and title are held by Wet'suwet'en houses under their system of governance", and that the federal and provincial governments "recognize Wet'suwet'en Aboriginal rights and title throughout the Yintah".[100] The MOU affirms a commitment by all parties to negotiate, within three months beginning at the time of signing (ending mid August 2020), legal recognition of the authority of the Wet'suwet'en Houses as Indigenous governing bodies holding Aboriginal rights and title. The MOU indicates that Wet'suwet'en title is a legal interest in land, and that "[j]urisdiction that flows from Wet'suwet'en Aboriginal rights and title will be transferred to Wet'suwet'en over time". It further states that in some cases jurisdiction will be

[98] Borrows, "Challenging Historical Frameworks", *supra* note 97 at 128.
[99] Reynolds, *supra* note 101 at 100.
[100] Memoranda of Understanding, 14 May 2020. On file with the author.

exclusive to the Wet'suwet'en, and in some it will be shared with Canada or B.C. Over the next 12 months, as agreed in the MOU, the specifics of how Aboriginal and Crown titles interface will be determined. This is indeed a significant development, but why did it take 23 years after the landmark Delgamuukw judgement to reach this agreement? What happened in the intervening years? What role has law, in jurisprudence and practice, had in maintaining conditions of uncertainty about Aboriginal rights and title in the context of the struggle of the Wet'suwet'en?

Aboriginal title is a collective claim. This characteristic dates back to the Calder case in 1976, where the courts determined that Aboriginal title exists in Canadian law, based on prior occupation and possession, whether or not it had been granted. The Calder case was significant for the fact that it "allows the courts to consider First Nations as political groups with their own legal systems and the right to seek remedies from the crown for failure to perform its obligations".[101]

Property is a central category through which Aboriginal title is rendered. In *Delgamuukw* it is noted that Aboriginal title cannot be "described with reference to traditional property law concepts".[102] Aboriginal title is a unique proprietary interest: "Analogies to other forms of property ownership – for example, fee simple – may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not".[103] Nonetheless, the ownership rights conferred by Aboriginal title are similar to those associated with fee simple, including "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right

[101] Knafla, *supra* note 100 at 6.
[102] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 190.
[103] *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at 72.

to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land".[104] Importantly, Aboriginal title excludes the right to alienate.

It was not until the SCC judgement in Tsilhqot'in (2014) that Aboriginal title was finally proven. The court applied the test and guidelines from Delgamuukw. In the trial judgment it was determined that the Tsilhqot'in Nation, not the Indian Act bands, was the group with an Aboriginal title claim.[105] "The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title sui generis or unique".[106] It was determined that the land was owned by the Tsilhqot'in, not the province of British Columbia.

In Tsilhqot'in, the courts describe key characteristics of Aboriginal title:

> *The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.*[107]

In this paragraph we can identify a few characteristics that are important for my understanding of how jurisprudence on Aboriginal title structures forms of legal violence and contributes to the development of narratives of conflict. First, in the above excerpt from Tsilhqot'in, we can

[104] *Ibid* at 73.
[105] *Tsilhqot'in Nation v British Columbia*, 2006 Court of Appeal at 149.
[106] Ibid at 72.
[107] *Ibid* at 50.

identify a distinction between excusive occupation and site-specific rights as grounds for Indigenous land rights. In regards to the first, Aboriginal title demands exclusive occupation of the land at the time of crown assertions of sovereignty. Site-specific rights, however, depend on "practices, customs or traditions integral to the distinctive cultures of Indian and Inuit peoples at the time of colonization".[108] Site-specific rights are based "broadly on practices, customs, and traditions that could, but need not, have been followed as a result of rights and interests supported by legal norms arising within Aboriginal societies".[109]

This framing iterates the 'distinctive culture' test developed in the Vanderpeet judgement. In 1996, the court held that Aboriginal rights only protected those practices, customs, and traditions that were ''integral to the distinctive culture'' of particular groups prior to European contact (Vanderpeet, at para. 5): ''To satisfy the integral to a distinctive culture test the aboriginal claimant must… demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture… that it was one of the things that truly made the society what it was'' [Vanderpeet, at paragraph 5, emphasis in original].[110] The Vanderpeet test effectively freezes Aboriginal rights in the past. As John Borrows argues, this decision deprives Aboriginal peoples "of protection for practices that grew through intercultural exchange… The rights of Aboriginal peoples should… be based on the continued existence of Aboriginal communities throughout the continent today".[111] Instead, the courts look to the past to determine and legitimate the content of Aboriginal title claims.[112]

---

[108] Kent McNeil, "The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison" in Louis A Knafla & Haijo Jan Westra, eds, *Aborig Title Indig Peoples Can Aust N Z* Law and society series (Vancouver, BC) (Vancouver: UBC Press, 2010) 146 at 153.
[109] *Ibid* at 54.
[110] *R v Van der Peet*, [1996] 2 SCR 507 at 5.
[111] John Borrows, *Recovering Canada: the resurgence of Indigenous law* (Toronto: University of Toronto Press, 2002) at 61.
[112] Borrows, "Challenging Historical Frameworks", *supra* note 93.

Prior occupation of land also allows for the infusion of colonial property values into Aboriginal title claims. Aboriginal title is a proprietary interest to the extent that the land is inscribed in such a way that it becomes 'property' in a way legible to the state and law. Brenna Bhandar explains how property norms relating to inscription and improvement as evidence of property rights find their way into Aboriginal title jurisprudence. Aboriginal title and rights, Bhandar explains, "are based on aboriginal peoples' prior occupation of the land but defined in relation to Anglo-Canadian norms of private property ownership and colonial sovereign power".[113] She explains how aboriginal title is made legible in the courts through idioms such as use and occupation. "Occupation, which grounds the claim of possession, is defined on the basis of cultivation, enclosure, or regular use of the land claimed".[114]

Another characteristic of Aboriginal title is the 'prove it' approach. The 'prove it' approach that is central to the Aboriginal title paradigm demonstrates how the legal category is oriented toward assuming the right of the Crown over lands and territories. This dates back to *Delgamuukw*, where the courts placed the onus of proof on First Nations (who never agreed to the assumed sovereignty of the crown, nor did they agree that underlying title to their lands resides it the crown). As Lois Knafla explains, "[t]he proof of Aboriginal title had to be made in British terms, had to be reconciled with an alien crown sovereignty, and even then was subject to the economic and social needs of the state".[115]

The significance of placing the burden of proving Aboriginal title on the Aboriginal group cannot be understated. Not only does it fail to recognize the obvious point that Aboriginal

[113] Brenna Bhandar, *Colonial lives of property: law, land, and racial regimes of ownership*, Global and insurgent legalities (Durham : Duke University Press, 2018) at 66.
[114] *Ibid* at 68.
[115] Knafla, *supra* note 100 at 7.

groups did occupy the land before the assertion of European sovereignty,[116] but it also demands an incredible about of work and resources from First Nations. This is identified as a key issue, or barrier, in the Final Report of the Truth and Reconciliation Commission Call to Action, Item #52, where significant revisions to Aboriginal title are demanded:

> *We call upon the Government of Canada, provincial and territorial governments, and the courts to adopt the following legal principles: (1) Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time. (2) Once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation.*

Finally, despite the landmark Tsilhqot'in judgement, it leaves an incredible amount of uncertainty and ambiguity in relation to Aboriginal title cases, according to Dwight Newman. He argues that "[t]he contents of Aboriginal title continue to be unclear in ways that wreak ongoing harm on fledging Indigenous economies. And the uncertainties pose ongoing problems for negotiated solutions that could further reconciliation in ways that court decisions never can".[117]

The recognition of Aboriginal rights and title should open space for the expression of dynamic and diverse Indigenous laws. By doing the opposite – by looking for exclusive occupation, relying on a 'prove it' approach, and creating further conditions of uncertainty – the contemporary 'recognition' of Aboriginal title contributes to the structuring of a narrative where Indigenous expressions and assertions of their laws that do not fit within this framework are understood as outside of the legal 'recognition' of Aboriginal rights and title and therefore as in conflict with the state. In other words, the limiting of Indigenous law that is central to Aboriginal

[116] Reynolds, *supra* note 101, at 102.
[117] Newman, Dwight. *The Top Ten Uncertainties of Aboriginal Title after Tsilhqot'in* (Fraser Institute, 2017) at 1.

title contributes to the production of knowledge about conflict whereby First Nations are positioned as delinquent, outside; as agitators. This is further emphasized and demonstrated empirically below. First, I explain the duty to consult.

The Duty to Consult

> *"The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right."*[118]

The duty to consult and accommodate in Canada is a constitutional duty that arises from the recognition of existing Aboriginal title and rights in Section 35(1) of the Constitution Act, 1982. It provides an opportunity for First Nations to participate in decisions regarding resource extraction, even in cases where Aboriginal title has not yet been 'proven'. The duty to consult is thus a separate area of law from Aboriginal title, however it is related. It derives from the *Haida* decision where it was determined that even in cases where Aboriginal rights and title were not confirmed, that there was a Crown duty to consult indigenous peoples when their lands and territories were going to be impacted by development. In the Haida Nation decision in 2004, the court held that the government, in transferring a tree farm licence to the company Weyerhaeuser on Haida territory, should have consulted the Haida Nation prior to these actions. This is due to the fact that the "Crown is bound to act honourably in its relation with Aboriginal peoples".[119]

[118] *Tsilhqot'in Nation v. British Columbia*, *supra* note 106 at 78.
[119] Dwight G (Dwight Gordon) Newman, *Revisiting the duty to consult Aboriginal peoples* (Saskatoon, SK, Canada : Purich Publishing Limited, 2014) at 17.

In *Haida*, the court centred the duty to consult on maintaining the honour of the Crown. When the Crown has knowledge of the potential impacts of activity on territory where there are legitimate claims to Aboriginal rights or title the duty is owed by the Crown due to its duties of honour. The scope of the duty to consult is proportionate to the strength of the claim to Aboriginal rights or title, and to the potential impacts of the proposed project on the title.[120] The Honour of the Crown is maintained, according to Haida, when engagement is meaningful, engaged in good faith, and in regards to procedural safeguards and administrative law[121]; "Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation".[122]

Haida introduced the idea of a 'spectrum' whereby the extent and rigorousness of the duty to consult is measured against the strength of a claim to Aboriginal rights or title: "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited… at the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high".[123] The judgment also introduced the important point that the duty to consult is a commitment to a process, not a resolution or agreement.[124]

Haida was the first in a trilogy of judgments from the SCC in 2004 and 2005 that have contributed significantly to the development of the duty to consult in contemporary jurisprudence. These cases mark "a shift from a focus by the court on static constitutional

[120] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at 39.
[121] *Ibid* at 41.
[122] *Ibid* at 42.
[123] *Ibid* at 43-44.
[124] *Ibid* at 49. See also Michael J Bryant, "The State of the Crown-Aboriginal Fudiciary Relationship: The Case for an Aboriginal Veto" in Patrick Macklem & Douglas Sanderson, eds, *Recognit Reconcil Essays Const Entren Aborig Treaty Rights* (Toronto ; University of Toronto Press, 2016) 223.

rights… to a dynamic proceduralism, a new approach that allows for the opportunity to recognize asserted Aboriginal rights and interests and protect them form unilateral Crown action".[125] In a judgement involving the Taku River Tlingit First Nation in 2004, the Supreme Court concluded that the government met the consultation requirement through an environmental assessment that considered the possible impacts of a new road on the First Nations land, as well as a title claim.[126] In the Mikisew Cree case (2005), which dealt with the duty of the government to consult with the First Nation in the development of a new road near/through their reserve on Treaty 8 lands, the SCC determined that there was a duty to consult in order to ensure that there was an honourable processes in the taking up of lands for the road.[127]

Dwight Newman explains that this trilogy of cases has contributed to the emergence of five fundamental components in the duty to consult:

> *1) The duty to consult arises prior to proof of an Aboriginal rights or title claims or in the context of uncertain effects on a treaty right 2) The duty to consult is triggered relatively easily, based on an insufficient level of knowledge on the part of the Crown relative to a possible claim with which the government action potentially interferes 3) The strength or scope of the duty to consult in particular circumstances lies along a spectrum of possibilities, with a richer consultation requirement arising from a stronger prima face aboriginal claim and/or a more serious impact on the underlying Aboriginal right or treaty right 4) Within this spectrum, a duty ranges from a minimal notice requirement to a duty to carry out some degree of accommodation of the Aboriginal interests, but it does not include an Aboriginal power of veto over any particular decisions 5) Failure to meet a duty to consult can lead to a range of remedies, from an injunction against a particular government action altogether (or, in some instance, damages) but, more commonly, an order to carry out the consultation prior to proceeding.*[128]

[125] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implement Braid Int Domsestic Indig Laws* Special Report (Waterloo, ON: Centre for International Governance Innovation, 2017) at 65.
[126] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550.
[127] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388.
[128] Newman, *supra* note 119 at 26.

There is significant room for political and social factors in each of these components, creating forms of friction between Aboriginal peoples and the state. Moreover, the five components illustrate the degree to which the duty to consult has become more of a process rather than a right and endgame.

The Duty to Consult and the configuration of Aboriginal Title as a centralized property regime

The 'spectrum' based on the strength of Aboriginal title or rights claims reproduces an idea of a hierarchy of rights. South African property law scholar Andre Van der Walt explains how the centralist property paradigm produces a rhetoric and logic of a hierarchy of rights, whereby "property rights are primarily valued according to their status as either property rights, personal rights or no-rights, and also as either strong rights, weak rights, or no rights".[129] Within this paradigm, ownership is a 'strong right' that "may have the status and force of trump rights, which means they will practically always trump other rights because they are stronger than any other right".[130] Property in Western legal cultural is organized around a logic of centrality, he argues, which "relies on unreflective intellectual habits" which in turn present a barrier to social and legal transformation in "that they condemn certain persons to the margins of society and of law, either by design or by default".[131] It is worth quoting him at length:

> *Accepting or confirming the centrality of property, even indirectly, tends to confirm a certain hierarchical ordering between having property, which centralists consider normal, and not having property, which centralists consider extraordinary. Assignment of having property to the center and not having property to the margins of normality justifies the unequal distribution of property and power in society, not only when the lack of property results*

[129] Van der Walt, *supra* note 66 at 27.
[130] *Ibid*.
[131] A J (Andries Johannes) Van der Walt, "Property and Marginality" in Eduardo M Peñalver & Gregory S Alexander, eds, *Prop Community* (Oxford ; New York: Oxford University Press, 2010) at 81.

> *from the personal shortcomings of the have-nots but also when society accepts it more sympathetically as the result of some natural or social disaster that upset the normal course of events… Ownership or property famously acts as a fence that protects the individual against outside threats" which depends "upon the presence of property on one side of the conflict as must as on its absence on the other.*[132]

Property is central to wider conditions of social inequality to the extent that it effects not only the distribution of material goods, but also informs assumptions about legal marginality: "property is central to the system in that the presence of property equals and justifies recognition and protection of social, economic, and legal autonomy and power, whereas absence of property self-evidently translates into and justifies the continued existence of social, economic, and legal weakness, vulnerability, and dependence".[133]

By constructing Aboriginal title along a spectrum, Indigenous peoples, particularly when their claims to Aboriginal title remain unproven, are assumed to have lesser rights than the state, and assumed to be in a position of weakness. The point being that it is not necessarily the absence of Aboriginal title that leads to dispossession, but the legal ability to undermine the strength of Aboriginal title, leading to a weaker claim, that contributes to the realization of law's violence, even in contexts where Indigenous peoples have not been dispossessed. The concept of slow violence is helpful here. In his landmark book, *Slow Violence and the Environmentalism of the Poor*, Rob Nixon introduces the concept of slow violence as a strategy and means to illuminate, and make visible, the ongoing forms of violence that are not captured or represented by singular events. Whereas forms of spectacular violence – including of course the specific moment of eviction or dispossession - often garner attention, fill headlines, and invoke visceral responses, it is the slow moving, ongoing, forms of violence and their effects that Nixon is

[132] *Ibid* at 82.
[133] *Ibid* at 83.

seeking to describe through the work of a broad range of writers, both fiction and non-fiction. Slow violence, he explains, occurs over time, its effects are the result of ongoing movement, and outside the purview of most renderings of violence. He explains, "slow violence is often not just attritional but also exponential, operating as a major threat multiplier; it can fuel long-term, proliferating conflicts in situations where the conditions for sustaining life become increasingly but gradually degraded".[134] Slow violence, he argues, is "pervasive", has "delayed effects".[135]

While Nixon does not write specifically about property, his focus on displacement clearly has implications for how we understand property dispossessions temporally and spatially: "Attritional catastrophes that overspill clear boundaries in time and space are marked above all by displacements – temporal, geographical, rhetorical, and technological displacements that simplify violence and underestimate, in advance and in retrospect, the human and environmental costs".[136] Nixon proposes "a more radical notion of displacement, one that, instead of referring solely to the movement of people from their places of belonging, refers rather to the loss of the land and resources beneath them, a loss that leaves communities stranded in a place stripped of the very characteristics that made it inhabitable".[137] This is a particular description of property dispossession that parallels the concept and theory of dispossession developed by Robert Nichols. Nichols (2020) explains a recursive, boot-strapping character of dispossession, whereby forms of property theft, even if not in themselves leading to dispossession, overlap and contribute to one another.[138] Dispossession is thus formed in a context of structural violence that

[134] Rob Nixon, *Slow violence and the environmentalism of the poor* (Cambridge, Mass: Harvard University Press, 2011) at 3.
[135] *Ibid*.
[136] *Ibid,* 7.
[137] *Ibid* at 19.
[138] Nichols explains, for example, that techniques of land acquisition were multifold in Anglo settler societies: "Anglo settlers obtained new territory from Indigenous peoples in these areas by annexation, purchase, temporary lease or rent, military occupation, squatting, and settlement… Some clearly required violence, coercion, and fraud.

is “subtended by systemic transfer, loss, and group differentiation” and divests “Indigenous peoples in a distinct and particular way of their ancestral homes" (Nichols 2020, 98). Dispossession can thus be accomplished through processes of slow violence whereby specific ‘moments’ or effects of law may seem innocuous (such as the ‘spectrum’ of the duty to consult as it is measured against the ‘strength’ of an Aboriginal title claim) but can lead to the systemic undermining of Aboriginal peoples sovereignty and self-determination.

The ability to infringe on Aboriginal title further underscores the inherent ‘weakness’ of the recognition of Aboriginal title. The ability of the Crown to infringe on Aboriginal title is a further example of law’s violence. The courts have developed a right to infringe on Aboriginal rights and title. Federal and Provincial governments can infringe on Aboriginal rights and title if they can satisfy a test to justify infringement, which includes determining if such infringement would be in the public interest. As Jim Reynolds explains, “[t]his test is another creation of the judges and is not mentioned in Section 35 of the Constitution Act, 1982, or elsewhere in the Constitution".[139] According to Tsilhqot’in,

> *to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.*[140]

Other methods were more peaceful, transparent, and based on norms of reciprocity, requiring mutual agreement and consent" (Nichols 2020, 88).

[139] Reynolds, *supra* note 101 at 108.

[140] *Tsilhqot’in Nation v. British Columbia*, *supra* note 106 at 125.

The ‘recognition’ of Aboriginal title thus rests on a deeply colonial positioning: despite its celebratory origins, it has fundamentally become a framework for the infringement of rights and uses the language of burden rather than partnership in decision-making.[141] What the ‘duty’ entails, and when it arises, remains an active area of debate and contestation linked to determinations of the ‘strength’ of Aboriginal title.

The primary point of struggle in the duty to consult and accommodate, I argue, is the effort to make it mean something that it is arguably not intended to mean – the right to consent, and by implication the right to veto if consent is not gained. In other words, Indigenous peoples do not have a right to veto a project based on the existence of Aboriginal title. Sarah Morales argues that the doctrine of the ‘duty to consult and accommodate’ (DTCA) in Canada has not “developed in a manner that recognizes the right to self-determination. Instead, it assumes Crown sovereignty and attempts to reconcile Indigenous interests to the development interests of the Canadian state”.[142] The courts have not been shy about underscoring this point: “The duty to consult and accommodate… flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group”.[143] The DTCA does not provide a jurisdictional right to make decisions over land and territory to the extent that development projects can be stopped.

In the recent case of Coldwater Indian Band et al. v Attorney General of Canada, these issues are stated in no uncertain terms: "Where there is genuine disagreement about whether a project is in the public interest, the law does not require that the interests of Indigenous peoples

[141] Oonagh Fitzgerald & Risa Schwartz, “Introduction” in *UNDRIP Implement Braid Int Domest Int Laws* (Waterloo, ON: Centre for International Governance Innovation, 2017) at 5.
[142] Morales, *supra* note 119 at 69.
[143] *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 114 at 53.

prevail".[144] "The case law is clear that although Indigenous peoples can assert their uncompromising opposition to a project, they cannot tactically use the consultation process as a means to try to veto it".[145] When adequate consultation has taken place but Indigenous groups maintain that a project should not proceed, their concerns can be balanced against "competing societal interests".[146]

The Wet'suwet'en

I am going to avoid paraphrasing the Wet'suwet'en's descriptions of themselves. The paragraphs below were written by the Office of the Wet'suwet'en and published in a submission to the BC EAO and Coastal GasLink Pipeline (2014). They describe both the Wet'suwet'en and their title.

> *The Wet'suwet'en are an Athabaskan culture related to inland Dene groups and speak a unique dialect, which they share with the Nat'oot'en or Babine people. The Wet'suwet'en are a matrilineal society organized into a number of exogamous clans. Within each clan are a number of kin based groups known as Yikhs, often referred to as House groups. Each House group is an autonomous collective that has jurisdiction over one or more defined geographical areas known as the House territory.*

> *Within the context of Wet'suwet'en society, this ownership is considered to be a responsibility rather than a right. Hereditary Chiefs are entrusted with the stewardship of territories by virtue of the hereditary name they hold, and they are the caretakers of these territories for as long as they hold the name. It is the task of a head Chief to ensure the House territory is managed in a responsible manner, so that the territory will always produce enough game, fish, berries and medicines to support the subsistence, trade, and customary needs of house members. The House is a partnership between the people and the territory, which forms the primary unit of production supporting the subsistence, trade, and cultural needs of the Wet'suwet'en.*

[144] *Coldwater Indian Band, et al v Attorney General of Canada, et al, 2020 CanLII 43130 (SCC)*, 2020 Supreme Court of Canada at 53.
[145] *Ibid* at 55.
[146] *Ibid* at 57.

> *… As the Supreme Court of Canada's decision in Delgamuukw made clear, Aboriginal title is based on and informed by the Aboriginal people's special attachment or relationship to the land. The Wet'suwet'en's special relationship to the land, grounds and affirms our title. The Wet'suwet'en express their special relationship through how we organize ourselves on the land, though our governance system, our laws, feast, clans, houses, chiefs, our people's identification with the territory through our crests, Kungax, totem poles, and Baht'lats. Individually and together these expressions of our special relationship to the land are integral to our distinctive Wet'suwet'en culture, and our title includes exclusivity and incorporates present-day needs.*
>
> *Our Aboriginal title provides us with the right to occupy and use the land exclusive of all others. It provides us with an exclusive right to decide whether and how land and resources will be occupied and used according to our cultural values and principles, exclusive not only of Coastal GasLink and its investors but also of the BC EAO. It provides us alone – exclusive of Coastal GasLink and its investors - with right to develop and benefit from the economic potential of our land and resources. Development and use that is irreconcilable with the nature of the Wet'suwet'en's special attachment to the land is precluded. Wet'suwet'en title is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown.*
>
> *The Wet'suwet'en have never relinquished or surrendered Wet'suwet'en title and rights to the lands and resources within Wet'suwet'en territory and continue to occupy and use the lands and resources and to exercise, enjoy and depend on existing title and rights within our territory. We have an inherent right to govern ourselves and our territory according to our own laws, customs, and traditions. This was affirmed in the Supreme Court of Canada Delgamuukw decision.*

There are five Wet'suwet'en Clans. The Gilseyhu (Big Frog), Laksilyu (Small Frog), Gitdumden (Wolf/Bear), Laksamshu (Fireweed), and Tsayu (Beaver clan). Each clan is made up of two or three house groups, which include people matrilineally connected to the point where everyone in the same house group knows how they are related. I include this description (above) in part to underscore the importance of the nation-to-nation relationship between the Wet'suwet'en and the Crown. Wet'suwet'en declarations of self-determination are therefore constituted in part through the specific legal characteristics of their relationship with the state. Wet'suwet'en position

themselves in a nation-to-nation relationship, thus underscoring that the enduring struggle is one over the jurisdiction of nations. However, as I show in this section, the jurisdictional authority of the Wet'suwet'en is challenged through a range of different state laws, strategies, and governance arrangements and processes, as the latter continues to operate as if state jurisdiction is hegemonic.

Wet'suwet'en have long resisted extractive activities on their land, which they have used and occupied for thousands of years: "Wet'suwet'en authority on the land base has played an essential role in maintaining the strength of cultural identity among the Nation. Despite generations of assimilation efforts, the Wet'suwet'en have attempted to reconcile their authority with the Crown for 150 years to no avail".[147] The full history of their struggle for sovereignty against the actions and presumptive legitimacy of the Crown is beyond the scope of this project, however an important landmark in their struggle is the Delgamuukw judgement in the Supreme Court.

Coastal GasLink Pipeline

The CGL Pipeline begins at an inlet in the Groundbirch area of British Columbia, will run (once construction is completed) approximately 670 km to deliver natural gas to a liquified natural gas terminal in Kitimat, BC. The CGL Pipeline is owned by LNG Canada, which is a joint venture of five global energy companies, Shell (40% interest in the project), North Montney LNG (25% interest), Diamond (15% interest), PetroChina (15% interest), and Kogas (5% interest). The CGL pipeline is the largest private sector investment in Canadian history, at $40 billion (NEB 2019).

[147] Office of the Wet'suwet'en (2011) *Wet'suwet'en Rights and Title and Enbridge's Northern Gateway Pipelines Project. Submission to: Northern Gateway Joint Review Panel*. Available at http://www.wetsuweten.com/. At 115.

As the Office of the Wet'suwet'en describes, "190 km of the proposed Coastal GasLink Project, from Honeagh Bin in Yextsowiten territory to Uyenii in Lho Kwah, lie within Wet'suwet'en Territory over which the Wet'suwet'en maintain Aboriginal Title and Rights".[148] Despite a history of opposition, in 2014 CGL received its Environmental Assessment Certificate, which, according to TransCanada, was gained after a two-year environmental and technical review, as well as a 7,200-page application to the B.C. Environmental Assessment Office (BCEAO). Permits from the B.C. Oil and Gas Commission (BCOGC) followed shortly thereafter, thus providing CGL the green light to begin construction.[149]

Despite the victory in Delgamuukw explained above, the Wet'suwet'en have had to actively resist ongoing attempts to establish extractive industries on their traditional territories. In 2007, the Wet'suwet'en Hereditary chiefs expressed their opposition to all pipelines on their territory, including the Pacific Trail Pipeline (PTP). As part of the ongoing resistance to pipelines, a checkpoint was established at Wedzin Kwa entrance in Unist'ot'en, in April 2009, and cabin construction began soon after directly on the location of proposed pipeline corridors. In 2012, Ms. Huson, Mr. Naziel and others set up a bridge blockade on the Morice West forest service road. On 3 September 2015 hereditary chiefs from all five clans, as well as representatives from the office of the Wet'suwet'en, visited the camp at Wedzin Kwa and asserted their support for the Unist'ot'en and affirmed their commitment to stop all pipelines

[148] Office of the Wet'suwet'en (2014) *Letter to the Ministers for decision on the TransCanada Coastal GasLink Project. RE: BC EAO list of Coastal GasLink Pipeline Project's Conditions*. 3 October 2014. Available at http://www.wetsuweten.com. At 2.
[149] TransCanada (April 2014). Coastal Gaslink Pipeline Project: Aboriginal Consultation Report 2. CGL4703-CGP-AB-RP-004.

(Unist'ot'en camp website).[150] In addition to these material acts of resistance, the Wet'suwet'en have also engaged actively in the consultation process and challenged the permitting process.

Throughout their resistance to the CGL pipleline, the Wet'suwet'en Hereditary Leadership met with TransCanada as part of a process of consultation. In their consultation, TransCanada met with the Wet'suwet'en Hereditary Leadership beginning in 2012. At the time of publication of the first consultation report in 2013, the WHL had been met with 5 times however they had not received any capacity funding, while the majority of other First Nations had.[151] However, as reported in 2014, between June 11 2012 and November 15 2013, Trans Canada reports that they met with the WHL a total of 11 times. Trans Canada reports here that they provided the Hereditary Leadership capacity funding to help compensate all the work involved in these consultations.[152] They met with the Wet'suwet'en Band Council 16 times, more than any other Band or First Nation. Of the 17 First Nations consulted throughout this period, four raised concerns about the potential impacts of the pipeline on the Aboriginal and Treaty Rights: 1) Nadleh Whut'en First Nation 2) Nak'azdli Band 3) Wet'suwet'en Hereditary Leadership 4) Saulteau First Nation.

Legal geographies of jurisdiction and property and their constitutive relationship with conflict

If jurisdiction is the pronouncement of law's authority and legitimacy, it is also through decisions about jurisdictional authority that law's violence is realized. One of the constitutive

[150] Unist'ot'en Camp Website. Timeline of Campaign. Available at: https://unistoten.camp/timeline/timeline-of-the-campaign/
[151] TransCanada (May 3, 2013). Coastal Gaslink Pipeline Project: Aboriginal Consultation Report 1. CGL4703-CGP-AB-RP-002, Appendix B.
[152] TransCanada (April 2014). Coastal Gaslink Pipeline Project: Aboriginal Consultation Report 2. CGL4703-CGP-AB-RP-004, at 75.

ways that law's violence is exercised is through methods of erasure that serve to ignore Indigenous jurisdictions. The following example is indicative of this process.

Provincial jurisdiction has been an area of contention in the CGL pipeline dispute, leading to a decision from the National Energy Board (NEB) that is illustrative of how jurisdiction is dealt with and imagined within Canada's current constitutional framework. On 30 July 2018 Mr. Michael Sawyer submitted an application to the NEB to "determine and issue a declaratory order that the CGL Pipeline is properly within federal jurisdiction and subject to regulation by the Board".[153] The application was to seek a declaration on the jurisdictional place of the project. While the entirety of the CGL pipeline exists within the province of BC, Sawyer argued that because of the inter-provincial transportation links required to sustain the project that it should fall within Federal jurisdiction and therefore be subject to Federal environmental review. The jurisdictional question was firstly a constitutional question referring to sections 91(29) and 92(10)(a) of the Constitution which outlines that works and undertakings, such as pipelines, "that are located wholly within a province are within the exclusive jurisdiction of the provincial legislature, while those that connect one province with another province, or that extend beyond the limits of a province, are within the exclusive jurisdiction of the federal parliament".[154]

On 26 July 2019 the National Energy Board tabled its decision on a matter concerning the Jurisdiction of the Coastal GasLink Pipeline Project. The NEB found, against the hopes of the applicant, that indeed the CGL Pipeline fell within provincial jurisdiction. However, the decision provides key insights into how this Pipeline is regulated in relation to the jurisdictions

[153] National Energy Board (2019) Letter Decision Re: Jurisdiction over the Coastal GasLink Pipeline Project. MH-053-2018. Decision of the National Energy Board. 26 July 2019
[154] Ibid at 15.

within which it runs, even if those jurisdictions do not have the ultimate authority to govern it. One of the most startling aspects of the proceedings is that while the issue at hand was to determine which jurisdiction the pipeline was within, Indigenous peoples are not even mentioned as having a voice in the jurisdictional debate. Considering the assertions and active participation of the First Nations in the Consultation process, these hearings demonstrate the extent to which they are ultimately excluded from any proceedings that do not, by law, include them.

It is clear that none of the participants in the jurisdictional review thought that the Aboriginal rights or title interests at stake raised relevant questions of federalism. The Attorney Generals of BC and Saskatchewan engaged directly with the question of cooperative federalism, arguing that "constitutional doctrine must facilitate, not undermine, cooperative federalism. The AG of Saskatchewan noted that cooperation between governments is what, in part, makes the division of powers in the Constitution work".[155] The submission from the Attorney General of BC is a fundamentally a statement, or pronouncement, of erasure of Indigenous jurisdiction, or existence, for that matter. The AG of BC argues that because CGL pipeline will exist entirely within the borders of the province, "laws should be made at the level of the jurisdiction closest to the people affected. Intra-provincial transportation primarily affects the people of that province. Inter-provincial transportation jurisdiction is for those cases where regulatory decisions will have significant extra-provincial impacts".[156] The centrality of the matter of jurisdiction is further legitimated through appealing to a spatialized 'local'. In the conclusion to the final report on the matter, it is stated: "the Project is a local work and undertaking properly regulated by the

[155] Ibid at 44.
[156] Argument of the Province of British Columbia (2019) National Energy Board Hearing Order MH-052-2018. Jurisdiction over the Coastal GasLink Pipeline. Available at: https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3767869. At 4.

province of BC".[157] This is a particular rendering of the 'local' that ignores the competing claims to space and territory made by Indigenous peoples.

As we know from the critical literature on jurisdiction, these matters are not mundane matters of law and government but rather a pronouncement and practice of state-law's legitimacy. The province and the courts treat jurisdiction as a technical legal issue; as an apolitical decision about how to delegate authority between different 'levels' of government over different kinds of environmental decision-making. In the decision of the NEB we identify how jurisdiction in the macro sense of a state asserting and re-asserting its sovereignty is performed through the micro-details of determining whether or not a project is 'local' or of Federal interest. By working as if Aboriginal title is not an issue of jurisdiction that needs to be folded into this decision-making, Indigenous sovereignty is left to be imagined as nothing more than a rights interest, rather than a question of Federalism.

Indigenous sovereignty claims are often rendered as concerns over cultural rights, a transition that Glen Coulthard has identified in the Dene Nation in the Northwest Territories. He identifies a shift whereby political rights to self-determination are translated as, and undermined through, a politics of recognition focused on the recognition and protection of Aboriginal cultural interests. He argues that the genocidal and assimilationist policies and ideologies of the colonial period have been modified through contemporary politics of recognition so far as to be "reproduced through a seemingly more conciliatory set of discourses and institutional practices that emphasize our recognition and accommodation. Regardless of this modification, however, the relationship between Indigenous peoples and the state has remained colonial to its foundation".[158] In this context Indigenous peoples can secure rights to particular cultural

[157] Supra Note 153 at 57.
[158] Coulthard, *supra* note 18 at 6.

activities practiced on land, but not to jurisdiction over lands.[159] The interpretation of Aboriginal peoples claims to jurisdiction as matters of culture is illustrate through the work of the EAO.

Throughout these consultations, the Wet'suwet'en Hereditary Leadership expressed their deep concern with the impacts of the project. Despite the celebrated Delgamuukw judgement, the validity of strength of the assertions of Aboriginal Title by the Office of the Wet'suwet'en and the hereditary chiefs are routinely undermined by state agencies. An exchange between the Office of the Wet'suwet'en and the BC Environmental Assessment Office is a telling example. In its submission to the EAO, the OW directs the EAO to review the testimonies and judgement provided in Delgamuukw as clear evidence of the legitimacy of the Wet'suwet'en claim to Aboriginal title, however in its reporting it is very unclear (and therefore unlikely) that the EAO referred to the Delgamuukw decision at all in its determination of Aboriginal title. Moreover, in conclusion to review of the Aboriginal title and rights interests and how they will be impacted by the Coastal GasLink project, OW explains:

> *"The Wet'suwet'en, who have constitutionally protected rights, have determined that the proposed Coastal GasLink project will have further significant environmental effects and cumulative impacts that include: loss and deterioration on lands and resources, unlawful infringement of our rights, and deterioration of our health and community well-being… It is the Wet'suwet'en position that both the Coastal GasLink Project and the BC EAO process pose serious and irreversible infringements to Wet'suwet'en title and rights. In accordance with Wet'suwet'en law and authority, the thirteen Wet'suwet'en Hereditary Chiefs assert our Wet'suwet'en title to our entire territory, including the area through which the proposed pipeline would pass".* [160]

[159] *Ibid* at 165.

[160] Office of the Wet'suwet'en (2014) Wet'suwet'en Title & Rights and Coastal GasLink, Submission to: BC EAO and Coastal GasLink Pipeline, at 111.

In response, however, the EAO reports: "EAO is of the view that the proposed Project would have low to moderate impacts on Wet'suwet'en asserted Aboriginal title to the Project area".[161]

This conclusion from the EAO is rationalized by splicing up and segregating specific issues that are otherwise understood as constitutive parts of a broader indigenous legal order articulated by the Wet'suwet'en. They refer to cultural rights, rather than matters of jurisdiction. For example, rather than acknowledging the cumulative impacts of the Coastal GasLink pipeline, as described by the Wet'suwet'en, EAO reports separate impacts on hunting, gathering, fishing, trails and travel ways.[162] It is a direct attempt to deny the inter-connected nature of indigenous legal orders and consider that an impact on one of these categories would have impacts on all others. It is a strategy to render jurisdictional claims as issues of disconnected and heterogeneous cultural rights.

The practices of the EAO represent attempts to challenge and undermine the jurisdictional authority of the hereditary leadership. These acts can be understood as methods of erasure expressed through the language of jurisdiction. These methods need to be understood as a rendering of jurisdictional territory in a language amenable and legible to settler law. Rather than acknowledging the inter-related nature and character of Indigenous laws, as described by the Wet'suwet'en, the EAO very simply averts to an understanding of jurisdiction that is cohesive, homogeneous, authoritative. The ease at which the EAO moves from the rich and detailed descriptions of the relationship between Indigenous law and the land to a purportedly a-political statement of state law is telling of the pervasive power of settler law as a unquestioned 'fall back' position.

[161] BC Environmental Assessment Office (2014). On file with the author. At 474.
[162] Ibid. at 474-476.

This is an example of law's role in underestimating the impacts of extractive activities, a characteristic of law's slow violence. Professor Dayna Scott describes the particular ways that law is interwoven into slow violence. She explains Nixon's approach:

> *law's slow violence is in the provision of complex principles, institutions, and mechanisms by which we judge as rational the systematic underestimation and discounting of human and environmental costs that can be displaced over time or space. Thus, law's violence must be appreciated and made visible in its day-to-day rigging of the contests over land, bodies, labour, and resources that Nixon describes. Law provides the structures through which the displacements are done.*[163]

The jurisdictional erasures explained above provide the mechanisms through which law underestimates and undermines Indigenous legal orders, contributing to conditions of slow violence that perpetually challenge Indigenous sovereignty. It is in these conditions that the Wet'suwet'en are mobilizing and asserting their rights to self-determination.

It would be inaccurate to suggest that the jurisdictional and territorial space being created through consultation processes is an exclusively state space. According to *Haida*, third parties like resource companies and proponents do not have a duty to consult and accommodate. But in practice, it is indeed these parties that are carrying out the consultation, that are determining the format, determining the place to meet, and having a significant influence on determining the scope and nature of the duty to consult. Thus, these are spaces where state jurisdictional authority is being enacted via corporate actors who have a significant stake in the project.

The duty to consult is being fulfilled through the work of corporate actors who are in turn seeking to define the scope of Aboriginal rights. The Yellowhead Institute reports that according to the Impact Benefit Agreement, Coastal GasLink seeks out "irrevocable consent" for the

[163] Dayna Scott, "Book Review: Slow Violence and the Environmentalism of the Poor, by Rob Nixon" (2012) 50:2 Osgoode Hall Law J at 489.

project and stipulates that the First Nation quell any current or future dissent to the project from within the Nation. As reprinted by the Yellowhead Institute, the IBA reads: "[The First Nation] will take all reasonable actions to persuade [First Nation] members to not take, any action, legal or otherwise, including any media or social media campaign, that may impeded, hinder, frustrate, delay, stop or interfere with the Project's contractors, any Authorizations or any Approval Processes".[164] This is an example of how jurisdictional authority is performed by a range of state and non-state actors. Through their work they create territory through the legal and governance processes of consultation. These processes – and their practices – function to exclude First Nations methods of decision-making and governance. An effect is that First Nations assertions of Indigenous law and governance is rendered as outside of and in conflict with the other actors engaged in these efforts.

Injunctions: Protecting 'property' within a settler legal geography

Within the legal geographies of resource extraction, injunctions have become the 'new normal' for corporate actors trying to limit the impacts of Indigenous resistance to their extractive projects.[165] Irina Ceric defines what an injunction is:

> *An injunction is a court order issued by a judge after an application is filed by a party to a lawsuit and is meant to protect the interests or rights of that applicant while the case is pending… If the injunction application is successful, the court issues an order forbidding the feared actions. An injunction can be interim (temporary) or interlocutory, meaning that it will stay in effect until trial.*[166]

[164] Pasternak, Shiri "Why are Indigenous rights being defined by an energy corporation?" Yellowhead Institute Policy Brief, Issue 51, February 7, 2020. Available at www.yellowheadinstitute.org.
[165] Irina Ceric, "Beyond Contempt: Injunctions, Land Defense, and the Criminalization of Indigenous Resistance" (2020) 119:2 South Atl Q 353–369.
[166] *Ibid*.

The question of what it is in law is of course only part of the issue – I am particularly concerned about what injunctions do in the context of state and First Nations relationships. Ceric argues that injunctions are part of settler-colonial legality that maintains the jurisdiction of the Canadian state over Indigenous territories, and a means by which Indigenous land defenders are criminalized (via contempt of court charges).[167] While I agree that injunctions contribute to the creation of legal spaces where material police-enforced violence is legitimated against Indigenous land protectors, the kind of legal violence that injunctions serve to enforce is much wider than processes of criminalization.

In Canada, injunctions have historically been used as a means of indigenous dispossession for the purpose of development and extractive activities on their lands. For example, a recent report by the Yellowhead Institute which was based on an analysis of more than 100 cases of injunctions found that only 18.5 % of injunctions filed by First Nations to stop industry and government activity across Canada were successful, while 76% of injunctions filed by corporations against First Nations were granted (Yellowhead 2019). The skewed outcomes demonstrate the courts unwillingness to recognize Aboriginal rights and title and accept indigenous jurisdiction.

Ceric explains the role of injunctions in criminalization. If someone violates the terms of an injunction, they can be charged for being in contempt of court. The use of contempt of court charges, argues Ceric, is a "specific, and especially pernicious, form of criminalization".[168] Injunctions provide a means to literally send land defenders to prison. Contempt of court charges are not part of the Criminal Code, so the accused do not benefit from Criminal Code protections nor are they subject to a trial by jury. There is an issue with this rendering of the criminalization

[167] *Ibid*.
[168] *Ibid at* 361.

of indigenous protest in conditions of settler colonialism, in that leads to a narrowing on the specific court proceedings involving individuals charged for their acts of resistance. This involves an unacknowledged scalar jump from the broader conditions to the legal charges against individuals.

My argument here is that injunctions reinforce a centralized and hierarchical conception of property rights and contribute to the production of knowledge about resource conflict in important ways. The criminalization of Indigenous land defenders is one aspect of this, but to focus on criminalization in this context focuses too narrowly on charges against individual peoples, and not on the formation of knowledge about conflict – and the constitutive understanding of Aboriginal rights as lesser rights against the state. A condition that perpetually positions First Nations as agitators of conflict rather than the subject of egregious violations of their rights and sovereignty.

Injunction proceedings are part of the micropolitics of jurisdiction and through them we can identify how the courts are used to powerfully articulate provincial jurisdiction. They demonstrate how jurisdiction is at once a multi-scalar process, whereby the specifics of legal argument are used to affirm a wider structural condition of the attempted erasure of Indigenous sovereignty. This is underscored by the point that injunctions cannot be challenged by claims to Indigenous sovereignty. As Irina Ceric explains the role of the "collateral attack" doctrine in injunction proceedings; it "precludes any challenge to the basis for the injunction itself. This rule rests on the notion that a court order is to be obeyed until it is set aside, varied, or reversed on appeal and that the validity of an injunction cannot be attacked in any other proceeding".[169] This fundamentally excludes any challenges to injunctions based on claims to Indigenous sovereignty.

[169] *Ibid* at 365.

However, the Unist'ot'en camp did make such an argument in the injunction proceedings, asserting that they are acting in respect of Wet'suwet'en law on unceded Wet'suwet'en lands.

On 3 November 2018 an application for injunction was served to the Unist'ot'en camp, and by 15 December 2018 a judge ruled that the gate blocking CGL access must come down. On the 7 January 2019 an RCMP tactical unit descended on the Gidumt'en checkpoint, arresting 14 land defenders and supporters and dismantling the gate. Armed with assault rifles and watched overhead by helicopters, the full force of the state and its commitment to protecting corporate interests was on display. Pictures and videos from the arrests were shared widely on social media and in the following days protests in support of Unist'ot'en filled streets across the country. The hereditary chiefs announced in the following days that they would comply with the temporary injunction, to the surprise of many. One commentator thought this was in part a response to the RCMP and the state finally taking notice of the authority of the hereditary leadership (APTN news). By the 7 of February, a statement on reconciliation between the province and the office of the Wet'suwet'en was agreed to by both parties (OW and BC 2019).

A decision on the interim injunction was handed down by BC Supreme Court Justice Marguerite Church on 31 December 2019. Church granted an injunction against members of the Wet'suwet'en nation, giving them 72 hours to take down their camp at the Morice West Forest Service road and the Gidimt'en Access Point, blocking workers from the CGL worksite. The decision is indicative of the settler rationalities being articulated in this ongoing contestation. The injunction judgement is based on a centralized property paradigm, a rationality that informs both the courts as well as narratives of the 'conflict' in popular media.

The analysis provided in the judgment is based on identifying people who are outside of a centralized property paradigm. A centralist property paradigm privileges and naturalizes vertical

and hierarchical sets of relationships. For example, it posits owners against non-owners and rests on the hierarchical nature of rights along an axis that moves from no rights, to some rights, to more rights. He explains the ordering function of centralist thinking:

> *centrality means that property is the key to the system of property rights (and, by extension, to a large part of the system of rights as a whole)— having ownership (or other rights) in property triggers a whole series of legal entitlements and privileges, just as its absence implies exclusion from those entitlements and privileges. Thus, property is central to the system in that the presence of property equals and justifies recognition and protection of social, economic, and legal autonomy and power, whereas absence of property self-evidently translates into and justifies the continued existence of social, economic, and legal weakness, vulnerability, and dependence.*[170]

Therefore, those with no rights are assumed to have to demonstrate that they have property rights, a logic central to the 'prove it' approach to Aboriginal title claims. The burden of proving Aboriginal title is on Indigenous peoples, who must go through the courts or negotiate with the Crown to demonstrate that they have an Aboriginal rights and title interest over a particular territory. As Eugene Kung and Gavin Smith – both staff lawyers at West Coast Environmental Law – explain, this is a 'prove it' approach that is characteristic of Canadian law on Aboriginal title. Despite the recognition of Aboriginal rights and title, they explain,

> *in practice the legal reality of Aboriginal title and governance has been largely held back from on-the-ground application by the Crown's fallback position, which could be cynically summarized as "Yes, Aboriginal title and governance exist, but we don't know where exactly and it's quite complicated, so in the meantime we're going to continue making decisions as if it doesn't exist anywhere.*[171]

[170] Van der Walt, *supra* note 126 at 83.
[171] Eugene Kung & Gavin Smith, "Canada's 'prove it' approach to Aboriginal title", (1 February 2019), online: *Policy Options* <https://policyoptions.irpp.org/fr/magazines/february-2019/canadas-prove-it-approach-to-aboriginal-title/>.

The ‘prove it’ approach informs Judge Church’s judgement. Judge Church looks for the ability of the protesters to demonstrate that they have a legitimate property right. Rather than assuming that they have the right, and assuming that it was then the state’s responsibility to demonstrate that they do not have rights, she holdss that the protestors do not have a consistent or legitimate claim to property rights. Rather than interpreting the different protests and protest camps that have emerged as part of a resistance to the CGL pipeline, Church understands the protests as groups making questionable claims to hereditary authority, and uses her interpretation of the apparent heterogeneity of claims to be indicative of a lack of cohesion and therefore a lack of credible claim to Aboriginal title. It is this logic that perpetuates an interpretation of ‘local’ conflicts.

In the Federal Court judgement upholding the interlocutory injunction, handed down 31 December 2019, Judge Church explains:

> *The evidence before me indicates significant conflict amongst members of the Wet'suwet'en nation regarding construction of the Pipeline Project, including disagreements amongst the Wet'suwet'en people as to whether traditional hereditary governance protocols have or have not been followed, whether hereditary governance is appropriate for decision making that impacts the entire Wet'suwet'en nation and the emergence of other groups, such as the Unist'ot'en, which purports to be entitled to enforce Wet'suwet'en law on the authority of Chief Knedebeas and more recently the WMC, which apparently seeks to challenge the authority of the hereditary chiefs to make decisions for the Wet'suwet'en nation as a whole and the manner in which the traditional governance processes have occurred.*[172]

She further writes:

> *the elected Band councils assert that the reluctance of the Office of the Wet'suwet'en to enter into project agreements, out of concern that it might negatively impact their claims to aboriginal title, placed the responsibility on the Band councils to negotiate agreements to ensure that the Wet'suwet'en*

[172] *Coastal GasLink Pipeline Ltd v Huson*, 2019 Supreme Court of British Columbia at 134.

> *people as a whole would receive benefits from Pipeline Project and other projects in their territory. This appears to have resulted in considerable tension between the Office of the Wet'suwet'en and the elected Band councils, which is readily apparent in the some of affidavit materials filed by members of the Wet'suwet'en community.*[173]

The following four paragraphs from Church's decision are indicative of how her reasoning, and her interpretation of 'internal conflicts' is used to undermine and challenge assertions of Indigenous law.

> *[137] All of this evidence suggests that the indigenous legal perspective in this case is complex and diverse and that the Wet'suwet'en people are deeply divided with respect to either opposition to or support for the Pipeline Project.*[174]
>
> *[149] The aboriginal title claims of the Wet'suwet'en remain outstanding and have not been resolved either by litigation or negotiation, despite the urging of the Supreme Court of Canada in Delgamuukw.*[175]
>
> *[151] Thus rather than efforts to prevent violation of Wet'suwet'en law, the defendants' efforts appear to have been directed specifically towards opposition to pipelines in general and the Pipeline Project specifically. Their public statements do not reference traditional Wet'suwet'en governance structures and upholding the authority of Chief Knedebeas, but rather describe the Unist'ot'en Camp as their focal point, part of a territorial "reoccupation" and strategically located in the Pipeline Project right of way as part of a resistance effort. They continue to encourage the establishment of new blockades and participation of individuals from outside the local community to join the blockades and establishing new structures in locations designed to impede the Pipeline Project or its construction.*[176]
>
> *(165) Instead, the defendants chose to resort to self-help remedies. As I have already noted there no evidence before me of any indigenous law which authorizes blockades of roads or bridges as a mechanism to deal with breach of Wet'suwet'en law*[177]

[173] *Ibid at* 68.
[174] *Ibid at 137*.
[175] *Ibid* at 149.
[176] *Ibid* at 151.
[177] *Ibid at 165*.

Church expects that the First Nations resisting the CGL pipeline must position themselves as a cohesive, collective subjectivity rather than a dynamic political group negotiating and asserting Indigenous law in their own ways.

Judge Church's decision assumes the cohesiveness of Aboriginal nations resisting the pipeline; it perpetuates an individualizing narrative that has long been corrosive in depictions of Indigenous peoples' struggles. For example, in media representations and published documentation of the resistance of the Wet'suwet'en, these First Nations are consistently referred to as a 'community' or 'group' rather than a People. Trans Canada, for example, consistently uses the terms 'Aboriginal groups', 'Aboriginal communities', 'Aboriginal interests', 'Aboriginal people'.[178] This "negatively singular" and "individualizing" terminology has a long history in government discussion.[179] Moreover, Coastal GasLink advertises that it values the relationships it has built with First Nations along the pipeline route and that its approach to engaging with Indigenous groups and other stakeholders is based on "building relationships, mutual respect and trust while recognizing the unique values, needs and interests of each community".[180] This is not an issue of semantics. In Section 35 of the Constitution Act refers to Aboriginal peoples as 'Peoples', a collective sovereign group. The International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights two international covenants both protect the right to self determination of Peoples. The UNDRIP similarly refers to Indigenous peoples as part of collective societies. The near absence of a recognition of the Wet'suwet'en as peoples, and the consistent trend to refer to

[178] See TransCanada Consultation Reports, 2013, 2014.
[179] Orkin, "When the Law Breaks Down", *supra* note 91 at 448.
[180] Bellrichard, Chantelle (2019) Benefits agreement asks First Nation to discourage members from hindering B.C. pipeline project. CBC News. 9 August 2019. Available at: https://www.cbc.ca/news/indigenous/coastal-gaslink-nak-azdli-whut-en-agreement-1.5238220

them as a 'community' is much less a slip and a misunderstanding and more of a symptom of settler colonialism and the denial of Aboriginal Peoples' jurisdiction over land.

The injunction has become a site of Indigenous resistance and assertions of autonomy and self-determination in terms of jurisdiction.[181] In response to the judgment, for example, the Wet'suwet'en Hereditary Chiefs released a media statement on January 4, 2020 stating

> *Wet'suwet'en Hereditary Chiefs representing all five clans of the Wet'suwet'en Nation have issued an eviction notice to the Coastal GasLink (CGL) pipeline company. The eviction of CGL is effective immediately, and applies to "Camp 9A" on Dark House territory, as well as the neighbouring Gidimt'en, Tsayu, and Laksamshu clan territories. Hereditary chiefs have gathered on Gidimt'en and Gilseyhu territories to monitor the eviction.*[182]

Thus, the injunction has become a site where the Wet'suwet'en assert their sovereignty in terms of jurisdiction.

Creating a 'conflict' and producing slow violence

In popular news and in government statements, a narrative of an 'internal' struggle between the elected band officials and the hereditary chiefs has emerged. This narrative derives in part from centralist property thinking that is represented in Judge Church's decision. The narrative of an internal conflict has been perpetuated by the premier of the province of British Columbia, who said at a press conference that, in contrast to the elected Band councils, the Wet'suwet'en hereditary chiefs have recently "emerged", by implication questioning their legitimacy as representatives of their people.[183] This is a startling opinion from the Premier. As OW explains,

---

[181] Ceric, "Beyond Contempt", *supra* note 165.
[182] See "*Wet'suwet'en Hereditary Chiefs Evict Coastal GasLink from Territory*". Available at https://unistoten.camp/wetsuweten-hereditary-chiefs-evict-coastal-gaslink-from-territory/. 4 January 2020.
[183] Hunter, Jestine, Brent Jang, Wendy Stueck, and Shawn McCarthy. *This pipeline is challenging Indigenous law and Western law. Who really owns the land?* The Globe and Mail. 13 January 2019.

the WHL have been present as representatives in negotiations with the crown for over 150 years, and in addition they have actively participated in the consultation process with CGL from the beginning, thus the suggestion that they have recently emerged in the specific context of the struggle against Coastal GasLink is an active form of denial, erasure, and the perpetuation of state violence. Peter Grant, legal council for the Wet'suwet'en nation, remarks in an interview with Aboriginal Peoples News, that "the band councils do not have jurisdiction in Wet-suwet'en territory over the traditional territory. Everyone knows that within the Wet'suwet'en nations, whether they are band councillors or hereditary chiefs. That's not a matter of dispute".[184] Grant further explains that the BC Government has not properly consulted with the hereditary chiefs in a way that they demonstrate that they are willing to modify their plans through consultations.

Downplaying the historical significance of Wet'suwet'en jurisdiction, as realized in part through their indigenous legal orders, and suggesting that hereditary leadership is 're-emerging', are all constitutive ways that the idea of an 'internal conflict' is created to undermine the legitimacy of the struggle. It is also an outcome of the specific legal practices and ideologies that underpin state claims to jurisdiction and property, as I have been explaining throughout. It is through these specific struggles that we can identify expressions of (state) law's contemporary violence, and their effect on the production of knowledge about conflict. The law produces conflicts, all the while remaining the assumed benchmark against which all indigenous laws are measured. Conflict is assumed to arise due to disharmony in First nations/indigenous communities, rather than as an outcome of the imposition of state laws.

---

https://www.theglobeandmail.com/canada/british-columbia/article-a-contested-pipeline-tests-the-landscape-of-indigenous-law-who/

[184] Brake, Justin (2019) Trudeau, Horgan under fire for downplaying Aboriginal title following raid of Wet'suwet'en. APTN News, 11 January 2019. https://aptnnews.ca/2019/01/11/trudeau-horgan-under-fire-for-downplaying-aboriginal-title-following-rcmp-raid-of-wetsuweten/

The Memorandum of Understanding

Earlier in the chapter I explained that on 14 May 2020 the Wet'suwet'en Hereditary Chiefs came to an agreement with the B.C. and Federal Government and signed an memorandum of understanding (MOU) affirming the recognition of Wet'suwet'en Aboriginal rights and title and setting a strict timeline for the negotiation of jurisdictional arrangements between the Wet'suwet'en and the Crown. On his Instagram page, Hereditary Chief Smogelgem writes that the signing of the MOU "is the first step towards self-determination and returning to the mindsets of our pre-contact ancestors" and "Colonialism is dying in Wet'suwet'en Yintah".

The MOU appears to be widely criticized by elected band members in the Wet'suwet'en nation who had previously agreed to the CGL pipeline. Reports indicate that the elected band members were not included in the direct negotiations between the Hereditary Chiefs, Canada, and B.C. Days before the signing of the MOU, 4 of 6 elected chiefs in northern B.C. rejected the MOU, demanding to be included in its negotiation. As reported by APTN news, Dan George, chief of the Ts'ilh Kaz Koh First Nation, said "They are proceeding without us, and we are a major part of this hereditary system, and as elected chiefs, we have signed agreements with environmental projects".[185] He continues,

> *This is the not the hereditary chiefs land, this is the community's land… They are not following the responsibilities of Hereditary Chiefs. To ignore their clan members and Elected Councils, something is terribly amiss. They do not represent us, and they have no legal authority to negotiate or sign any documents on behalf of our clans or our members without a mandate… Rights and title are the collective rights of ALL Wet'suwet'en people; they are not held only by Hereditary Chiefs and they cannot be defined or compromised by*

[185] Wilson, Lee and Kathleen Martens. *They're proceeding without us: Elected chiefs in B.C. push back on Wet'suwet'en rights and title agreement*. APTN News. 12 May 2020. https://www.aptnnews.ca/national-news/theyre-proceeding-without-us-elected-chiefs-in-b-c-push-back-on-wetsuweten-rights-and-title-agreement/

> *the small hand-picked group the government is dealing with. That is 19th century treaty making, not 21st century reconciliation.*[186]

In an apparent response to concerns among elected Chiefs about the negotiations leading to the MOU and directly following it, the Wet'suwet'en Hereditary Chiefs released a press statement on 1 June 2020. In it they describe the effects of colonization on their governance systems:

> *Since time immemorial, our Clans, Tsayu, Gitdumten, Laksilyu, Laksamshu and Gilseyhu and our house members have come together to plan, to make decisions across our yintah and take care of each other. This indigenous way of decision making is based upon our Kungax, our oral history and Anuk niwh'it'ën, our sacred laws and is often witnessed in our bahalts, potlatch.*
>
> *We have almost two centuries of colonial forces attempting to assimilate and dismantle our Wet'suwet'en governance system, our language and ceremonies and our connection to the yintah. With much respect to our grandparents, parents and ancestors, they kept our ways of being alive for us today and for those yet to come… Collectively we are working together to continue on this path, to listen, to reach out and to rebuild the relationships the oppressive forces have left behind.*[187]

The fact that the MOU ignited further discussions among First Nations impacted by the CGL pipeline is indicative of the governance issues at stake in the project. The statement above, however, is an example of how these particular negotiations provide an opportunity to engage deeply with Indigenous governance issues. These negotiations are constitutive of assertions of self-determination in the contemporary moment.

An alternative legal geography and an alternative understanding of conflict

It is in this legal context that Indigenous peoples are asserting their self-determination by defining their own elements of consent. The Yellowhead Institute, for example, summarizes

[186] Ibid.
[187] Wet'suwet'en Chiefs Dialogue. Press Release by Wet'suwet'en Hereditary Chiefs. 1 June 2020. Available at http://www.wetsuweten.com/.

some of the characteristics of Indigenous consent by defining four distinct elements of Indigenous consent – Restorative, Epistemic, Reciprocal, Legitimate. They explain: "While these constitute an evolving and generalized form of consent (many nations often have their own models and principles), we see this conceptualization emerging from Indigenous-led consent-based practices that de-centre state authority and obligations, revitalize Indigenous knowledge, law and custom, and promote inclusion within and even across communities".[188] It is on this point that I turn to the struggle for self-determination by the Wet'suwet'en peoples.

In contrast to defining the 'local' in relation to Constitutional doctrine, Indigenous peoples assert their authority to the territory through which CGL will pass through appeals to transnational law and norms on Indigenous peoples' rights. Transnational indigenous rights norms have long had an important role in interpreting the rights at stake. The Unist'ot'en established a Free Prior and Informed Consent protocol, which is "is a request of permission to enter the lands of the traditional chiefs and matriarchs. Visitors are asked to identify themselves and their relationship to the hosts, as our ancestors did. Like a border crossing, the protocol questions make Unist'ot'en land a safe place. FPIC ensures peace and security on the territory".[189] Professor Margot Young from UBC's Allard School of Law, explains that International law is central to the resolution of the disagreements on Wet'suwet'en territory: "All levels of government are bound by treaties signed by Canada, and Canadian constitutional law is to be informed by these human rights obligations. United Nations concerns are not to be lightly cast aside".[190]

---

[188] Yellowhead Institute. "Land Back: A Yellowhead Institute Red Paper." Toronto, ON, 2019. https://yellowheadinstitute.org/. at 21.
[189] Unist'ot'en Camp Zine. Available at https://unistoten.camp/
[190] BC Civil Liberties Association. Media Advisory of Press Conference on January 15, 2020. Legal Complains Files Against RCMP Exclusion Zone in Wet'suwet'en. 14 January 2020. Available at: https://www.ubcic.bc.ca/media_advisory_legal_complaints_filed_against_rcmp_exclusion_zone

International standards can be used to pressure the Canadian government to change its approach. Shin Imai explains that the Canadian approach to consultation, and the courts' obsession with limiting the question of consent to consultation between indigenous peoples, the state and industry, is not in line with international standards on the consent standards. He shows that international financial regulatory bodies commit to the consent standard, for example (Imai 2017). As an indication that the Canadian state is feeling pressure to meet a higher standard of consent, Indigenous and Northern Affairs Canada Minister Carolyn Bennett "committed to full implementation of UNDRIP, including FPIC, but insisted on further qualification stating that FPIC must be interpreted through domestic legal and constitutional frameworks".[191] The Wet'suwet'en Hereditary Chiefs have also engaged with the United Nations on multiple times to demand recognition of their sovereignty. Hereditary chief Na'moks and Freda Huson made statements to the special rapporteur during the meeting of the UN Permanent Forum on Indigenous Issues in New York in April 2019. In January 2020, Wet'suwet'en Hereditary Chiefs submitted a request to the United Nations to monitor RCMP, CGL, and government, days before the RCMP dismantled their blockade.

Transnational norms on Indigenous rights have been an important leverage for the Wet'suwet'en Hereditary Chieftaincy particularly because Provincial and Federal Governments have taken so long to respect their authority. Writing about some of the dynamics of Indigenous rights struggles in Mexico, political scientist Courtney Young finds fascinating parallels to the transnational and trans-local struggle in Wet'suwet'en: "When the practices of self-government create minorities within communities, those minorities are able to reach beyond the community, to courts, international tribunals, corporate headquarters, and the streets of the capital city to

[191] Yellowhead Institute, 2019. Supra note 184. At 19.

voice their opposition".[192] She explains the relevance of transnational organizing in conditions of Constitutional pluralism: "indigenous voices depended on a wide range of venues, strategies, and mechanisms to achieve their goals; but no venue, strategy, or mechanism, either alone or in combination, guaranteed a particular outcome, not least because indigenous people often take up competing positions. Enabling migration among political venues may be the best way of securing the contingency that anchors the legitimacy of constitutional democracy".[193] Thus Aboriginal title still provides some opportunity to demanding the right to consent, rather than merely consultation. The transnational character of Indigenous struggles for self-determination is further illustrated in the next chapter, on the ongoing struggle in Xolobeni.

Conclusion: Reflections on Self-Determination, Jurisdiction, Property and Legal Violence in Canada

Reading the struggle in Unist'ot'en as one between rival jurisdictions illustrates the particular practices that contribute to the making, and challenging, of sovereignty between the Canadian state and the Wet'suwet'en. It demonstrates the ways that Wet'suwet'en jurisdictional claims are rendered as either proprietary interests or as issues of cultural rights. It also illustrates how the Wet'suwet'en mobilize and assert themselves in relation not only to the Canadian state, but also in relation to transnational movements for the rights of Indigenous peoples. Finally, by reading the Wet'suwet'en reports of post-colonial violence we might identify contemporary politics of self-determination. In this framework we can identify how conflict is territorialized in relation to

[192] Courtney Jung, "The Politics of Horizontal Inequality: Indigenous Opposition to Wind Energy Development in Mexico" in Andrew Arato, Jean L Cohen & Astrid von Busekist, eds, *Forms Plur Democr Const* (New York: Columbia University Press, 2018) at 332.
[193] *Ibid* at 333.

settler claims to jurisdiction, producing narratives of ‘inter-communal conflict’ that serve to undermine Indigenous sovereignty and collective autonomy.

Chapter 3: Self-determination as resistance to legal violence on an ecological frontier in Xolobeni, South Africa

In November 2018, the peoples of Xolobeni in the Eastern Cape of South Africa, celebrated a landmark victory recognizing their right to 'say no' to proposed titanium mining on their territory. They have been struggling against proposed mining for well over two decades and this court victory sent shockwaves across the country. For some, it was celebrated for recognizing the legitimacy of customary law and collective decision-making autonomy in relation to mining and infrastructure development. For others, the judgement signaled an undermining of state authority to make decisions regarding development that was purported to be in the interest of 'all South Africans'. The victory is often articulated as one for Indigenous rights.

Indigenous rights are contested in the South African context. After giving a presentation on the politics of Indigeneity and legal pluralism in South Africa at the University of Western Cape, a participant in the room (who had many years of experience in public policy in the context of land and property issues) said to me "you are barking up the wrong tree by engaging with Indigenous rights. You know the United States doesn't only have 52 states, it has thousands of sovereign states in First Nations?'. He was clearly insinuating that the recognition of Indigenous rights would lead to the fragmentation of the country, ethnic division, and ungovernable 'sovereign states', a perspective articulated elsewhere.[194]

The reasoning behind this statement is precisely what makes Indigenous rights particularly contested in South Africa. The post-apartheid transition has been facilitated through a Constitutional democracy and the state, as a non-racial and inclusive representation of the diversity of the country, is imagined as the progressive vehicle to overcome a history of racial

[194] See Adam Kuper, "The Return of the Native" (2003) 44:3 Curr Anthropol 389–402.

division. The State, led by the governing African National Congress (ANC), was and is the liberation party. Moreover, self-determination was used during the anti-apartheid struggle as a way to assert the rights of all black South Africans against the apartheid state.[195] To argue today that there are indigenous peoples who have rights to self-determination is both to assume that self-determination for the black majority is not complete through the state, to challenge the state as a vehicle for liberation, and to risk division in the celebrated 'rainbow nation'. In other words, the specific historical context of colonialism, apartheid, and liberation via democracy contributes to a deep reluctance towards Indigenous rights. Indigenous rights are thus understood to be a fracture in the wider project of democracy and peoples advocating for their recognition are blamed for inciting ethnic or inter-communal conflict.

In the broader International and region context, however, Indigenous rights are gaining currency. The African Charter on Human and Peoples' Rights recognizes three categories of rights: civil and political, social and economic, and peoples' rights. The African Charter is unique for its protection of peoples' rights. Peoples' rights refer to the collective rights and include the rights to self-determination (art. 20), the right to sovereignty over natural resources (art. 21), right to development (art. 22). People's rights have been linked to indigenous rights in Kenya and could potentially be used as a means to recognize Indigenous rights and the legitimacy of customary law in South Africa as well.[196] Across the continent, a number of landmark judgements concerning Indigenous Peoples demonstrate "that the legal category of 'indigenous peoples' has allowed communities (sometimes divided by colonization) to reassert their rights, using the concept of 'indigeneity' as a means of defining themselves as peoples

[195] Heinz Klug *Self-Determination and the Struggle Against Apartheid*, SSRN Scholarly Paper, by Heinz Klug, papers.ssrn.com, SSRN Scholarly Paper ID 3526426 (Rochester, NY: Social Science Research Network, 1990).
[196] See Wicomb and Smith 2010

entitled to specific rights".[197] I draw inspiration from James Anaya, former UN special Rapporteur on the right of Indigenous Peoples, who explains that the question of whether or not one group identifies as indigenous is "secondary to the more focused inquiry about what concerns the group may be raising in human rights terms and whether it helps to address those concerns by reference to the indigenous rubric".[198] Indigenous rights contribute significantly to the development of human rights norms related to customary law and land rights for rural peoples.

The idea that Indigenous rights are identity-based and divisive is a very powerful narrative that informs critics across the political spectrum in South Africa and Canada. This is a conflict narrative that positions one collective actor, a self-identified and self-determined political actor, against the state. The state is always positioned outside of this narrative. As I did in the last chapter, here I read assertions of autonomy and self-determination through a perspective of law's violence.

Due to this history of colonization, apartheid, and racial division, reading the struggle in Xolobeni as one over rival jurisdictions orients the narrative in such a way that the rights of the community, as a collective (referred to as a 'customary community'), are elevated in relation to the state. However, this case study also illustrates the complex relationships that have emerged between human rights and jurisdiction. In a post-apartheid context where citizenship rights are often translated and articulated through the language of human rights, in Xolobeni, assertions of jurisdictional authority and self-determination are claims to citizenship rights. As I show, what appears as a paradoxical relationship (as compared to the struggle in Unist'ot'en) between self-

[197] Jérémie Gilbert, "Litigating Indigenous Peoples' rights in Africa: Potentials, Challenges, and Limitations" (2017) 66:3 Int Amp Comp Law Q 657–686 at 284.
[198] S James Anaya, *International human rights and indigenous peoples*, Aspen elective series (Austin: Wolters Kluwer Law & Business, 2009) at 36.

determination and citizenship has emerged through particular rural struggles for land rights as well as conditions of human insecurity and violence experienced by mining effected communities. These conditions might be understood through the optic of the 'frontier'.

Legal violence on the frontier

Law's violence is articulated within a frontier ecology in Xolobeni. A frontier ecology refers to overlapping and contested discourses of law and governance within a particular imagined and territorialized space. Anthropologist Anna Tsing describes the imaginative work of the frontier: "The frontier… is not a natural or indigenous category. It is a travelling theory, a blatantly foreign form requiring translation".[199] A frontier, according to Tsing, is an "an imaginative project capable of moulding both places and processes".[200] In Xolobeni, peoples' histories of threatened dispossession and struggle to protect the land are re-articulated today in the context of overlapping discourses and proposed development interventions. It is a biodiversity hotspot (one of around 35 in the world), a 'development corridor' according to the state's recent spatial development plan, a place of development possibility for a 'smart city', a world-class highway with one of the continent's largest suspension bridges, and of course, the site of a mine.[201] Frontier ecologies are not distinct zones where the colonizer meets the colonized (as Nicholas Blomley[202] characterizes it, for example), or where progress meets wilderness, rather frontier ecologies refer to "frontiers of ecological change where prior governance arrangements are being challenged and dissolved to make way for new governance arrangements".[203] Peluso and Lund

[199] Anna Lowenhaupt Tsing, "Natural Resources and Capitalist Frontiers" (2003) 38:48 Econ Polit Wkly at 5101.
[200] *Ibid* at 5102.
[201] See 2020 Spatial Development Plan, Mbizana Municipality.
[202] Blomley, "Law, property, and the geography of violence", *supra* note 61.
[203] Shubhra Gururani & Peter Vandergeest, "Introduction: New Frontiers of Ecological Knowledge: Co-producing Knowledge and Governance in Asia" (2014) 12:4 Conserv Soc at 344.

describe 'frontiers of land control': "They are sites where authorities, sovereignties, and hegemonies of the recent past have been or are currently being challenged by new enclosures, territorializations, and property regimes. What is new is not only land grabbing or ownership but also… new actors and subjects, and new legal and practical instruments for possessing, expropriating, or challenging previous land controls ".[204] Legal violence, I show, takes particular forms in frontier ecologies as legal pluralism is particularly accentuated and actors diverse. Often, it seems, law's violence in this context has the same result as it always has – it is a tool of colonial dispossession used to transform land into property and clear territory for resource extraction. The violence that threatens the peoples of Xolobeni is articulated in no uncertain terms, as described below. Yet the violence of law is dispersed through a range of actors with overlapping objectives.

Foundational literature in sociolegal studies explains that law is a deeply contradictory site of struggle whereby the colonized or dispossessed both experience the violence of law and appeal to it to leverage rights.[205] This is particularly the case in the frontier ecology of Xolobeni, where histories of resistance to apartheid era dispossession, conservation discourses, a proposed mine, and a highway in development, overlap in ways that bring jurisdictions and actors into specific kinds of relations. Law is both a medium for transformation as well as a means to legitimate the reproduction of histories of racism. In this chapter I illustrate law's fragmented and often contradictory role in the struggle for the right to consultation and consent in South Africa. I demonstrate that significant victories have been won in efforts to gain recognition and

[204] Peluso & Lund, "New frontiers of land control", *supra* note 71 at 668.
[205] Hirsch, Susan F. and Mindie Lazarus-Black (1994) "Performance and Paradox: Exploring Law's Role in Hegemony and Resistance". In Mindie Lazarus-Black and Susan F. Hirsch (eds) *Contested States: Law, Hegemony and Resistance*. Routledge: New York and London. Pp. 1-34; E P Thompson, *Whigs and hunters: the origin of the Black Act*, [1st ed.]; [reprinted with a new postscript]. ed, Pergrine books (Harmondsworth: Penguin Books, 1977).

legitimacy for customary law in South Africa's new constitution. These victories should not be understated. However, I identify that despite these victories, law's role in perpetuating a constitutive relationship between methods of erasure and processes of divide and agitate, offers continued opportunities for those opposed to the recognition of customary law to undermine its validity. Law's violence, I argue, can be identified through efforts to divide and disrupt local collectivities, as well as state presumptions of jurisdictional authority. In the previous chapter developments in Aboriginal title and the duty to consult were interrogated as particular (and contested) legal vehicles through which self-determination is being articulated against law's violence, in this chapter I explain the emergence of the Right to Say No. The Right to Say No demands that peoples identify themselves as a collective and autonomous group, and positions them against the power of the state. In the second half of the chapter I explain, first, how legal violence is legitimated through maintaining abstract, generalized territorializations of space and condemning 'local' conflicts. Local conflicts are constructed in contrast to a presumed broader territory of governance. Second, I explain how legal violence is legitimated through the use of technologies of jurisdiction. It is precisely through resistance to both of these forms of legal violence that we can identify contemporary articulations of self-determination in this contested environment.

The Right to Say No is a very recent development in South Africa. Calls for adequate community consultation in the extractive industry have amplified in recent years, as evidenced in a number of recent reports.[206] It has also become the focus of strategic litigation. The 'right to consent', however, is founded on a much different Constitutional commitment than in Canada. Section 25 of the Final Constitution guarantees that all peoples who lack security of title due to

[206] SAHRC (2018) National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa. Available at: https://www.sahrc.org.za/.

racially discriminatory rule are provided with security of land tenure or comparable redress. Incredibly, in the recent *Maledu* (elaborated below) Constitutional Court judgement it was determined that, in part, denying customary land rights as a legitimate source of land tenure security would amount to continuing a long history of undermining the land rights of racialized rural peoples and therefore their 'informal rights' to land need to be protected on par with common law property rights. In High Court judgement *Baleni* this argument was extended to determine that the people of Xolobeni have a right to determine how decisions are made about their land, and have the right to say no to development on their lands that they disagree with.[207] In others words, in the absence of a Constitutional protection of Aboriginal title, the South African Courts have used human rights norms, paired with a commitment to provide redress to histories of racial discrimination, to secure the customary land tenure as a focus of rights in this rural community.

Struggle over traditional leadership

A key characteristic of the struggle in Amadiba is a conflict between the state-recognized traditional leadership and the community. The disagreements over the authority of Chief Lunga Baleni reveal ongoing contestations over jurisdiction and the right to self-determination. Under the *Traditional Leadership and Governance Framework Act*, the governing body of the Umgungundlovu community is the Amadiba Traditional Council, and Chief Lunga Baleni is the chairperson of the Amadiba Traditional Council and the iNkosi (traditional leader) of the Umgungundlovu Traditional Community. According to 'official' records, Duduzile Baleni, while the acting iNkosana (headwoman) of the Umgungundlovu Traditional Community, reports to

[207] Baleni and Others v Minister of Mineral Resources and Others 2018 73768/2016 (HC)

Chief Lunga Baleni, and therefore cannot act on the Community's behalf. Chief Lunga Baleni has agreed to the mine, while Duduzile Baleni argues that he does not have the authority to do this without first gaining the consent of the impacted community.

In a press statement one of the community leaders, Nonhle Mbuthuma, spokesperson for the Amadiba Crisis Committee (ACC), states that "[t]he government categorizes the Umgungundlovu community as part of the Amadiba tribal authority or Traditional Council under chief Lunga, but the Umgungundlovu community rejects the leadership of chief Lunga insofar as chief Lunga supports the establishment of the titanium mine on the community land of the Umgungundlovu people".[208] In an act of defiance against the authority of Lunga,[209] Mbuthuma and members of the ACC argue that they reserve the right to choose their leader. Mbuthuma further argues that "the community defines itself as such [Umgungundlovu] and members share the same social values, similar economic interests and aspirations. We are governed by our own customary law".[210] Here, the reference to their 'own customary law' refers to a belief that the mechanisms for electing traditional leaders are not determined by state legislation but are to be the product of community negotiation and decision-making.

History and emergence of the right to consent in South Africa

Communities across the African continent have begun demanding the Right to Say No.[211] Emboldened by the Pretoria High Court judgment in Xolobeni, discussed below, and tired of the

[208] N. Mbuthuma, Statement by Nonhle Mbuthuma re: South African Police Services, Mbizana District, Commnuity Perceptions of Partial Conflict, On file with the author, (2016).
[209] The authority of Chief Lunga has also been discredited because he is a board member of XolCo, the local partnership corporation with stakes in the proposed mine.
[210] Supra note 167.
[211] See for example http://aidc.org.za/permanent-peoples-tribunal/; as well as Amandla Media, 'We Communities Have Been Saying No!' https://www.youtube.com/watch?v=SemHA4uhM90 (2020).

devastating impacts of extractive industries on their lands, rural peoples are beginning to mobilize around what they understand to be a fundamental right. The Right to Say No is not in legal doctrine or UN Declarations; rather it represents a statement from rural peoples who draw from the transnational legal standard free, prior and informed consent (FPIC)[212] and weave it in with their own localized demands for the right to veto large-scale industrial projects. It is an assertion of communities taking back power.

Demands for the right to 'consent' have been a central nerve in the land reform struggle since the transition to democracy in South Africa. Consent is a stronger claim than the right to consultation, but the latter leads to the former in important ways. Processes of consultation are central to the processes of transformative constitutionalism,[213] as well as to the rights of rural peoples in democratic South Africa. Transformative constitutionalism overlaps with a theory of a democratic developmental state, for example, that emphasizes participation, collaboration and empowerment of all players in society as "central means and ends in our transformative Constitution".[214] Jurisprudence on social rights serves to "enhance the participatory capabilities of those living in poverty and… facilitate the inclusion of marginalised voices in the debate on what is required to achieve such a society".[215] The new Constitutional order promotes "a way of

[212] The first recognized assertion of FPIC was in the International Labour Organization's Convention 169. Today references to FPIC often refer to the United Nations Declaration on the Rights of Indigenous Peoples where Article 32 requires that States must consult with indigenous peoples, through their own chosen institutions, in order to "obtain their free and informed consent prior to the approval of any project affecting their land or territories and other resources, particularly in connection with the development, utilization and exploitation of mineral, water or other resources".

[213] Rather than focusing solely on Constitutional law – as realized in the Final Constitution and the jurisprudence of the Constitutional Court – I focus on conditions of transformative constitutionalism, inspired by the word of Klare, Karl E. 1998. "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights* 14 (1): 146-188.; Klug, Heinz. 2000. Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction. Cambridge: Cambridge University Press.

[214] Solange Rosa, "Transformative Constitutionalism in a Democratic Developmental State" (2011) 22 Stellenbosch Law Rev at 543.

[215] Sandra Liebenberg, "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 Stellenbosch Law Rev 5 at 36.

looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant".[216]

In the period immediately following the first democratic elections in 1994, legal advocates and communities understood that 'consent' needed to be central to land reform legislation focused on the communal areas in South Africa. For example, in the draft Land Rights Bill of 1999, section 13(1) includes the stipulation that "no person who holds a protected right to land may be deprived of that right without their consent"[217]. It further suggests that no prospecting or mining can take place on land without the Minister of Minerals consulting with and gaining the consent of the owners of the land (Section 48(2(b(i))). The issue of consent is however conspicuously removed in later drafts, leading critics to ask:

> *Why did the drafters scrap the provisions in previous drafts that required community consultation, community consent for transfers, choice about land administration structures and human rights standards in land rights administration?... Consultation, consent and human rights protections were not left out by an oversight. They used to be there. They were taken out.*[218]

The assumption in this statement is that particular actors advocated successfully to take out requirements of consent and consultation; it is suspected that those lobbying for the increased power and authority of traditional leaders over lands in the former communal areas were behind the shift. Around the same time, the White Paper on Traditional Leadership was introduced. The White Paper was a pivotal moment, according to lawyer Wilmien Wicomb, in that it represents the first official assertion that traditional leaders must act as custodians of customary law, rather

[216] Pius Langa, "Transformative Constitutionalism" (2006) 17:3 Stellenbosch Law Rev at 354.
[217] According to the Draft Bill, a protected right means the right to occupy, use, or have access to land.
[218] PLAAS/NLC Community Consultation Project, Submission to the Portfolio Committee on Agriculture and Land Affairs, On file with the author, (2003).

than being subjects of, and held accountable by, customary law. In other words, customary law, rather than being law in its own right, was framed as an accessory to Traditional Leadership.[219] This framing is apparent in the presumed role of traditional leaders in being the 'gatekeepers' of consultations:

> *The system of Bantu authorities eroded the culture of consultation and, instead, traditional leaders relied more on the power of their backers than on the collective wisdom of the communities they were leading. It is against this historical background that steps which are intended to restore the integrity of the institution of traditional leadership are being taken.*[220]

Note that rather than coming to the conclusion that steps are being taken to restore the integrity of customary law and the collective forms of governance that it represents, the statement underscores traditional leadership as the institution to be restored. The post-apartheid rise of traditional leadership "was facilitated precisely by the statutory empowerment of these leaders and the further marginalisation of customary law, including the mechanisms of accountability it requires".[221] This has enormous implications for the right to consent, or the Right to Say No, in that it removes this right from rural communities and legitimates, in statutory law, traditional leaders as custodians of customary law and the authorities to make decisions above the right and will of communities.

In transcripts from public consultations and public submissions regrading key post-apartheid legislation concerning rural land governance we can identify the recurrent assertion of

[219] Wilmien Wicomb, "The Exceptionalism and Identity of Customary Law under the Constitution Customary Law" (2013) 6 Const Court Rev 127–146.
[220] White Paper on Traditional Leadership and Governance, Government Gazette 25438, General Notice 2336 (10 September 2003), available at http://www.polity.org.za/article/white-paper-ontraditional-leadership-and-governance-july-2003-2003-09-30 at 13.
[221] Wicomb, *supra* note 219.

the right to be consulted on matters impacting rural land rights.[222] A sense of injustice for not being properly consulted is a key theme in the history of land tenure reform legislation. It is also clear that consultation is primarily understood as a collective, or communal, process. For example, 'community consultation' is a term used much more often than general references to 'custom' or 'culture'. This is likely due to the fact that 'customary law' is a particular rendering of a collective and historical practice, which includes a commitment to collective decision-making. Thus consultation, as a collective decision-making practice, is used as a descriptive term more often than an abstract reference to 'customary law'.

While there is evidence of a history of demands for consultation in the wider context of transformative constitutionalism, it was not until more recently that both consultation, and the right to consent, have been litigated in courts. Establishing a Right to Say No is a means of asserting a form of self-determination and requires drawing from a broad repertoire of rights, which include international Indigenous peoples' rights, the realization of legal pluralism, cultural rights, and the intrinsic value of land and traditional governance practices. As I illustrate below, the articulation of a right to say no was in part made possible by the landmark Richtersveld constitutional court judgment and the introduction of living customary law.

The jurisprudence and politics of living customary law

In 2003, the Constitutional Court of South Africa handed down a landmark land restitution judgment transferring land to the Richtersveld community, marking the first time that common

[222] The following discussion is based on an analysis of transcripts of public consultations and submissions made during the consultative step in the legislative process. This includes the aforementioned documents related to the introduction of the Communal Land Rights Act, the Traditional and Khoisan Leadership Act, and the High Level Panel on the Assessment of Key Legislation and Fundamental Change. This includes 67 documents in total. The author used the qualitative research software Nvivo in his analysis. Please contact the author for a complete bibliography of referred documents.

law Aboriginal title was applied in an African court.[223] The *Richtersveld* decision was significant because of how it was informed by law from other jurisdictions; it also marked the beginning of further South African engagements with transnational policy and international human rights norms in land reform. The Constitutional Court argued that the community had rights to land and that these rights were properly determined by reference to 'Indigenous law'.[224] Importantly, 'Indigenous law' meant the same thing as 'customary law' in the judgment, a change in language that arguably served to naturalize and solidify a link between 'customary law', which has a long history in South Africa and 'Indigenous law' with its international human rights connotations.

Taking inspiration from common law principles defining Aboriginal title, the Constitutional Court determined that the subject land was owned communally, that the community had been historically defined in part by its exclusion of others, that it had exclusive rights to the subject land, and that its rights included prospecting, mining, and using minerals.[225] After the Supreme Court of Appeal found that customary ownership was 'akin to common law ownership',[226] the Constitutional Court went further by finding that the right to land in question amounted to what it termed 'Indigenous law ownership' in its own right.[227] The court explained the concept of 'Indigenous law' by referring to its evolving nature, ". . . Indigenous law is not a

[223] A. K. Barume, *Land Rights of Indigenous Peoples in Africa*, 2nd Edition, (Copenhagen, International Working Group on Indigenous Peoples in Africa, 2014); K. Lehmann, 'To define or not to define: The definitional debate revisited', *American Indian Law Review* 31, 2 (2007), pp. 509-529; H. Mostert, "Beyond 'Richtersveld': the judicial take on restitution of communal land rights in South Africa', In L. Godden and M. Tehan (eds) *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, New York, 2010). pp. 215-240.

[224] Alexkor Ltd and Another v Richtersveld Community and Others 2003 (12) BCLR 1301 (CC), Para 50.

[225] Through the testimonies of expert witnesses, the SCA found that "This evidence clearly establishes that the Richtersveld community believed that the right to minerals belonged to them and that they acted in a manner consistent with such a belief. They exploited the minerals without requesting permission from anyone to do so and, significantly, strangers respected their rights by obtaining their permission to prospect for minerals and concluding mining and mineral leases with them" (SCA 2003, 87).

[226] Richtersveld Community and Others v Alexkor Ltd and Another 2003 (6) BCLR 583 (SCA), para 29 and 111.

[227] Alexkor v Richtersveld, (2003), para. 51.

fixed body of formally classified and easily ascertainable rules. By its very nature, it evolves as the people who live by its norms change their patterns of life".[228] The Constitutional Court argued that legal pluralism needed to be taken seriously in South Africa.[229] It is from these statements of the evolutionary and changing character of customary law, as well as its place in South African law, that the concept of 'living customary law' was born.

The *Richtersveld* judgment advances Indigenous Peoples' customary law rights beyond the framework developing in common law jurisdictions elsewhere. Jérémie Gilbert explains that the recognition of possession and customary law as a source of land rights in the case goes beyond its recognition in common law countries such as Australia and Canada where Aboriginal title is subordinated to the power of the state to extinguish it.[230] Instead, the court "adopted a less State-centric approach to Indigenous peoples' land rights, emphasizing the power of customary laws".[231]

Aboriginal title and Indigenous rights represent human rights norms that develop in both political contexts and international arenas. They have been interpreted and elaborated in transnational spheres of deliberation and translated into local contexts as they are rendered in 'the vernacular'.[232] James Anaya explains that the expansive use of Aboriginal title should be understood in relationship to the emerging articulation of Indigenous rights, a "process in

---

[228] Ibid, para 52.
[229] Ibid, para 45-51.
[230] Jérémie Gilbert, "Litigating Indigenous Peoples' rights in Africa: Potentials, Challenges, and Limitations" (2017) 66:3 Int Amp Comp Law Q at 671.
.
[231] Gilbert, *Litigating Indigenous Peoples' Rights in Africa*, pp. 671.
[232] S.E. Merry, *Human Rights and Gender Violence Translating International Law into Local Justice*. (Chicago, University of Chicago Press, 2006); M. Goodale, "Locating Rights, Envisioning Law Between the Global and the Local." In M. Goodale and S.E. Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge, Cambridge University Press, 2007), pp. 1-38; B. Ibhawoh, "From Ubuntu to Grootboom: Vernacularising Human Rights through Restorative and Distributive Justice in Post-Apartheid South Africa" In T. Kepe, M. Levin, and B. von Lieres (eds) *Domains of Freedom: Justice, Citizenship and Social Change in South Africa* (Cape Town, University of Cape Town Press, 2016), pp. 239-257.

connection with norms and values"[233] evolving within a larger political field of Indigenous identification and organization. From this perspective we can acknowledge that the assertion of Indigenous subject positions and Indigenous rights involve processes of articulation in which norms, values, and histories of dispossession are shared and compared, such that legal forms emerging from one colonial history can be used to address others.[234]

The significance of the Richtersveld decision is illustrated by the fact that it is cited repeatedly in key judgments on the development of living customary law and its application in the communal areas of the former bantustans (reserves) in South Africa.[235] Living customary law has been an important means by which communities can define their autonomy against the powers of traditional leaders. In the judgement Royal Bafokeng (RBK) Nation (2018) the applicants asserted their autonomy over land they had owned collective (as a property under common-law) and argued therefore that they did not have to submit to the authority of the whole nation. Importantly, they appealed to the duty to consult.[236] Judge Gutta decided that "A failure to recognize the duty to consult as legally enforceable, fosters arbitrariness and autocracy, and undermines the participatory democracy which is at the heart of our Constitution and of RBN governance".[237] The victory represented by this judgment is understood by researchers and legal critics to be another victory for living customary law.

In the Constitutional Court judgment, *Maledu v. Itereleng Bakgatla Minerals Resources Limited* (2018) (*Maledu*), concerns a collectivity self-identified as the Lesetlheng community. In

[233] J. Anaya, *Indigenous Peoples in International Law*. (Oxford, Oxford University Press, 2004).
[234] D. Huizenga, 'Articulations of Aboriginal Title, Indigenous rights, and Living Customary Law in South Africa'. Social & Legal Studies 27, 1 (2018), pp.3–24.
[235] See Bhe and Others v. Magistrate, Khayelistsha and Others, 2004; Cala Reserve v. Premier of the Eastern Cape, 2015; Shilubana and Others v. Nwamitwa, 2008; for an analysis of Bhe and Shilubana, see Claassens, 2011.
[236] Bafokeng Land Buyers Association v The Royal Bafokeng Nation, Case No: CIV APP 3/17
[237] Bafokeng Land Buyers Association v The Royal Bafokeng Nation, Case No: CIV APP 3/17, para. 48.

the judgement the court dealt with the question of informal land rights as protected by the *Interim Protection of Informal Land Rights Act* (IPILRA). The determining issue was whether "the applicants are without a legal remedy simply by virtue of the fact that they constitute a community whose tenure of the farm in issue here is legally insecure as a result of past racially discriminatory laws or practices".[238] IPILRA stipulates “no person may be deprived of any informal right to land without his or her consent” (IPILRA, Section 2). The judgment deals precisely with determining the specific history of dispossession experienced by the applicants and the governance relationship between rural communities and the traditional territory within which they reside.

In the Maledu judgment Petse AJ, writing for an unanimous court, determined that the *Mineral and Petroleum Resources Development Act* (MPRDA) had to be read in conformity with the Interim Protection of Informal Land Rights Act (IPILRA) .[239] He ruled in response to the spirit of the Constitution, asserting the legislation at stake (IPILRA and MPRDA) needs to be interpreted in line with the Constitutional commitment to dealing with histories of racialized deprivation.[240] The court determined that “the MPRDA must be read, insofar as possible, in consonance with IPILRA… There is no conflict between these two statutes; each statute must be read in a manner that permits each to serve their underlying purpose".[241] Most significantly, the judgment protects the right to consent to mining, rather than merely consultation.

[238] Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2018 CCT265/17 ZACC 41, para 31. This is in reference to Section 25(6) of the Constitution: “A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”.
[239] This judgment was handed down a month before the Xolobeni judgment and certainly had a significant role to play in their victory; in Xolobeni the applicants sought a declaratory order on the protection of informal land rights, as per IPILRA, which includes the right to consent, against the lesser right of consultation in MPRDA. Thus, in many ways, this judgment offered the declaration before Xolobeni was decided.
[240] Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2018 CCT265/17 ZACC 41, para 34.
[241] Ibid para 106.

In November 2018 the Umgungundlovu community of Xolobeni won a landmark judgment in the Pretoria High court affirming their right to say no to resource extraction without their consent, which they could only grant according to their own customary governance structures. This is now known as the *Xolobeni* judgment against mining on their territory. During the court proceedings on 23 April 2018, Advocate Tembeka Ngcukaitobi (acting for the applicants) declared that "there is no question that the applicants are an Indigenous people" to justify drawing upon international Indigenous Peoples' rights and more specifically, the right to exercise FPIC.[242] The fact that the people of Xolobeni were never dispossessed of their land during apartheid, have a long historical and cultural connection with their land, as well as a history of continued marginalization by the state, appeared to be significant to their Indigenous subjectivity being unchallenged. The applicants also drew inspiration from a long history of rural resistance in the area.

In the *Xolobeni* judgment, Judge Basson found that the applicants have the right to be consulted, under the MPRDA, and to consent to development on their land, as required by IPILRA. The judgment is a profound assertion of the links between the cultural practices, ways of life, heritage significance, and land as territory in Umgungundlovu. The judgment emphasizes the relationships between individuals, households (umzi), the wider community, and the land they collectively use and manage. Importantly, and in a further reflection of the influence of the Constitutional commitments to transitional justice, Judge Basson highlights that contemporary vulnerability of informal land rights is due to the historical marginalization of customary law and the common law 'interpretations' of such laws. The decision of the court aligns with an argument made by land rights lawyer Wilmein Wicomb: rights arising from customary law are unique, or

[242] See hand held video recording of the proceedings, by John Clarke: https://www.youtube.com/watch?v=z1geB7fLj74

exceptional, in that "these rights suffered from historical discrimination. They therefore deserve special protection and promotion".[243] The applicants "may not be deprived of their land without their consent" and the community must be allowed to make a decision "in terms of their own custom" before any proposed deprivation of land takes place.[244] The role of international law, including FPIC, in interpreting the rights of the applicants is affirmed in the High Court Judgment.[245] By recognizing the link between customary law and collective decision-making, the judgment is also a statement on the authority of autonomous groups against the state.

The judgements above mark important victories for the rights of collectivities to land and natural resources in South Africa. The Xolobeni judgement easily contributes to this important jurisprudence. However, this victory needs to be understood in the context of the contested jurisdictions in which the Xolobeni struggle continues, and the specific significance of a recent judgement allowing a highway development across their territory.

'Local' conflict in conditions of multi-territoriality: Historical struggle, conservation, the mine, and the highway

Historical struggle

The struggle against mining in Xolobeni is within two wider territorial designations. Xolobeni is an area within the broad Umgungundlovu community, which exists in the Amadiba territory. There is a long history of struggle in the area. The Umgungundlovu peoples resisted apartheid authorities in the Mpondo Revolts in 1960s, rising up against apartheid-era attempts to govern rural land and institute 'betterment planning' through unaccountable chiefs. The Mpondo Revolts

[243] Wicomb, the exceptionalism of customary law, pp. 141.
[244] Baleni and Others v Minister of Mineral Resources and Others 2018 73768/2016 (HC), para 83.
[245] Baleni and Others (2018), para 20, 27, 78.

are remembered as one of the few successful rural acts of resistance against the apartheid state and its project of racial classification and dispossession. Historical accounts of these revolts describe the importance of rural forms of governance not accounted for by the apartheid legislation such as the 1951 Bantu Authorities Act. Historians Sarah Bruchhausen and Camalita Naiker explain that during open resistance in 1959-1961, 'tens of thousands of rural dwellers and migrant workers gathered on mountains, in forests, and in villages to organize a campaign of resistance in which they rejected the institution of Tribal Authorities as well as the idea of chieftaincy entirely'.[246] They continue, '[a] defining feature of the Mpondo revolts was the use of mountains as sites of subaltern politics and spaces for the organisation of resistance by ordinary male rural dwellers and migrant workers'.[247] Geographers Thembela Kepe and Lungisile Ntsebeza assert that the 'Mpondo revolts by far represented the strongest statement by rural people against social, economic, and political forces that came together to deny them of their right to democracy and equality'.[248] This celebrated history provides a well of memory and motivation for today's activists.

Conservation

The transnational importance of the struggle in Xolobeni is underscored by the fact that the area has long been a focus of conservationists and is a recognized global biodiversity hotspot. Historically, discourses of conservation and underdevelopment have positioned rural Mpondo peoples as in need of development introduced, designed and controlled by others. The pairing of

[246] S. Bruchhausen and C. Naicker, 'Broadening Conceptions of Democracy and Citizenship: The Subaltern Histories of Rural Resistance in Mpondoland and Marikana' in F. Brandt and G. Mkodzongi (eds) *Land reform revisited: democracy, state making and Agrarian transformation in post-apartheid South Africa* (Afrika-Studiecentrum series, Leiden, The Netherlands; Boston, Bril, 2018), pp. 30.
[247] Ibid.
[248] T. Kepe and L. Ntsebeza, 'Introduction', in T. Kepe and L. Ntsebeza (eds) *Rural Resistance in South Africa: The Mpondo Revolts after Fifty Years*, (Leiden and Boston: Brill, 2011), pp. 2.

conservation and underdevelopment has a long history in South Africa, where, even after the end of apartheid, there remains an entrenched racialized ideology among state officials and conservation activists that poor black people are a hinderance and threat to biological diversity.[249] In recent years, however, as the effects of climate change have become both more widely known and more deeply and physically experienced, the conservation of Pondoland has become an important focus of national and transnational allies siding with the community in their efforts to stop mining.[250]

The Mine

The Amadiba peoples have been resisting mining on their land for decades. Despite their victory in November 2018, the judgement is being appealed and it is expected that the matter will eventually reach the Constitutional Court. As part of their efforts to stop mining they established the Amadiba Crisis Committee in 2007, the same year that a mining license was granted to Transworld Energy and Mineral Resources (TEM), a subsidiary of the Australian owned Mineral Commodities Ltd. (MRC). A company set up under a black economic empowerment scheme called the Xolobeni Empowerment Company (XolCo) is a partner in the investment. The license covers an area of land 22 km long and 1.5 km wide along the Eastern Cape coastline, constituting 2867 hectares. The intention of TEM is open-cast mining on roughly 900 hectares of land within the mining area. The impacted area, however, will be much larger. Stockpiles, dumps, treatment plants, pipelines, powerlines, access roads, accommodations of mine workers, and other infrastructure will

[249] For a recent summary of this work see T. Kepe, 'Meanings, alliances and the state in tensions over land rights and conservation in South Africa', in S. Mollett and T. Kepe (eds), *Land Rights, Biodiversity Conservation, and Justice: Rethinking Parks and People* (London and New York, Routledge, 2018), pp. 17-30.
[250] K. Bloom, *The fate of Xolobeni would be the fate of us all*, Working Document No 2, Tricontinental: Institute for Social Research (October 2019).

certainly by much wider than the proposed site.[251] Research conducted by the ACC and partners determines that 70 to 75 households, made up of roughly 600 individuals, will be forcibly dispossessed, while many more will be impacted by the mining activities.[252]

As explained above, the peoples of Xolobeni won their right to say no to the proposed mine. However, the DMR is appealing the judgment. The department's director-general, Thabo Mokoena, lamented the Baleni judgment in parliament soon after the decision, arguing that if consent of communities were required, there would be no mining in the country.[253] It is not only state actors who argue that the judgement goes too far and fundamentally undermines the ability of the state to make decisions regarding mineral resources. Many commentators argue that the judgement overstates the rights and power of communities against the state, and undermines the role of the state as the custodian of minerals in South Africa, as stipulated in the MPRDA. Writing in the Mail & Guardian newspaper, Sabelo Ngubeni argues that the judgement interferes with the state's role as the custodian of all minerals in the country and undermines the state's ability to grant mining rights. Ngubeni argues "that the consent requirement casts the net too wide and that it is characterized by many challenges that render its implementation difficult, if not impossible".[254] The author advocates for a different approach: "The consent requirement may be dispensed with in favour of free, prior and informed consultation".[255]

[251] See, for example, Baleni, Duduzile, 2016. Founding Affidavit, in the High Court of South Africa (Gauteng Provincial Division, Pretoria). Para 68. On File with the Author.
[252] Founding affidavit, para 47. On file with the author.
[253] A. Cawe (2019) Mining Consent: Autonomy of rural poor under attack. Business Day. Times Media (pty) Ltd. 18 February 2019.
[254] S. Ngubeni (2019) Xolobeni mining ruling compromises the state. Mail & Guardian. 13 September 2019. Available at: https://mg.co.za/article/2019-09-13-00-xolobeni-mining-ruling-compromises-the-state.
[255] S. Ngubeni (2019) Xolobeni mining ruling compromises the state. Mail & Guardian. 13 September 2019. Available at: https://mg.co.za/article/2019-09-13-00-xolobeni-mining-ruling-compromises-the-state.

The Highway

While I have written about the specifics of the mine elsewhere, in this thesis I emphasize and elaborate on the proposed N2 WildCoast Highway. Despite the ACC feeling that the mine and the highway constitute the same threat, the mine has received much more attention by researchers and journalists. As I show, the dynamics and conflicts arising around the development of the highway are very similar to those associated with the mine.

The N2 Wild Coast Road (N2WCR) is celebrated as a key piece of a national infrastructure project part of a National Development Plan. In 2017 the Transport Minister, Joe Maswanganyi, announced that the road was one of 18 Strategic Integrated Projects approved by cabinet. The National Treasury is providing most of the capital for the road, however tolls will also be used to raise money to pay for the construction of the road.

The N2WCR begins at the Gonubie Interchange (near the city of East London in the Eastern Cape) and ends at the N2 Isipingo Interchange, just south of Durban, a major port city in the province of Kwa-Zulu Natal. Upgrades to existing roads cover 470 km of the total project. The remaining 90km runs through what is referred to as the 'greenfields' section in the Wild Coast, the majority of which is within the Umgungundlovu traditional territory. It is this section that has been contested in court by members of the Umgungundlovu community. Due to the highway upgrades and the shorter length between East London and Durban (the highway will be approximately 85 km shorter than the current N2 highway), the highway development will reduce travel between the cities by an estimated 3 hrs.

The highway will include nine new bridges, all in the greenfields section of the development. Of these nine proposed bridges, SANRAL is proposing the construction of two of the largest and most spectacular bridges on the continent, called the Mtentu River Bridge and the

Msikaba River Bridge. The Mtentu River Bridge will be 1130m long, with a 260m main span raised 160m high. It will be a balanced cantilever design. The Msikaba River Bridge will be a 580m long bridge held 192m above the river. It will be a cable-stayed design. The development is certainly impressive for its engineering and vision.

A community member in Mtentu, Sibusiso Mqadi, chairperson of the Amadiba crisis committee, said the people did not want the road anywhere near their communities because it would facilitate the Xolobeni mining project. He explains:

> *We see that the construction of the bridge is going ahead in Mtentu but we are not part of the process and have been sidelined and even chased away from meetings to discuss matters pertaining to its construction. The purpose of this road is to make it possible for trucks to ship the raw materials from Xolobeni mine to a smelter in East London. So the N2 Wild Coast Toll Road will make it easier for them to transport the minerals they will get from the mine. The freeway they are proposing is meant only to reduce the travelling distance to the smelter in East London, thereby facilitating mining. We are opposed to the road, just as we are to the mining in Xolobeni. We know the projects are related." in City Press.*[256]

Despite the feeling among some members of the community that the highway and the mine present concurrent and interrelated threats to their land and livelihoods, SANRAL views the projects in line with how state legislation identifies them – as completely distinct. In a community meeting at the Konkhulu in Xolobeni in 2017, the CEO of SANRAL explained that SANRAL is a roads agency and has absolutely nothing to do with the proposed mine. He explained the organization of government and the distribution of authority; creating an image of an apolitical process carrying out duties to fulfill national agendas. In an official statement, SANRAL claims "The N2WCR has no direct link to the proposed Xolobeni sand dune

[256] *Ngcukana 2018, Oct 8*

project".[257] A perspective that was entirely unconvincing in the political context of Xolobeni. In a 28 January 2019 statement, SANRAL said the Baleni judgement recognizing the Xolobeni community's right to consent "will not have any influence" on the construction of the N2 Wild Coast Highway.

SANRAL was granted an environmental authorization to implement the project on 19 April 2010 by the Deputy Director General of the Environmental Quality and Protection of the DEA. The Wild Coast Communities appealed the decision in terms of section 35 of the ECA, however all the appeals were dismissed by the Minister on 26 July 2011.[258] In 2012 members of the Amadiba coastal villages filed a case in the North Gauteng High Court seeking a judicial review to set aside the environmental authorization of the N2 Wild Coast Toll Road. By 2017 SANRAL still had not replied to the submitted court papers.

Despite the pending court challenges, SANRAL started to build through the Greenfields section in 2017. The contract to build the brides was advertised internationally and eventually given to Aveng Strabag, a joint venture comprising Aveng Grinaker-LTA, based in Johannesburg, and Vienna based Strabag International. Sometime in the second half of 2017 Sanral began blasting in Mtentu to begin carving out the rock for the highway.[259] This construction sparked protests by local communities. Villagers in the Khanyayo area blocked all SANRAL construction work on the N2 near Mtentu river in 2017 for more than three weeks. They were demanding that SANRAL pay compensation for loss of grazing land or the removal of ancestral graves.[260]

[257] SANRAL 2017, 8
[258] Zukulu et al V The Minister of Water and Environmental Affairs et al., Para 23, 24.
[259] Ngcukana, Lubabalo (2017) Sanral starts N2 project, despite court action. News24. Available at https://www.news24.com/news24/SouthAfrica/News/sanral-starts-n2-project-despite-court-action-20170923
[260] Ibid.

Construction on the Mtentu mega bridge was started in January 2018. However, in October 2018 the Jama community began protests against SANRAL, effectively stopping construction on the Mtentu bridge. Protesters from the Jama community demanded that SANRAL provide jobs for local people and fire a project liaison officer who lost the trust of the community, Mr Zeka Mnyamana. Mnyamana is the former executive of the Xolobeni empowerment company, formed as a Black Economic Empowerment company in partnership with Australian Minerals Commodities in the Xolobeni mineral sands mining project. Reporter Dennis Webster writes in the *New Frame* that the resistance erupted due to broken promises made to the community. He writes, "[w]hile the contractors [Aveng-Strabag] initially committed to spending at least 30% of the project funds on subcontractors from local small, medium and micro enterprises, the figure was later deemed "not feasible to achieve" and revised down to 7%".[261] The community also felt that the construction site was over militarized and wanted the security guards to leave. In February 2019, after months of not being able to work due to the protests, Aveng Strabag terminated its contract to build the bridge and left the job site. They cited inability to work due to "threats of violence and levels of community unrest and protest action related to demands made against Sanral".

Unlike the ACC, the Jama community is in favour of the highway construction and hopes that it will bring jobs to the area. Nonetheless, the ACC stood in solidarity with the Jama community, writing on 30 October 2018 on their facebook page: "we are in solidarity with the Jama community protests against Sanral". In their statement of support for the Jama community, the ACC writes "Our experience is that Sanral botch social engagement and makes deals with contractors that doesn't want to hire locals. Local traditional leaders are bribed and communities

[261] Webster, Dennis (2019) Resistance stalls mega Wild Coast bridge. New Frame. https://www.newframe.com/resistance-stalls-mega-wild-coast-bridge/ 5 February 2019.

are then divided". Here we can identify the strategy to divide and agitate, discussed earlier, in the context of the highway development.

The conflicts that have arisen around the highway development are due in part to broken promises of industry, and the contractors in particular. The contractors were expected to fulfill a Constitutional mandate by providing opportunities for local and impacted communities. Their original commitment to offer 30% of project funds to small, medium, and micro enterprises, the corporate partners were able to decide to significantly scale back that commitment to 7%, leading to a loss of trust between the community and the contractors, and a sense of (back stabbing). Moreover, SANRAL has long touted job creation as a key benefit of road construction. Sanral spokesperson Vusi Mona is recorded by reporter Lubabalo Ngcukana that R400m will be allocated specifically for hiring unskilled, semi-skilled, and skilled workers, making it appeal to the demographics of rural Eastern Cape residents who are statistically the poorest in the country. Further, she says, "R1.5bn is destined for local small, medium and micro enterprises that include local contractors, suppliers and goods and services to the road and bridge construction projects".[262] Yet these promises have not materialized, leading to the community protests.[263]

The 2012 submissions were eventually heard in the Pretoria High Court December 3-5, 2018. The communities asked the court to set aside the environmental authorization to build the road. At issue in the attempt to set aside the environmental assessment include first, the socio-economic impact of tolling were not considered in the authorization, second, there was inadequate public consultation before approving the road, and third, the alternative routes were not adequately considered. The submission also explained that the applicants don't want

[262] Ngcukana, supra note 224.
[263] (Cite SAHRC Report re mining and community benefits)

construction to stop, they just want to road to be moved further away from their homes and from the coast. The applicants argued that the threatened 'customary community' needed to be consulted at the Komkhulu (meeting place) in terms of their customary law, and referred to transnational norms on community consultation drawn from the World Bank, FPIC, and UNDRIP.[264]

In the judgement,[265] handed down in March 2019, the Judge C Pretorius sided with SANRAL, finding that the community consultation that contributed to the environmental authorization went 'above and beyond' industry standards. She denied any real impact on customary law, refuted the idea that community consultations needed to happen at the Konkhulu (as, she argues, this was never brought up in the past), and argues that the applicants exaggerate the potential impacts of the highway. The struggle against the N2 Wild Coast Highway underscores the persistence of law's violence against the collective authority of the peoples of Umgungundlovu. It represents that despite the victory in the Baleni judgement, the wider structural conditions in which customary law is marginalized are maintained and re-created in a separate legal case, one where the claims of the community to customary law and autonomy are rejected and their autonomy disregarded.

Legal violence in Xolobeni

In his context, I identify the persistent expressions of legal violence against the collective autonomy of the peoples of Umgungundlovu. The descriptions of violence documented below

[264] Applicants Heads of Arguments, para 180-186. The applicants also referred to binding treaties such as the Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic Social and Cultural Rights, International Covenant on Civil and Political Rights, and the African Charter on Human and People's Rights.

[265] Zukulu et al V The Minister of Water and Environmental Affairs et al.

illustrate how the conflicts are structural. The violence can be understood as structural because it is consistently targeted at the self-identified peoples of Umgungundlovu. It is used to subvert the idea that those advocating against the mine are a self-identified group, a self-determined and autonomous collectivity. The reporting of the violence consistently avoids describing their autonomy as a people and the acts of violence are portrayed as disparate, abstract events targeted at individuals – those who oppose the mine. The conflict is narrated in such a way that the peoples of Xolobeni are identified not as a self-determined collectivity with their own customary law, but rather as a group plagued by 'internal' conflict. It is through condemning the violence that the peoples of Xolobeni assert their identities and legitimacy as an autonomous group, defined by their customary decision-making structures.

In March 2015 the chairperson of the Amadiba Crisis Committee was murdered outside of his home by two men posing to be police officers. It is widely known that he was murdered for his active resistance to the mine. There are yet to be any arrests in the relation to the murder. In December 2015 there were a number of attacks on 'anti-mining' community members in the Xolobeni area, including a threatening attack on the headwoman of Umgungundlovu, Cynthia Baleni. Upon seeing a group of men coming towards her homestead, Baleni and her family members hid in a nearby forest when the men searched the area and fired gun shots into the air.[266]

The ACC has long described the violence that they have been subject to. A leader in the ACC told one reporter that the ACC "wants to make sure the world can see how these mining

[266] T. Washinyira (2016) We will die for our land, say angry Xolobeni villagers as dune mining looms. Mail & Guardian. 12 February 2019. Available at: http://mg.co.za/article/2016-02-12-we-will-die-for-our-land-say-angry-xolobeni-villagers-as-dune-mining-looms-1

companies are dividing our community and creating violence".[267] The peoples of Umgungundlovu allege that TEM's BEE partners "have engaged in organized campaigns of violence".[268] The further explain that the "damage done to the AmaMpondo nation by the politicians since this chaos started cannot be measured".[269] The ongoing effect of violence in their community is to their cohesiveness and collective power as a peoples, thus repairing for the conflict seems nearly impossible.

The use of language about a general area and a group of people ignores the fact that the peoples are a collective defined by their relationship to a territory. In a moratorium imposed by mining minister Mosebenzi Zwane in September 2016, Zwane cited "significant social disintegration and highly volatile nature of the current situation in the area".[270] The phrase 'social disintegration' is a term used to focus the violence on the impacted peoples, framing them as responsible for an internal issue. Referring to the 'area' is a general descriptor of a particular place. The violence against a peoples, their culture, and their land, is unacknowledged.

The spatialization of conflict is reinforced by a narrative that 'anti-mining activists' are influenced and organized by "outside influence", including the influence of wealthy white environmentalists and foreign NGOs. Such a claim is belittling to the collective solidarity and strength of the Xolobeni peoples. For example, pro-mining leader from the Amadiba area, Qunya, has accused the ACC of telling people that mining is bad for the community and

[267] M. le Cordeur (2016) Court battle linked to Wild Coast mining rights heats up. Fin24. 11 January 2016. Available at: http://www.fin24.com/Companies/Mining/court-battle-linked-to-wild-coast-mining-rights-heats-up-20160111

[268] Objection in terms of section 10(1)(b) of the MPRDA. Prepared by Legal Resources Centre and Richard Spoor Attorneys, 04 March 2016. Para 55.5. On file with the author.

[269] Amadiba Crisis Committee (2019) Kingship conflict again in Court on Tuesday – Court must respect customary law: Pondoland is not for sale!. 2019 08 19. Available at: http://aidc.org.za/court-must-respect-customary-law-acc/

[270] Sole, Sam (2019). Xolobeni: The mine, the murder, the DG – and many unanswered questions. Daily Maverick. Available at: https://www.dailymaverick.co.za/article/2019-06-30-xolobeni-the-mine-the-murder-the-dg-and-many-unanswered-questions/. Accessed 24 September 2019.

"causing chaos so that they get more funding.. If there are no donors involved, how come they can afford a lawyer like Richard Spoor?".[271] Gwade Mantashe states in an interview with journalist Sam Sole, he discussed the overbearing influence of well-resourced NGOs based in Johannesburg, many of which receive funding from international sources. He explains that he wants to talk to the "rural based organization that may not be formally registered and all that [because] they are in a village"[272] to get their opinion about mining.

Prominent mining proponents appear to believe that conflict and environmental destruction are inevitable in mining. Brother Mark and Patrick Coruso, the former being the chief executive of MRC, are notorious for this perspective. The ACC alleges in a press statement in 2007 that in conversation with Patrick, he told them violence was inevitable. When ACC members asked, "Don't you understand that this project leads to bloodshed in our community?", Patrick relied "In my experience you cannot have development without blood".[273] When asked about the need to balance sustainable development with mining as a development tool, Gwade Mantashe replied: "I come across that all the time – I'm a mine-worker myself. You know how I normally describe mining? I say it is difficult. It is dangerous. It is dirty. It is diseased. Okay, that's mining… Now, if you can take extreme positions on that matter we will not have what is called sustainable development".[274]

In a final example, in the Mbizana municipality's Integrated Development Plan 2020-2021, the conflict is briefly commented on. The Plan refers to 'internal fighting' as a potential barrier to the development of the tourism industry in the municipality and suggests that such

[271] T. Washinyira (2016) We will dies for our land, say angry Xolobeni villagers as dune mining looms. Mail & Guardian. 12 February 2019. Available at: http://mg.co.za/article/2016-02-12-we-will-die-for-our-land-say-angry-xolobeni-villagers-as-dune-mining-looms-1
[272] Sole, supra note 234.
[273] Ibid.
[274] Ibid.

disagreements are inevitable: "there are community structures such as the crisis management [appears to refer to the ACC] that are interested only in mining versus the community trust that is interested in tourism. These structures are fighting about two different sectors and there is no solution as to which sector can be prioritized and how to strike a balance in both structures".[275]

Divide and disrupt

Central to the work of the state has been a campaign to 'divide and disrupt', leading to conflicts that can be narrated as 'internal' or 'inter-communal' conflicts arising from within the impacted group. 'Divide and disrupt' refers to a practice on behalf of the state and mining interests that seeks to divide the Umgungundlovu community by giving particular peoples resources or gifts for their support, elevating the status of peoples by naming them leaders without community consultation or support, planning meeting and populating them with supporters while sidelining participants who are against mining, or by direct acts of violence that incite fear and intimidate.

Since the mining licence was granted in 2007, multiple 'community' meetings and celebrations have been organized in Xolobeni by the state in support of the mine. These meetings have often been disrupted or decried as illegitimate by the peoples of Umgungundlovu. For example, in August 2008, the Minister of the DMR, Buyelewa Sonjica, organized a jamboree in in Xolobeni to celebrate the award of the mining right to MRC. As described by journalist Same Sole, "the authorities bused in people from far beyond the mining area and laid on free food, entertainment and registration facilities for identity books and social welfare grants… marshals kept a register, seemingly for mining lobbyists to record a huge groundswell of support".[276] Even at this time it was alleged that only a "handful" of people were against mining, and these people

[275] Integrated Development Plan, Mbizana municipality, 2020-2021. One file with the author. Pg. 272.
[276] Sole, supra note 234.

were influenced and organized by John Clarke, perpetuating a long-standing narrative that protest against the mine was influenced by white outsiders and foreign NGOs.[277]

Again, in 2017, while the Xolobeni dispute was in court, the Minister of DMR, Gwade Mntashe, organized a meeting in Xolobeni on 23 September. There was a perception among the ACC that people were brought into the event from areas not impacted by the mining. Attendees who wanted to speak against mining were blocked from entering the tent where Mantashe was speaking. The DMR, arguing in support of their meeting, reported that only "a small group of people were instigated to disrupt and supress discussions, but the meeting proceeded as planned" – alleged only the ACC was against mining, while 9 other groups were in support.[278] The meeting exploded into chaos when police fired tear gas into the crowd and people began running. Richard Spoor, who represented the peoples of Umgungundlovu against mining, was arrested and charged with inciting violence, charges which were later dropped.

These meetings are examples of the structural violence that the Umgungundlovu peoples experience because they undermine the collective authority of the Umgungundlovu peoples and their governance structures. Customary law is not a written set of rules, it is a set of governance practices, ways of living collectively and in relationship to the land and territory. These staged meetings are a direct threat to the authority of customary law. They do operate, however, with the backing of state law to the extent that they are not illegal and they are even supported by, or protected by, the police. The meetings are a direct attack against the jurisdictional authority of the peoples of Umgungundlovu. It is via these challenges to their jurisdictional authority that we can identify contemporary expressions of law's violence.

[277] Ibid.
[278] Ibid.

Resisting the (territorializing) technologies of jurisdiction

Contestations around jurisdiction are not only articulated in relation to governing authorities, as I explained in relation to traditional leadership. Technologies of jurisdiction are also the site of resistance, whereby the peoples of Xolobeni assert their rights to place and territory by resisting encroaching technologies of jurisdiction. Technologies, in the Foucauldian sense, refer to means and tools by which ideas or political strategies are enacted through everyday practice. As Dorsett and McVeigh explain "[t]he technologies of jurisdiction gives us a kind of 'law craft', showing us how not only to get on with making law work, but how to think about making law work differently".[279] Technologies of jurisdiction include writing, mapping, precedent and categories. These technologies have a double force: to make legible and to authorize/legitimate through their very legal legibility.[280] Technologies of jurisdiction enable repetitive and consistent decision-making and provide important means of ordering law and establishing authority.

Technologies of jurisdiction are fundamental to understanding how it is spatialized in particular places. The spatial character of jurisdiction is produced through technologies of mapping that identify and demarcate territories and parcels of land. While jurisdiction depends on mapping territory, it was not always the case that jurisdiction, particularly over people, was expressed through technologies of mapping. In Medieval England, for example, jurisdiction was determined by status, whereby ranks, groups, or classes of people were given particular legal positions.[281] However, it was through the introduction of the technology of mapping that jurisdiction was shifted from being based on status to being based on territorial jurisdiction.[282]

---

[279] Dorsett & McVeigh, *supra* note 40.
[280] *Ibid*.
[281] Shaunnagh Dorsett, "Mapping Territories" in Shaun Mcveigh, ed, *Jurisprud Jurisd* (London, UNITED STATES: Taylor & Francis Group, 2007) 137 at 139.
[282] *Ibid* at 140.

This example underscores the extent to which jurisdiction is co-constituted in specific ways through the production of new technologies of making legible (a topic returned to below).

It is through the technology of mapping that jurisdiction takes a territorial form. In her article 'Mapping territories', Shaunnagh Dorsett (2007) explains that "jurisdiction is inaugurated through the mapping of physical space… As a technology of jurisdiction, mapping allows space to be reconceptualized as place… and… allows the legal space of jurisdiction to be mapped on to the physical space of the land and sea".[283] Moreover, "the unknown became knowable and, more importantly, claimable. The place of territorial jurisdiction could be created out of the space of the unknown".[284] Technologies of mapping were fundamental to European colonial expansion, as early colonists produced maps of previously 'unmarked' areas and effectively created opportunities for expansion and justified claims to jurisdiction over them. The emergence of mapping, and the unique cartographic tools used to map territories, was fundamental to the emergence of jurisdiction as a form of legal control over territories and subjects.

There are three technologies of jurisdiction that I have identified as sites of state-backed jurisdictional claims and community resistance. First, the use of steel pegs to mark out the highway. There have been multiple instances where peoples in the Amadiba territory have found steel pegs inserted in the ground to mark out the highway that they did not authorize. In August 2019, for example, workers were stopped from putting steel pegs in the ground for SANRAL to mark the N2WCR. As reported by the ACC, "Mr Mashona Wetu, induna in Headwoman's Council of Umgungundlovu, traditional area on the Amadiba coast (called 'Xolobeni'), told the workers from KwaZulu-Natal that they had been misled. This is the people's land. It is not the

[283] Shaunnagh Dorsett, "Mapping Territories" in Shaun Mcveigh, ed, *Jurisprud Jurisd* (London, UNITED STATES: Taylor & Francis Group, 2007) at 138.
[284] *Ibid*.

Mayor's land or the government's land. Everything here starts at the community's Komkhulu (Great Place)."[285] Multiple speakers during a meeting with the CEO of SANRAL explained that steel pegs were allegedly put in cemeteries, on brought 'during the night' without the community knowing.[286] Community members have also forced contractors who were putting in steel pegs out of their territory in an attempt to stop the highway development.[287] Community statements illustrate how steel pegs have themselves become a sign of an encroaching state; symbolic of forced development as infrastructure is mapped over their territory.

Second, the use of attendance registers by state agents are often identified by community members are members of the Amadiba Crisis Committee. The attendance registers are identified as a way to gain perceived widespread consent for the highway. One community member explains,

> *another thing that really bothers me is that there are attendance registers with people who say that they want this road. You hold these meetings in those areas far away and ask them if they want a road. Those people sign and they say they want a road. But then that road is going to be constructed here. Why don't they say that they want that road to happen where they are? Please take your attendance registers in your office and look up the persons who say they want a road. Build your road there. Please, leave us in peace. Too much blood has been spilled here in Amadiba.*[288]

Both the stakes for the highway and the attendance registers are used by state actors as evidence in support of a claim to authority over territory. A further, and more elaborate technology of governance over territory, is the use of a survey.

---

[285] Amadiba Crisis Committee (ACC) (2019) SANRAL blocked again from steel pegging N2 Toll Road on the Xolobeni coast. 2019-08-10. Available at: https://www.facebook.com/amadibacrisiscommittee/posts

[286] Ihlazo (Disgrace) at Xolobeni. Video recorded 6 April 2017. Filmed in the Umgungundlovu Komkhulu (Traditional Court House). Filmed by John Clarke and Dick Forslund. Translated by Nelisa Mdibi and Ali Gule. Available at: https://www.youtube.com/watch?v=kYEJy2RmnYk.

[287] ACC, Supra note 249.

[288] Ihlazo (Disgrace) at Xolobeni. Supra note 250, Quote at time 1:04:04.

SANRAL has completed an extensive consultation to support the highway development. SANRAL claims: "In 2015, a survey by the Human Sciences Research Council found 98.8% support from over 3000 respondents in or from the Pondoland region. When speaking with all kinds of different groups and communities, SANRAL has found that this is true. Even amongst persons initially opposed to the project, when the facts were shared, there is now support or at least acceptance".[289] A review of the survey, however, reveal that these results are unsurprising, due largely to the design of the survey.

The survey was developed through initial focus group discussions that informed the development of the questionnaire and design of the survey questionnaire. A total of 2314 respondents participated across 10 towns and villages. While the reach of the survey is impressive, respondents where asked only general questions, such as 'Would you like to see a new national road built between Lusikisiki and Port Edward?'.[290] 'If the new national road were to be built, do you think more people from other places would come and live here?', 'Do you think that new job opportunities would be created in this area during construction of the new road?'. They do ask about potential disadvantages to the road, asking specifically: 'If this new national road were to be built, what would the ONE greatest disadvantage be to you?' (a) Damage to the environment (b) Dangerous and fast-moving traffic (c) Corruption (d) Loss of land or infrastructure (e) Better access for criminals'. No where do they ask if respondents would be willing to be moved from their homes, if they imagined that the road might impact their community or ancestral graves, some of the main issues in the case now. Yet, SANRAL routinely refers to the general aspects of the survey – its reach and numbers of peoples engaged with – as a way to legitimate it.

[289] SANRAL 2017, 7
[290] Section 66, SANRAL Survey

SANRAL provides a summary of their funding in a final survey report. They explain, "Almost all respondents in all localities say that if the new road were to be constructed, job opportunities in other towns would become more accessible; more people from other places would come and live in their village; and the children of their household would attend school in another town or village".[291] The authors of the survey and report admit, however: "It should be borne in mind that at no stage were respondents shown a map of any proposed route for the N2 and their answers to these questions would have been based on speculation and hope that the proposed route would bring these benefits of improved access".[292] In other words, the survey respondents were only presented with a vision for the highway and a range of general benefits of having the infrastructure built near them. The specifics of the road construction, and its specific impacts, remained completely out of the survey and therefore unknown to the survey respondents. Yet the findings of this report are cited as authoritative in the court papers filed by the respondents and in the judgement.

Legal geographers argue that law has a consequential role in producing space and territory. Moreover, they argue that property is a territorial relation to the extent that it arranges peoples and places in relations with one another. Law and society scholar David Szablowski (2019) similarly uses the concept of territorialisation in his study of extractive industry governance; his work provides important insights for a legal geography of international law. Szablowski explains that large-scale extractive industry investment, particularly in areas of the globe where states have little governance capacity in 'far flung' and rural areas, depends on creating 'territories of extraction' in order to legitimate and enable extractive activities. He

[291] SANRAL Survey 11
[292] SANRAL Survey 12.

explains that this involves "the remaking of legal, social, political, and ecological spaces through a spatialized reordering of authority in order to facilitate and prioritize resource extraction over other activities".[293] A central characteristic of these processes is the use of transnational extractive industry governance norms. It is worth quoting him at length:

> *Typically, making extractive territories involves marginalizing the influence of local institutions and actors over territorial governance... Thus, mining codes or mineral agreements override or undermine local property rights; municipal authority over land use planning is displaced by decisions of the national energy or mining ministry; customary authority over irrigation is superseded by licenses issued by the national water authority; etc. This involves displacing both official and unofficial normative systems operating within local legal spaces.*[294]

His work demonstrates how extractive industries impose their control over territories not through making claims to sovereignty, or asserting sovereign jurisdictions, but rather by legitimating their intervention through a multi-scalar and multi-sectoral governance regime.

The survey, described above, is one technology used to inaugurate state jurisdiction. In other words, the state performs its jurisdiction through the survey. In an opinion article, Ayabonga Cawa reflects on the contemporary means by which rural peoples' autonomy is being attacked, arguing that "the state's instruments of coercion can in one era be helicopters and tear gas, and in another surveys, referendums and a deep mistrust of the people who should by rights choose for themselves the livelihood strategy suitable to them".[295] There is a consequential spatiality to this contemporary violence. The spatial scope of the survey serves as a means to territorialize 'local' conflict and disagreement. Making a distinction between jurisdiction and territory is important for illustrating these dynamics.

---

[293] David Szablowski, "'Legal enclosure' and resource extraction: Territorial transformation through the enclosure of local and indigenous law" (2019) 6:3 Extr Ind Soc 722–732.
[294] *Ibid*.
[295] A. Cawe (2019) Mining Consent: Autonomy of rural poor under attack. Business Day. Times Media (pty) Ltd. 18 February 2019.

Some researchers who use the concept of territory in their work have introduced the idea of multi-territoriality. This is the concept of "territory from the perspective of multiple overlapping power relations, from the most obvious material processes of political and economic power to more subtle – yet no less significant – processes of symbolic power".[296] In this respect, the concept of 'territorial pluralism' has been used to examine how self-government, equitable forms of recognition, and power sharing arrangements are negotiated with the state[297] while anthropologists Dussart and Poirier use the idea of "entangled territorialities" to "engage with the multiplicity and variability of connections, with the inevitability of correlations, the uncertainty of their outcomes, and the unintended consequences".[298] For me, however, jurisdiction does the important conceptual and explanatory work of multi-territoriality by focusing on the fact that many different jurisdictions can exist in one space, indeed this is the norm between municipal, provincial, and federal governments, for example. Jurisdiction, explain Shiri Pasternak, "marks the inauguration of a legal order, whereupon authorities of various kinds govern the ways in which these laws will be ordered and organized in space, and define its subjects and scope".[299] She explains overlapping jurisdictions and their administrative regions and boundaries as micro-powers, akin to a 'thickening heap of lines' on a map; "[t]hese micropowers, enacted under federal and provincial jurisdictions, have carved out spatial patterns of land use and population control that defy easy mapping".[300] It is within conditions of

[296] R Haesbert, "A Global Sense of Place and Multi-territoriality: Notes for Dialogue from a 'Peripheral' Point of View" in David Featherstone, Joe Painter & Doreen B Massey, eds, *Spat Polit Essays Doreen Massey* RGS-IBG book series (Chichester, West Sussex ; Malden, MA: Wiley-Blackwell, 2013) at 149.
[297] See Richard Simeon, Karlo Basta & John McGarry, eds, *Territorial pluralism: managing difference in multinational states*, Ethnicity and democratic governance series (Vancouver, BC: UBC Press, 2015).
[298] Françoise Dussart & Sylvie Poirier, "Knowing and Managing the Land: The Conundrum of Coexistence and Entanglement" in Sylvie Poirier & Françoise Dussart, eds, *Entangled Territ Negot Indig Lands Aust Can* (Toronto: University of Toronto Press, 2017) at 11.
[299] Pasternak, *supra* note 49.t 10.
[300] *Ibid* at 21.

overlapping jurisdictions that ‘inter-communal’ conflict emerges as a territorialized form of violence, created through legal means and assumed to be responded to via legal means. Thus law, in creating that which it presumes to represent, also assumes the authority to respond, a central feature of law’s violence.

These are three ways that I have found that the ACC is resisting the technologies of jurisdiction; there could be more. What these three examples demonstrate is how efforts by the state to map the territory for mining and infrastructure development are actively resisted. These acts of resistance, including pulling up stakes or sending away people trying to put them in, as well as reporting critiques of the attendance registers, are assertions of authority and evidence of a competing claim to jurisdiction. Therefore resistance to the technologies of jurisdiction offer an opportunity for the peoples of Xolobeni to assert their claims to territory and collective autonomy.

Ihlazo

Long-time ally of the people of Umgungundlovu, social worker John Clarke, regularly films meetings and trials related to the struggle and uploads them to YouTube. A video titled Ihlazo documents, without edits, a meeting between the peoples of Xolobeni at their Konkhulu with the CEO of the South African National Roads Agency. The video is a rich archive of community sentiment about the highway development. Statements in the video speak directly to the violence experienced against the collective authority of the peoples of Umgungundlovu. It is with these statements that I conclude this chapter.

> *Pondo customary law requires that you sit with us first and negotiate before you proceed with any plans. So you have already failed because you have violated our customary law. If you are carrying on, it should mean that you*

have permission… We do not want it, because you did not start where you were supposed to start…As you can see, we are here.[301]

In the quote below, the efforts of SANRAL to divide and agitate are clearly articulated.

SARNAL, as you can see and as you can hear the damage that you have done, it is irreparable. Firstly, you broke down our chieftainship of the Pondo people from the top, right from the king all the way down to the chiefs. Now, that is irreparable. Secondly, you are causing conflicts between relatives and you are showing that you do not respect people. Thirdly, as government, you do not respect us. I don't know what government you are. If you were the government of South Africa, you would have respected us.[302]

The war that you all have created: for how long do you want it to go on? For how long do you want to see Pondoland blood spilled? You cannot fix this anymore. You have caused too much damage. You have caused damage in our chieftaincy. You've caused damage down to the people. There is a song in Pondoland that says: You have caused conflicts amongst the relatives. That is exactly what you have done. You have pitted us against each other, even relatives. That is why we say you cannot fix this any longer… You must take your steel pegs, your tractors, you and your contractors leave. If not, there will be blood spilled... This is our land. If needs be we are prepared to let the grass grow on our backs… we are fighting for this land so that we can live peacefully. We don't want anything that disturbs us.[303]

In these statements we can read the violence felt by the peoples of Umgungundlovu, as well as the harm caused by the violence in their communities. Remember, there is an entrenched ideology that positions Indigenous peoples as threats to the state and to democracy. Flowing from this is a perspective of local peoples, asserting their collective rights and autonomy, as agitators, groups plagued by inter-communal conflict. In this chapter I have outlined the emerging jurisprudence on the Right to Say No, and demonstrated continued forms of legal

[301] Mr Ace Mthwa , in Ihlazo (Disgrace) at Xolobeni. Video recorded 6 April 2017. Available at: https://www.youtube.com/watch?v=kYEJy2RmnYk.
[302] Nonhle Mbuthuma, in Ihlazo.
[303] Ibid.

violence expressed through jurisdictional claims to territory. One of the effects of these jurisdictional claims is the territorialization of 'inter-communal' conflict.

Law's relationship to violence is foundational, that it is performed (and iterated) through language, discourse, and material inscriptions. Property and jurisdiction constitute particular sites where law's violence is spatialized. One of the sociolegal effects of these conditions is that legal geographies of law's violence contribute to the production of social and political knowledge about conflict, particularly conflicts over resources.

Conclusion: Reflections on Self-Determination, Jurisdiction, Property and Legal Violence in South Africa

In Canada self-determination almost always is a claim to autonomy. However, in South Africa, self-determination is paradoxically a claim to citizenship rights. This is not a diminishing of the significance of the claim to collective, rather it speaks to the conditions in which self-determination is being asserted. During apartheid in South Africa, self-determination was used to exclude black and coloured South Africans from citizenship rights. The Bantustans were used to segregate racialized South Africans in 'self-governing' territories within the borders of South Africa. Today, however, we are witness to re-articulations of self-determination in South Africa, but in productive relationship with claims to citizenship. This is indeed a paradoxical pairing that is indicative of the present conjuncture. Self-determination and citizenship rights are woven together through the nascent legal and political movement for the 'right to say no' to resource extraction. The right to say no is fundamentally oriented towards exposing the violence endemic to the mining industry. It also expands the human rights vocabulary to provide a nuanced view of collective rights with an emphasis on the importance of land for spiritual practices and collective

identity, values that are severely under threat by the mining industry. This is not a 're-emergence' of self-determination; it is an articulation in the present conjuncture.

Rather than assuming that self-determination is a claim against the state for an alternative state-based form of autonomy and sovereignty, we might be inspired by the law and politics of the right to say no to begin to understand self-determination as a response to continuing forms of structural violence whereby peoples are attempting to have a stake and decision-making authority in place-based development practices. The framework foregrounds the role of state and corporate actors, as well as traditional leaders (who may also identify in the prior two groups), in creating conditions of human insecurity and violence, leading customary communities to turn to demanding the right to consent (via self-determination) as a legal remedy to ongoing deprivation.

Chapter 4: Conclusion

Introduction

In this conclusion I provide a summary of some of the specific interventions I have made throughout the thesis, as well as a reflection on the broader questions that underpin the analysis. In this thesis I compare, in a transnational and cross-contextual way, two struggles happening in parallel in Canada and South Africa respectively – Wet'suwet'en and Xolobeni. I argue that the ongoing struggles in Wet'suwet'en and Xolobeni are illustrative of how self-determination is articulated in particular political, legal, and ecological environments. The thesis illustrates the different contexts in two countries where the right to consent has emerged as a key battleground for self-determination in settler-colonial and post-colonial contexts. The case studies illustrate the multi-scalar legal landscapes in which the right to consent is negotiated, including customary and indigenous legal traditions, constitutional law, jurisprudence, and international law, and how the articulations of these different scales of law occur in the particular contexts of each country. Through my analysis of competing jurisdictions, I identify contemporary legal violence in conditions of legal pluralism.

At the broadest level my effort has been to examine slow violence, referring to the ongoing and incremental forms of violence that are often left out of analysis of the spectacular and explosive violent effects of resource extraction. This perspective influences how I approach the concepts of jurisdiction and property. I destabilize centralized and state-based forms of property and jurisdiction to understand them both as constituting specific sets of relations. I explain in the thesis that legal violence is spatialized through contestations over property and jurisdiction. I further explain, at different parts of the thesis, the methods of erasure and processes of division and disruption are key to the facilitation of law's violence.

Examining the relationships between self-determination and legal violence has been a way for me to study how law is implicated in, and productive of, new forms of violence while not overlooking the agency of Indigenous and rural peoples. Rather, I contend, it is precisely by studying legal violence that I may better understand the specific articulations of Indigenous self-determination in a transnational and comparative way. As the comparative study between Unist'ot'en and Xolobeni show, Indigenous Peoples' articulations of self-determination emerge in complex social contexts, where transnational law, national commitments to transitional justice, country-specific jurisprudence, the particularity of extractive or infrastructural development, coalesce in relation to historical forms of colonization. Finally, by focusing on legal violence, as I have here, I have narrowed in on the specific role of law as an interface of negotiation, concentrating on the power of law as both a source of authority and legitimacy and a site of resistance. This approach provides a way to investigate the very specific moments and intersections where settler-colonialism is animated against the resistance of Indigenous and rural peoples.

In both chapters I provide a history of the emergence of the right to consent, beginning with the constitutional frameworks and moving through jurisprudence. In chapter two I explain Aboriginal rights and title and the development of the duty to consult and accommodate. I provide some international context for these legal developments by comparing them with the international standard of free, prior, and informed consent. I identify how this legal architecture reproduces a centralized, hierarchical property regime, and assumes neat divisions between jurisdictions. Common positivist presumptions about property and jurisdiction do not account for the complex and overlapping forms of authority and power that actually exist in negotiations between the Environmental Assessment Office, Wet'suwet'en band councils and hereditary

leadership, provincial and federal governments and their jurisdictions. The injunction against the Wet'suwet'en resistance, for example, was one site where a centralized and hierarchical conception of property is reproduced, and conflicts narrated. The logic and operations of injunctions perpetually positions First Nations as agitators, pushing them to the knife edge of criminalization. Injunctions also generate new politics of jurisdiction whereby resistance to injunctions – including setting up blockades or establishing a camp – are means to claim jurisdictional authority over territory.

In chapter three I focus on the ongoing struggle in Xolobeni. I describe Xolobeni as a frontier ecology. I explained that the struggle in Xolobeni is not only focused on a mine, but also on the development of a highway. A complex history of apartheid-era resistance to forced removals, conservation initiatives, and state neglect of infrastructure development also characterize this complex landscape. Efforts to divide and disrupt the local traditional governance structure are particularly clear in the Xolobeni case study, as I explain. I demonstrate how the struggle, while taken to the courts, is also being waged through specific jurisdictional micro-politics, including resistance to stakes put in by the South African National Roads Agency and attendance registers used at meetings. Throughout the chapter I draw from community statements to describe the forms of violence they have been subject to, despite their important legal victories.

Reflections on jurisdiction

It is useful here to recall some key insights from the literature on jurisdiction. Legal geographer Sheri Pasternak explains that jurisdiction refers to a the inauguration of law, or the "authority to

have authority", and is therefore a key site of contestation and conflict.[304] It is precisely the plurality of legal systems, mapped as a single sovereign space, argues Pasternak, that masks state power.[305] She explains this complex landscape:

> *The internal parcelization of territorial space, the state's claims to absolute space, and the on-the-ground jurisdictional practices that codify and mark struggles over natural resources, all work to undermine representations of jurisdiction that neatly lay settler and Indigenous jurisdiction side by side, whether in scalar or other formations.*[306]

Examining each case as a struggle over jurisdiction has been useful for understanding how, in the context of legal pluralism, different laws overlap and map onto the landscape. It is also helpful for thinking through claims to the landscape not as the production of governance regimes (or as a territorial claim), but as assertions of authority expressed through practice. For example, in both cases we are witness to material acts used as forms of resistance to claim jurisdiction over territory, including building a camp in Unist'ot'en or weekly meetings at the konkhulu in Xolobeni and the pulling out of stakes to disrupt the work of SANRAL. Jurisdictional overlaps characterize the struggles in Xolobeni and Unist'ot'en; moreover, as I show, they spatialize and normalize law's contemporary violence.

Dorsett and McVeigh explain that while "terms like dignity, rights, autonomy, and self-determination are often used to engage the two forms of jurisdictional authority", this kind of dichotomous rendering "should be treated with care. It is the practices of jurisdiction that provide the craft and form of life of lawful relations that are brought to the meeting place of laws".[307] In the case studies of negotiations over the right to consent provided here I demonstrate that the

---

[304] Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:02 Can J Law Soc Rev Can Droit Société 145–161 at 146.
[305] *Ibid* at 148.
[306] {Citation}
[307] Dorsett & McVeigh, "Jurisprudences of jurisdiction", *supra* note 47 at 112.

character of lawful relations can be usefully described as violent. Violence is not a result of failed processes of consent, but is actually a formative force in the production of socio-legal struggles for the right to consent. In other words, legal violence is not an outcome of failed consultation processes, it is embedded throughout and therefore a productive site that contributes to the production of specific social relations. Legal violence animates consultation processes. This finding parallels Pasternak's findings on jurisdiction. She argues that it is through jurisdiction that "settler sovereignty organizes and manages power… in the absence of legal agreement, a perpetual struggle over jurisdiction defines the terrain".[308]

This has implications for how I understand frontier ecologies. Resource frontiers are widely understood to be characterized by changing forms of government, where previous forms of political and institutional legitimacy and authority are being challenged and replaced by new governance regimes that include new institutional arrangements, forms of expertise, and material practices.[309] Frontiers are spaces of intensified re-making, where just as new kinds of social relations and governance arrangements are created, others are destroyed. Resource control on frontiers is both a destructive and constructive process wherein prior rights and claims are delegitimized and new ones gain currency and authority.[310] This study demonstrates a further characteristic of frontier ecologies – they are spaces where jurisdictional authorities are not yet settled. The conception is based in a broader understanding of legal pluralism, and accounts specifically for the layered claims to jurisdiction, including multiple state and non-state forms of jurisdiction.

[308] Pasternak, *supra* note 49 at 3.
[309] Peluso & Lund, "New frontiers of land control", *supra* note 70.
[310] Mattias Borg Rasmussen & Christian Lund, "Reconfiguring Frontier Spaces: The territorialization of resource control" (2018) 101 World Dev 388–399 at 392.

Reflections on consent

In reflecting on this thesis I have come to understand the processes and rights that underpin consultation not as representation of peaceful resolution, but as conjunctures that re-arrange conditions of social conflict wherein colonial forms of power are re-produced. Historical power inequalities, while significantly challenged through the activism of local communities and their role in developing the right to consent, re-emerge through consultation processes in important ways.

Processes of consultation and the right to consent have woven through them new forms of legal violence that position land defenders on the knife edge of criminalization. In other words, while community members may participate in consultation processes, as soon as they skirt outside of these programs, as soon as they challenge the outcomes, they are immediately criminalized and subjected to historical colonial narratives of under development, 'inter-communal' conflict, lawlessness – the 'others' of modernity and outside of modern law. Structural power-relations are determinative to the extent that in the event of disagreement between impacted communities and states bent on facilitating extraction, states and extractive industry have an arsenal of historical forms of prejudice against racialized, rural, and Indigenous peoples at their disposal to undermine the legitimacy and authority of land defenders. These historical forms of prejudice are underpinned by positivist understandings of jurisdiction and property, as I have show throughout the thesis.

This is not to suggest that emerging international rights to consent are doomed to fail. It is rather to argue that the struggle for consent is part of a much wider struggle for decolonization whereby the rights of historically marginalized peoples need to be elevated, recognized, and legitimated across space and scale. Decolonization at these sites demands challenging not only

the power of the ‘state’, but also the legal and ideological edifice behind centralized notions of property and state-based forms of jurisdiction. It demands recognizing the forms of property ownership and jurisdictional claims made by Indigenous peoples in their efforts to protect their rights to territory. This involves unsettling presumptions about neatly demarcated jurisdictions and identifying how they are contested. Moreover, it demands identifying how, through conflicts over jurisdiction, authorities and legitimacies are reformed.

Finally, processes of consent are highly contested sites whereby state and corporate actors, Indigenous peoples, as well as wider national publics engage through news and social media. In these contexts, how conflicts are narrated, and who has the power to inform narrations of conflict, is a significant issue. As I have shown, the ideological structure of both real property in land, as well as assumptions about state-based jurisdictional authority, contribute to the production of narratives about conflict whereby Indigenous peoples are positioned as being complicit in, or causing, conflict.

Reflections on transnational dynamics and the criminalization of land defenders

How indigenous and rural autonomies engage with the international right of self-determination, and its derivative right of FPIC, is distinct in each locale. In this thesis I have argued that the distinctiveness of local engagements with FPIC has to do with both the histories of colonization in each country, as well as the specifics of contemporary struggle. I have argued that both the historical, colonial violence of law as well as the day-to-day practice of law produces forms of legal violence. Self-determination is asserted, I argue, in part through resistance to legal violence. The significance of the focus on the relationship between self-determination and legal violence is its utility in doing transnational and comparative work. As I have shown, it is useful

for illustrating the specific role of law, jurisdiction, and property in struggles for self-determination.

Keeping forms of legal violence in view underscores the need to keep the remedial aspect of the right to consent in focus. This point is particularly important in the context of a global rise of FPIC as a transnational norm that is leveraged by a range of actors, frameworks, and laws in many different contexts. Often assertions of FPIC don't emphasize the fact that it needs to be informed by transitional justice principles. The justice to be remedied here is the historical exclusion of Indigenous and customary law by state legal systems, and thus the historical exclusion of Indigenous jurisdictional authority. FPIC is powerful because the norm re-inserts local power by providing a language and framework for historically marginalized peoples to enter into global governance regimes that otherwise have been developed by powerful actors. The study developed in this thesis keeps in tension both the articulation of self-determination and the persistence of legal violence, and by doing demonstrates the need to keep a transformative, transitional justice agenda at the centre of struggles for the right to consent to elevate historically marginalized laws, customs, and collective autonomies.

The comparison of the struggles in Xolobeni and Unist'ot'en underscore that the politics of self-determination are not determined by law. This may be self-evident for researchers in the discipline of law and society. But in this thesis, I have identified some of the main structural features that contribute to the unique articulations of self-determination. Self-determination, while an international human right, is asserted in relation to the specific histories of colonialism and the contemporary constitutional context. A further point might be made here: the contemporary articulations of self-determination are also formulated in conditions of neoliberalism. Further research might explore how conditions of neoliberalism, widely

understood as both the downloading of state governance practices to non-state actors and market mechanisms, as well as the re-arrangement of new forms of government, contribute to the creation of contested environments where claims to self-determination are made.

Conclusion: Legal violence and the criminalization of land defenders

Legal violence has implications for how we might understand criminalization on resource frontiers. Criminalization, for example, is not only about the discursive production of legality and illegality. It begins through processes that undermine the social power of impacted peoples. Fundamentally, I find, understanding legal violence is key to understanding how land defenders are placed on the knife edge of criminalization. What moves someone so quickly from being a community member, a parent, someone concerned about the survival of their families and their cultures and their peoples, to a criminal? To someone without the protections of citizenship in South Africa, to someone, in Canada, who is the target of a state purportedly committed to reconciliation?

A few landmark reports have been published in the last two years telling of the dramatic increases in murders of human rights and land defenders around the world, however most concentrated in a few South American countries.[311] Many authors turn to 'criminalization' as a concept to explain the targeting of these defenders.[312] The conclusions of the reports often call on states and businesses to protect land defenders from harm. There is no question that such measures are urgently needed. However, the optic of criminalization of individuals might also serve to understate the structural conditions in which collectivities are targeted for trying to protect their land and livelihoods. In other words, these reports of 'red' and 'fast' violence,

[311] Global Witness, *supra* note 2.
[312] Inter-American Commission on Human Rights, *supra* note 2.

whereby people are attacked or murdered, need to be supplemented by analysis of slow violence, of which racialized peoples, Indigenous peoples, women, and the poor are over-represented. Analysis of these contemporary struggles from the view of socio-legal studies might explore, for example, new forms of legal violence (and their relationship to colonial violence) in extractivist frontiers that contribute to divisions, disruptions, and insecurities experienced by organized collectivities as well as the criminalization of individual land defenders. As I have shown, legal violence is spatialized and territorialized through jurisdiction and property, an analysis that could contribute to understanding the landscapes in which Indigenous peoples struggle against the violent encroachment of their land and assert claims to self-determination.

Bibliography

JURISPRUDENCE

Canadian:

Coastal GasLink Pipeline Ltd v Huson, [2019] BCSC 2264.

*Coldwater Indian Band, et al v Attorney General of Canada, et al, [*2020] SCC 43130.

Delgamuukw v British Columbia, [1997] 3 SCR 1010.

Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511.

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), [2005] 3 SCR 388.

R v Van der Peet, [1996] 2 SCR 507.

Taku River Tlingit First Nation v British Columbia (Project Assessment Director), [2004] 3 SCR 550.

Tsilhqot'in Nation v British Columbia, [2007] BCSC 1700

Tsilhqot'in Nation v British Columbia, [2014] 2 SCR 257.

South African:

Alexkor Ltd and Another v Richtersveld Community and Others [2003] BCLR 1301.

Bafokeng Land Buyers Association v the Royal Bafokeng Nation [2017] (CC) CIV APP 3/17

Bakgatla-ba-Kgafela Communal Property Association v Bakgatla-ba-Kgafela Tribal Authority and Others [2015] (6) SA 32 (CC).

Baleni and Others v Minister of Mineral Resources and Others [2018] 73768/2016 (HC)

Bhe and Others v Magistrate, Khayelistsha and Others [2004] (10) SA 580 (CC).

Cala Reserve v Premier of the Eastern Cape [2015] 169/14 (HC)

Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another [2018] CCT265/17 ZACC 41.

Mayelane v Ngwenyama and Another [2013] (4) SA 415 (CC),

Premier of the Eastern Cape and Others v Ntamo and Others [2015] 169/14 ZAECBHC 14; 2015 (6) SA 400 (ECB); [2015] 4 ALL SA 107 (ECB)

SECONDARY MATERIALS: MONOGRAPHS

Anaya, James. *Indigenous peoples in international law* (Oxford University Press, 2004).

Anaya, S James. *International human rights and indigenous peoples*, Aspen elective series (Austin: Wolters Kluwer Law & Business, 2009).

Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2005).

Benda-Beckmann, Franz von, Keebet von Benda-Beckmann & Melanie Wiber. *Changing properties of property* (New York: Berghahn Books, 2009).

Bhandar, Brenna. *Colonial lives of property: law, land, and racial regimes of ownership*, Global and insurgent legalities (Durham: Duke University Press, 2018).

Borrows, John. *Recovering Canada: the resurgence of Indigenous law* (Toronto: University of Toronto Press, 2002).

Coleman, William D (William Donald). *Property, territory, globalization: struggles over autonomy*, Globalization and autonomy (Vancouver: UBC Press, 2011).

Coulthard, Glen Sean. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: Univ Of Minnesota Press, 2014).

Dorsett, Shaunnagh & Shaun McVeigh. *Jurisdiction*, Critical approaches to law (Abingdon, Oxon ; New York, NY: Routledge, 2012).

Cornell, Drucilla. Law and revolution in South Africa: uBuntu, dignity, and the struggle for constitutional transformation, 1st edition ed, Just ideas (New York: Fordham University Press, 2014).

Fitzpatrick, Peter. *Modernism and the grounds of law*, Cambridge studies in law and society (Cambridge; New York: Cambridge University Press, 2001).

Lippert, Randy K & Michelle Brady. *Governing practices: neoliberalism, governmentality, and the ethnographic imaginary* (Toronto; University of Toronto Press, 2016).

McHugh, Paul G. *Aboriginal title: the modern jurisprudence of tribal land rights* (Oxford: Oxford University Press, 2011).

Merry, Sally Engle. Human Rights and Gender Violence Translating International Law into Local Justice. (Chicago, University of Chicago Press, 2006).

Newman, Dwight G (Dwight Gordon). *Revisiting the duty to consult Aboriginal peoples* (Saskatoon, SK, Canada: Purich Publishing Limited, 2014).

Nixon, Rob. *Slow violence and the environmentalism of the poor* (Cambridge, Mass: Harvard University Press, 2011).

Pasternak, Shiri. *Grounded authority: the Algonquins of Barriere Lake against the state* (Minneapolis; University of Minnesota Press, 2017).

Povinelli, Elizabeth A. *The cunning of recognition indigenous alterities and the making of Australian multiculturalism* (Duke University Press, 2002).

Reynolds, James I. *Aboriginal peoples and the law: a critical introduction* (Vancouver, BC: Purich Books, an imprint of UBC Press, 2018).

Sikor, Thomas & Christian Lund, eds. *The Politics of Possession: Property, Authority, and Access to Natural Resources* (Chichester, West Sussex, U.K.; Malden, MA: Wiley-Blackwell, 2010).

Simeon, Richard, Karlo Basta & John McGarry, eds. *Territorial pluralism: managing difference in multinational states*, Ethnicity and democratic governance series (Vancouver, BC: UBC Press, 2015).

Simpson, Audra. *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press: Duke Univ Pr, 2014).

Singer, Joseph William. *Entitlement: the paradoxes of property* (New Haven, CT: Yale University Press, 2000).

Taylor, Charles, Amy Gutmann & Charles Taylor. *Multiculturalism: examining the politics of recognition* (Princeton, N.J: Princeton University Press, 1994).

Thompson, E P. *Whigs and hunters: the origin of the Black Act*, [1st ed.]; [reprinted with a new postscript]. ed, Pergrine books (Harmondsworth: Penguin Books, 1977).

Van der Walt, A J (Andries Johannes). *Property in the margins: AJ van der Walt* (Oxford: Hart Pub., 2009).

Webber, Jeremy H A. *The constitution of Canada: a contextual analysis*, Constitutional systems of the world (Oxford : Hart Publishing, 2015).

SECONDARY MATERIAL: ARTICLES

Blomley, Nicholas. “Law, property, and the geography of violence: the frontier, the survey, and the grid” (2003) 93:1 Ann Assoc Am Geogr 121–141.

———. “Precarious Territory: Property Law, Housing, and the Socio-Spatial Order” (2020) 52:1 Antipode 36–57.

Borrows, John. “Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism” (2017) 98:1 Can Hist Rev 114–135.

Brady, Michelle. 2016. “Neoliberalism, Governmental Assemblages, and the Ethnographic Imaginary.” In Governing practices: neoliberalism, governmentality, and the ethnographic

imaginary, edited by Michelle Brady and Randy K. Lippert, 3-31. Toronto: University of Toronto Press.

Bruchhausen, Sarah. and C. Naicker, 'Broadening Conceptions of Democracy and Citizenship: The Subaltern Histories of Rural Resistance in Mpondoland and Marikana' in F. Brandt and G. Mkodzongi (eds) Land reform revisited: democracy, state making and Agrarian transformation in post-apartheid South Africa (Afrika-Studiecentrum series, Leiden, The Netherlands; Boston, Bril, 2018), pp. 30.

Bryant, Michael J. "The State of the Crown-Aboriginal Fudiciary Relationship: The Case for an Aboriginal Veto" in Patrick Macklem & Douglas Sanderson, eds, *Recognit Reconcil Essays Const Entren Aborig Treaty Rights* (Toronto ; University of Toronto Press, 2016) 223.

Ceric, Irina. "Beyond Contempt: Injunctions, Land Defense, and the Criminalization of Indigenous Resistance" (2020) 119:2 South Atl Q 353–369.

Cockburn, Patrick J L et al. "Introduction: Disagreement as a window onto property" in Maja Hojer Bruun et al, eds, *Contested Prop Claims What Disagreement Tells Us Ownersh* Social justice (Abingdon, England) (Abingdon, Oxon ; Routledge, 2018) 1.

Cover, Robert M. "Violence and the Word" (1986) 95:8 Yale Law J 1601–1629.

Derrida, Jacques. "Force of Law: The 'Mythical Foundation of Authority'" in Drucilla Cornell et al, eds, *Deconstruction Possibility Justice* (New York: Routledge, 1992) 3.

Dorsett, Shaunnagh. "Mapping Territories" in Shaun Mcveigh, ed, *Jurisprud Jurisd* (London: Taylor & Francis Group, 2007) 137.

Dorsett, Shaunnagh & Shaun McVeigh. "Jurisprudences of jurisdiction: matters of public authority" (2014) 23:4 Griffith Law Rev 569–588.

Douzinas, Costas. "The metaphysics of jurisdiction" in Shaun Mcveigh, ed, *Jurisprud Jurisd* (London: Taylor & Francis Group, 2007) 21.

Dussart, Françoise & Sylvie Poirier. "Knowing and Managing the Land: The Conundrum of Coexistence and Entanglement" in Sylvie Poirier & Françoise Dussart, eds, *Entangled Territ Negot Indig Lands Aust Can* (Toronto: University of Toronto Press, 2017) 3.

Fitzgerald, Oonagh & Risa Schwartz. "Introduction" in *UNDRIP Implement Braid Int Domest Int Laws* (Waterloo, ON: Centre for International Governance Innovation, 2017) 1.

Gilbert, Jérémie. "Litigating Indigenous Peoples' rights in Africa: Potentials, Challenges, and Limitations" (2017) 66:3 Int Amp Comp Law Q 657–686.

Goodale, Mark. "Locating Rights, Envisioning Law Between the Global and the Local." In M. Goodale and S.E. Merry, The Practice of Human Rights: Tracking Law between the Global and the Local (Cambridge, Cambridge University Press, 2007), pp. 1-38.

Gururani, Shubhra & Peter Vandergeest. “Introduction: New Frontiers of Ecological Knowledge: Co-producing Knowledge and Governance in Asia” (2014) 12:4 Conserv Soc 343.

Haesbert, R. “A Global Sense of Place and Multi-territoriality: Notes for Dialogue from a ‘Peripheral’ Point of View” in David Featherstone, Joe Painter & Doreen B Massey, eds, *Spat Polit Essays Doreen Massey* RGS-IBG book series (Chichester, West Sussex ; Malden, MA: Wiley-Blackwell, 2013) 146.

Hart, Gillian. “Denaturalizing Dispossession: Critical Ethnography in the Age of Resurgent Imperialism” (2006) 38:5 Antipode 977–1004.

Huizenga, Daniel. “Articulations of Aboriginal Title, Indigenous Rights, and Living Customary Law in South Africa” (2018) 27:1 Soc Leg Stud 3–24.

Ibhawoh, Bonnie. “From Ubuntu to Grootboom: Vernacularising Human Rights through Restorative and Distributive Justice in Post-Apartheid South Africa" In T. Kepe, M. Levin, and B. von Lieres (eds) Domains of Freedom: Justice, Citizenship and Social Change in South Africa (Cape Town, University of Cape Town Press, 2016), pp. 239-257.

Jung, Courtney. “The Politics of Horizontal Inequality: Indigenous Opposition to Wind Energy Development in Mexico” in Andrew Arato, Jean L Cohen & Astrid von Busekist, eds, *Forms Plur Democr Const* (New York: Columbia University Press, 2018) 317.

Kepe, Thembela and L. Ntsebeza, ‘Introduction’, in T. Kepe and L. Ntsebeza (eds) Rural Resistance in South Africa: The Mpondo Revolts after Fifty Years, (Leiden and Boston: Brill, 2011).

Kepe, T. ‘Meanings, alliances and the state in tensions over land rights and conservation in South Africa’, in S. Mollett and T. Kepe (eds), Land Rights, Biodiversity Conservation, and Justice: Rethinking Parks and People (London and New York, Routledge, 2018), pp. 17-30.

Knafla, Louis A. “‘This Is Our Land’: Aboriginal Title at Customary and Common Law in Comparative Contexts” in Louis A Knafla & Haijo Jan Westra, eds, *Aborig Title Indig Peoples Can Aust N Z* Law and society series (Vancouver, BC) (Vancouver: UBC Press, 2010) 1.

Klug, Heinz. "Self-Determination and the Struggle Against Apartheid", SSRN Scholarly Paper, by Heinz Klug, papers.ssrn.com, SSRN Scholarly Paper ID 3526426 (Rochester, NY: Social Science Research Network, 1990).

Kuper, Adam. “The Return of the Native” (2003) 44:3 Curr Anthropol 389–402.

Langa, Pius. “Transformative Constitutionalism” (2006) 17:3 Stellenbosch Law Rev 351–360.

Liebenberg, Sandra. “Needs, Rights and Transformation: Adjudicating Social Rights” (2006) 17 Stellenbosch Law Rev 5.

Macklem, Patrick & Douglas Sanderson, “Introduction: Recognition and Reconciliation in Indigenous-Settler Societies” in Patrick Macklem & Douglas Sanderson, eds, From recognition

to reconciliation: essays on the constitutional entrenchment of Aboriginal and treaty rights (Toronto ; University of Toronto Press, 2016)

McNeil, Kent. “Indigenous and Crown Sovereignty in Canada” in Michael Asch, John Borrows & James Tully, eds, *Resurgence Reconcil Indig-Settl Relat Earth Teach* (Toronto, UNKNOWN: University of Toronto Press, 2018) 293.

———. “The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison” in Louis A Knafla & Haijo Jan Westra, eds, *Aborig Title Indig Peoples Can Aust N Z* Law and society series (Vancouver, BC) (Vancouver: UBC Press, 2010) 146.

Mills, Aaron. “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill Law J Rev Droit McGill 847–884.

Morales, Sarah. “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implement Braid Int Domsestic Indig Laws* Special Report (Waterloo, ON: Centre for International Governance Innovation, 2017) 63.

Newman, Dwight. The Top Ten Uncertainties of Aboriginal Title after Tsilhqot’in (Fraser Institute, 2017)

Orkin, Andrew. “When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law” (2003) 41:2 Osgoode Hall Law J 445–463.

Pahuja, Sundhya. “Laws of encounter: a jurisdictional account of international law” (2013) 1:1 Lond Rev Int Law 63–98.

Pasternak, Shiri. “Jurisdiction and Settler Colonialism: Where Do Laws Meet?” (2014) 29:02 Can J Law Soc Rev Can Droit Société 145–161.

Peluso, Nancy Lee & Christian Lund. “New frontiers of land control: Introduction” (2011) 38:4 J Peasant Stud 667–681.

Prudham, Scott & William D Coleman. “Introduction: Property, Autonomy, Territory, and Globalization” in William D Coleman, ed, *Prop Territ Glob Struggl Auton* Globalization and autonomy (Vancouver: UBC Press, 2011) 1.

Radcliffe, Sarah A. “Geography and indigeneity I: Indigeneity, coloniality and knowledge” (2017) 41:2 Prog Hum Geogr 220–229.

Rasmussen, Mattias Borg & Christian Lund. “Reconfiguring Frontier Spaces: The territorialization of resource control” (2018) 101 World Dev 388–399.

Richland, Justin B. “Jurisdiction: Grounding Law in Language” (2013) 42:1 Annu Rev Anthropol 209–226.

Rosa, Solange. “Transformative Constitutionalism in a Democratic Developmental State” (2011) 22 Stellenbosch Law Rev 542.

Roy, A. “Paradigms of propertied citizenship: transnational techniques of analysis” (2003) 38:4 Urban Aff Rev 463–491.

Sarat, Austin. “Speaking of Death: Narratives of Violence in Capital Trials” (1993) 27:1 Law Soc Rev 19–58.

Scott, Dayna. “Book Review: Slow Violence and the Environmentalism of the Poor, by Rob Nixon” (2012) 50:2 Osgoode Hall Law J 479–489.

Simpson, Audra & Andrea Smith. “Introduction” in Audra Simpson & Andrea Smith, eds, *Theor Native Stud* (Durham ; Duke University Press, 2014) 1.

Slattery, Brian. “The Generative Structure of Aboriginal Rights” in Patrick Macklem & Douglas Sanderson, eds, *Recognit Reconcil Essays Const Entren Aborig Treaty Rights* (Toronto ; University of Toronto Press, 2016) 100.

Szablowski, David. “‘Legal enclosure’ and resource extraction: Territorial transformation through the enclosure of local and indigenous law” (2019) 6:3 Extr Ind Soc 722–732.

Tsing, Anna Lowenhaupt. “Natural Resources and Capitalist Frontiers” (2003) 38:48 Econ Polit Wkly 5100–5106.

Valverde, Mariana. “Jurisdiction and Scale: Legal `Technicalities’ as Resources for Theory” (2009) 18:2 Soc Leg Stud 139–157.

Van der Walt, A J (Andries Johannes). “Property and Marginality” in Eduardo M Peñalver & Gregory S Alexander, eds, *Prop Community* (Oxford ; New York: Oxford University Press, 2010) 81.

Vandergeest, Peter & Nancy Lee Peluso. “Territorialization and State Power in Thailand” (1995) 24:3 Theory Soc 385–426.

Wicomb, Wilmien. “The Exceptionalism and Identity of Customary Law under the Constitution Customary Law” (2013) 6 Const Court Rev 127–146.

Williams, Melissa S. “Introduction: On the use and abuse of recognition politics” in Avigail Eisenberg et al, eds, *Recognit Self-Determ Dilemmas Emancip Polit* Ethnicity and democratic governance series (Vancouver, BC : UBC Press, 2014) 3.

Wolfe, Patrick. “Settler colonialism and the elimination of the native” (2006) 8:4 J Genocide Res 387–409.

Yarrow, David. “Law’s Infidelity to Its Past: The Failure to Recognize Indigenous jurisdiction in Australia and Canada” in Louis A Knafla & Haijo Jan Westra, eds, *Aborig Title Indig Peoples Can Aust N Z* Law and society (Vancouver: UBC Press, 2010) 85.

Yates, Julian S & Leila M Harris. “Hybrid regulatory landscapes: The human right to water, variegated neoliberal water governance, and policy transfer in Cape Town, South Africa, and Accra, Ghana” (2018) 110 World Dev 75–87.

Yeh, Emily T & Joe Bryan. “Indigeneity” in James McCarthy, Gavin Bridge & Thomas Albert Perreault, eds, *Routledge Handb Polit Ecol* Routledge international handbooks (Abingdon, Oxon; New York, NY: Routledge, 2015) 531.

Klug, Heinz. *Self-Determination and the Struggle Against Apartheid*, SSRN Scholarly Paper, by Heinz Klug, papers.ssrn.com, SSRN Scholarly Paper ID 3526426 (Rochester, NY: Social Science Research Network, 1990).

Kung, Eugene & Gavin Smith. “Canada’s ‘prove it’ approach to Aboriginal title”, (1 February 2019), online: *Policy Options* <https://policyoptions.irpp.org/fr/magazines/february-2019/canadas-prove-it-approach-to-aboriginal-title/>.

SECONDARY MATERIAL: ONLINE NEWS CONTENT, REPORTS BY NON-GOVERNMENTAL ORGANIZATIONS

Amadiba Crisis Committee (ACC) “SANRAL blocked again from steel pegging N2 Toll Road on the Xolobeni coast”. 2019-08-10. Available at: https://www.facebook.com/amadibacrisiscommittee/posts

Amadiba Crisis Committee. “Kingship conflict again in Court on Tuesday – Court must respect customary law: Pondoland is not for sale!” 2019 08 19. Available at: http://aidc.org.za/court-must-respect-customary-law-acc/

Amandla Media “We Communities Have Been Saying No!” https://www.youtube.com/watch?v=SemHA4uhM90 (2020);

Argument of the Province of British Columbia. “National Energy Board Hearing Order MH-052-2018. Jurisdiction over the Coastal GasLink Pipeline.” Available at: https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3767869. At 4.

BC Civil Liberties Association. Media Advisory of Press Conference on January 15, 2020. Legal Complains Files Against RCMP Exclusion Zone in Wet’suwet’en. 14 January 2020. Available at: https://www.ubcic.bc.ca/media_advisory_legal_complaints_filed_against_rcmp_exclusion_zone

BC Environmental Assessment Office. On file with the author. 2014.

Bellrichard, Chantelle. Benefits agreement asks First Nation to discourage members from hindering B.C. pipeline project. CBC News. 9 August 2019. Available at: https://www.cbc.ca/news/indigenous/coastal-gaslink-nak-azdli-whut-en-agreement-1.5238220

WOMIN Collective. “Beyond Extractivism: Reclaiming Peoples Power, Our Right To Say No!” At: https://womin.org.za/our-work/main-support-activities/beyond-extractivism-reclaiming-peoples-power,-our-right-to-say-no.html

Bloom, Kevin. “The fate of Xolobeni would be the fate of us all” Working Document No 2, *Tricontinental: Institute for Social Research* (October 2019).

Brake, Justin. “Trudeau, Horgan under fire for downplaying Aboriginal title following raid of Wet’suwet’en”. *APTN News*, 11 January 2019. https://aptnnews.ca/2019/01/11/trudeau-horgan-under-fire-for-downplaying-aboriginal-title-following-rcmp-raid-of-wetsuweten/

Cawe, A. “Mining Consent: Autonomy of rural poor under attack”. *Business Day*. Times Media (pty) Ltd. 18 February 2019.

Global Witness. “Defending Tomorrow: The climate crisis and threats against land and environmetnal defenders” (2020). Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/

Hunter, Jestine, Brent Jang, Wendy Stueck, and Shawn McCarthy. “This pipeline is challenging Indigenous law and Western law. Who really owns the land?” The Globe and Mail. 13 January 2019. https://www.theglobeandmail.com/canada/british-columbia/article-a-contested-pipeline-tests-the-landscape-of-indigenous-law-who/

Ihlazo (Disgrace) at Xolobeni. Video recorded 6 April 2017. Filmed in the Umgungundlovu Komkhulu (Traditional Court House). Filmed by John Clarke and Dick Forslund. Translated by Nelisa Mdibi and Ali Gule. Available at: https://www.youtube.com/watch?v=kYEJy2RmnYk.

Inter-American Commission on Human Rights. “Criminalization of Human Rights Defenders”, by Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 49/15 (2015).

le Cordeur, M. “Court battle linked to Wild Coast mining rights heats up”. *Fin24.* 11 January 2016. Available at: http://www.fin24.com/Companies/Mining/court-battle-linked-to-wild-coast-mining-rights-heats-up-20160111

Mbuthuma, Nonhle. Statement by Nonhle Mbuthuma re: South African Police Services, Mbizana District, Commnuity Perceptions of Partial Conflict, On file with the author, (2016).

National Energy Board. *Letter Decision Re: Jurisdiction over the Coastal GasLink Pipeline Project. MH-053-2018*. Decision of the National Energy Board. 26 July 2019

Ngcukana, Lubabalo. “Sanral starts N2 project, despite court action”. *News24*. Available at https://www.news24.com/news24/SouthAfrica/News/sanral-starts-n2-project-despite-court-action-20170923(2017)

Ngubeni, S. “Xolobeni mining ruling compromises the state.” *Mail & Guardian*. 13 September 2019. Available at: https://mg.co.za/article/2019-09-13-00-xolobeni-mining-ruling-compromises-the-state.

Office of the Wet’suwet’en. “Wet’suwet’en Rights and Title and Enbridge’s Northern Gateway Pipelines Project”. Submission to: Northern Gateway Joint Review Panel. Available at http://www.wetsuweten.com/. At 115.

Office of the Wet'suwet'en. "Letter to the Ministers for decision on the TransCanada Coastal GasLink Project. RE: BC EAO list of Coastal GasLink Pipeline Project's Conditions." 3 October 2014. Available at http://www.wetsuweten.com. At 2.

Office of the Wet'suwet'en. "Wet'suwet'en Title & Rights and Coastal GasLink", Submission to: BC EAO and Coastal GasLink Pipeline, at 111.

PLAAS/NLC "Community Consultation Project, Submission to the Portfolio Committee on Agriculture and Land Affairs", On file with the author, (2003).

Report of the Special Rapporteur on the rights of indigenous peoples, "Report to the Human Rights Council, Thirty-ninth session", A/HRC/39/17 (2018).

Sole, Sam. "Xolobeni: The mine, the murder, the DG – and many unanswered questions." *Daily Maverick*. Available at: https://www.dailymaverick.co.za/article/2019-06-30-xolobeni-the-mine-the-murder-the-dg-and-many-unanswered-questions/. Accessed 24 September 2019.

South African Human Rights Commission. "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa." (2018). Available at: https://www.sahrc.org.za/.

Thematic Social Forum "Resisting mining and extractivism: The Right to Say No Campaign". At: https://www.thematicsocialforum.org/resisting; 2020.

TransCanada (April 2014). "Coastal Gaslink Pipeline Project: Aboriginal Consultation Report" 2. CGL4703-CGP-AB-RP-004.

TransCanada (May 3, 2013). "Coastal Gaslink Pipeline Project: Aboriginal Consultation Report" 1. CGL4703-CGP-AB-RP-002, Appendix B.

Unist'ot'en Camp News. See "Wet'suwet'en Hereditary Chiefs Evict Coastal GasLink from Territory". Available at https://unistoten.camp/wetsuweten-hereditary-chiefs-evict-coastal-gaslink-from-territory/. 4 January 2020.

Unist'ot'en Camp Website. Timeline of Campaign. Available at: https://unistoten.camp/timeline/timeline-of-the-campaign/

Unist'ot'en Camp Zine. Available at https://unistoten.camp/

Washinyira, T. "We will die for our land, say angry Xolobeni villagers as dune mining looms." *Mail & Guardian*. 12 February 2019. Available at: http://mg.co.za/article/2016-02-12-we-will-die-for-our-land-say-angry-xolobeni-villagers-as-dune-mining-looms-1

Webster, Dennis. "Resistance stalls mega Wild Coast bridge." *New Frame*. https://www.newframe.com/resistance-stalls-mega-wild-coast-bridge/ 5 February 2019.

Wet'suwet'en Chiefs Dialogue. "Press Release by Wet'suwet'en Hereditary Chiefs." 1 June 2020. Available at http://www.wetsuweten.com/.

White Paper on Traditional Leadership and Governance, Government Gazette 25438, General

Wilson, Lee and Kathleen Martens. “They’re proceeding without us: Elected chiefs in B.C. push back on Wet’suwet’en rights and title agreement.” *APTN News*. 12 May 2020. https://www.aptnnews.ca/national-news/theyre-proceeding-without-us-elected-chiefs-in-b-c-push-back-on-wetsuweten-rights-and-title-agreement/

Yellowhead Institute, “Legislation Affecting Indigenous Peoples: An Overview of the Liberal Record”. Policy Brief 33, 28 June 2019. Available at www.yellowheadinstitute.org

Yellowhead Institute. “Land Back: A Yellowhead Institute Red Paper.” Toronto, ON, 2019. https://yellowheadinstitute.org/. at 21.