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# Silencing, consultation and indigenous descriptions of the world

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*The Inter-American Court and Commission of Human Rights, following the approach in key international human rights texts, have emphasized the importance of procedural rights in the protection of indigenous rights to territory and to cultural identity. In particular, the Court and Commission have focused on rights to consultation in a range of cases in which indigenous peoples have challenged mining, logging and other extractive activities on their territories.*

*Consultation processes are often expected to serve a wide range of purposes in the protection of indigenous rights and interests in territory. Consultation is a means of informing a community about a project, but also a process through which an agreement can be reached between the community and the State about the use of territory or the sharing of benefits. In this article, I focus on consultation's role as part of the impact assessment process.*

*In determining the impact that a project might have on indigenous territory, the Court and Commission have found that the State must assess both the environmental and cultural impacts of a plan or activity. Consultation is a necessary part of the identification of the impacts of an activity and ensuring that the State has all the necessary information prior to making decisions to grant concessions over indigenous territory.*

*However, the Court and Commission's interpretation of indigenous testimony in consultation processes could undermine the role of such testimony in the assessment of environmental impacts, and might silence indigenous participants rather than ensure their meaningful participation. With reference to the idea of illocutionary silencing, taken from feminist speech act theory, I argue that the Court and Commission have interpreted indigenous testimony about the environment as being claims about the cultural impacts of disputed activities or plans, and not as claims about the environmental impacts. In other words, when indigenous community members have offered descriptions of their territories and surrounding environments, such testimony has been treated not as descriptions of the environment but as reports of cultural beliefs and practices. As a result, indigenous input in regard to the environmental impacts of a project or plan can be overlooked. In this article I argue that this failure to recognize indigenous accounts of the environment means that these communities are silenced through the consultation process and denied the opportunity to be informed about all relevant impacts.*

**Keywords:** *informed consultation, impact assessment, illocutionary silencing, indigenous rights, speech acts, Inter-American Court, Inter-American Commission of Human Rights*

## 1 INTRODUCTION

The right to consultation is central to the approach of the Inter-American Court ('the Court') and Commission of Human Rights ('the Commission') to protecting the rights

of indigenous peoples, particularly in regard to indigenous rights to property.<sup>1</sup> Consultation plays a number of roles and has a number of objectives in the reasoning of the Court and Commission.<sup>2</sup> One of the functions of consultation, identified both in international instruments on indigenous rights and in the Court and Commission's case law,<sup>3</sup> is that it is a means by which states must gather information on the impacts of a project or proposal on indigenous peoples and their territories.

The Court has found that the obligation of states to consult indigenous communities on legal or administrative measures that affect them is a general principle of international law, and one connected to indigenous rights to self-determination. While consultation has been central to the Court's jurisprudence on indigenous rights, in this article, I argue that the Court and Commission's interpretation of the testimony of indigenous peoples sometimes has the effect of undermining the right to consultation. Even though indigenous communities speak in consultation processes, their speech is not always heard as the community intended it. This is a problem that can be understood as a form of *silencing*, and specifically what the feminist philosophers Jennifer Hornsby and Rae Langton refer to as *illocutionary silencing*.<sup>4</sup>

Hornsby and Langton have argued that women are often disabled in their use of language.<sup>5</sup> A woman may intend to do something with her speech – such as refuse a sexual advance – but for one reason or another, this intention may not be recognized and 'taken up' by the listener.<sup>6</sup> Hornsby and Langton refer to this as *illocutionary silencing*. In this article, I argue that the idea of illocutionary silencing (a concept I discuss in greater detail in the next section) reveals important problems in the approach of the Court and Commission to consultation processes with indigenous peoples. The Court and Commission have recognized that communities are silenced when they are denied the opportunity to speak or, when their speech is ignored. An application of the concept of illocutionary silencing reveals, however, that in their interpretation of indigenous testimony, the Court and Commission are themselves guilty of silencing indigenous claimants.

1. *Saramaka People v Suriname* (2007) Series C No 172 (Inter-American Court of Human Rights); *Maya Indigenous Community of the Toledo District v Belize* (2004) OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 Case 12053, Report No 40/04 (Inter-American Commission of Human Rights).

2. These include consultation for the purposes of reaching an agreement or obtaining consent, consultation for the purpose of informing those affected by a proposed activity, consultation to establish communication between the parties, consultation to generate information for the State to collect and consider in its decision-making, consultation to determine how benefits ought to be shared, consultation to ascertain whether and to what degree indigenous interests would be prejudiced, consultation to protect cultural and identity rights, consultation to ensure participation of those affected in decision-making processes, among others. See, for example, *Maya Indigenous Community of the Toledo District v Belize* (n 1) para 132; *Saramaka People v Suriname* (n 1) para 133.

3. It is this aspect of consultation that is emphasized in Article 15 of the International Labour Organization's 1989 Indigenous and Tribal Peoples Convention 169, which provides that states must 'consult ... with a view to ascertaining whether and to what degree [indigenous peoples'] interests would be prejudiced'. See also *Kichwa Indigenous People of Sarayaku v Ecuador* (2012) Series C No 245 (Inter-American Court of Human Rights) [204].

4. Jennifer Hornsby, 'Disempowered Speech' (1995) 23 *Philosophical Topics* 127; Rae Langton, 'Speech Acts and Unspeaking Acts' [1993] *Philosophy & Public Affairs* 293.

5. Langton (n 4) 321.

6. Hornsby (n 4) 134.

This kind of silencing is apparent in cases in which consultation processes form part of the assessment of the impacts of a project or a policy development. The Court and Commission have stipulated that states must prepare social and environmental impact assessments prior to issuing any concessions or taking decisions about projects on indigenous territory.<sup>7</sup> These institutions have also recognized that consultation provides information that is essential to a full assessment of the impacts. The assessments play a crucial role in environmental decision-making, determining whether and how a project ought to be implemented. As the Indigenous and Tribal Peoples' Convention puts it, 'the results of these studies shall be considered as fundamental criteria for the implementation of these activities'.<sup>8</sup> Consultation processes ought to be opportunities for communities to not only receive, but also to generate and provide information to the State about both cultural and environmental impacts of proposed activities or policies. However, the Court and Commission have treated the claims that indigenous participants make about their environments as claims about their cultural practices and beliefs, and not also as claims *about their environments*. In other words, indigenous testimony has been understood to address cultural and not environmental impacts, even in situations when it appears that the testifier is describing the environment.<sup>9</sup> This, I argue, is a form of illocutionary silencing and this silencing undermines the consultation process and the protections such a process is meant to secure for indigenous peoples.

I make this argument through a number of steps. I begin by introducing the idea of illocutionary silencing as it has been developed by Hornsby and Langton. Illocutionary silencing is a concept that emerges from JL Austin's speech act theory,<sup>10</sup> and so this discussion begins with a brief overview of Austin's argument that speech is a kind of action, and his distinction between *locutionary*, *illocutionary* and *perlocutionary* speech acts.<sup>11</sup>

7. *Saramaka People v Suriname* (n 1) para 146; *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) paras 204–7.

8. Indigenous and Tribal Peoples Convention, C169 s 7(3). Quoted in *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) para 204.

9. Although I do not address it here, my argument in this paper, with its emphasis on the statements that indigenous community members make in consultation processes, raises important questions about the interpretation of these statements. Often, a statement will be translated multiple times, from an indigenous language to the language of governance in a state to English and/or Spanish for the Court's assessment. Problems of translation abound, not only because claims may be mistranslated but the receiving language may lack the needed vocabulary. For the purposes of this paper I treat the translations of indigenous testimony as accurate reflections of the statement made, but in practice this problem of translation could be a significant one.

10. JL Austin, *How to Do Things with Words* (Harvard University Press, Cambridge, MA 1962).

11. The focus of this paper, and of the concept of silencing used here, is on indigenous testimony as a speech act. Scholarly attention has been given to the ways in which indigenous peoples suffer epistemic injustices and to questions associated with the reception of indigenous testimony. My focus here is different. I am concerned with the prior question of whether indigenous testifiers are able to perform the act of testifying at all. For an argument on epistemic injustice and indigenous communities, see Rebecca Tsosie, 'Indigenous Peoples, Anthropology, and the Legacy of Epistemic Injustice 1', in IJ Kidd and G Pohlhaus Jr (eds), *The Routledge Handbook of Epistemic Injustice* (Routledge, Abingdon 2017); Rebecca Tsosie, 'Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights' (2012) 87 Wash. L. Rev. 1133.

Next, I turn to the Court and Commission's practice in regard to indigenous consultation. With reference to the case of *Kichwa Indigenous People of Sarayaku v Ecuador* decided by the Court in 2012,<sup>12</sup> I argue that the Court treats indigenous testifiers as only making claims about cultural beliefs and practices, despite the fact that it appears that the testifiers intend to make claims that describe the environment. In doing so, the Court silences the community rather than ensuring that the community has its say.

In the last part of the article, I turn to the implications of this silencing. First, I argue that the idea of illocutionary silencing reveals an injustice that has largely gone unnoticed in the context of indigenous community consultation. When communities are silenced, it is as though the consultation did not happen at all. While some attention has been given to the idea that indigenous communities suffer epistemic injustice in legal proceedings,<sup>13</sup> in this article I argue that communities sometimes suffer a 'linguistic injustice'<sup>14</sup> in consultation processes.<sup>15</sup> Second, I argue that the failure to recognize indigenous descriptions of the environment has important implications for impact assessments, the manner in which they are conducted and whether consultation is 'informed'.

Before diving into this argument, it is important to clarify the nature of my interest in consultation. The Court and Commission's focus on consultation in indigenous rights cases has been strongly criticized for a number of reasons. Scholars and activists alike have expertly outlined the inadequacies and limits of consultation processes to protect the substantive rights of indigenous peoples to territory and to self-determination.<sup>16</sup> A prominent objection is that the Court and Commission have not done enough to ensure that states only undertake activities that affect indigenous peoples with their free, prior and informed *consent*.<sup>17</sup> In arguing for a consent (rather than a consultation) standard in indigenous rights cases, scholars have also highlighted the many failings of consultation processes as they are envisioned in law and carried out in practice.<sup>18</sup> This literature has been invaluable in shaping my own understanding of the inadequacies of consultation processes. However, the focus of this article is not

12. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3).

13. See, for example, the discussion of case law in the US judicial system in Tsosie, 'Indigenous Peoples and Epistemic Injustice' (n 11); Tsosie, 'Indigenous Peoples, Anthropology, and the Legacy of Epistemic Injustice I' (n 11).

14. Leo Townsend, 'Group Assertion and Group Silencing' (forthcoming paper) Language & Communication.

15. The question of what the relationship is between linguistic and epistemic injustice in indigenous rights cases is one for future research. My tentative view is that while both forms of injustice might stem from the same prejudice or social practice, the question of whether a particular instance of testimony is believed requires that one first determines whether the testimony was heard in the illocutionary sense.

16. See, for example, Riccarda Flemmer and Almut Schilling-Vacaflor, 'Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia's and Peru's Extractive Industries' (2016) 37 *Third World Quarterly* 172; César Rodríguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 *Indiana Journal of Global Legal Studies* 263.

17. The Court has recognized that consent is needed but only in limited instances. See *Saramaka People v Suriname* (n 1) para 134.

18. See eg, Flemmer and Schilling-Vacaflor (n 16); Philippe Hanna and Frank Vanclay, 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent' (2013) 31 *Impact Assessment and Project Appraisal* 146; Rodríguez-Garavito (n 16); Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10 *Northwestern University Journal of International*

on consultation as a substitute for consent. Rather, it is focused on considering some of the limitations of consultation as a component of social and environmental impact assessments.

Consultation processes are an opportunity for those affected by a decision to participate in the decision-making process, not only by expressing their acceptance of, or resistance to, a project, but also by receiving and providing information about the potential impacts of a decision to decision-makers. While the different goals and functions of consultation processes cannot be easily pulled apart (especially since a single process is often called upon to achieve all the relevant goals), the focus of this article is on the information provision aspect of consultation. As a result, this article does not address the question of whether or not projects on indigenous land should require consent. In focusing on this question, I do not suggest that something less than consent is required for projects on indigenous land, but rather I set out to highlight limitations in the interpretation of indigenous testimony by the Court and the Commission. While the Court's misinterpretation of the claims of indigenous testifiers also raises important issues for understandings of consent, this is a matter for future research.

It is also important to emphasize that it is not my argument that all indigenous peoples share a particular understanding of the world, or that all indigenous peoples assert their own unique understandings of the world. Rather, my argument is that *when* indigenous peoples describe the environment, such descriptions ought to be taken as they are intended if communities are to have their say and not to be silenced in consultation processes.

## 2 CONSULTATION AND SILENCING

### 2.1 Indigenous rights to consultation

Together, the Court and Commission have built up a significant and progressive body of jurisprudence on the rights of indigenous communities.<sup>19</sup> This is despite that fact that neither of the principal rights documents that govern these bodies – the American Declaration of the Rights and Duties of Man<sup>20</sup> and the American Convention on Human Rights (ACHR)<sup>21</sup> – directly refer to indigenous rights. This body of jurisprudence has been built up, in large part, through an expansive approach to the right to property<sup>22</sup> in the ACHR.<sup>23</sup> The right to property has been deployed to re-establish the

Human Rights 54; Joji Carino, 'Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice Talk' (2005) 22 *Arizona Journal of International and Comparative Law* 19.

19. See JM Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6 *Human Rights Law Review* 281.

20. American Declaration of the Rights and Duties of Man, OAS Res XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1* at 17 (1992).

21. American Convention on Human Rights (Pact of San José) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

22. Article 21 secures for everyone 'the right to the use and enjoyment of his property', American Convention on Human Rights (ibid).

23. See eg, *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* [2013] Series C No 270; *Saramaka People v Suriname* (n 1);

rights of indigenous peoples to their territories in circumstances of colonial removal and in the face of a fast-growing extractive industry and other industrial demands on territory.<sup>24</sup> The Court has found that the right to property ‘must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources’.<sup>25</sup> The Court and Commission have given ‘property’ an expansive meaning, arguing that one can incorporate under the concept of property not only classic individual and private property rights, but also interests in cultural identity, juridical personality, effective judicial protection, traditional law and the meeting of basic needs.<sup>26</sup> Indigenous rights to property include ‘the communal form of indigenous land tenure as well as the distinctive relationship that indigenous people maintain with their land’.<sup>27</sup>

Drawing on international instruments,<sup>28</sup> including the International Labour Organization’s Indigenous and Tribal Peoples Convention 169<sup>29</sup> and the UN Declaration on the Rights of Indigenous Peoples,<sup>30</sup> the Court and Commission have recognized a ‘distinctive’<sup>31</sup> and ‘special’<sup>32</sup> relationship between indigenous communities and their territories that ‘warrants special measures of protection’.<sup>33</sup> The protection of this relationship has been recognized as being ‘fundamental to the effective realization of the human rights of indigenous peoples more generally’.<sup>34</sup>

*The Yakye Axa Indigenous Community v Paraguay* [2005] Series C no 125; *Maya Indigenous Community of the Toledo District v Belize* (n 1); *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Series C No 79; Inter-American Commission on Human Rights, ‘Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources’ (2009) OEA/Ser. L/V/II. Doc. 56/09 para 58; Thomas Antkowiak, ‘Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court’ (2013) 35 University of Pennsylvania Journal of International Law 113, 138.

24. See *The Yakye Axa Indigenous Community v Paraguay* (n 23); *Saramaka People v Suriname* (n 1); *Moiwana Village v Suriname* [2005] Series C No 124.

25. *Maya Indigenous Community of the Toledo District v Belize* (n 1) para 115.

26. Antkowiak (n 23) 160.

27. *Maya Indigenous Community of the Toledo District v Belize* (n 1) para 116. In the matter of *Mary and Carrie Dann v United States*, for example, the Commission found that the collective aspect of indigenous rights to property ‘has extended to acknowledgement of a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used’. See *Mary and Carrie Dann v United States* (2002) Doc. 5 rev. 1 at 860 Case 11140, Report no 75/02 (Inter-American Commission of Human Rights) [128].

28. Examples of this practice can be found in *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) [161]; *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 23) [148–53]; *The Yakye Axa Indigenous Community v Paraguay* (n 23) [138–9]; *Sawhoyamaya Indigenous Community v Paraguay* [2006] Series C No 146 [122–3]; *Xákmok Kásek Indigenous Community v Paraguay* [2010] Series C No 214 [143]; *Saramaka People v Suriname* (n 1) 106, 117; *Moiwana Village v Suriname* (n 24) [86].

29. Indigenous and Tribal Peoples Convention 1989 (C169).

30. UNGA Res A/RES/61/295 Declaration on the Rights of Indigenous Peoples (adopted on 12 September 2007).

31. *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 23) para 149.

32. *Saramaka People v Suriname* (n 1) s A.1.

33. *Mary and Carrie Dann v United States* (n 27) para 128.

34. *Ibid.* See also *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* [2014] Series C No 284.

Although the right to property has been redefined in its application to indigenous peoples, the Court relies on traditional property protections to ensure the right.<sup>35</sup> These include requiring states to recognize and register indigenous title, to provide compensation or ensure a reasonable benefit in the event that the right is to be limited, and, most importantly for the purposes of this article, to ensure effective consultation in respect of decisions that affect indigenous territory.<sup>36</sup> In the matter of *Saramaka v Suriname*, the Court found that the State must abide by three safeguards prior to issuing concessions over indigenous territory:

First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan ... within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Third, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.<sup>37</sup>

Consultation plays a crucial role in ensuring all of these safeguards. Along with ensuring access to justice, it is the primary way in which the Court requires states to ensure indigenous participation in decision-making; consultation is necessary to determine what constitutes a reasonable benefit; and consultation is required to both assess and inform communities about the impacts of a proposed project. It is the third of these that I focus on here.

While neither the Court nor the Commission spell out exactly how a consultation process ought to take place, it is clear that they envision an opportunity for indigenous peoples to speak in accordance with their traditional and cultural practice, and to be heard by those making decisions that affect them.<sup>38</sup> Beyond the requirement that consultation is informed and happens in accordance with the traditional practices of the community, the Court and Commission have said little about what it is for someone to have the opportunity to speak or what is required to ensure they are heard. What it is to speak and to be heard has been at the heart of Hornsby and Langton's scholarship on speech acts and silencing and it to this that we now turn.

## 2.2 Consultation, speaking and silencing

As discussed in the previous section, at the heart of the right to consultation as it has been articulated by the Court and the Commission is the idea that people can come

35. *Kaliña and Lokono Peoples v Suriname* [2015] Series C No 309 (Inter-American Court of Human Rights) [203].

36. See James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 *Arizona Journal of International and Comparative Law* 7, 16.

37. *Saramaka People v Suriname* (n 1) para 129. See also *Kaliña and Lokono Peoples v Suriname* [2015] Series C No 309 [213–15].

38. Efrén C Olivares Alanís, 'Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence from the Inter-American System of Human Rights' (2013) 5 *Goettingen Journal of International Law* 187, 205.



together to have their say in respect of decisions that affect them and thereby participate in those decisions.<sup>39</sup> In other words, communities must be heard, understood and considered in the decision-making process. A consultation process cannot merely have the appearance of doing this, but must in fact ensure participation.<sup>40</sup> The Court has identified cases where a community appears to participate in a consultation process but where the consultation process in fact denies rather than ensures participants a say.<sup>41</sup> Where only members of a community selected by the State or a developer are allowed to participate or where communities are bribed or harassed in the consultation process, the fact that a process took place does not mean the community has been consulted.

Hornsby and Langton would argue that these are different instances of speech being silenced. For these scholars, silencing does not only happen when one is denied the opportunity to speak altogether. This is because in speaking, as JL Austin argued, we do not only make utterances but we also do other sorts of things with words.<sup>42</sup> Austin argued that speech is a kind of action, and he distinguished between different sorts of speech acts, namely *locutionary*, *illocutionary* and *perlocutionary* speech acts.<sup>43</sup> One performs a *locutionary speech act* simply by uttering a meaningful sentence. One does not require anything from an audience to *successfully* perform a locutionary speech act. An *illocutionary speech act*, on the other hand, concerns the communicative significance of the act. For example, if a speaker says, 'There is a wolf', the speaker may be warning the audience, or inviting the audience to observe something or trying to persuade them of something. The illocutionary act indicates how the utterance (the locutionary act) ought to be taken. Significantly, Austin argued that illocutionary speech acts will only be successfully performed when the audience recognizes what the speaker is up to.<sup>44</sup> In other words, I have not warned an audience unless *they* recognize that what I am doing is warning them – the audience must 'take what I say in a certain sense'.<sup>45</sup> The *perlocutionary* act involves some impact or effect caused by the utterance of the words. If the audience is warned by my statement, their being warned is the consequence, or the perlocutionary act.<sup>46</sup>

It is the idea of the *illocutionary* speech act, and the related concept of *illocutionary silencing*, that is most important for the purposes of my argument, as it highlights the role of the audience in the performance of speech acts. Hornsby points out that the use of language is a social action, 'consisting of the production and reception of utterances'.<sup>47</sup> Focusing only on the locutionary act overlooks the social, communicative nature of speech.<sup>48</sup> To know whether an illocutionary speech act has been successful,

39. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) para 177; *Saramaka People v Suriname* (n 1) para 134.

40. 'The consultation procedure may not be limited to compliance with a series of formal requirements', Inter-American Commission on Human Rights (n 23) para 285.

41. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) s VII.

42. Austin (n 10); Hornsby (n 4) 133.

43. Austin (n 10) 102–3. See Hornsby's discussion of Austin at Hornsby (n 4) 133.

44. Austin (n 10) 115.

45. *Ibid* 116.

46. See the discussion on the difference between illocution and perlocution at *ibid* 109.

47. Austin (n 10); Hornsby (n 4) 129.

48. Hornsby (n 4) 134.

we need to pay attention to both speaker and audience – the audience needs to recognize what the speaker ‘is up to’.<sup>49</sup> Hornsby calls this ‘reciprocity’:

An audience who participates reciprocally does not merely understand the speaker’s words but also, in taking the words as they are meant to be taken, satisfies a condition for the speaker’s having done the communicative thing she intended.<sup>50</sup>

On this approach, a speaker may successfully perform a locutionary speech act by coming out with the right words, and uttering meaningful sentences, but may fail to perform the illocutionary speech act when the audience does not recognize what the speaker intends to do with those utterances – that the speaker is warning or inviting or persuading, for example.<sup>51</sup>

Reciprocity between speaker and audience may be missing for a number of reasons. An audience’s assumptions about the speaker, for example, may hinder this reciprocity. Assumptions that a speaker lacks authority or expertise may mean they are not heard as they intended,<sup>52</sup> or believing someone to be insincere<sup>53</sup> or a liar may mean the audience does not take the words as they were meant to be taken. A person is silenced when they cannot do with speech what they may have wanted to.<sup>54</sup>

Hornsby and Langton’s crucial insight in regard to silencing, is that one is not only silenced when one is denied the chance to speak (locutionary silencing) or when one’s speech does not have an effect (perlocutionary silencing), but also when an audience fails to recognize what the speaker is up to (illocutionary silencing). Having one’s say, in other words, is not only a matter of having the opportunity to make coherent utterances, but also depends on one’s audience taking one’s words as they are intended to be taken.

This insight is significant for the discussion of indigenous testimony in consultation processes because on this account an indigenous participant might successfully perform a locutionary speech act in a consultation process, but if their intentions are not recognized they have not succeeded in the illocutionary speech act. A community might be silenced in circumstances when they are talking about their experiences and interests in a process specifically designed for that purpose but the audience fails to take what is being said as it is intended.

The Court and Commission have recognized that indigenous peoples are silenced in both the locutionary and the perlocutionary sense, although these institutions do not describe such silencing in these terms. When a state or company only consults community members it has bribed with offers of jobs, for example, and represents the views of these community members as being those of the community, the community itself is denied the opportunity to actually participate.<sup>55</sup> This could be seen as a form

49. Ibid.

50. Ibid.

51. As Austin puts it, an illocutionary speech act ‘involves securing of uptake’, Austin (n 10) 116–17.

52. See Langton’s discussion of this in respect of pornography in Langton (n 4) 320–8. She argues that sometimes something about who a person is or the role that person occupies prevents their words being taken up as they were meant to be taken up. Dotson gives the example of black women being received as though they lack authority in Kristie Dotson, ‘Tracking Epistemic Violence, Tracking Practices of Silencing’ (2011) 26 *Hypatia* 236, 242–3.

53. Hornsby’s investigations here are into the silencing of women and she gives the example of the ways in which presumptions of insincerity in regard to women renders it impossible for a woman to successfully refuse sex, even when she attempts to do just that. Hornsby (n 4) 137.

54. Ibid 138. Hornsby argues that the person is thus disempowered as a speaker.

55. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) s VII.

of locutionary silencing.<sup>56</sup> When a community does participate in a consultation process but their contribution, or an aspect of their contribution, is ignored by decision-makers, this could be seen as perlocutionary silencing.<sup>57</sup> The Court, however, has not only failed to note and prevent instances of illocutionary silencing, but is itself responsible for perpetrating this kind of silencing in its interpretation of indigenous testimony.

In the next part of this article, I illustrate this point by arguing that one finds an example of the Court silencing indigenous testifiers in this illocutionary sense in the case of *Kichwa Indigenous People of Sarayaku v Ecuador*.<sup>58</sup> This is a case in which the Kichwa Indigenous People make a number of assertions about their territorial environment. These assertions are not taken to have any bearing on the assessment of the environmental risk that the extractive activities might have, however, as the assertions are only seen to speak to the social and cultural impacts the activities might have.

### 3 ILLOCUTIONARY SILENCING IN THE CASE OF *KICHWA INDIGENOUS PEOPLE OF SARAYAKU V ECUADOR*

In the *Sarayaku* case,<sup>59</sup> the Kichwa people argued that the State of Ecuador violated a number of their human rights when it approved oil exploration activities by a private company, CGC, on their territory. CGC engaged in various problematic tactics in its attempt to gain access to Sarayaku territory, including negotiating with and bribing individual members of the community, using access to medical care as a means to gather signatures on consent forms, forming pro-oil extraction groups to support exploration activities, and making promises of jobs and funds for development projects.<sup>60</sup> When the community continued to reject CGC's attempts to access their territory, the company hired a private consultancy of social scientists to engage in tactics designed to divide the community and to manipulate community leaders.<sup>61</sup> The company began seismic exploration in 2002 resulting in the destruction of sites of spiritual importance to the Kichwa people as well as damage to water sources and plant life of great 'environmental, cultural and nutritional value'.<sup>62</sup>

The Court found that Article 21 of the American Convention, the right to property,<sup>63</sup> not only requires that communities be recognized in their title over traditional

56. This is the subject of ongoing research with Leo Townsend, including a joint paper in process on group testimony and silencing. See also Townsend (n 14).

57. Perlocutionary silencing might also sometimes constitute what Mirander Fricker refers to as epistemic injustice of the testimonial kind. This argument has been made by Rebecca Tsosie in respect of the requirement for indigenous communities in the USA to get objective, 'expert' confirmation of the existence of a sacred site before it will be formally recognized as such. Indigenous assertions that a site is sacred, although recognized as such, do not have the perlocutionary effect of proving the site is sacred despite the community's expertise on the subject. See Tsosie, 'Indigenous Peoples and Epistemic Injustice' (n 11) 361. This might be recognized both as an instance of perlocutionary silencing and epistemic injustice.

58. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3).

59. *Ibid.*

60. *Ibid* vii.

61. *Ibid* vii.

62. *Ibid* 172.

63. American Convention on Human Rights (n 21).

territories, but that the right also protects the close relationship that indigenous peoples have to their land.<sup>64</sup> Following its practice, discussed in section 2.1 of this article, the Court found that proper consultation is crucial to protecting this unique relationship and indigenous cultural identity in a multicultural society.<sup>65</sup>

One of the things that makes the *Sarayaku* case unique is that the Judges conducted a visit to the Kichwa peoples' territory and directly engaged with and consulted the community.<sup>66</sup> The judgment recounts testimony given by community representatives during that visit, including testimony about the Kichwa peoples' territory. The clearest example of this is the description of *pachas* offered by a community representative and recounted in the judgment:

Beneath the ground, *ucupacha*, there are people living as they do here. There are beautiful towns down there; there are trees, lakes and mountains. Sometimes you hear doors shutting in the mountains; that is the presence of those that live there ... We live in the *caipacha*. The powerful and ancient shaman lives in the *jahuapacha*. There everything is flat, beautiful ... I don't know how many *pachas* there are above, where the clouds are there is a *pacha*; where the moon and stars are there is another *pacha*; beyond this there is another *pacha*, where there are paths made of gold; then this there is another *pacha* where I have been, which is a planet of flowers where I saw a beautiful hummingbird that was drinking honey from the flowers.<sup>67</sup>

This statement contains a number of assertions that appear to be descriptive claims about the surrounding environment. These are descriptions of the environment as it is understood and experienced by the community, including observational claims to the effect that the speaker hears doors closing and has seen a planet of flowers and hummingbirds. This appears to not only be an account of cultural practices and identity, but also an account of what the environment is like. It describes the environment, much as an environmental scientist might describe the terrain or the biological diversity in an area – albeit in different terms. The environment, according to this description, is not just made up of different natural and man-made elements. It is not only a collection of natural resources or even simply a complex natural ecosystem, but it is also made up of these various *pachas* and people living both on and inside the earth.

In response to these statements, the Court does not refer to the environment described, but rather to the *worldview* of the Kichwa people. The Court states that '[a]ccording to the worldview of the Sarayaku People, their land is associated with a set of meanings: the jungle is alive and nature's elements have spirits (Supay), which are interconnected and whose presence makes places sacred'.<sup>68</sup> It also finds that 'the Kichwa People of Sarayaku have a profound and special relationship with their ancestral territory, which is not limited to ensuring their subsistence, but rather encompasses *their own worldview* and cultural and spiritual identity'.<sup>69</sup> In its references to the 'worldview' of the community, and in its emphasis on cultural and spiritual identity, the Court appears to treat the statements of community representatives as describing the cultural beliefs of the community, but not as describing the environment. The Court seems to ignore the fact that in their statements and submissions

64. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) paras 148–55.

65. *Ibid* 159.

66. *Ibid* 18–21.

67. *Ibid* 150.

68. *Ibid* 57 (my emphasis).

69. *Ibid* 155 (my emphasis).

the community representatives, however, do not just describe unique kinds of relationships to the environment – relationships of closeness and dependence – but rather, they offer descriptions of the environment itself. In this respect, the Court seems to fail to recognize what the speakers are up to or, as Hornsby might put it, the illocutionary force of the speech acts.

The Court's failure to recognize the environmental claims of the community is not only apparent in its reference to the community's 'worldview', but also in its exclusive use of the idea of a 'worldview' in reference to community testimony. The Court does not refer to the 'worldview' of the external, technical experts that it finds must conduct impact assessments, or the experts who give testimony in the course of the hearing. These experts are not taken to be describing their belief systems. There is no discussion of their relationship to the environment (or to other subjects that they study). The Court does not discuss the 'worldview' that might inform expert assessments of environmental impacts nor the possibility that anthropologists who submit evidence on indigenous community practices are merely describing their beliefs about those communities.<sup>70</sup> In comparing its responses to these different sources of information, it appears that the Court treats expert claims as claims that speak to some objective reality and indigenous claims about the state of the environment as being, exclusively, claims about a belief system.<sup>71</sup>

The Court's failure to recognize the illocutionary force of indigenous testimony is also visible in its failure to recognize the complex questions and challenges that are presented by the community's account of the environment. Had the Court heard the indigenous testifiers as describing the environment, it would have been compelled to tackle (or at least consider) the difficulties such an account poses for the Court and for the assessment of impacts. The Court would need to consider that experts and indigenous communities likely offer very different, possibly irreconcilable, accounts of the state of the environment. That the Court does not consider such a conflict, nor raise any questions about differing environmental descriptions, suggests that it fails to recognize these descriptions in the testimony of the community representatives. I discuss the impact these descriptions have on assessment in greater detail in section 4, below.

The last way in which the Court's failure to take up the environmental descriptions in indigenous testimony is apparent is in the way the Court responds to the impact assessments undertaken by CGC prior to the Community bringing the matter to Court. CGC compiled assessments based on the research of its own assessors and

70. I raise the Court's treatment of expert testimony here to highlight the contrast with the way in which indigenous testimony is treated but this does suggest a number of additional questions. Scholars have argued that the epistemic positioning of scientists and experts is often ignored, resulting in the assumption that scientific language and findings are objective or neutral. See, for example, Lorraine Code, 'Taking Subjectivity into Account', in Claudia W Ruitenberg and DC Phillips (eds), *Education, Culture and Epistemological Diversity: Mapping a Disputed Terrain* (Springer Netherlands 2012). Code critiques positivist notions of objectivity in what she refers to as modern epistemology. While the Court does seem to assume that experts are able to produce ideal, objective knowledge, it is the impact of these assumptions on testimony that concerns me here rather than the question of whether or not such objectivity is possible. This is important, however, as the view an audience has of the speaker's capacity to speak 'objectively' may have a bearing on whether or not that audience takes up the intended force of a particular speech act. I return to this later in the paper.

71. See the discussion of the requirement that experts verify indigenous claims in US law in Tsosie, 'Indigenous Peoples and Epistemic Injustice' (n 11).

these assessments were approved by the State, but not implemented.<sup>72</sup> The Court is critical of the approach CGC adopted and the lack of independence of its experts and finds that CGC's original failure to include affected communities meant that its assessments 'did not take into account the social, spiritual and cultural impact that the planned development activities might have on the Sarayaku People'.<sup>73</sup> The Court does not include environmental impacts in that list.

The Court states that the assessments do not assess the social impacts adequately, but it raises no concerns about the descriptions of the environment detailed in those assessments, nor about the impacts on soil, air, water or any other natural resources. Had the Court recognized indigenous testimony as describing the environment, one would expect some questions or discussions about the lack of an assessment of impacts on the environment so described or reasoning as to why such an assessment was not needed. Aside from the lack of independence of the assessors (who were appointed by CGC), the Court gives no indication that the environmental assessments failed to assess the *environmental* impacts. The Court appears to assume that environmental impacts can be assessed without engaging with the community. Such an assumption would not be possible if the Court took community representatives to be making statements about the state of the environment and, therefore, about the impacts of the project on that environment.<sup>74</sup>

The Court's discussion of the community's 'worldview'; its failure to consider the potential worldview partiality of experts; its lack of concern about possible conflicting environmental descriptions; and its failure to object to CGC's environmental assessment all suggest that the Court hears the indigenous testifiers as only speaking about cultural beliefs and not as describing the environment. This failure to recognize what the community representatives were up to in their testimony – the illocutionary speech act – means that the community representatives were silenced in regard to their environmental claims. Before proceeding with the implications of this silencing, it is important to clarify a few points and respond to some possible objections that might arise at this point.

First, silencing of the illocutionary kind is not the result of a deliberate act.<sup>75</sup> As discussed in section 2, illocutionary silencing occurs where there is a lack of reciprocity

72. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) para 69.

73. *Ibid* 207.

74. One might wonder whether the reference to *social* impacts in the Court's statement includes environmental impacts. In its jurisprudence, the Court does not clearly distinguish social from environmental impacts, nor does it specify what, if anything separates their respective assessments. As a human rights court, the Court is unsurprisingly concerned with environmental impacts in so far as they impact humans and their rights. For example, in the *Saramaka* case, the Court found that whether harm to natural resources might be considered a justifiable limit on the right to property depends on whether or not such harm 'amounts to a denial of [the Saramaka peoples'] traditions and customs in a way that endangers the very survival of the group and of its members', *Saramaka People v Suriname* (n 1) paras 126–8. Social impacts, therefore, may include environmental impacts. In this case, however, CGC did conduct environmental impact assessments and these assessments were approved by the relevant government agency (although they were never executed). *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) para 69.

75. While one might argue that a person is wilful in their prejudices or ignorance in regard to a speaker, this wilfulness cannot logically extend to the failure of reciprocity. As soon as the audience recognizes what the speaker is up to in their speaking, there is reciprocity. If the audience fakes misunderstanding, this would result in perlocutionary rather than illocutionary silencing.

between speaker and audience – the audience does not recognize what the speaker intends to do with their utterances.<sup>76</sup> Where an audience recognizes what a speaker is up to but disagrees with the speaker, or ignores the speaker, this is not illocutionary silencing.<sup>77</sup>

Reciprocity between speaker and audience may be missing for a number of reasons. In the case of indigenous communities, it is possible that certain assumptions about what indigenous communities are doing when they describe the environment may preclude reciprocity. Assumptions that indigenous communities lack the authority or expertise to speak about the nature of the environment may mean that their attempts to describe the environment are not taken as such. Equally, assumptions about the nature of the world or the belief that there can be a single, objective description of the environment (that does not consist of *pachas* or doors in the mountains) may mean an audience receives indigenous descriptions not as descriptions of the environment, but only as descriptions of indigenous cultural practices or worldviews.<sup>78</sup> The effect of these sorts of assumptions is that the community members may not have their say in a consultative process. Descriptions of the environment become, to borrow a term from Langton, ‘unspeakable’ for indigenous communities.<sup>79</sup>

Second, and relatedly, recognizing the illocutionary force of the testimony does not compel the audience to accept or agree with the claims made. In other words, the Court did not need to accept the assertion that the environment includes *pachas* and doors in the mountain to avoid silencing the community. If the Court were to recognize the description offered by indigenous testifiers, but to reject it as inaccurate, this would not be illocutionary silencing.<sup>80</sup> The Court might acknowledge that the community is describing the environment but reject that description as incorrect. This possibility may raise a number of epistemic and other justice questions, but since the Court would be taking up the claim in such a case, these issues would not include injustices associated with illocutionary silencing. Illocutionary silencing happens when the community’s assertions about the environment are not recognized as they are intended, and this has to be distinguished from the Court recognizing those assertions but rejecting them as factually or otherwise inaccurate.<sup>81</sup>

76. As Austin puts it, an illocutionary speech act ‘involves securing of uptake’. Austin (n 10) 116–17.

77. It may be perlocutionary silencing. The fact that the audience recognizes what the speaker is up to means the illocutionary force of the utterance is taken up. What the hearer then does with the utterance does not change this uptake.

78. See, for example, the expert testimony of Theodore Macdonald Jr in the case of *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 23) para 83(c). See also *Sawhoyamaxa Indigenous Community v Paraguay* (n 28) para 118. Here the Court finds that close relation to land, traditional means of survival, worldview of religion all constitute part of the community’s cultural identity.

79. Langton (n 4) 317.

80. Since recognizing but rejecting a particular description of the environment necessarily includes uptake. A decision to reject a particular account may raise a number of different problems in law, but these would not include illocutionary silencing.

81. Consider, for example, claims made by climate-change deniers who base their denial on religious texts. If I were to reject their arguments on the basis that they are not consistent with scientific assessments, the deniers are not silenced, but rather disagreed with. That is to say, I recognize what they are up to with their speech, but this does not mean I have to agree with them.

A possible objection that might arise at this point is that my understanding of the Court's interpretation of indigenous testimony seems to rest on a problematic dichotomy between 'culture' and 'environment'.<sup>82</sup> An anti-representationalist point of view<sup>83</sup> suggests that every 'description' of the world should be understood to be mediated by language, culture and context, and that distinguishing between cultural claims and claims about the environment is not so easily done. My argument is not, however, that indigenous testifiers (or, for that matter, independent experts) sometimes step out of their cultural and social context in order to engage in the culturally neutral activity of describing the world. Rather, in focusing on indigenous testimony and speech acts, my concern is with what the testifiers *intend* to communicate and whether or not this intention is recognized by those hearing the testimony. I am concerned with the illocutionary force of the testimony. Whether or not one thinks that language can represent an external world accurately, it is possible to recognize a difference in the kinds of claims people make about their environments and the kinds of claims they make about their relationships to the environment, and to distinguish between what they intend to convey with these claims. For example, when I say, 'The lemon tree in my garden has special significance for my family' we can recognize this as a different sort of claim to my claim that 'The leaves on my lemon tree are green and pointy at their tips'. In the second instance, I intend to describe the properties of the tree. I would be surprised if someone treated this as a claim about the tree's cultural or spiritual significance to me and my family. In the case of indigenous testifiers, however, the Court appears to treat their claims about the environment as claims about the community's relationship to the environment and to their culture, even when the claims are intended to be descriptions of the environment. Recognizing that such silencing occurs does not require that one adopts a dualistic view of the world.<sup>84</sup>

Another objection that might be raised at this point is that even if this is a case of illocutionary silencing of the community, it does not really matter, as it does not have an effect on the outcome in the case. After all, the Court is clearly recognizing and affirming indigenous testimony in the *Sarayaku* case. It is specifically and directly seeking to protect indigenous rights to have a say about decisions that affect them and to be heard by the State and developers. Given this, why does it matter if the Court identifies these testimonial accounts as accounts of culture and not as descriptions of the environment? In the next section, I aim to demonstrate that silencing of the kind outlined here does matter and has a number of important implications.

82. This might be seen to be particularly problematic in the context of a discussion of indigenous testimony as it is sometimes argued that many indigenous peoples 'do not often separate their systems of thought into separate domains of "religion", "philosophy", and "science".' Tsosie, 'Indigenous Peoples and Epistemic Injustice' (n 11) 1138. Thank you to the anonymous reviewers who encouraged me to engage with this objection.

83. One might adopt an anti-representationalist position from a range of different theoretical perspectives, but I take it to be a position that broadly rejects the idea that mental states refer to things or objects outside of the mind and can be assessed with reference to those things or objects.

84. One also need not think that the speaker holds such a view. The speaker in this case is likely describing both cultural beliefs and the environment in the description of *pachas*. The Court, however, may see these claims as exclusively cultural. If the Court understood these claims as exclusively describing the environment where this was not the intention of the speaker, this too would be silencing.



## 4 WHY ILLOCUTIONARY SILENCING IN CONSULTATION MATTERS

### 4.1 Silencing and the importance of consultation in indigenous rights cases

In the next few paragraphs, I argue that illocutionary silencing has a problematic impact on the assessment of impacts and on ensuring that consultation is informed. Before turning to the problems of silencing and information, however, it is important to recognize the ways in which the silencing of indigenous communities is its own injustice regardless of the impacts it might have on a particular decision or activity on indigenous territory, particularly given the crucial role that consultation plays in indigenous rights protection.

Silencing, Langton has argued, deprives people of the right to perform speech acts.<sup>85</sup> This is because the capacity to speak involves more than just making meaningful utterances (or more than just locution). Speaking, as discussed in section 2, involves doing things with words, and the idea of illocution reveals the role that the audience plays in enabling speech acts. Where the audience does not take up the speech as it is intended, the speech is ‘disabled’.<sup>86</sup> In other words, the speaker has not been able to perform the speech act – she is silenced. This is not a figurative but a literal silencing. Langton argues:

One way of being silent is to make no noise. Another way of being silent – literally silent – is to perform no speech act. On Austin’s view, locutions on their own are nothing. Locutions are there to be used. Words are tools. Words are for doing things with. There is little point in giving someone tools if they cannot do things with them.<sup>87</sup>

In the case of indigenous speakers, illocutionary silencing means that these communities have not been able to have their say or to participate and, as a result, they have not been properly consulted<sup>88</sup> and therefore they have been denied the right to consultation.<sup>89</sup>

Since the right to consultation is one of the means by which indigenous rights to property are protected, illocutionary silencing may also deprive communities of their property rights. What is more, the Court has found that consultation is not merely a derivative right, the purpose of which is to secure the substantive right to property. Rather, the Court views effective, culturally appropriate consultation

85. See Langton’s discussion of the difference between silencing in which groups are prevented from speaking at all, and silencing that happens when a speaker, despite uttering the appropriate words, ‘fails to perform the intended illocutionary act’. Langton refers to this as ‘illocutionary disablement’ in Langton (n 4) 314–15.

86. Ibid 321.

87. Ibid 327.

88. At least in so far as they are silenced. It is possible that they do participate in respect of some aspects (such as cultural impacts) and not others. This is equivalent to a community being denied the right to make any comment (locutionary silencing) in respect of one part of a proposal but being fully consulted in respect of another. The fact that they have been partially consulted does not mean that the requirement for consultation is satisfied. I also recognize that communities find other ways to have their say that do not depend on the State engaging in formal and legally required consultation. A failure to consult, however, may still constitute a form of *silencing* even if the community finds other ways to have their say.

89. In the *Sarayaku* case, the Court is interpreting testimony heard during the Judge’s visit to the community and not in a formal consultation process. The judgment, however, sets a precedent for how states and domestic courts can interpret indigenous testimony in consultation processes and thus has an important bearing on the right to consultation.

as a substantive right of its own. In the *Sarayaku* case, the Court recognized the right to consultation as ‘precisely recognition of [indigenous and tribal communities’] rights to their own ... cultural identity ... which must be assured, in particular, in a pluralistic, multicultural and democratic society’.<sup>90</sup> Ensuring indigenous communities have their say is not just a matter of ensuring their interests are not overlooked in decision-making processes. Consultation also functions to ensure they are recognized in their identities and membership in society, that they are valued and counted.<sup>91</sup> For consultation to play this and all its other roles, participants must be able to have their say. When communities are silenced, they are not consulted and do not have their say.<sup>92</sup>

## 4.2 Silencing and impact assessments

### 4.2.1 Indigenous and expert accounts in impact assessments

Illocutionary silencing has important implications for the assessment of the impacts of a proposed activity or decision. Since the Court has often heard cases in which no impact assessment has been conducted, many of its comments on impact assessment focus on the requirement to conduct an assessment, and not on the content of these assessments or the manner in which they ought to be conducted.<sup>93</sup> Despite this, it is possible to uncover the Court’s approach and assumptions about impact assessments and the role of consultation in its somewhat limited treatment of those subjects and, more revealingly, in its failure to raise or address questions and problems associated with such assessments.

In its interpretation of the *Saramaka v Suriname* judgment,<sup>94</sup> the Court found that impact assessments serve two connected purposes. First, an impact assessment must determine the possible harm that an activity will cause to property and to the community. This evaluation is necessary to ensure that no concessions are granted when the impacts of the activity will ‘amount to a denial of the survival of the Saramaka people’.<sup>95</sup> Survival, the Court has emphasized, is not simply a matter of not endangering the lives of the Saramaka people, but must ensure that they ‘may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected’.<sup>96</sup>

Second, an impact assessment must generate the necessary information that a community needs to ‘ensure that members of the Saramaka people are aware of possible risks,

90. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) para 159.

91. This is not a function reserved for indigenous people. Waldron argues that opportunities to have one’s say and tell one’s story in a legal process is one of the key ways in which law protects and recognizes our human dignity. See Jeremy Waldron, ‘How Law Protects Dignity’ (2012) 71 *The Cambridge Law Journal* 200. See also Dina Townsend, ‘Human Dignity and the Adjudication of Environmental Rights’ (University of Oslo 2017) ch 5.

92. As mentioned earlier in the paper, communities often find other ways to ensure they are heard when consultation processes are denied or inadequate. My argument does not exclude the possibility that communities might have their say in other ways (although illocutionary uptake would still be required).

93. Thanks to the editors for drawing my attention to this point.

94. *Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs* (Inter-American Court of Human Rights).

95. *Ibid* 28.

96. *Saramaka People v Suriname* (n 1) para 121.

including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily'.<sup>97</sup> I look at the implications of silencing and ensuring that communities are informed in the next section, 4.2.2.

In its jurisprudence, the Court does not spell out how an impact assessment ought to be carried out, but does stipulate some basic requirements. The assessment must take place prior to the granting of a concession and must comply with 'international standards and best practice'<sup>98</sup> (and the Court specifically mentions the Akwé:Kon Guidelines in this regard).<sup>99</sup> In the *Sarayaku* case, the Court also emphasized that independent experts should be appointed 'to ensure an objective, impartial and technically verifiable assessment, aimed at providing factual data from which a set of consequences may emerge for the approval and, in a given case, the execution of the corresponding plan'.<sup>100</sup> The Court's requirement that environmental impact assessments be conducted by independent, technical experts is designed to address problems associated with private companies appointing assessors who serve the company's ends – a tactic deployed by CGC in its attempts to thwart community resistance to extractive activities.

The Court requires that external experts are appointed for the assessment of both cultural and environmental impacts, but while the Court repeatedly emphasizes the importance of community participation in cultural impact assessments, the judgment is far more ambiguous about the role of community consultation in assessing environmental impacts. The Court's failure to recognize the testimony of community representatives as containing indigenous descriptions of the environment suggests that the Court does not see indigenous communities as having anything to add in regard to an assessment of the state of the environment or the potential impacts on that environment. As a result, the Court appears to adopt the view that questions about what impacts an activity will have on air, soil or water quality, or what an activity will do to plant or animal life on the territory, are questions that can be fully answered by technical experts. Since the Court does not identify a need for indigenous accounts of the environment to be included in environmental impact assessments, the Court's protection and inclusion of indigenous communities through consultation and assessment extends only to culture and custom and not to the environment as it is described by the community.<sup>101</sup>

As I argued in section 3, however, the Court need not necessarily accept the community's account of the environment in order to avoid silencing the community. Having recognized indigenous descriptions of the environment, the Court might find that the community is mistaken in its belief that there are *pachas* or doors in the mountain.

97. *Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs* (n 94) para 40.

98. *Ibid.*

99. Secretariat of the Convention on Biological Diversity, 'Akwé:Kon Guidelines' (2004). These voluntary guidelines were prepared by the Secretariat of the Convention on Biological Diversity to address 'the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities'.

100. Inter-American Commission on Human Rights (n 23) para 252.

101. The Court states that, 'the development and continuation of [the Sarayaku Peoples'] worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States', *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) para 146.

Recognizing indigenous descriptions of the environment does not necessarily mean that the Court must find ways to protect an environment it cannot see.<sup>102</sup>

Were the Court to recognize indigenous descriptions of the environment, however, it would have to grapple with the possibility of different, incompatible accounts of the environment being offered by communities and independent experts – as noted above. This likely incompatibility suggests that the Court must either determine the grounds on which one account or the other ought to be preferred, or determine how the impacts on the environment as described by the community, are to be assessed.

Were the Court to reject an indigenous testifier's description of the environment, it would need to be explicit about its reasons for doing so, which might make the assumptions that inform such decisions more transparent and open to critique or development in later cases.<sup>103</sup> On the other hand, if the Court did not reject indigenous accounts of the environment, then such accounts would need to be explicitly included in impact assessments and in the decision-making process. The Court would therefore need to ask not only what the impact of oil extraction will be on the cultural practices and beliefs of the community that there exists a planet of flowers, but also what drilling will do *to that planet of flowers*.

When communities are silenced, questions about how to reconcile conflicting accounts of the environment and how to assess impacts on an environment that the Court cannot see, do not arise. Recognizing illocutionary silencing in the *Sarayaku* case, then, not only suggests that the community was not actually consulted, but also brings to light important deficiencies in the Court's treatment of impact assessments.

#### 4.2.2 Impact assessments and informed consultation

As discussed above, the Court and Commission have found that indigenous communities have a right to *informed* consultation in respect of projects and activities that take place on their territories. An impact assessment is necessary to ensure that consultation is in fact informed. Communities must have all the necessary information before them in order to be able to assess the nature and extent of any proposed development or extractive project on their territory, what the risks of a project may be, and to make an informed decision about whether to support or oppose a project.<sup>104</sup> To do this, an environmental impact assessment must describe the environment prior to commencement of the project and detail the ways in which the project will alter and degrade that environment, in order to determine the risks to the community's environment and health.<sup>105</sup>

Currently, the Court and Commission assess the adequacy of an *informed* consultation process based on the extent to which impacts were assessed and these assessments

102. Thanks to Anna Gearar for raising these questions and pushing me to consider what such accounts demand of the Court.

103. If the Court were to recognize but reject indigenous accounts of the environment, new questions might arise about the value of consultation processes in the protection of indigenous rights when indigenous knowledge and descriptions are not believed.

104. Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights in Ecuador' (1997) OEA/Ser.L/V/II.96 Doc. 10 rev. 1.

105. *Saramaka People v Suriname* (n 1) paras 40, 129. See the discussion of impact assessments and the 'Akwé:Kon' Voluntary Guidelines for the conduction of cultural, environmental and social impact assessments in cases of projects to be developed in indigenous territories, including sacred sites by the Commission in Inter-American Commission on Human Rights (n 23) paras 254–62.

communicated, so that those affected had the opportunity (in accordance with their custom) to express their resistance or consent. The right to be informed has generally been formulated as a right to access to information generated by external, expert assessors, rather than as also encompassing a right to generate information.<sup>106</sup> As the Court states in the *Sarayaku* case, ‘... the consultation must be informed, in the sense that the indigenous peoples must be aware of the potential risks of the proposed development or investment plan, including the environmental and health risks’.<sup>107</sup>

Acknowledging that indigenous communities are also describing their environments in their testimony, however, suggests that these communities cannot be properly informed unless they are also generating information about the impacts of an activity on the environment *as they understand it*. In the previous section, I argued that the Court need not necessarily accept indigenous accounts of the environment to avoid silencing the community. The Court might recognize but reject a community’s account of the environment and this would not constitute illocutionary silencing. For communities to be informed, however, their descriptions of the environment need to be taken seriously. In other words, whether or not a community is informed is something that must be determined (at least in part) with reference to the community’s own understanding of the environment. This is because this is information that is relevant to the community, and to the community’s acceptance or rejection of a particular activity on their territory, and this is true regardless of any position an external party may take in regard to that environment.

In the case of the Sarayaku people, this means that the community not only requires scientific information about threats to water, air and soil quality, but also information about what impact the activities will have on the *pachas*. This is not the same thing as knowing what impacts oil extraction might have on the community’s belief in the *pachas*, or on particular cultural practices that engage with the *pachas*. Rather, it is to ensure that the community has the opportunity to look at the proposed activities, and their locations, and to ask questions about what those activities (drilling, use of explosives, water diversion and so forth) will do to the environment as they understand it – to the *pachas*, to the doors in the mountains, to the planet of flowers.<sup>108</sup>

Since these are questions that external, technical experts are not likely to be able to answer, the community cannot be positioned as passive recipients of information in respect of the requirement that a consultation process must be informed. Communities also need to assess environmental impacts for the purposes of consultation. While the community already has information about the *pachas*, they may still need to conduct their own investigations into how a particular proposal will affect this environment. This is information the community generates for themselves, but it is also information that the community may share with decision-makers, scientific assessors and all other parties to the consultation to assist in proper assessment and decision-making.<sup>109</sup>

106. Quoted in Hanna and Vanclay (n 18) 150.

107. *Kichwa Indigenous People of Sarayaku v Ecuador* (n 3) para 208.

108. It is important to note that it is not necessary for others to accept the account offered by the community to still hold that the community ought to have an opportunity to assess the impacts on the environment as they understand it, as a prerequisite to the community making an informed decision about whether or not to support a proposal.

109. The Commission has pointed out that consultation is a process of dialogue, and meaningful dialogue requires shared access to findings about the risks of the project. There may be occasions where such information cannot be shared outside of the community, where indigenous laws prevent such sharing. In these cases, communities would nevertheless be in a better

This enquiry does not replace the scientific impact assessment, but is an enquiry that ought to accompany and complement such a scientific assessment.

This is an approach that accords with the the Akwé:Kon Guidelines. The purposes of the Guidelines include supporting ‘the full and effective participation and involvement of indigenous and local communities in screening, scoping and development planning exercises’.<sup>110</sup> The Guidelines call for the involvement of indigenous communities throughout the assessment stages, including in the development of the terms of reference for conducting the impact assessments.<sup>111</sup> While the Guidelines put great emphasis on the role of indigenous communities in cultural impact studies, they also recognize the importance of consultation in environmental impact assessments and the importance of integrating these assessments.<sup>112</sup>

Recognizing that communities may need to assess the impacts of an activity on the environment as they understand it, first demands that their descriptions of the environment are taken as such. The problem with illocutionary silencing is that in failing to recognize what a testifier is up to with their speech, the Court also fails to recognize the other ways in which a consultation process is flawed, including whether or not consultation is in fact informed.

## 5 CONCLUSION

The Court and Commission have built up an important and extensive body of case law and commentary on the rights of indigenous communities to be secured in their territories, and the rights of these communities to be consulted in respect of activities affecting those territories. The cases and commentaries emphasize the close and unique relationships of these communities to their territories. Ensuring this relationship is protected, the Court and Commission have found, requires informed consultation at each stage of the project planning and development.

The Court and Commission have taken a substantive approach to the right to consultation, recognizing that sometimes a consultation process can have the effect of silencing communities rather than ensuring that they have their say. As a result, the Inter-American system emphasizes the importance of consultation that happens in accordance with the cultural practices of the affected indigenous communities, in an accessible language and in a manner that respects traditional governance systems.

In this article I have highlighted another way in which communities might be silenced, in a consultation process designed to ensure they have their say. Illocutionary silencing is much more difficult to identify than locutionary or perlocutionary silencing. I have argued that we find an example of illocutionary silencing in the

position to make their own decisions about their support of or resistance to a particular project, but I acknowledge that this poses some problems for the idea of consultation to ensure sound environmental decision-making. Many thanks to the editors for bringing this to my attention. For the Commission’s statement on consultation as dialogue, see Inter-American Commission on Human Rights, ‘Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources’ (n 23) para 285.

110. Secretariat of the Convention on Biological Diversity (n 99) s 3(a).

111. *Ibid* 14.

112. As the Akwé:Kon Guidelines make clear, assessing cultural impacts must include assessing ‘relationships with the local environment’, and assessing environmental impacts ought to include ‘interrelated socio-economic and cultural’ impacts, *ibid* 6(a) and (d).

*Sarayaku* case, as the Court failed to recognize indigenous accounts and descriptions of the environment. This silencing has significant implications for the effectiveness of a consultation process. Since ensuring indigenous participation in decisions about their territory through consultation plays a central role in the protection of indigenous rights to property and cultural identity, this is a crucial problem.

The recognition of indigenous accounts and descriptions of the environment has important practical implications for what information is necessary for consultation to count as 'informed'. Independent and expert scientific assessments of environmental impacts are essential to any consultation process. In circumstances in which indigenous communities offer their own accounts of the environment, however, scientific assessments are not sufficient to ensure the community has all the information needed to come to an informed conclusion about proposed activities. These communities also need to generate information about the impacts on the environment as they understand it if they are to be fully informed.