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# Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment

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**Abstract:** The livelihoods of indigenous peoples, custodians of the world’s forests since time immemorial, were eroded as colonial powers claimed *de jure* control over their ancestral lands. The continuation of European land regimes in Africa and Asia meant that the withdrawal of colonial powers did not bring about a return to customary land tenure. Further, the growth in environmentalism has been interpreted by some as entailing conservation ahead of people. While this may be justifiable in view of devastating anthropocentric breaching of planetary boundaries, continued support for “fortress” style conservation inflicts real harm on indigenous communities and overlooks sustainable solutions to deepening climate crises. In reflecting on this issue from the perspective of colonial land tenure systems, this article highlights how ideas—the importance of individualised land ownership, cultivation, and fortress conservation—are intellectually flawed. Prevailing conservation policies, made possible by global non-governmental organisations (NGOs) and statutory donors, continue to harm indigenous peoples and their traditional territories. Drawing from the authors’ experience representing the Batwa (DRC), the Ogiek and Endorois (Kenya) and Adivasis (India) in international litigation, this paper examines the human and environmental costs associated with modern conservation approaches through this colonial lens. This article concludes by reflecting on approaches that respect environmental and human rights.

**Keywords:** fortress conservation; indigenous peoples; decolonisation; customary land tenure; forest governance; Democratic Republic of Congo; Kenya; India

## 1. Introduction

At its most fundamental level, colonialism is premised on exploitation of colonised peoples, their territories and resources [1,2]. The acquisition of new lands and natural resources was thus paramount to the colonial project. It provided colonising powers with wealth and strategic advantages that allowed massive empires to flourish, furnishing raw materials and markets that fuelled industrialisation [3,4]. Indigenous peoples and other local communities were treated as objects that needed to be subjugated, removed or eliminated in order to exploit their labour and guarantee unfettered access to their lands and the “productive” use of resources [5,6]. This separation of indigenous peoples from their natural environments was a crucial component of colonisation [7], one that persists in contemporary conservation strategies [5,8–10], with devastating consequences for indigenous peoples and the environment [7,11–14].

In this context, this article explores how three principles central to the colonial enterprise worked to alienate indigenous peoples from their territories and resources, tracing the colonial legacies of

contemporary conservation policies. Because the authors draw from the experiences of indigenous communities in the DRC, Kenya and India, this article focuses on the form of colonialism commonly perpetrated in Africa and Asia, where local labour and resources were exploited without a permanent settler presence [15,16]. Like their colonial predecessors, contemporary conservation strategies often involve the creation of national parks and protected areas that dispossess and exclude indigenous and local communities from their lands. Because the drivers and impacts of colonisation on conservation are ongoing [9], for the purposes of this article we consider decolonisation to broadly mean the reversal of colonialism, including its political, economic, social, cultural and environmental impacts [17].

Since their inception in the United States in the early nineteenth century, the creation of protected areas has denied indigenous peoples their rights, evicted them from their homelands and provoked long-term social conflict, starvation and death [11,18,19]. A prevailing mode of conservation, known as “fortress” or “colonial” conservation [10,18,20], is based on the belief that biodiversity protection is “best achieved by creating protected areas where ecosystems can function in isolation from human disturbance” [21,22]. It assumes that “local people use natural resources in irrational and destructive ways, and as a result cause biodiversity loss and environmental degradation” [22]. Fortress conservation is characterised by (1) the creation of a protected area from which local people dependent on the natural resource base must be excluded; (2) enforcement by park rangers patrolling the boundaries, often using coercion and violence to ensure compliance; and (3) only tourism, safari hunting, and scientific research are considered appropriate uses within protected areas [22]. Although evictions are carried out in the name of conservation (a public good) rather than colonial exploitation, the devastating consequences to indigenous livelihoods and cultures remain the same.

While not all protected areas have resorted to fortress conservation strategies, many that overlap with indigenous territories ultimately result in policies that restrict indigenous peoples’ access to and traditional use of their ancestral lands to the detriment of indigenous livelihoods. Accordingly, these protectionist practices have come under increasing scrutiny [10]. In response, many stakeholders in the conservation establishment (i.e., actors vested in shaping and implementing mainstream, transnational conservation strategies including lawmakers, academics, conservation scientists and individuals operating in large global conservation NGOs, governments, international agencies and donors) have adopted formal policies committing to respect indigenous rights under what has come to be known as a “new paradigm” on protected areas [11,18,23,24]. Unfortunately, these commitments have failed to materialise [24,25]. Despite a growing body of evidence that suggests the most effective way to conserve the environment is through the recognition and enforcement of customary indigenous title to ancestral lands [13,24,26–28], intractable obstacles prevent these rights from being made effective. These obstacles are by no means new. They are the legacies of a colonial world view that shaped systems of knowledge creation and law with far-reaching consequences that reverberate today.

To better illustrate the problems associated with fortress conservation, this article culls from the authors’ experience as human rights lawyers representing indigenous communities struggling to secure customary title to their ancestral lands. The bulk of their cases involve indigenous communities who have either been evicted or face the imminent threat of eviction in the name of conservation. Each of the examples included in this article aims to illustrate a perspective often overlooked in academic debates surrounding the efficacy of conservation strategies that are needed to tackle climate change and biodiversity loss. They are framed to highlight the practical challenges that prevent indigenous rights from being made effective despite successful campaigns to enshrine their rights in international treaties, soft law, the jurisprudence of international human rights bodies, and domestic legislation.

The first describes the plight of the Batwa of the Kahuzi-Biega Forest in the Democratic Republic of Congo (DRC), emblematic of the environmental and human costs associated with the creation of protected areas and the violations that persist despite the “new paradigm” on protected areas adopted by the global conservation establishment. The second explores the limitations of enforcing indigenous title to lands gazetted for conservation through international litigation and, in particular, the challenges the Endorois and Ogiek indigenous communities of Kenya have encountered implementing favourable

international human rights rulings. The third discusses the threatened eviction of tribal peoples in India, known as Adivasis, under the Forest Rights Act (FRA), a piece of legislation that recognises customary indigenous land rights in forests gazetted for conservation. The FRA established an administrative procedure for Adivasis to apply for formal title. In practice, however, mechanisms established to formalise title have largely failed, paving the way for conservation and wildlife NGOs to seek a court order evicting significantly more than two million forest-dwelling tribal peoples from their lands.

These examples underscore the ways in which colonial systems of domination, employed to consolidate power over colonial holdings and subjects, were underpinned by a racist ideology that endures today. This system of beliefs and principles has entrenched structural discrimination against indigenous peoples in global legal systems, which still do not effectively recognise their customary right to their ancestral lands. [29,30]. And even when they do, indigenous peoples face intractable hurdles in making customary land rights enshrined in domestic legislation effective in practice [31]. In the conservation context, failure to recognise indigenous title is at the heart of why their lands are more vulnerable to expropriation without compensation. Until their rights to land and resources are effectively protected and enforced by domestic legal regimes, indigenous peoples will remain susceptible to further dispossession and exploitation, and so too, the environment. Aside from the damage to peoples and communities, history teaches us that separating indigenous peoples from their ancestral lands removes one of the most effective layers of protection these territories could ever receive [32].

## 2. Colonial Land Ideologies, Conservation and Indigenous Injustices

This article seeks to draw the inextricable links between colonialism and the modern conservation ideologies that persist today. Certain principles central to colonialism in Africa and Asia have worked to alienate indigenous peoples from their territories and resources, ultimately making fortress conservation possible [10]. The introduction of individualised property regimes and the emphasis placed on cultivation as the only “productive” form of land use worthy of legal protection created insecure land tenure and enabled colonisers to exploit indigenous peoples, their lands and their resources [33,34]. Colonial powers then sought to remedy the ecological damage caused by their overexploitation through conservation models premised on removing indigenous peoples from their ancestral lands [35]. The common thread that runs through all of these principles is the need to exploit natural resources for the benefit of the coloniser and dispossess indigenous peoples of their territories, a process with parallels to modern conservation practices. Thus, despite being well into the twenty-first century, colonial conservation remains alive and well [8].

### 2.1. Individualised Property Regimes

In most parts of the world, the notion of private land ownership began with the arrival of Europeans [36]. This Western concept failed to resonate with indigenous communities [37], who generally held and used their territories and resources collectively, for the benefit of the entire group [38,39]. Communal rights over land and resources were integral to their traditional way of life, as well as the most effective way to safeguard their natural environments [40]. Notwithstanding, communal land systems were often disregarded under colonial rule and laws were enacted to impose individualised land tenure regimes [29,41].

European powers structured land systems in their colonies to maximise economic returns [42]. The logic behind individual property regimes is based on the principle of productivity, the idea being that individual titling enables wealth creation through the use and/or transfer of individual allotments of land [41,43]. It was also seen as part of the civilising mission to bring indigenous peoples in line with “progress” and the “more advanced” ways of Europeans [34,44]. However, it bears emphasising that to the extent that individual property systems have generated wealth, it has been for the benefit of the coloniser, not the colonised. Even when States have sought to rectify colonial land expropriation by

conferring individual title to indigenous peoples (as distinct from recognising their collective right to their ancestral lands), it has generally failed to improve their material circumstances [43].

And while the economic benefits remain highly tenuous, the social costs are tremendous [25]. Indigenous peoples lost massive portions of their territories through individual titling schemes [45], which have been used to prevent these communities from accessing and safeguarding their traditional lands [43]. They also result in overlapping and conflicting land rights with respect to the same territories [46]. This has been a key driver of poverty, inequality and conflict [25,47]. The supremacy placed on individual ownership, and the corresponding nonrecognition of traditional or customary land tenure, has also contributed to deforestation, biodiversity loss and other forms of environmental destruction [41,48,49]. In contrast, recognising and enforcing community-based tenure of indigenous lands has been recognised as a key strategy in combating climate change and environmental degradation [13,25,50].

Today, the rights of indigenous peoples to their customary territories and resources is widely recognised at the international level [30]. Prominently, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007, provides for their right to “own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation” and demands that States “give legal recognition and protection to these lands, territories and resources” [51]. Nevertheless, customary ownership and use rights are still commonly violated by States, as well as private corporations [29,30]. Thus, the respect and recognition of customary ownership and use rights remains a central struggle for many indigenous communities [52].

## 2.2. Primacy of Land Cultivation

Indigenous peoples’ lands have been consistently deprived of legal protection unless they were used according to Western ideals [53]. Colonial ideologies have long foregrounded agriculture as the most valuable, acceptable use of land [54]. Early European scholars believed that land ownership required cultivation [55]. Influentially, John Locke maintained that people who did not cultivate the land did not have ownership rights over it [56]. In his mind, this justified the dispossession of indigenous peoples from their lands [55]. Cultivation thus became the gold standard, while other traditional indigenous land uses were deemed backward and uncivilised [56].

Two primary rationales have been extended for the prioritisation of agrarian land use. First, it was seen as the most productive use of land [6,34]. The colonial enterprise depended on the appropriation of natural resources in the colonies, to the great detriment of indigenous peoples [57]. The economic value of indigenous territories could only be conferred on colonising powers through exploiting local labour, the creation of jobs and exporting the raw materials derived from the land [34]. Second, teaching indigenous peoples how to cultivate the land was seen as an avenue to “civilise” them [34]. In the same vein as Christianising missions and the imposition of Western education, colonial regimes sought to civilise indigenous peoples by transforming them into sedentary farmers [34].

Indigenous peoples were not considered capable of rationally using lands in a productive manner [58]. Because colonisers only saw them as an endless supply of cheap (free) labour, the subsistence activities they carried out on their ancestral lands (hunting, fishing, grazing) were not deemed sufficient to confer ownership rights, making them ripe for the picking and put to use for more “profitable” activities [37]. These ideas have persisted in the postcolonial era, where successful land use is associated with Western ideals of productivity and indigenous alternatives remain devalued [58].

However, there was another strategic objective behind foregrounding cultivation. It served as an impetus for the colonial appropriation of indigenous territories [34]. For instance, under the theory of *terra nullius*, colonial powers could acquire indigenous territories that were “unoccupied” [59,60]. While later ruled a legal fiction in the seminal *Mabo v Queensland* case [61], colonial powers relied on *terra nullius* to justify their takings of uncultivated, “wilderness” well into the 20<sup>th</sup> century [62]. Thus, the fact that indigenous hunter-gatherer communities did not use territories in the same way as

Europeans served as a pretext to treat such lands as “unoccupied” and thus free for the taking [63]. Of course, just because the land was being used differently did not mean that it was uninhabited or unoccupied [55]. Still, cultivated lands were afforded greater protection under the law [45].

Well after the withdrawal of colonial powers, the principle of “the land belongs to those who cultivate it” remained central to postcolonial land policy [6]. The practice of converting massive swathes of forests and other landscapes into plantation economies instituted by colonial governments has continued in the postcolonial period [6]. This paved the way for plantation-style cultivation of export crops, commercial hunting and herding and the extraction of natural resources used to produce the consumer goods that fuelled industrialisation in colonising States and environmental damage in former colonies [64]. Accordingly, the activities carried out by colonisers and successor governments on the ancestral lands of indigenous peoples have played a crucial role in the industrial and commercial dynamics that emerged in the colonial era and continue to drive the global economy today. Many of these dynamics continue to be the drivers of the global climate crisis today.

### 2.3. Colonial Plunder and “Conservation”

The widespread plunder of natural resources was a hallmark of colonisation [65]. Nature was something that was to be commodified in order to enrich the colonial power [5]. In turn, indigenous territories were treated as business enterprises, with seemingly unlimited resources to exploit [66–68]. Undoubtedly, this had dire environmental consequences [69]. Only upon the realisation that their activities were causing rapid environmental degradation did colonisers begin to concern themselves with nature conservation [8]. This brought about early attempts by colonisers to preserve indigenous lands—*notwithstanding* the fact that indigenous peoples have been conserving their own traditional territories for centuries prior to European contact [5]. Yet the ideology that emerged was that nature was something that should be first exploited, then preserved, but all without the input, involvement or participation of indigenous populations [65].

Instead of coming to grips with the environmental toll brought about by their own exploitative behaviour, colonial powers, and later, successor States consistently blamed local indigenous communities for environmental degradation [70,71]. Slash and burn agricultural practices and subsistence hunting (as distinguished from large-scale commercial poaching) were decried as environmental threats, despite the fact that such claims have largely been proven inaccurate [70,72]. As a result, colonial conservation practices dictated that indigenous peoples be removed from their natural environments [65].

While nature preservation was framed as a universal good, colonial conservation was structured to benefit the colonising power. The protection and preservation of pristine natural environments initially benefited the colonising States (through tourism, trophy hunting and scientific research) whose own lands had already been developed for other economic purposes [73]. These policies also served as a pretext to exert control over colonised territories and local populations [5]. Even today, the advantages continue to flow from the former colonies to developed countries by way of carbon emissions trading and offsets [73–75]. Moreover, when former colonies receive conservation funding from Western donors or NGOs, only a small percentage makes it to indigenous and local communities [25], despite the extensive overlap between protected areas and indigenous lands [76].

The Parties to the Convention on Biological Diversity (CBD) agreed in 2010 to ensure that 10 per cent of their surface area be conserved through protected areas [77,78]. Yet, this biodiversity target has disproportionately burdened indigenous peoples. In the face of declining biodiversity, former colonies with significant indigenous populations are under enormous pressure from developed countries and international conservation organisations to set aside more and more territories for conservation [73]. Many are, in fact, far exceeding the 10 per cent target set forth in the CBD [73]. Conversely, developed countries—many of the world’s biggest polluters—continue to lag behind [73]. Emboldened and financially incentivised by large intentional conservation NGOs, governments in former colonies continue to evict indigenous communities in order to sequester ever more land in the

name of conservation [79]. Significantly, this international backing has not been adequately conditioned on the protection and safeguarding of indigenous communities [79].

Fortress conservation is thus a lasting legacy of colonialism in Africa, Asia and elsewhere [65]. The formal end of European political control in former colonies did not result in a return to customary land tenure or indigenous conservation approaches [80,81]. Instead, postcolonial States have often continued the land use and conservation policies of the coloniser, to the great detriment of indigenous peoples [81]. In some contexts, indigenous land rights have been further marginalised under postcolonial governments [82]. This is not meant to diminish the brutal impact of colonial rule on indigenous peoples; rather it demonstrates how colonial norms and knowledge systems have been institutionalised in colonised territories, at the expense of the most marginalised and consistently exploited groups [83]. Whereas indigenous peoples are the world's best conservationists and most effective climate change mitigators [24,26,84], much of the rapacious exploitation that has taken place on their lands during and since colonisation paved the way for processes of industrialisation that are directly responsible for the environmental crisis we face today [5,7]. Although the rhetoric around conservation has moved away from 'fences and fines' post-independence, this shift has been largely semantic and protectionist approaches continue to be adopted [10,24,85].

### 3. Fortress Conservation Threatens Indigenous Territories and Livelihoods Around the World

As of 2018, there were 230,000 protected areas registered in the World Database of Protected Areas (WDPA) (up more than nine per cent from 2014) [86,87]. While the number of protected areas has steadily increased over the last decades [87], the authors acknowledge there is a lack of data on the precise number of protected areas that have resulted in the eviction of indigenous and local communities [88]. Not all protected areas are the same in terms of the management objectives and human uses that they permit. The International Union for Conservation and Nature (IUCN) has established a classification system that sorts protected areas into six categories [89]. Four of the six categories are considered "strict" protected areas, meaning they impose strict restrictions on local communities' access to and use of the resource base [89]. Unfortunately, not all of the 230,000 protected areas registered in the WDPA provide classification criteria, making it difficult to determine the precise number of strict protected areas (which are more likely to result in the eviction of local communities when their lands overlap with the protected area). Nevertheless, it bears emphasising that studies suggest that stricter protections on paper do not necessarily result in better conservation outcomes [90–92] whereas the human costs associated with these policies are well documented [24,26]. A recent review of 160 protected areas further suggests that protected areas that enhance human wellbeing by allowing sustainable use of the resource base are correlated with better conservation outcomes [93]. While more research needs to be carried out to draw definitive conclusions on the kind of management style and resource use that will optimise conservation outcomes, the prevailing approach is failing to do so.

As of 2016, less than five per cent of the world's protected areas were managed and conserved by indigenous peoples and local communities [24]. This is of particular concern considering the establishment of protected areas disproportionately impact indigenous peoples. It also speaks to the prevalence of colonial conservation. Although indigenous territories encompass around 22 per cent of the world's land surface, they contain 80 per cent of the world's biodiversity [24], are havens of diverse flora and fauna, free from deforestation and rich in resources and rare species, evidence of their unassailable track record as the world's best environmental custodians [25,76]. Instead of rewarding indigenous communities for protecting their territories while occupying them, "they are frequently and increasingly evicted and persecuted due to prevailing insistence on 'fortress conservation'" [73]. About 50 per cent of the protected areas created by the global conservation establishment in the twentieth century were located on lands either occupied or regularly used by indigenous peoples [11], even though they represent only five per cent of the global population [25]. With the exponential growth

of protected areas in the last fifty years, conservation has thus become “the number one threat to indigenous territories” [11].

The increasingly militarised approach propagated by the conservation establishment creates antagonism towards indigenous communities, who are cast as criminals, poachers, and squatters on lands they have traditionally and sustainably occupied for centuries, if not longer [22,94]. It paints them to the outside world as climate violators often without any evidence of the damage they are purported to have caused to the environment. In particular, “forest sequestration through fortress conservation approaches is creating chronic patterns of abuse and human-rights violations” in protected areas [24,25], including extra-judicial killings and the obstruction of justice by governments who fail to remedy and redress those abuses [24,25,95–97]. This is often achieved with the complicity of large international conservation NGOs who fund and help administer protected areas under the mistaken belief that it will assist conservation [11,81,95,96].

The maintenance of fortress conservation policies by large conservation NGOs is a colonial legacy that alongside the failure to recognise native title based on customary laws causes irreparable damage. As briefly discussed in Section 2, above, national parks and other protected areas have proliferated under the auspices of legal systems inherited from colonial powers that fail to recognise indigenous peoples’ customary title to ancestral lands. Rather than using tools of expropriation, which would require demonstration of a public good and a resort to due process, fortress conservation is often undertaken through forcible means that treat indigenous peoples akin to objects rather than subjects of law [98].

The establishment of protected areas therefore often involves the eviction of an indigenous community from their ancestral lands without their free, prior and informed consent [24,99]. Because traditional, indigenous livelihoods depend on access to ancestral lands, eviction in the name of conservation threatens indigenous peoples’ very survival. It entails the destruction of their culture and traditional knowledge, disperses the community, disrupts kinship systems and often leads to famine, disease and death [18]. By excluding indigenous peoples from their lands, fortress conservation transforms them from “independent and self-sustaining to deeply dependent and poor communities” that find themselves needing to assimilate to a monetised economy and a majority culture that often discriminates against them [11].

Sidelined and impoverished by colonial conservation models that deprive them of their usufruct rights (and accordingly, the ability to undertake subsistence activities that have sustained them since time immemorial), evicted indigenous communities are “driven to desperate survival actions denounced as ‘criminal’ by conservationists” [11]. Many risk being “legally” shot and killed by ecoguards for entering their ancestral lands to hunt or collect food, medicinal plants and firewood [100,101]. Fortress conservation thus entails the violation of a series of inter-related human rights, including but not limited to, the right to property, the right to culture, the right to food and natural resources, the right to health, and the right to economic, social and cultural development. Despite numerous international human rights judgments condemning these practices as unlawful [102–105] the spread of protected areas on the ancestral lands of indigenous peoples has persisted [20,24,26,85].

Of particular concern, the creation of protected areas and national parks often involves the displacement of traditional, indigenous communities with a proven track record as the world’s best environmental custodians [9,24,25]. These communities have been sustainably using and preserving their ancestral lands for many generations [5]. Significantly, fortress conservation wilfully ignores the growing body of evidence that shows that the removal of indigenous peoples from their ancestral lands harms the environment and that indigenous-governed lands perform as well, if not better than State-controlled protected areas in fostering biodiversity, reducing deforestation and degradation and sequestering carbon [13,84,106–111], all for a fraction of the cost [27]. As such, fortress conservation deprives the territories indigenous peoples once occupied of their highly effective stewardship and often leads to less desirable conservation outcomes [11]. In part this is because a growing number of non-indigenous groups (including settlers, artisanal loggers and miners, exotic animal poachers,

cash-crop farmers and cattle ranchers) move into unpatrolled and poorly managed protected areas to engage in illicit activities that are far more damaging to the environment [11]. As the United Nations (UN) Special Rapporteur on the rights of indigenous peoples has explained: “From the conservation perspective, the loss of the guardianship of indigenous peoples and the placing of their lands under the control of government authorities who have often lacked the capacity and political will to protect the land effectively, has left such areas exposed to destructive settlement, extractive industries, illegal logging, agribusiness expansion and large-scale infrastructure development. Even where national policies and laws require strict protection for protected areas, in many countries State agencies have still authorized mining, oil and gas extraction, logging, dams and reservoirs, highways and other projects in direct conflict with conservation goals.” [24]

In sum, absent indigenous peoples’ knowledgeable and responsible stewardship, protected areas have “declined into anarchic decay. In such areas biodiversity ebbs closer to zero as species either leave or crash. International conservationists then issue reports lamenting the impending extinction and blaming the very poachers and timber thieves that their policies and actions created.” [11] Accordingly, experts increasingly agree that indigenous custodianship offers the best protection protected areas can ever receive [11] at a fraction of the cost of alternatives [25,50] and, unlike fortress conservation, it complies with international human rights obligations [32].

#### 4. Reflections from the Field

The irreparable harms indigenous communities disproportionately suffer as a result of conservation-related displacements is vividly illustrated by the three case studies discussed in this Section. These cases arise from Minority Rights Group’s (“MRG”) legal work representing minority and indigenous communities around the world. Each one serves to illustrate the legal and political challenges associated with combatting human rights abuses that stem from conservation policies premised on the eviction of local communities, exposing the unacceptable human toll they exact on indigenous peoples. They underscore that to safeguard our environment, we must adopt conservation strategies centred on making indigenous peoples’ customary land rights effective in practice, particularly in the domestic legal regimes charged with implementing them.

##### 4.1. *The Human and Environmental Costs of Fortress Conservation: The Batwa of the Kahuzi-Biega Forest*

The plight of the Batwa of the Kahuzi-Biega Forest in the DRC illustrates the human and environmental costs attendant to fortress conservation policies propagated by the conservation establishment and funded by large statutory donors in developed countries. The Batwa are an indigenous ethnic group and one of the most marginalised of all minorities in the Great Lakes region. Commonly referred to as “Pygmies”, they are a traditional, forest-dwelling community that has lived in symbiosis with the Kahuzi-Biega Forest in the South Kivu region of the DRC since time immemorial [112,113].

The Kahuzi-Biega Forest is also home to Eastern lowland gorillas (a critically endangered species related to but distinct from the more well-known mountain gorilla). In 1970, the government enacted a law creating a national park called the Parc National Kahuzi-Biega (PNKB) under an initiative led by a Belgian conservationist. The creation of the PNKB led to the forced relocation of some Batwa families elsewhere within the forest. In 1975, the government expanded the PNKB area from 60,000 to 600,000 hectares, leading to the eviction of 3,000 to 6,000 Batwa individuals and restricting their access to their ancestral lands without compensation [112].

During these evictions, the Batwa were violently driven out without warning and forced to find shelter among non-Batwa communities that discriminated against them. No relocation arrangements were made to assist the Batwa, they have received no compensation and have lived in extreme poverty as squatters in various rural areas surrounding the PNKB ever since. Conversely, non-Batwa have been allowed to remain in the park or received compensation. Any attempts to seek redress in domestic courts have been unavailing [112,114].



The DRC has seized ancestral Batwa land without their consent or prior consultation. The forest from which they are now excluded provided them with security and sustenance as a source of food, medicine, and fuel. In addition, the Batwa's ancestral territory is seen as sacred, inextricably linked to the spiritual and cultural integrity of the community and its traditional way of life [112,113]. As such, the dispossession of the Batwa's lands involves the violation of a series of inter-related human rights that have ongoing consequences for the community, threatening their very survival. To date, the DRC has failed to provide adequate redress. For this reason, in 2015, MRG and Environnement Ressources Naturelles et Développement (ERND), a local NGO, lodged a complaint on behalf of the Batwa of the PNKB before the African Commission on Human and Peoples' Rights (ACHPR or the Commission). The case remains pending [115].

For the Batwa, the consequences of their eviction have been particularly harsh. As a direct effect of the dispossession of their territories and their continued inability to access the land following their eviction, they are presently denied meaningful access to, use of, and participation in decisions concerning their ancestral land, preventing them from pursuing their traditional way of life, cultural and religious practices, and livelihood. The Batwa have been displaced, forced to resettle among non-Batwa communities that routinely discriminate against them due to their ethnicity, and are denied access to the natural resources located on their ancestral lands without consultation or compensation. They are also deprived of access to the most basic of social services, including education and healthcare [112–114].

Due to the deep-rooted ethnic discrimination they experience, the Batwa are excluded from local political councils and decision-making processes outside of their own group, further marginalising the community and rendering it politically vulnerable. They are chronically landless as non-indigenous customary laws do not recognise their rights. Landless and vulnerable, many Batwa must work the lands of their non-Batwa neighbours without pay in a situation the ACHPR has described as resembling slavery [114,116]. Their makeshift settlements are far removed from health and education centres—that they would have difficulty accessing in any case due to persistent and insidious discrimination—and also lack access to roads, arable land, water and sanitation. They suffer high rates of malnourishment, disease, and mortality as a result of the harsh living conditions they experience on the outskirts of the park. The human toll has been enormous: by the early 1980s, 50 per cent of the Batwa expelled from their ancestral lands in the PNKB had perished [112,113].

In recent years, the situation has continued to deteriorate as the DRC fails to uphold the Batwa's human rights. This includes failure to protect the ancestral lands from commercial poaching, illegal mining, and timber extraction, even though the United Nations Educational, Scientific and Cultural Organization (UNESCO) declared the Kahuzi-Biega Forest a World Heritage Site in 1980. These activities (fuelled by the presence of armed rebel groups in the region following the Rwandan Civil War) have resulted in deforestation and a drastic decline in the endemic animal and plant species the PNKB was created to protect. Corrupt park guards either engage in illegal exploitation of the park or turn a blind eye to it. They allow non-Batwa communities to remain in the forest undisturbed even though they engage in activities far more harmful to the environment than those deriving from the Batwa's traditional, low impact lifestyle [117–121].

Moreover, the Batwa do not benefit in any way from the exploitation or revenue garnered from conservation and tourism royalties collected in relation to their ancestral land. Whereas the Batwa's traditional knowledge allowed them to protect the forest and safeguard the territories and animals, now, some Batwa risk heavy fines, imprisonment, and even death by returning to the forest to collect herbs and wood and to hunt [112,113]. Encounters with park guards have turned increasingly violent as members of the Batwa community report being beaten, tortured and arrested. Some have been shot dead; others harassed and intimidated for denouncing human rights abuses and standing up for their community's rights [100]. As tensions have escalated, park guards have resorted to collective punishment, raiding nearby Batwa villages, harassing and intimidating members of the community, destroying their property and burning down their houses. The DRC has failed to hold park guards

accountable for these abuses. By contrast, several members of the Batwa community are in jail accused of illegally accessing their ancestral lands.

Following the paradigm shift inaugurated by the Durban Action Plan in 2003 [23], several actors in the conservation establishment have adopted policies undertaking to respect indigenous peoples' rights, including their right to free, prior and informed consent [11,18,23]. One of the initiatives that has arisen under the new paradigm is the Whakatane Mechanism. It was developed in 2011 by IUCN to "address historical institutional injustices against indigenous communities in the name of conservation of natural resources on traditional lands" [122]. The Whakatane Mechanism also aims to develop best practices of sustainable conservation that encourage partnerships between indigenous peoples, park authorities and local organisations.

In September 2014, the Batwa commenced a Whakatane dialogue process with PNKB authorities. It focused on addressing the immediate needs of the Batwa, including access to land, education, health and jobs, and capacity training to achieve long-term goals such as collective ownership and rights-based conservation. The parties discussed different proposals. Park authorities emphasised that under the PNKB's strict protection scheme, the Batwa could not be restored to their lands; however, they suggested providing the community with alternate lands. A road map was adopted memorialising the park administrator's commitments to redress the Batwa's displacement. However, to date, no land has been allocated to the Batwa. The Kahuzi-Biega Whakatane Dialogue Process has broken down due to park authorities' repeated failure to deliver on their promises. After years of protracted negotiations, many members of the Batwa community no longer believe that it offers any prospect of successfully resolving their situation.

The experience of the Batwa of the PNKB shows that despite efforts made to integrate indigenous rights into the new conservation paradigm, in practice, the suffering of marginalised indigenous populations caught in the cross-hairs of fortress conservation continues to be treated as regrettable, but necessary collateral damage. Sadly, the irreparable harm fortress conservation has inflicted on the Batwa community cannot be reversed. Even if they obtain a favourable decision from the ACHPR, several generations have now been born outside of the forest. The community has been dispersed. Without access to the forest, elders have been unable to transmit traditional knowledge and cultural practices to future generations and many members of the community no longer know how to live their traditional, forest-based lifestyle. Nevertheless, the community longs to return to the Kahuzi-Biega Forest, their "surrogate mother" [123]. Despite the difficulties and prolonged timelines, they see their case before the ACHPR as the only viable means of doing so.

#### *4.2. The Limitations of Challenging Evictions Carried Out in the Name of Conservation in Court: The Endorois and Ogiek of Kenya*

Litigation cannot undo the havoc wreaked on lives and communities after decades of forced separation from ancestral lands and ensuing landlessness. Yet, notwithstanding its limitations, seeking legal redress before international and regional human rights bodies is often the only avenue available to ensure the recognition of indigenous peoples' land rights. Obtaining a favourable judgment however is only half the battle. As the Ogiek and Endorois cases show, after the protracted legal campaigns required to win a case at the international level, implementation often remains elusive.

Like the Batwa, the Endorois and Ogiek peoples are indigenous communities evicted from their ancestral lands in the name of conservation. The Kenyan government removed the Endorois in 1973 to create the Lake Bogoria Game Reserve. In October 2009, Kenya served the Ogiek with an eviction order, purportedly to conserve their ancestral lands in the Mau Forest. MRG has represented both communities in their cases before the ACHPR and the African Court on Human and Peoples' Rights (the "African Court"), respectively. Despite obtaining favourable judgments, vindicating their rights, Kenya has failed to implement them [124,125].

The Endorois are a semi-nomadic indigenous, pastoralist community who have herded cattle and goats for many centuries in the Lake Bogoria area of Kenya's Rift Valley. They have a strong attachment

to their land, which provides fertile pasture, medicinal salt licks for their cattle and is central to the community's religious and cultural life. Following independence, ownership of the land passed to the State, who held it in trust, for the benefit of the community until 1973, when Kenya evicted the Endorois to create a game reserve. Their dispossession without consultation or compensation seriously interfered with their pastoralist livelihood and the exercise of their culture and religion. Following a series of failed attempts to have their customary rights recognised in domestic courts, the Endorois, represented by MRG and the Centre for Minority Rights Development (CEMIRIDE) (a local NGO), launched a case before the ACHPR [126].

In February 2010, in the first ruling of its kind, the ACHPR rendered a decision, recognising indigenous peoples' collective rights to their traditionally owned lands in Africa [102]. The Commission further found that by restricting the Endorois' access to ancestral lands, Kenya had violated several rights under the African Charter on Human and Peoples' Rights (the African Charter), including their right to development [102]. The ACHPR's decision is ground-breaking because it held that Kenya had breached the African Charter by failing to seek the Endorois' free, prior and informed consent or adequately compensating them for the eviction. It thus established, for the first time, that governments must engage with indigenous peoples in the development policies that impact them [102]. Accordingly, the Commission recommended that the Kenyan government restore the Endorois to their lands and ensure their unrestricted access to Lake Bogoria and the surrounding area. It also recommended that Kenya pay compensation for the eviction and royalties to the community from the profits garnered from the reserve [102].

Ten years later, Kenya has failed to comply with most of the Commission's recommendations. Following a lengthy delay, in September 2014, the government gazetted a Task Force to implement the ACHPR's decision. Unfortunately, the Task Force's mandate was limited to exploring whether implementation was possible, rather than how to implement the decision. Moreover, the Task Force did not meaningfully include the Endorois nor did its terms of reference require consultation with the community. During its twelve-month operation, the Task Force failed to make meaningful progress and, to date, its mandate has not been extended [124].

Importantly, the government of Kenya has failed to comply with the key recommendations of the decision, namely, to restore the Endorois to their ancestral lands and to compensate the community for the losses suffered. Although some progress has been made on revenue sharing, including a modest payment of royalties from bio-enzyme extraction (\$20,000 USD) [124], the outcome is far from adequate. It was not until 2014 that the Baringo County government agreed to share a portion of the tourism revenues generated by the reserve. However, it has refused to pay royalties directly to the community and has placed restrictive conditionalities on the disbursement of funds, thus limiting the community's ability to collectively decide how to spend the royalties to which they are entitled under the Commission's ruling.

The Ogiek case appears to be following a similar pattern. The Ogiek are traditionally a forest-dwelling, hunter-gatherer community that has lived in the Mau Forest of Kenya since time immemorial. They continue to depend on forest resources although, following a series of evictions that have been ongoing since the colonial period, most are now primarily involved in agriculture and/or pastoralism. Although many Ogiek have land rights on the fringes of the forest, government policies of converting communal land to individual ownership led to much of it being sold off to others, jeopardising their livelihood and their ability to live collectively on their lands. In the first instance, colonial administrators implemented a series of measures—including through the creation of forest reserves ostensibly in the name of conservation—that resulted in the displacement of members of the community. Since independence, the Kenyan government proceeded in much the same fashion, breaking up the Ogiek lands, allocating parcels of it to third parties, including political allies, and permitted substantial commercial logging to take place [127]. In a bid to preserve the remaining portions of the Mau forest that had not been degraded during and since colonisation, the Kenyan government proceeded to implement a series of conservation measures that resulted in further evictions

of Ogiek. These measures effectively labelled them encroachers and banned them from the forest. They failed to recognise the crucial role the Ogiek have played (and continue to play) in preserving their ancestral lands, conveniently blaming them for the environmental damage the government's own policies had hastened to inflict.

In October 2009, the Kenyan Forestry Service served the Ogiek and other inhabitants in the Mau Forest with a 30-day eviction order, purportedly to conserve the forest [127]. MRG, together with CEMIRIDE and the Ogiek Peoples' Development Program (OPDP), swiftly applied to the ACHPR for a provisional measure barring Kenya from proceeding with the threatened eviction. In November 2009, citing the far-reaching implications of the eviction on the Ogiek's survival, the Commission referred the case to the African Court, where it became the first indigenous rights case it has decided [127]. In a historic judgment rendered in May 2017, the African Court recognised the special relationship indigenous peoples have to their ancestral lands and held that the African Charter protects both individual and collective property rights [105]. Crucially, the African Court recognised that as indigenous peoples, the Ogiek have a critical role to play in safeguarding their local ecosystems and in conserving and protecting their ancestral lands. It held that the Ogiek could not be held responsible for the depletion of the Mau Forest nor could it justify their evictions or the denial of access to their land to exercise their right to culture. The African Court reserved its ruling on reparations but ordered Kenya to take measures to remedy the violations it had found, including to the right to property [105].

Since then, the Kenyan government has gazetted two Task Forces, purportedly to drive implementation of the African Court's judgment. Like with the Endorois, the first Task Force's mandate expired without issuing any recommendations or consulting the community on implementation. Kenya gazetted a second Task Force in November 2018 with an expanded mandate to include recommendations not only on implementation, but also on enhancing the participation of indigenous communities in sustainable forest management [128,129].

To date, the second Task Force has failed to issue any recommendations and has extended its deadline, most recently delaying until 24 January 2020. To date, the Ogiek have not seen a Task Force report, even though they are the purported beneficiaries of the Task Force process. Of greater concern, in November 2019, following a 60-day notice period, the government of Kenya proceeded to enforce an eviction order against several Ogiek families in clear violation of the original judgment. This does not bode well for the Task Force's final recommendations nor for the implementation of the reparations judgment when it is rendered.

In sum, despite the progressive role international litigation has served in defining and expanding the scope of indigenous peoples' rights, as applied through regional human rights bodies, much work remains in the realm of implementation. Even when human rights tribunals render judgments in favour of indigenous groups, states often resist implementation. In this regard, members of the international community and donors must support civil society by demanding States comply with their international human rights obligations, particularly when they are given effect through international court judgments. In the indigenous context, doing so is often the only way to ensure domestic regimes give customary indigenous land rights legal effect. Failure to do so prolongs the injustice court judgments set out to redress and shows a reckless disregard for human rights institutions.

#### *4.3. Conservationist Opposition to Indigenous Land Reform: The Adivasis of India*

Like indigenous communities in the DRC and Kenya, the principal struggle of the Adivasis of India revolves around the recognition of their customary land rights and control over their traditional territories and resources [130]. Adivasis largely correspond with the State recognised 'Scheduled Tribes' and are also commonly referred to as 'tribals' or 'tribal peoples' [131]. The vast majority of Adivasis live in India's forests, which have been at the centre of their traditional way of life for hundreds of years [132,133]. Indeed, these communities maintain a symbiotic relationship with the forest, relying on it for their physical, cultural and spiritual needs, while contemporaneously protecting its environmental integrity [134–136].

Despite specific protections afforded to them in the constitution, Adivasis are the most marginalised group in India [40]. This stems in large part from a long history of discrimination and misappropriation of their lands and resources under colonial rule [137,138]. Successive colonial legislation criminalised some Adivasis at birth [130,139], expropriated wide swathes of the forest without any consideration of Adivasi customary ownership or land use [135], and increasingly nationalised forest areas, depriving Adivasis of their rights to access and use their ancestral territories [140]. The explicit purpose of these policies was to exploit the natural resources of the forests and maximise profits for the British populace [131,141]. Colonial administrators in turn engaged in massive deforestation, razing the land for agricultural use and resource extraction [142].

Exploitation of the forests have continued in the postcolonial era. Industrial and infrastructure projects have multiplied across resource-rich Adivasi territories. [40]. These territories are increasingly exploited by the government or contracted to private corporations to extract valuable forest resources [143]. While these activities disproportionately impact Adivasis, they do not receive an adequate share of the wealth derived from their lands [131]. Worse, millions have been displaced from the forests to accommodate large-scale development projects. Indeed, Adivasis constitute nearly 50 per cent of persons displaced by development initiatives, despite being only eight per cent of India's population [85].

For generations, Adivasis ensured that forest lands and resources were judiciously used and conserved [133,135]. This sustainable use was central to their traditional way of life as forest dwellers [40]. Nevertheless, Adivasis are commonly evicted from their ancestral lands as a result of conservation measures [81,144]. Like other States, protected areas have proliferated in India. As of 2019, it had more than 100 national parks and 550 wildlife sanctuaries [145]. The rise in protected areas has been accompanied by increased displacement of Adivasis as a result [28,85,146]. Millions now live in and around these protected areas, despite having used their intimate forest knowledge to safeguard these lands long before they were deemed in need of "protection" [147]. Indeed, their responsible stewardship is the reason that the forests are worth protecting in the first place [136]. Nevertheless, Adivasi participation is seldom considered in conservation initiatives. For example, the 1980 Forest Act provided for the conservation of India's forests, but made no provision for Adivasi land rights [133]. Instead, it paved the way for the mass evictions of Adivasis in the name of conservation [148].

Adivasi groups are typically blamed for mass deforestation and other forms of environmental degradation [143]. Traditional slash and burn practices are commonly denounced as environmentally destructive, despite a growing body of evidence suggesting that other factors are the primary cause of environmental damage [70,149–151]. Even though forest area and quality has precipitously declined under State governance [135] and international stewardship from conservation NGOs [81], conservation policy still continues to embrace the misguided colonial belief that Adivasis are a "backwards people", incapable of preserving forest resources without external expertise [152]. In turn, they are removed from their lands in order to make way for outsiders to "protect" their ancestral territories without human interference. They are forcibly prohibited from returning by paramilitary-style ecoguards [153]. This has resulted in numerous acts of violence, human rights abuses and a general resistance of State conservation initiatives [154].

The adoption of the FRA in 2006 marked a seminal moment in the struggle to realise Adivasi forest rights [147]. At first, advocates saw it as a promising development towards advancing indigenous land tenure. The FRA's intent was to rectify the "historical injustice" of tribal land dispossession by formalising the land ownership and resource rights of forest dwelling communities "who have been residing in forests for generations but whose rights could not be recorded" [155]. It delineates a framework and procedure to formalise the land rights of forest dwellers, enabling them to cultivate, occupy, and conserve their traditional territories [135]. It also provides for the "right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use", reinforcing the Adivasis' role as custodians of the

forest [149,155]. Accordingly, the FRA was seen as central to sustainable development, effective conservation and the livelihoods of millions of Adivasis [156].

Soon after the FRA came into force, obstacles to its effective implementation became apparent. Applicants needed to engage in an arduous claims process to enforce their rights under the FRA [155]. While local bodies are charged with determining ownership and use rights, the FRA relies on state and central governments for its effective implementation [137]. This foreign procedure does not resonate with Adivasi legal traditions and systems [138]. Additionally, most Adivasis are extremely poor, illiterate, and live far from sites of power. Many do not understand the complicated claims process or lack the required documentation [133,137,149,157]. Thus, the structural discrimination Adivasis experience has proved to be a significant obstacle to successful processing of claims under the FRA [149]. Of the claims received so far, over one million have been rejected [133].

Further troubling is the litigation instituted by former forest officials and various wildlife and conservation organisations challenging the constitutionality of the FRA [149]. Instead of enlisting of forest dwellers (and their traditional knowledge) to their cause, these groups are seeking to defeat the legislation under the mistaken belief that these communities will irrevocably damage the environment if allowed to remain in the forest [154,158]. The lawsuit ultimately led to the Indian Supreme Court ordering the evictions of all forest dwellers whose applications had been rejected under the FRA [159], subjecting upwards of two million families to the threat of imminent eviction [147].

In response, forest dwellers protested across India [160]. Hundreds of experts and conservationists criticised the decision [161]. For its part, MRG called upon India to reverse the Supreme Court's Order [157] and submitted a third-party intervention to the Court setting forth the applicable international standards on customary land rights and the well-recognised status of indigenous peoples as the best environmental custodians.

The Supreme Court stayed its eviction order in July 2019 to determine whether the claims process adhered to due process requirements [162]. While the evictions cannot lawfully proceed for the time being, it leaves millions in legal limbo, contributing to yet another chapter in the long history of insecure land tenure for Adivasis. Despite the potential for the FRA to rectify colonial land injustices and promote secure land tenure, structural discrimination has weaponised it against indigenous peoples. Now, it falls to the Indian Supreme Court to ensure the FRA does not become yet another empty promise for Adivasis.

## 5. Conclusions

Fortress conservation is the latest in a long line of colonial interventions premised on separating indigenous communities from their natural environments. Like prior colonial land policies, these conservation models are fundamentally flawed. Not only have they failed to adequately protect the environment, but they have also had devastating impacts on the livelihoods of millions of indigenous peoples. The experiences of the Batwa, the Endorois, the Ogiek and the Adivasis expose just some of the immense barriers indigenous communities face when conservation is placed above people and enabled by the non-recognition of customary indigenous title. The situation of the Batwa of the Kahuzi-Biega Forest exposes how reforms made to integrate indigenous rights into protected area management have failed to materialise. The Endorois and Ogiek cases show the limitations of complex adjudication processes that may result in formal recognition of customary indigenous title at the international level but do not compel the political will of incumbent governments to implement it domestically. Finally, the threatened eviction of Adivasis in India reveals that even when customary indigenous title is recognised through domestic legislation, the mechanisms by which it is made effective can nevertheless render millions landless.

Ultimately, large conservation NGOs and international donors that fund conservation initiatives in former colonies must be held to account for the harms fortress conservation policies have disproportionately inflicted on some of the world's most marginalised and environmentally conscious communities. They must do so by providing effective mechanisms for victims of fortress conservation

to seek redress, providing adequate restitution and compensation. These actors must stop funding and promoting these policies in favour of indigenous and community conserved areas (ICCAs), i.e., territories conserved and administered by indigenous peoples and local communities [163], leveraging their considerable power to help catalyse the legal and political reforms necessary to make customary indigenous title enforceable. As a starting point, conservation projects must respect indigenous peoples' right to self-determination and free, prior and informed consent. They must also devote funds to better understand how indigenous traditional knowledge helps preserve the environment, integrating it into modern conservation science. Such a rights-based approach to conservation is not only required urgently as a matter of international human rights law, it is also often the best way to effectively conserve the environment and mitigate climate change [32].

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