From *M'Intosh* to *Endorois*: Creation of an International Indigenous Right to Land

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Acknowledgments

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Abstract

Vestiges of colonial land regimes still plague both developing and industrialized societies and further marginalize vulnerable, indigenous populations worldwide. Recent progressive jurisprudence - in particular the Endorois case out of Kenya - has begun to change this landscape. This article streamlines the debate on indigenous and native rights to land by synthesizing historical and modern developments in common law and international legal systems that definitively establish native title rights. It contextualizes the history of dispossession experienced by indigenous peoples and the constitutional and legal reforms needed to change both law and practice. Despite developments over the last decades native title recognition is far from universal. Many countries lag behind in recognition and in the process condone exploitative colonial legacies. This article argues for an immediate increased emphasis on implementing reforms that respond to modern jurisprudence and the growing international jus cogens on indigenous rights to land.

I. INTRODUCTION

On February 2, 2010 the African Union approved the decision by the African Commission on Human and People's Rights (ACHPR) to restore the ancestral lands of the Endorois community.[1] The Endorois had been slowly evicted from their lands by the Kenyan government between 1973 and 1986. The ruling established a major precedent on indigenous right to ancestral land under the African Charter whose ramifications are still coming to bear.[2] The ACHPR decision now opens the door for potentially hundreds of indigenous land claim cases from across all African Union member states. It also has the potential to reverse centuries of negative impact caused by the stubborn vestiges of colonial land regimes across Africa.

The legacy of colonial legal theory on native or aboriginal title to property still dictates policies that marginalize indigenous groups in and beyond Africa - even centuries after independence and the formation of sovereign nations. But international and common

[1] Assembly of the African Union, Fourteenth Ordinary Session, 31 January – 2 February 2010, Addis Ababa, Ethiopia.

[2] This article will use the term 'native title' in reference to native, indigenous, indian and/or aboriginal forms of ownership of land. (In *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, ICLQ 56 3 (583), 1 July 2007, Jeremie Gilbert defines native title in the following terms: 'Aboriginal or native title is a right to land. It is a collective title under which an indigenous community has the right to its use and occupation'. (p. 5/588). The related footnote reads: 'On the notion of exclusivity of such occupation, see High Court of Australia, Commonwealth v Yarmirr (2001), 208 CLR 1. At p.6/589, he further writes: '(…) the doctrine on indigenous title implies recognition of the possible cohabitation of two systems of laws, common law and indigenous law, within the same jurisdiction. As Pearson points out: 'Native title is neither a common law nor an Aboriginal law title but represents the recognition by the common law of title under Aboriginal law'. The related footnote reads: 'N Pearson, 'The Concept of Native Title at Common Law' in G Yunupingu (ed), *Our Land is our Life, Land Rights, Past Present and Future* (University of Queensland Press, St Lucia, 1997).

law jurisprudence on native title has evolved dramatically in the past decade. Landmark court cases in various countries and in international forums have established new precedents that have the potential to mitigate and even reverse the injustices perpetrated over the last two centuries by colonial legal regimes. Court cases, national legislation and international charters and declarations have all contributed to what is becoming an international norm of native title to land. Many countries, however, continue to ignore this precedent.

The evolution of common law native title has occurred rapidly over a fairly short period. As a result, many countries and legislators are behind the times. Domestic courts often deny indigenous reparation and land claims without considering the relevant questions identified by the high courts of other countries. Courts often overlook valid claims that had previously been denied, but whose reasoning has been revealed as misguided. Domestic legislation continues to be passed that either denies rights, since recognized by courts, or in granting rights, does not accord the full bundle recognized by common law or international charters. Even when rights are recognized, effective implementation and enforcement often lags behind.

This article attempts to streamline the debate on native title and provide a rational foundation that will encourage increased recognition of indigenous claims to land. The article traces the historical origin of native title up through recent developments that bring greater recognition to the full range of indigenous property rights recognized under modern international and comparative law. The article examines the independent but convergent evolution of native title in two separate systems – common law jurisprudence in former British colonies, and international human rights legal frameworks, focusing on the African and Inter-American systems. The first part of the article examines the historical precedent of common law native title, including its derivation from English common law theories and the treatises of John Locke and Emmerich de Vattel, that evolved in the seventeenth century dealing with questions posed by indigenous forms of property. The first court decisions on native title and property rights from the U.S. and the Privy Council considerably shaped the debate that was to follow in many common law courts. Many of which falsely interpreted the prior decisions and used false reasoning to rescind indigenous property rights seemingly granted prior.

The second part of the article examines modern legal developments in common law countries and under international human rights frameworks. New scholarship has questioned past decisions' reliance on antiquated native title theory and new decisions have established a growing jurisprudence that recognizes indigenous property rights. This section analyzes this growing international precedent, including the legal reasoning used to establish it. The article also discusses regional human rights charters and recent jurisprudence that has interpreted these charters in favor of native title recognition – in particular the Endorois case. Finally the article advocates for more progressive

application of native title principles and proposes its positive, potentially transformative, impact on international development and equitable economic growth.

II. HISTORICAL TREATMENT OF NATIVE TITLE

British and European legal definitions of "property" were first adapted and applied to colonial legal frameworks starting in the 18th century. John Locke, Emerich de Vattel and Hugo Grottius were particularly influential. Much of the early ideologies from Europe reflected the sentiments of industrial Europe, a dense, urban society with limited natural resources. The legal doctrines from these civilizations, England in particular, were transported to colonies and imposed out of context on lands and people with different concerns and ideologies of "property". Often the doctrines were misapplied to rationalize the greed with which native land was appropriated. To understand early jurisprudence in common law native title and the societal effects that have resulted, it is necessary to review the theories that influenced early jurists in their decision-making.

A. Property Theories

Common law property theories first developed in England shortly before the 13th century. Court rulings as early as 1290 considered the development of property.[3] But up through the fifteenth century in England property was only used to refer to goods and animals, not land.[4] In the beginning of the seventeenth century land was incorporated into theories of property. The principle of possession as the indicator of property in land has roots in Roman law, but was not fully embraced in English common law until Blackstone's *Commentaries* in 1769.[5] The *Commentaries* were the first modern methodical treatise on the common law suitable for a lay readership.

Much of the common law property theory developed in the seventeenth century largely in response to territorial issues created by colonization. Land use patterns observed in the societies of European colonies stimulated further discussion on the definition of personal or communal property and the vestment of title. The writings of John Locke attempted to define universal doctrines of property - one that could be applied to the

[3] *See generally.* David J. Seipp, The Concept of Property in the Early Common Law, *12 L. & Hist. Rev. 29* (Spring 1994)
[4] *Id.*
[5] See generally. *Blackstone Commentaries*, Sir William Blackstone, The Rights of Things, Book II, Chapter 16., Clarendon Press, 1765-1769 ("Occupance is the taking possession of those things, which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But, when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome quod nullius est, id ratione naturali oxxupanti conceditur")

new lands over which the Crown claimed sovereignty.[6] They contributed to the development of English common law and philosophy that generally viewed property as "a unitary, abstract, more or less absolute right" and "a bedrock element of the conceptual structure of law."[7] John Locke's *The Second Treatise of Civil Government* is most often cited for the mixed labor theory that property is created when the resources of nature are removed and mixed with a person's labor or combined with something that is his own.[8] A person's labor is a product of their body, which is their own property, and when combined is sufficient to remove the "something" from the common in which it exists and to exclude the common access of others. Locke's theory has most famously been used by courts to support the idea that indigenous hunter-gatherer groups do not have effective title to their land, because they have not invested the labor required to create a property interest.

In the *Law of Nations on the Principal of Natural Law* (first published in 1758) Emerich de Vattel espoused that all men have a natural right to inhabit the earth and draw from it what is necessary for their support.[9] But when the human race is greatly multiplied, such that inhabitants cannot survive without cultivating the soil, then land must be secured for its undisturbed cultivation and hence the rights of property and ownership evolve.[10] This concept is extended to grant sovereignty and ownership to nations that take possession of a country that belongs to no one.[11] Given this theory Vattel also postulates that the territories occupied by wandering tribes in small numbers cannot be held as a real and lawful taking of possession and thus the "confined at home" nations of Europe may come upon and lawfully take possession of the land inhabited by "the savages." Vattel's reasoning is grounded in beliefs that the indigenous form of communal property use was a result of cultural inferiority and that Europeans were justified in imposing a "civilized" society and notion of property.[12]

Neither Vattel nor Locke considered the validity of ownership and non-use for conservation of land – a paramount belief in native cultures. Both taught that the right to own land was dependent on the ability of the owner to develop the land.[13] Locke

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[6] *Id.* at 30
[7] *Id.* at 34
[8] *The Second Treatise of Civil Government*, 1689
[9] Law of Nations, Chapter XVIII
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] See, *e.g.,* Vattel, The Law of Nations on the Principles of Natural Law, Chapter XVIII, "natural law ... only confers upon individual Nations the right to appropriate territory so far as they can make use of it. ... We have already pointed out (§ 81), in speaking of the obligation of cultivating the earth, that these tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession. ... But if each Nation had desired from the beginning to appropriate to itself an extent of territory great enough for it to live merely by hunting, fishing, and gathering wild fruits, the earth would not suffice for a tenth part of the people who now inhabit it." and Locke, Second Treatise of Civil Government, Chapter 5 Of Property,

stated that "even amongst us land that is left wholly to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, "waste," and we shall find the benefit of it amount to little more than nothing."[14]

Hugo Grottius was influential in Locke's and Vattel's theories through his 1625 work, *De jure belli ac pacis libri tres.* He supported the state's ability, with popular consent, to alienate sovereignty over a part of its territory that is uninhabited or deserted.[15] But the state cannot alienate a people without their consent or, sovereignty not held by inheritance, without violating the "voluntary compact."[16]

These theories, however, did not seem to extend to European and feudal-based ownership over hunting or other undisturbed, "unimproved" land. These lands were not seen as "waste" but paradoxically as valuable pieces of property. The value placed on unused land is not universal, but subjective, dependent on the person placing the value and the culture that valuates.

B. Crown Title

Of great importance to early native title issues in British colonies is the engrained principle of Crown title to land. In England, the traditional view is that the Crown ultimately holds title in all land of its subjects, because the Crown is the paramount ruler of the land. [17] When applied to colonies of the Crown, native "title" took the form, not of a fee simple, but of a grant from the Crown of possessory control. Native "title" in this context was inalienable and subject to Crown control, including sale of land to subjects or displacement for sovereign use.

Feudal law was established in England after the Norman conquest and essentially turned landowners into tenants of the feudal lord and ultimately, the King.[18] Common law developed to further support the principle that all land was held either mediately or immediately by the Crown.[19] This principle forms the basis of and is commonly referred to as the Doctrine of Tenures. It is now legal fiction in England.

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para 31: God gave man the right to "as much [property] as any one can make use of to any advantage of life before it spoils ... whatever is beyond this is more than his share."

[14] John Locke, Second Treatise of Civil Government, Chapter 5 Of Property, para 42.

[15] See. Kent McNeil,"Self-Government and the Inalienability of Aboriginal Title" *47 McGill L.J. 473* (2002) at 491

[16] *Id.*

[17] Kent McNeil, *Common Law Aboriginal Title* (1989) at 79

[18] McNeil argues, however, that the rationale that the land originally belonged to the King and was granted out to the tenants was not supported by the prior Anglo-Saxon history of land possession before the Norman conquest. Nor could William I have acquired possession of all the land by conquest. The feudal land laws from the Norman period have thus been viewed as a mere justification of the feudal system and not as proper legal precedent. (McNeil at 84)

[19] *Id.* at 82

English legislation and common law developments in the 1700s changed the traditional power of the Crown over private property in England. Under modern British constitutional law the Crown cannot cede territory without assent of local inhabitants or Parliament's approval.[20] However, the original feudal principle continued to be applied in colonies and for the acquisition of foreign land. Subsequent cases from colonies further entrenched this common law principle in the colonies and with particular force regarding native title.[21]

C. Colonial Land Principles

The ideology of property and land use law in Britain was applied to the Crown's colonization manifesto with unwavering conviction, but inconsistent rationale. Applicable doctrines of land title were routinely interpreted in a false manner to reach an end result that ultimately granted property rights to the Crown or its subjects. An underlying notion that indigenous populations did not have the social systems or sophistication to possess a title right to land was used as a justification for these varying and faulty interpretations.

British common law on land title had developed to a large extent by the time European colonization began in earnest in the sixteenth century. However, the new role of the Crown and her subjects as colonizers stimulated a renewed examination of property definitions, but now in a foreign context. The main schools of property philosophy that developed from this period were focused more on justifying colonization rather than objectively examining property and did not incorporate comprehensive, cross-cultural approaches. Philosophers such as Locke, Grottius and Vattel developed their theories amidst massive European colonization and in response to questions of the morality of colonization. The theories that developed were not all a blind endorsement of colonization, but, nevertheless, were commonly used to justify native land expropriation.

Vattel in the *Law of Nations* states that nations are not given an unabashed license to claim all unoccupied territory in its sight, but instead "will only recognize the *ownership* and *sovereignty* of a nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them." Vattel also supported the sovereignty philosophy that lawful governance is based on consent of the people governed and involved an "original contract" between subject and ruler.[22]

[20] *Id.* at 90 (1939 Act and others have limited the control of the Crown individual property)
[21] See generally. *Milirrpum v. Nabalco* 17 FLR 141; *In re the Ninety-Mile Beach* NZLR 461; *In Re Paulette* 63 DLR
[22] *See*. Kahn, Benjamin, The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand, *35 Stan. J Int'l L. 49,* 62 (Winter, 1999)

In his *International Law Treatise* Oppenheim furthers interprets the *Law of Nations* by arguing for international and domestic requirements of consent before property can be transferred to state (crown) or cession of territory validated.[23]

These popular theories on property rights and implications on "native title" as well as other jurisprudence led to the creation of general principles in colonial land dealings. During the period of British and European colonization, four basic methods of acquiring colonial land were recognized –

(1) conquest
(2) persuading indigenous populations to submit to the colonizer's rule,
(3) purchasing some or all of the land from indigenous populations, or
(4) discovering and possessing "unoccupied" land first – the doctrine of *terra nulius* and discovery.[24]

British colonization was generally given one of two constitutional status – uninhabited territories occupied by British subjects under authority of the Crown, or territories acquired by conquest, war or treaty. However, many colonial territories including India and North America fit neither category. Purchase was rarely recognized. Sovereignty was applied to native land, meaning it could not be sold to a private individual but only transferred from sovereign to sovereign.[25]

As exploration and colonization continued, Europeans began settling in lands already occupied, and use of the *terra nullius* and the discovery doctrine became more common. European powers eventually expanded the doctrine to include lands occupied by indigenous populations considered too primitive to have an organized society.[26] This occurred despite early commentators' inability to justify such expansion.

The *Royal Proclamation* of 1763 was a key doctrine to the British approach to colonization and native title. The Proclamation prohibited private purchase of native land and the full alienability of native title in the British colonies. The Proclamation was grounded in a largely paternalistic attitude to indigenous populations to "protect" them from unfair transactions with European settlers.[27] While there were numerous instances of fraud by settlers against natives in purchasing their land, it is difficult to say that the Proclamation was created solely as a means to combat unfair transactions. A historic responsibility on the part of the crown to protect indigenous populations in land transfers does exist, but is tempered by a refusal to allow complete, inalienable native

[23] L. Oppenheim, International Law: A Treatise 19 (H. Lauterpacht ed., 8th ed. 1955)
[24] Schiveley, 33 Vand. J. Transant'l L. 427 (citing: Ann McGrath, A National Story, in Contested Ground: Australian Aborigines Under the British Crown 1, 1 (Ann McGrath ed., 1995))
[25] *Supra* note 16 at 496 (explains why only the Crown was considered as having the ability to purchase native land).
[26] See discussion on *Johnson v. M'Intosh*, infra note 32 (*M'Intosh* is perhaps the most influential early former colony common law decision supporting and applying the doctrine of discovery)
[27] *Supra* note 16 at 478

land control. The Proclamation also served to advance other principles of Crown title, including the discovery and conquest doctrines, discussed below. It furthered British common law that granted exclusive title to the Crown by essentially eliminating all private interests to land and establishing the exclusive purchase and control of land by the Crown itself. Native people were viewed as having a Crown grant to possess and use the land, subject to future expropriation, but not inalienable title.

As described earlier, common law supported the principle that the Crown held all land and that only explicit recognition vested legal title.[28] This principle was commonly referred to as the *doctrine of tenures* and *recognition doctrine*. Numerous courts and legislators cited this doctrine as the rationale for denying indigenous claims to land, despite occupation of land prior to Crown acquisition of the territory. An analysis of the doctrine of tenure's role in post-feudal England, however, reveals that it did not have preclusive effect in its own country, let alone in colonies.

The *doctrine of continuity* was a much more progressive but extremely limited principle applied in a few British colonies in Africa (discussed further in the Africa section).[29] Continuity meant that existing private property rights continued after a change in sovereignty. These decisions were the initial seeds of a legal foundation that would be laid much later.[30]

III. EARLY JUDICIAL TREAMENT OF NATIVE TITLE

Judicial decisions on native title from both newly-independent, former colonies and from current colonies or Commonwealth states set an early precedent that denied fundamental property rights to indigenous groups. Many of these early cases were based on property theories espoused by the aforementioned philosophers and often with the purpose of legitimatizing colonial land-grabs. The precedent from the earliest cases had profound reverberations on the development of native title in other common law countries and as a result native title in all common law countries experienced parallel evolutions. Early Privy Council decisions legitimated the extinguishment of native title in the Commonwealth. These Privy Council decisions then provided some support for major native title decisions in the fledgling United States court system, which served to reinforce decisions in Canada, New Zealand and additional Privy Council decisions. All of which were consequently used as support to extinguish native title claims in Australia, India and Malaysia.

The precedent established over this period has guided treatment of indigenous groups in common law countries for the past two centuries, but over the past two decades has

[28] *Supra* note 18 at 82
[29] E.g., *In Re Southern Rhodesia, Infra* note 75; *Amodou Tijani v. Secreatary Southern Nigeria, infra* note 74*; Bakare Ajakaiye v. Lieutenant –Governorn, Southern Provinces, infra* note 78
[30] *Supra* note 18 at 173

quickly eroded. At current, all native title claims demand a comprehensive examination that emphasizes contemporary common law native title precedent over the voluminous jurisprudence from centuries back.

This section explores those early common law precedent-setting cases, taking into account the context and statutory developments within each country. It sets the historical context from which current developments of native title will be examined in the following sections.

A. United States

The famous case of *Johnson v. M'Intosh* (1823) set an early precedent for native title treatment under the common law in former British colonies.[31] The Marshall court took a decidedly non-British approach in its attempt to establish an American common law precedent and refuted the legitimacy of the *Royal Proclamation*. *M'Intosh* is considered the first and most influential case regarding native title, although it also relied partially on earlier decisions by the Marshall court in *Fletcher v. Peck*[32] and the Supreme Court of New York in *Jackson v. Wood*.[33] These cases were the first real adjudication of native title in a current or former British colony, not because a Native tribe was given standing and brought a suit, but because two settlers were squabbling over indigenous land.

Marshall, in both *M'Intosh* and *Fletcher* recognized an Indian "right of soil" in the land they possess, but qualified this right as subject to the prerogative of the government and not equivalent to a fee simple: "the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizing in fee on the part of the state."[34] The Dissent in *Fletcher*, however, argued that government interest in Indian land could only occur by way of purchase or conquest. Marshall dismissed this argument and any other notion of a fee simple estate for Indian title in *M'Intosh* by holding that title in the State derives from discovery while the interest retained by the Indians is only one of occupation. The doctrine of discovery, per Marshall, is dependent on his assertion that the natives "remain in a state of nature, and have never been admitted into the general society of nations." As such the land upon which they live, according to "tribunals of civilized states", is ripe for acquisition by discovery and to cultivate in a manner indicative of a developed sense of individual property. Marshall espoused the philosophies of Vattel and Locke as support that the type of land use the Indians practiced did not create a proprietary interest. Marshall also pointed to racist statutes of Virginia and other colonies as proof that Indians are an inferior race of people, are "under the perpetual protection and pupilage of the government", and therefore cannot hold valid title to land.

[31] *Johnson v. M'Intosh*, 21 U.S. 543 (1823)
[32] *Fletcher v. Peck* 6 Coranch's Rep. 646 (1810)
[33] *Jackson v. Wood*, 7 Johns. Rep. 296; See. *Johnson v. M'Intosh* US LEXIS 293 at 27.
[34] *Fletcher* at 142-143

The precedent established in *M'Intosh* was furthered by three more Indian title cases of the Marshall court – *Worcester v. Georgia*, *Cherokee Nation v. Georgia* and *Mitchel v. US*.[35] The property right held by Indians under the discovery doctrine was strengthened in *Worcester* and granted a full right of occupation and all use of the land, timber and subsurface extraction that accompanies. *Mitchel* broadened the view of the Court as to what constitutes Indian occupation of land to include hunting grounds and other areas with reference to a tribe's "habits and modes of life".[36] Indian occupation was considered to be "as sacred as the fees simple of the whites."[37] The Court maintained however that Indian occupation was essentially a grant from the State, not equivalent to a fee simple accorded, and that the land ultimately remained inalienable. As a result, the US government also retained an exclusive right to extinguish title that has been used in numerous cases of US expropriation of Indian tribal land.[38]

While courts preached the theoretical basis for "Indian title", the practical recognition of Indian territory was largely ignored – a challenge for implementation to this day. Indian tribes were continually displaced from territory they had occupied since time immemorial and settled in reservations. Common law developments in Indian title were generally inconsequential because, 1) treaties between the government and Indian tribes were reached that precluded any common law remedy and 2) Congress at all times retained the ability to extinguish Indian title and the political nature of the issue precluded a judicial remedy. Congress was free to displace and expropriate Indian land by way of legislation. The Fifth amendment protects government expropriation of private property without just compensation, however, as shown in the next paragraph, the Court did not extend its prior jurisprudence to include Indian land in the definition of "private property."

The inherent problem with the US common law precedent of native title is that fee title remained in the possession of the government, passed down from the Crown. Thus the occupation rights of Indian tribes did not classify as private property and therefore not protected by the 5th amendment's prohibition on government expropriation without just compensation. This classification problem reared its ugly head almost one hundred years later in a series of cases brought by Indian plaintiffs for compensation for government-expropriated lands. In 1955 the Supreme Court in *Tee-Hit-Ton Indians v. US*[39] ruled that there exists only a right of occupancy that can be extinguished by the

[35] *Worcester v. Georgia* 31 US 515 (1832); *Cherokee Nation v. Georgia* 30 US 1 (1831); *Mitchel v. US* 34 US 711(1835)
[36] *Mitchel* at 746
[37] *Id.*
[38] See. *Oneida Indian Nation v. County of Oneida* 414 US 661 (1974); *Buttz v. Northern Pacific Railroad* 119 US 55 (1886) (although the judgment was effectively ignored by President Andrew Jackson and the Georgia state authorities, with the Cherokee being evicted from their land very shortly after the handing down of the jugdment – resulting in the infamous Trail of Tears.)
[39] *Tee-Hit-Ton Indians v. US* 348 US 272 (1955)

government at all times "without any legally enforceable obligation to compensate the Indians."[40] The subject of Indian compensation for expropriated lands was ruled as being under the exclusive purview of Congress, even though in *Tee-Hit-Ton*, the land in question was in Alaska, which was ceded to the US by Russia and never "discovered" or "conquested."[41]

B. Canada

The effect of the *Royal Proclamation* on Canadian treatment of Native land rights was much stronger than in the US by way of Canada's incorporation into the Commonwealth. The Royal Proclamation affirmed the right of indigenous people to remain in possession (without title) of their traditional lands and held that they were not to be "molested or disturbed" on their lands.[42] Land within the area defined by the Proclamation could only be acquired by the Crown and only by treaty or purchase from the Indians.

Canadian common law on native title first developed in *Connolly v. Woolrich* (1867) where Indian laws and usages were recognized as valid and not subject to abrogation upon acquisition of Crown sovereignty over the tribes.[43] The ruling implied the application of the doctrine of continuity to Crown lands.[44]

In *St. Catharine's Milling and Lumber Company v. The Queen* (1888) the Privy Council verified the doctrine of Indian right to land as derived from the *Royal Proclamation.* Native lands were still subject to control by the Crown and "dependent upon the good will of the Sovereign."[45] Indian title, again, was not equivalent to a fee simple, and, as

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[40] *Id.* at 279

[41] *Tee-Hit-Ton Indians v. US* 348 US 272 (1955) (denying Indian title proprietary status - difference between officially recognized title by Congress and permissive occupation in granting compensation for appropriation; no right to compensation of claims attached to native titles in the absence of a statutory direction to pay (quoted from Calder: "In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government- owned land rather than making compensation for its value a rigid constitutional principle")); See also *Alacea Band of Tillamooks v. US* 341 US 48 (1951); 329 US 40 (the relevant portion of the Fifth Amendment provides as follows: nor shall private property be taken for public use, without just compensation; The finding of the Court in the second *Tillamooks* case was therefore that aboriginal title did not constitute private property compensable under the Amendment); additionally the *Shoshone* and *Klamath* (299 US 476; 304 US 119) decisions not requiring payment of claims for expropriation of lands reserved for Indians by treaty were quickly eroded shortly after issuance, despite not being explicitly overruled by the Supreme Court.

[42] Report of the Royal Commission on Aboriginal Peoples, *Looking forward*, *Looking Back* (1996) <http://www.ainc-inac.gc.ca/ch/rcap/rpt/lk_e.html> at January 5th 2004.

[43] See. *Connolly v. Woolrich* 17 RJRQ 75 (1867)

[44] *Id.* at 84

[45] See. *St. Catharines' Milling and Lumber Company v. the Queen*, 14 App. Cas. 46 (1888)

stated by Lord Watson, represented a "mere burden" on the substantial and paramount estate of the Crown.[46] However, the *Proclamation* at its inception in 1763 only covered land in Canada that had already been settled such as Ontario, where *St. Catharine's Milling* was based. In territory not covered by the *Proclamation* Indian rights to land were not recognized and a unilateral assertion by the Crown to ownership vested title. Litigation challenging this assertion over native land rights in the original unsettled territories did not occur until the twentieth century (discussed in the modern precedent section of this article).

C. New Zealand

Common law native title first developed in New Zealand in the case of *The Queen v. Symonds* (1847), where the Privy Council recognized a customary aboriginal title by the Maori to their lands that could only be extinguished by the Crown and only with the consent of the owners.[47] The judgment also verified the decision from the Land Claims Ordinance that formalized the 1840 Treaty of Waitangi where the Maori ceded their sovereignty to the Crown in return for recognition of the "full exclusive and undisturbed possession of their Land and Estates, Forests, Fisheries and other properties which they may collectively or individually posses so long as it is their wish and desire to retain the same in their possession."[48] The Land Claims Ordinance provided that only the Crown could preempt the right of the aboriginal inhabitants to occupation of their rightful lands.

Further developments in statutory law, such as the Native Rights Act and the first Native Land Act, were followed by the common law decisions in *Wi Parata v. Bishop of Wellington*[49] and *Nireaha Tamaki v. Baker.*[50] The Privy council in *Wi Parata* (1901) declared the Treaty of Waitangi to be invalid because the Maori had no civilized system of law and thus was not a civilized state with whom a treaty could be entered into.[51] This ruling was overturned twenty-four years later in *Nireaha* (1925) where the Privy Council criticized the prior ruling and recognized that customary law of the Maoris could indeed be used as consideration by New Zealand courts for determining property rights.[52] The Council rejected the theory that all land in New Zealand became vested in the Crown upon acquisition of sovereignty. However, the courts continued to recognize the earlier precedent from *Wi Parata* and in subsequent cases allowed Crown prerogative to disregard native title.[53] The obligations of the Crown under the Treaty of

[46] *Id.* at 58
[47] *The Queen v. Symonds*, NC PCC 387 (1847)
[48] Benjamin A. Kahn, The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience, 35 Stan. J. Int'l L. 49, 62 (1999).
[49] *Wi Parata v. Bishop of Wellington* 1877 3 NZ Jur. (NS) 72
[50] *Nireaha v. Baker* 1901 A.C. 561 (NZPCC 371)
[51] See. *Wi Parata*
[52] See. *Nireaha* at 577
[53] See. *In re the Ninety-Mile Beach* 1963 N.Z.L.R. 461 at p. 468

Waitangi, as asserted by *Wi Parata*, were strictly moral, not legal and to interpret otherwise would be to "question the sovereign power."[54]

D. Australia

Australian colonization occurred largely under the *terra nullius* doctrine. When the Crown acquired sovereignty over Australia, all vacant land became Crown territory. Because aboriginal occupation and use of land was not recognized under the *terra nullius* doctrine, the virtual entirety of Australia vested in the Crown. The application of the *terra nullius* doctrine was influenced by prior common law cases that held that lands of aboriginal people were "without laws", or "primitive in their social organization."[55] The Privy Council decision *Cooper v. Stuart* (1889) affirmed this expanded view of *terra nullius* as applied to Australia's colonization.[56] The colony of New South Wales was acquired by based on *terra nullius* because the inhabitants had no "settled law" or "established system of law" at the time of annexation. The distinction of when a system of rules becomes "established" or "settled law" was not discussed, but merely assumed in regards to the aboriginal inhabitants of New South Wales. In an earlier decision, dicta considered that New South Wales must be uninhabited because the aboriginal people of the area lived without habitation and without laws.[57]

Australian native common law has ultimately played a large role in the development of modern precedent, but surprisingly, Australian courts did not first litigate the issue until 1968 in the *Milirrpum v. Nabalco* case.[58] The development of common law in *Milirrpum* and subsequent cases, including *Mabo v. Queensland* will be discussed in subsequent sections of this paper.

E. India

Privy Council decisions from native land disputes in India established the Recognition Doctrine – extinguishing native title in favor of automatic Crown title, unless there was explicit recognition by the Crown of these pre-existing rights. These decisions were largely contradicted by the series of African Privy Council decisions decades later (see below). The earlier decision of *Secretary of State of India v. Kamachee Voye Sahaba* (1859) accorded the Crown title to private property of the Raj of Tanjore seized by the East Indian Company while acting on the Crown's behalf.[59] The Council ruled that courts have no jurisdiction to hear such cases because they represent acts of state and that there was a clear intention to extinguish pre-existing rights to the private property at

[54] See. *Wi Parata*
[55] *Mabo v. Queensland*, (*No.2*) 175 CLR 1, 39 (1992) (citing the definition of *terra nullius* as discussed in the *Advisory Opinion on Western Sahara*, International Court of Justice (1975))
[56] *Cooper v. Stuart* 14 App. Cas. 286 (1889)
[57] *Macdonald v. Levy*, 1 Legge 39, at 45 (1833)
[58] *Milirrpum v. Nabalco Pty. Ltd.* 17 FLR 141 (1971)
[59] *Secretary of State of India v. Kamachee Voye Sahaba* (1859) 13 Moo PC 22

issue.[60] No precedent was created for extinguishment of pre-existing property rights in general, only those that were actually seized.

In *Secretary of State for India v. Bai Rajbai* property rights through inheritance in a village ceded to the Crown decades earlier were denied because ante-cession rights were not continuous.[61] The Council ruled that, "the only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them."[62]

Vajesingji Jorawarsinghji v. Sec. Of State of India cited *Kamachee* and *Bai Rajbai* as support for its holding that pre-existing property rights in general can be extinguished upon acquisition of Crown sovereignty.[63] Instead, specific acts of acknowledgment by the Crown after its acquisition of sovereignty were required for pre-existing customary property rights to remain in existence. According to Lord Dunnedin: "Any inhabitant of the territory can make good in the Municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing."[64] In order to reverse the vesting in the Crown of all private lands, an individual would have to demonstrate an intention of the Crown to recognize their pre-existing rights.

F. Africa

Leading scholars from Africa, including H.W.O. Okoth-Ogendo – the late Professor of Public Law at the University of Nairobi – have illustrated a number of "juridical fallacies" perpetrated in Africa by colonial-era courts. These fallacies are based on the same common law doctrines applied throughout colonies to justify the expropriation of land.[65]

According to Ogendo, the first fallacy contributing to the dispossession of indigenous peoples in the African context was *denial of proprietary character* - the assertion that the way indigenous communities occupied and used land did not constitute a system of property worthy of recognition under state law – similar to *terra nullius* and discovery doctrines. Indeed it was often asserted that indigenous people themselves

[60] *Id.*
[61] *Secretary of State for India v. Bai Rajbai,* LR 42 IA 229 (1915)
[62] *Id.* at 237
[63] *Vajesingji Jorawarsinghji v. Sec. Of State of India*, LR 51 IA 357 (1924)
[64] *Id.* at 361
[65] Okoth-Ogendo, H., Expert Opinion submitted to the African Commission on Human and Peoples' Rights in support of the Endorois case, September 2006, on file with author. See also Okoth-Ogendo. H, Tenants of the Crown: The Evolution of Agrarian Law and Policy in Kenya, ACTS PRESS, Nairobi, 1991. Okoth-Ogendo. H, " Legislative Approaches to customary tenure and tenure reform in East Africa", in Evolving Land Rights, Policy and Tenure in Africa, edited by C. Toulmin and J. Quan. London: International Institute of Environment and Development, 2000.

"acknowledged" that land was not held as property i.e. as an asset exclusive to identifiable individuals or groups. The basis of this assertion was the notion that property rights are constituted only when individuals or other "jural" persons exercise jurisdiction, coupled with exclusive control over corporeal or incorporeal phenomena. In this view property exists only if exclusive rights of use, abuse and disposition are vested in individuals. Since communities used and controlled land in common, indigenous land relations therefore did not confer property rights, but mere privileges.

Ogendo pointed to this as the reasoning used to justify indiscriminate declaration of land as vacant and ownerless not only by British colonial authorities, but also by their French, German, Belgian and Dutch counterparts. It also supported the drive for the imposition of foreign property law as a measure to fill the perceived gap in this vital legal regime. In Kenya, that reasoning led to the importation of a regime of property law designed primarily for the acquisition and administration of private rights to land.

The second juridical fallacy outlined by Ogendo was that radical (ultimate) title to land - whether occupied or unoccupied - could only vest in the colonial sovereign. Before 1939, colonial authorities had promulgated laws declaring all land in Kenya the property of the British sovereign - a combination of the *terra nullius* doctrine and Royal Proclamation used with effect in other British colonies.[66] New colonial laws promulgated in 1939[67] created two separate domains. The first, known as "crown land," referred to radical title that remained vested in the colonial sovereign. "Native areas", on the other hand, constituted radical title that was now vested in a Native Lands Trust Board sitting in London. The board in question was in charge of administering "occupation, use, control, inheritance, succession and disposal of any land situated in the native lands".[68]

"Native areas" boundaries were detailed across Kenya and entrenched in Chapter IX of the (now repealed) Kenyan Constitution. County Councils replaced the Native Lands Trust Board.[69] In other words, at independence, radical title to the domain of "native areas" (referred to as "trust lands" upon independence) was shifted to the relevant

[66] See Crown Lands Ordinance 1915 and the High Court decision in *Isaka Wainaina wa Gathomo and Anor v. Murito wa Indangara and Anor* and *Attorney-General (1922-23) 9(2) KLR 102.* See also *Ole Njogo and Others v Attorney General of the East African Protectorate* (1914) 5 EALR – 70. For an in-depth analysis of the case, see Hughes, Lotte. *Moving the Maasai: A Colonial Misadventure*. St Antony's Series. Basingstoke, UK: Palgrave Macmillan, (2006). The case is also discussed in detail in Gathii, James. *Imperialism, Colonialism and International Law*. Bepress Legal Series, Albany School of Law, (2006).

[67] See Kenya Highlands Order-in-Council, and Kenya Native Areas Order-in-Council

[68] Kenya Colony, Crown Land Ordinance, 1915, Section 25.

[69] Section 115(1) of the Constitution (repealed August 2010) of Kenya provides: "All Trust land shall vest in the County Council within whose area of jurisdiction it is situated." Section 115 (2) also provides: "Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual." Sections 114-116 of the Constitution (again repealed as of August 2010) were regulated by the Trust Land Act, Cap 288 of 1963.

councils in whose areas of jurisdiction each unit was situated.[70] That is how these entities became trustees of the land at issue in land claim cases across Kenya.

Although the vesting of radical title in the county councils (and the Native Lands Trust Board before them) was supposed to "protect" this domain it was always understood that the State or its agencies could "raid" land within it without recourse to the stringent procedures of compulsory acquisition applicable to private land.[71] Ogendo explained that the effect of "setting apart" land, under the constitutional provisions in force until 2010, was to extinguish "any rights, interests or other benefits in respect of that land that (are) previously vested in a tribe, group, family or individual under African customary law".[72]

A further fallacy, according to Ogendo, laid in the assumption that indigenous social and governance institutions were incapable of or unsuitable as agents for the allocation and management of and resolution of disputes relating to land. Consequently, these

[70] County Councils and/or the President were given power under Sections 117 and 118 of the Constitution read together with sections 7 – 13 of the Trust Land Act (cap. 288) to "set apart" such land for purposes not always in the interest of communities occupying it. Under the new constitution, land "lawfully held as trust land" – with the exception of game reserves, parks or sanctuaries – is classified hereafter as community land.

[71] *Supra* note 66 (Section 75 of the Constitution of Kenya (repealed) provided protection from compulsory possession or acquisition unless such possession or acquisition complied with several conditions, including that of public purpose and propotionality of that purpose vis-à-vis private hardship ensuing from the expropriation. These provisions, alongside those under the Land Acquisition Act (Cap 295), which prescribe a comprehensive procedure for compulsory acquisition, sharply contrast with the Trust Land Act's far weaker protections – particularly with regard to communities. In *The Endorois' Legal Case and Its Impacts on State and Corporate Conduct in Africa* (2010), Korir Singoei draws particular attention to Section 7(1) of the Trust Land Act, which establishes the procedure for 'setting aside' of trust land in the following terms :

> Where written notice is given to a council, under subsection (1) of section 118 of the Constitution, that an area of Trust land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette. (2) Before publishing a notice under subsection (1) of this section, the council may require the Government, within a specified reasonable time – (a) to demarcate the boundaries of the land, and for this purpose to erect or plant, or to remove, such boundary marks as the council may direct; and (b) to clear any boundary or other line which it may be necessary to clear for the purpose of demarcating the land; and, if the land is not demarcated within the time fixed by the council, or if the person or body on whose application the land is to be set apart so requests, the council may carry out all work necessary for the demarcation of the land and require the applicant to pay the cost of the demarcation, (3) A notice under subsection (1) of this section shall specify the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and shall also specify a date before which applications for compensation are to be made to the District Commissioner. (4) Where the whole of the compensation awarded under section 9 of this Act to persons who have applied before the date specified in the notice given under subsection (1) of this section has been deposited in accordance with section 9 of this Act, the council shall make and publish in the Gazette a notice setting the land apart.

[72] Section 117(2) of the Constitution (repealed August 23, 2010).

institutions were not only suppressed, but were often by-passed or replaced in the ordinary process of land administration. Instead, new and parallel state institutions exercising a wide range of powers over indigenous land and associated resources were promulgated without consultation with communities or their presumed "trustees". The result was that indigenous land governance institutions very quickly atrophied making it even easier for the state to raid indigenous land and associated recourses.

Native title jurisprudence from the colonies further illustrates the operation of these fallacies to construct property regimes favorable to the colonizers. Early decisions from the Privy Council out of the British colonies of Southern Rhodesia (present day Zimbabwe) and Southern Nigeria strengthened precedent in support of the fallacies through the doctrines of conquest and continuity. The Council in *Re Southern Rhodesia* (1919) examined the native land rights and customs that existed under the previous African ruler before being overthrown by the British South African Company, upon order of the Queen, in establishing the colony of Southern Rhodesia.[73] Ultimately, Sumner found that title had vested in the Crown by conquest - the sovereignty of the previous ruler had already been recognized by the Crown, thus the subsequent conquest vested title to land in the Crown. *Southern Rhodesia* recognized continuity of native land rights from the previous ruler, but vested title in the Crown after conquest due to legislative and other acts of state.

Amodu Tijani v. Secretary, Southern Nigeria (1921) accorded positive recognition of some native land rights even after conquest by the Crown.[74] Plaintiffs sought compensation for expropriation of land by the Crown in the colony of Southern Nigeria (present-day Nigeria). The Council determined that while the Crown possessed ultimate title to the land, the private rights affected had to be analyzed under the customary law of the inhabitants. Compensation was awarded for the land and the Council recognized that a change in sovereignty alone cannot disturb rights of private owners. [75] The decision also supported the assertion that an explicit act of state recognizing native rights is not required for continuity of rights.[76]

Bakare Ajakaiye v. Lieutenant-Governor, Southern Provinces further supported the proposition that an acquisition of Crown sovereignty does not destroy all pre-existing

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[73] *Re Southern Rhodesia* [1919] AC 211

[74] *Amodu Tijani v. Secretary, Southern Nigeria*, AC 211 (1919)

[75] Further support for compensation for expropriation of private native lands was provided by, A*deyinka Oyekan v. Musendiku Adele*(122) (1957) 1 WLR 876 (Lord Denning stated at p 788, that:"In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law".) as cited by Brennan J, in *Mabo* at 59

[76] See McNeil at 172 n45

private property rights; and that a Crown declaration recognizing pre-existing property rights is not required.[77] However, *Re Southern Rhodesia*, helped establish the judicial fallacy of denial of proprietary character by distinguishing recognition of native title based on the social sophistication and organization of their societies.[78] Those on a lower societal scale were accorded less deference to native property customs when determining title.[79]

The historical context underpinning the early treatment of native title by colonial authorities is one rooted in racist and paternalistic statutes, which culminated in the suppression of indigenous land governance institutions. Both the assertion that the way of life in which indigenous peoples occupied and used their land did not constitute a system of property worthy of recognition under state law, as well as the related denial of their juridical personality, served to reinforce a legal framework that subjected native title to the Crown's goodwill and discretion. The abuse of this discretion, coupled with the lack of viable remedies in response to extinguishment of native title during the colonial era, left a legacy of dispossession that remains difficult to supercede in modern times. The following section highlights legal developments that have increasingly served to bridge the important normative gaps of protection required for the full and effective realization of indigenous land rights.

IV. MODERN NATIVE TITLE DEVELOPMENT

Common law native title has evolved dramatically over the past two decades across the separate judicial systems of many former colonies. National judicial systems have largely forged their own precedent, often rejecting doctrines established by the Privy Council that had, for decades, shaped the treatment of indigenous groups by sovereign governments. While acting independently, each court has looked to other common law jurisdictions for direction on the issue of contemporary native title rights. Courts have analyzed and denounced the fallacies of past decisions that led to acquisition of Crown title in former British colonies.

International legal systems such as the Inter-American Court of Human Rights (IACHR) and African Commission on Human and Peoples Rights (ACHPR) have also taken up the issue of native title through progressive interpretation of regional human rights frameworks that provide, *inter alia* the right to property, the right to development and the right to free, prior, informed consent. The recent adoption of the UN Declaration on the Rights of Indigenous Peoples has pushed states to re-consider old unjust laws

[77] *Bakare Ajakaiye v. Lieutenant-Governor, Southern Provinces*, AC 679 (1929)
[78] *Id.* at 234
[79] *Id.*

further.[80] The result has been a cross-cultural, international discussion and consensus on the property rights that should be naturally accorded to indigenous people.

Much of the advancement in common law native title has been furthered by the writing of native title scholars that have questioned the interpretations of past courts and reanalyzed the application of property and eminent domain doctrines to colonization.[81] Schools of native title theory now reject the past imposition of British and European property ideologies on radically different societies.

The next section details the chronological development of this consensus in both common law jurisprudence and international human rights bodies.

A. Common Law Jurisprudence

By the end of the nineteenth century, the land-use regimes firmly in place in Australia, Canada, New Zealand, and the United States were heavily dependent on the concept of defeasible private property and its resource estate, and hostile to any communal arrangements that might complicate or impede market-based transfers of title. Nevertheless, a few high-profile cases brought about a seismic shift in legal and public opinion and the need to consider local and indigenous norms when determining land ownership.

i. *Milirrpum v. Nabalco*

A good place to start when analyzing the development of a modern common law native title precedent is with the Australian case of *Milirrpum v. Nabalco*.[82] Although dismissed for lack of proof of title, the Court proceeded to analyze the rights of aborigines in *obiter dicta*. As discussed earlier, Australian colonization was predicated on an expanded version of the *terra nullius* doctrine that regarded inhabited land as being devoid of ownership by virtue of being occupied by people with "unsettled laws." The Australian High Court in 1971 in *Milirrpum* analyzed the expanded doctrine and its use as justification for Crown title. Considering the lack of Australian precedent, the Court looked at decisions from other common law countries, including the competing Privy Council precedents from the African and Indian cases, the New Zealand case of *Wi Parata* and *Symonds*, and the more recent US case of *Tee-Hit-Ton*. The Court

[80] Also resulting in some new legislaton that protects or redefines state relations with indigenous peoples, see. Australian Native Title Act – 1993; Malaysia Aboriginal Peoples Act 1939 (amended in 1974); Indigenous Peoples' Rights Act (IPRA) of the Philippines, 29 October 1997 (allowing for the titling of indigenous peoples' ancestral domains as inalienable communal properties)

[81] E.g., McNeil, supra note 18 (purports that common law aboriginal title exists and can be used as a basis for indigenous land rights in any territory which the Crown acquired by settlement);
Tehan, Maureen, "A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act" 27 *Melbourne University Law Review*, 523 (August 2003); Bryan, Bradley, "Property as Ontology: On Aboriginal and English Understandings of Ownership", 13 *Canadian Journal of Law and Jurisprudence.* 3 (January 2000).

[82] *Milirrpum v Nabalco,* (1971) 17 FLR 141 (alson known as the "Gove Land Rights Case")

determined that the expansion of the *terra nullius* doctrine did not accord with historical fact. Justice Blackburn stated that aboriginal peoples actually had an elaborate, but subtle system of laws that "was remarkably free from the vagaries of personal whim or influence."[83] Aboriginal occupation of land coincided more with a spiritual connection and a duty to care for the land, rather than a European-based concept of land domination. The *Milirrpum* decision began the long process of eroding the foundation of years of common law precedent in support of the *terra nullius* doctrine that would eventually eliminate the justification for Crown and settler acquisition of land title in Australia. Despite the advancements in dicta regarding *terra nullius*, *Milirrpum* ultimately represented a setback in common law native title. Justice Blackburn definitively denied that the common law might recognize title based on rights of people other than individuals. In accordance, he also held that any future land claims could only be recognized by development of corresponding legislature.

ii. *Calder* and the Canadian Supreme Court

Calder v. A-G of British Columbia[84] (1973) followed shortly after *Milirrpum* in the Supreme Court of Canada. The Court in *Calder* was confronted with the Canadian precedent established almost one hundred years earlier in *St. Catharine's Milling* (1887) that indigenous people had no common law rights to land and thus in areas outside of the *Royal Proclamation,* the Crown acquired title to land by unilateral declaration. The Supreme Court departed from precedent and the approach of the trial and appeals courts. Citing Lord Haldane in *Amodu Tijani* the Court, per Hall J, recognized that the court should consider concepts of property more broadly, beyond the classic English common law definition, to ensure there is no discrimination against indigenous rights.[85] In doing so, the Court recognized, for the first time, the continuous existence of common law native title. The judgments in *Calder* emphasized the fact that indigenous possession of the land could form the basis for common law aboriginal title.[86] The Court further took issue with Blackburn J's interpretation in *Milirrpum* of the *Calder* Court of Appeals case. Blackburn read the case to support the proposition that while common law native title theoretically exists, the title is extinguished upon conquest or discovery unless explicitly granted or recognized by the Crown. The *Calder* court took issue with this opinion and cites *Johnson v. M'Intosh* as support that the burden lies with the Crown to show that each common law native title that pre-existed conquest or discovery was explicitly extinguished.[87] Per Judson J:

> [t]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary rights". What they are asserting in this

[83] *Id.* at 167
[84] *Calder v. A-G of British Columbia* [1973] SCR 313
[85] *Id.* at 112
[86] The court decided in the present case, however, that title had been extinguished by the Crown.
[87] *Id* at p. 57

action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished."[88]

Six years after *Calder* and eight after *Milirrpum* the High Court of Australia decided a case brought by the Wiradjuri aboriginal nation seeking recognition as a sovereign entity and sovereign title over its land.[89] Building off the dicta in *Milirrpum*, the court in *Coe* stopped short of creating a binding precedent that Australian law recognizes pre-existing aboriginal rights to land. The court divided on the issue, but also expressed reservations over deciding on the merits of acquisition of Crown sovereignty.

The Canadian common law of native title further developed in *Baker Lake v. Minister of Indian Affairs* (1980) where Mahoney J, for the Trial Division of the Federal Court of Canada, recognized the existence of title separate from the *Royal Proclamation.*[90] Mahoney detailed four requirements for establishing a pre-existing native title in territory whether ceded, conquered or settled:

1. That they and their ancestor were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title
3. That the occupation was to the exclusion of other organized societies
4. That the occupation was an established fact at the time sovereignty was asserted by England.[91]

The Plaintiff, was a nomadic, hunting aboriginal tribe, but were able to prove their traditional, exclusive use of the land at issue since time immemorial and therefore assert common law title. Mahoney furthered the biased notion that the level of society sophistication determines whether indigenous customary title is recognized, by requiring an "organized society" in his four point test. [92] However, Mahoney qualified the definition of an organized society to be one that functions according to the needs of its members.[93] Thus an indigenous tribe like the Inuit in the Northwestern Territories would (and need) not function like an English society because the needs of its member do not necessitate such operation. Mahoney cites *Calder* and *Southern Rhodesia* as support for a pluralistic approach to the definition of society sophistication. To determine that a society is organized according to the needs of its members is to recognize sovereignty and, as provided in *Amodu Tijani,* to give effect to the rights enjoyed under the previous regime.[94] Mahoney, however, ultimately concluded that the indigenous tribe did not have a proprietary interest in their land despite meeting the qualifications for title. The Crown Charter grant to the Hudson Bay Company, he ruled, extinguished aboriginal title because it came directly in to conflict with private land

[88] *Id.* (Judson [26] (quoting the definition of indigenous property rights from *St. Catherine's Milling)*
[89] *Coe v. The Commonwealth* (1979) 53 ALJR 403
[90] *Baker Lake v. Minister of Indian Affairs* (1980) 1 FC 518
[91] *Id.* at 557-8
[92] E.g., *Southern Rhodesia ; Milliprum*
[93] *Supra* note 90 at 559
[94] *Id.* (citing *Amodu Tijani* ch. 6 6nn. 44-5)

rights that could not be reconciled. Thus, while seemingly recognizing the existence of native title, when applied in practice, the Canadian common law, still would not accord tangible rights to native groups.

The Canadian Supreme Court took up the issue in earnest in 1984 in *Guerin v The Queen*. In *Guerin* the court held the Crown in right of Canada liable for monetary damages to the Musqueam Indian tribe for use of reserve land. And used common law native title as the basis for imposing a fiduciary duty, citing *Amodu Tijani* as support for the doctrine of continuity. However, the Court stopped short of recognizing an outright common law basis and still attached native title not to native practices and dependent on local customs but to an obligation taken on by the Crown, in this case attached to the establishment of reserves. Nevertheless, the Court gave tangible effect to the developing common law recognition of native title and set future precedent for adequate compensation for expropriation of traditional native land.

A decade later, in *Van deer Pet*, Chief Justice Lamer recognized the need for reconciling the Crown's sovereignty with the prior occupation of North America by aboriginal peoples. In his view, this required that account be taken of the 'aboriginal perspective while at the same time taking into account the perspective of the common law', noting further that, 'true reconciliation will, equally, place weight on each'.[95] In this light, the doctrine on indigenous title has been acknowledged as a bridge between indigenous and non-indigenous cultures, where common law doctrine coexists alongside recognition of native title.[96] This approach's inherent recognition of indigenous peoples' preexisting customs and claims on ancestral land therefore establishes a clear link between historical and present day injustices that flow from dispossession since the beginning of colonization.[97]

iii. *Mabo v. Queensland*

The famous *Mabo* cases in Australia were an enormous windfall for the recognition of common law native title and represent the single largest development in common law in the past three decades. The repercussions of *Mabo* have been seen throughout other common law countries. The first *Mabo* case was brought to recognize native title in the Torrens Strait Islands off the coast of Queensland. At issue in the High Court's decision was an act by the Queensland Parliament in 1985 that declared that title in the Murray Islands (of which the Torrens Strait Islands are a part of) had vested in the Crown upon annexation in 1879. The court ruled the act violated the Racial Discrimination Act of 1975 by implying that non-recognition of native title was based not on a lack of common law native title doctrine, but on racist ideologies. The court did not decide on the existence and/or binding effect of common law native title, but implied its existence.

[95] Lamer CJ in R v Van der Peet (1996) S.C.R. 507, at 50.
[96] Gilbert, J. *Historical Indigenous Peoples' Land Claims: A Comparative and Interna- tional Approach to the Common Law Doctrine on Indigenous Title*, ICLQ 56 3 (583), 1 July 2007, at 588.
[97] *Id*., at 588.

The case was remanded to the lower courts for determination of private property rights at time of annexation.

When *Mabo* returned to the Australian High Court in 1992 the issue directly centered around recognition of native customs as a basis for determining native land rights and title under common law. The Court made a sweeping decision that recognized native title in Australia as a common law doctrine and overruled past decisions such as *Milirrpum* and the *terra nullius* justification for Crown colonization in Australia. The Court made three major declarations:

1. Australia was not *terra nullius* when the British acquired sovereignty in 1788. Rather it was occupied by Aboriginal and Torres Strait Islander people;
2. Aboriginal and Torres Strait Islander people had rights in the land they occupied at the time of annexation by the British Crown;
3. These rights could survive the acquisition of sovereignty by the British Crown in accordance with the *doctrine of continuity*.

The recognition of the *doctrine of continuity* as part of Australian common law was a major development in commonwealth native title recognition, especially in the context of Australia's prior treatment of its aboriginal people. The rejection of the *terra nullius* and the *doctrine of tenures* doctrine had ramifications for other common law countries that rationalized colonization on similar doctrines.

Mabo did allow for extinguishment of native title by the Crown, but established a requirement, echoing that of *Calder*, that there be a "clear and plaint intention to do so".[98] The Court dismissed the power of a general declaration of sovereignty to a territory as being a valid extinguishment of all native title rights: "the view that the rights and interests in land possessed by the inhabitants of a territory when the Crown acquires sovereignty are lost unless the Crown acts to acknowledge those rights is not in accord with the weight of authority." [99]

The Plaintiffs in *Mabo* were granted specific damages and had their land returned to them. However, the issue of compensation for government expropriation and its corresponding terms were not directly dealt with in *Mabo*. There remained afterwards some question as to how the Court would handle compensation cases based on native title and to what the common law in general held. It has been noted by some scholars that *Mabo* made the Commonwealth Constitution the controlling body for extinguishment of native title and that expropriation of lands under the Constitution would require just compensation to native property holders.[100]

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[98] *Mabo* (1992) 107 ALR at 50
[99] *Id.,* at 40
[100] *See* Gordon Brysland, *Rewriting History 2: The Wider Significance of Mabo v. Queensland,* 17 Alternative L.J. 162, 165 (1992)

iv. Post- ***Mabo***

The Native Title Act of 1993 and the establishment of the National Native Title Tribunal advanced Australian native title significantly and allowed for recognition of native title and mediation of claims without going to court. However, the advances of the Act were amended by subsequent administrations and challenged by State legislation. Native title was reaffirmed in the 1996 decision in *Wik v. Queensland* where a conflict between native title and pastoral leases was adjudicated.[101] The Court determined that pastoral leases were not granted under common law and therefore did not extinguish any prior-existing native title. Leases instead are granted by statute, and as ruled in *Mabo*, non-specific legislation cannot extinguish common law native title. However, the Court held that native title must "yield" to the leases, meaning there is no right to exclusive possession while the lease is active, but that title will reassert itself upon conclusion.

Additional development in common law native title occurred in other countries around the time of the landmark decisions in *Mabo* and quite often looked to the Australian High Court's decision for support. In Canada, the Supreme Court decided *R. v. Sparrow* in 1990, ruling that limitations of native rights by the government can only be justified when the objective is "compelling and substantial" and the legislation in question is "required to accomplish the needed limitation."[102] An objective of "in the public interest", it ruled, is not sufficient and is impermissibly vague.[103]

The case of *Delgamuukw* (1997) is the most recent authoritative opinion on native title out of Canada.[104] The Court reaffirmed the validity of Aboriginal title and refined the test of native title to three prongs:

1. The Aboriginal population making the claim must have occupied the land in question at the time of the Crown's assertion of sovereignty over the territory
2. If present occupation of the land is provided as evidence of occupation at the time of the Crown's assertion of sovereignty, the Aboriginal population must also show a continuity between the two times of occupation
3. The occupation at the time the Crown asserted sovereignty must have been exclusive.[105]

Additionally, *Delgamuukw* departed from Australian jurisprudence by defining native title as exclusively a communal right.

The Canadian Supreme Court decisions have had a profound effect on negotiation of native land claims both in Canada and across the commonwealth. In 1992 an Inuit land

[101] *Wik v. Queensland* (1996) 141 A.L.R. 129
[102] *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1121
[103] *Id*., at 1113
[104] *See Delgamuukw v. British Columbia* [1997] 3 S.C.R. at 1097
[105] *Id.,* at 1102-1104

claim was granted for one billion dollars, control of two million square kilometers and exclusive mineral rights to sixteen percent of the area.[106]

v. *Sagong* and Malaysia

A series of Malaysian decisions on native title in the late 1990s advanced the discussion on common law native title to fully include all former British colonies and established a modern precedent for common law countries that had been colonized pursuant to doctrines other than *terra nullius* or discovery. The importance of this precedent is significant for its application in former British colonies in Africa, India and Southeast Asia that had similar patterns of colonization and independence.

When the Malay peninsula was colonized, the Torrens land system was introduced and all "unclaimed land" became Crown land. Indigenous people that lived in the "unclaimed land" were not disturbed, but their rights in the land were not recognized when sovereignty was obtained. In 1996 the Johor Bahru High Court adjudicated the case of *Adong bin Kuwau & Ors v Kerajaan Negari Johor & Anor* ('*Adong*').[107] *Adong* was the first case decided in Malaysia where indigenous people (Orang Asli) sued the government for their traditional rights under law.[108] As a result, the Court discussed and relied highly on common law developments in native title from outside Malaysia and looked to cases from *Worcester* to *Mabo* for guidance in determining whether the plaintiffs had any rights.

The *Adong* case involved State controlled forestland that was also the traditional and ancestral forage land of the plaintiff tribes. The State of Johore had entered into an agreement with Singapore to be paid for the use of the land in constructing a dam that would supply water to both Singapore and Johore, but that would destroy the traditional land of the plaintiffs. The court held that the plaintiffs' native title rights were violated by the State's actions and ordered compensation paid based on an estimated value per acre. The court cited a broad common law recognition of native title throughout former British colonies, including those still practicing the Torrens land system where native title is most often granted through native land right statutes. As Malaysia has no special native right statutes, the court relied solely on the analysis of common law native title as the source of a remedy.

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[106] The Nunavut Political Accord of October 30, 1992 laid the groundwork for the creation of Nunavut under the Nunavut Act and was a significant step in the settlement of the Nunavut Land Claims Agreement. The territory was formally created on April 1, 1999. Other important land claims inspired from the Canadian Supreme Court decisions include the Nisga'a Treaty, by which nearly 2,000 square kilometres of land was officially recognized as Nisga'a, and a 300,000 cubic decameter water reservation was also created. The Bear Glacier Provincial Park was also created as a result of this agreement. The land-claim's settlement was the first formal treaty signed by a First Nation in British Columbia since the Douglas Treaties in 1854.

[107] Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors, 1997-1 MLJ 418.

[108] *Id*., at p.1

Common law doctrines that shaped the court's decision were extracted from native cases from around the common law world. The US cases of *Mitchel* and *Worcester* were cited as support that native right of occupancy is as sacred as the European fee-simple. Privy Council decisions of *Amodu Tijani*, *Southern Rhodesia* and *Nireaha Tamaki* were cited as support for the doctrine of continuity and the acknowledgement of *sui generis* native title rights that could be recognized under common law. The court also relied heavily on the holding of the Canadian Supreme Court in *Calder* and *Baker Lake* that granted a native right to title and to continue living on the lands as their forefathers had lived; as well as on the Australian High Court in the *Mabo* cases that native title is given its content by consideration of traditional laws and observance of traditional customs and that native title can cease if observance of the customs cease. *Mabo* also influenced the court's decision that native title is inalienable and that it can be extinguished by the Crown only by explicit acts. The court also looked to the Malaysian Federal Constitution and Aboriginal Peoples Act as support for its decision.

The court argued that while the Malay Sultanates were the controlling body at the time of British colonization, aboriginal rights were recognized within the Sultanates by way of occupation of land. Thus when the British colonized, acquired sovereignty and introduced the Torrens land system, the native title of occupation continued by way of common law recognition and a lack of extinguishment of title by the Crown. The court also tackled the sensitive issue of compensation for expropriation of native land by the State government. It determined that the plaintiffs suffered deprivation in five different ways: (1) deprivation of heritage land; (2) deprivation of freedom of inhabitation or movement under art 9(2); (3) deprivation of produce of the forest; (4) deprivation of future living for himself and his immediate family; and (5) deprivation of future living for his descendants.[109] The court, after careful consideration, granted the plaintiffs compensation equivalent to double that given per acre to the Johore government by Singapore (RM 12,000 per acre).[110]

The High Court of Sabah & Sarawak, which is governed by slightly different laws than Johore and Malaysian peninsula states, held native title to be valid in 2001 in the *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation SDN BHD & Ors*.[111] The Court determined that the customary laws of the Iban people in Sarawak are recognized by common law and that no legislation has been created that extinguishes common law native title, nor is specific legislation needed to validate its existence. Native title in Sarawak therefore survived the ceding of sovereignty to the Crown. The court cited *Adong, Calder* and *Mabo* as dispositive on the issue of common law native title.

Adong and *Nor Anak* represented a seismic shift in treatment of native title in Malaysia up to that point. However, they also bracketed native title in a paternalistic caveat that

[109] *Id.,* at p 10
[110] *Id.*
[111] *Nor Anank Nyawai & Ors v. Borneo Pulp Plantation SDN BHD & Ors,* [2001] 2 CLJ 769

it is a right "to live on their land as their forefathers had done" and that once the traditional customs of the group cease to be observed "the foundation of native title expires and the Crown becomes full beneficial title."[112] This misguided assertion of a need for cultural continuity was quickly rejected by the High Court in *Sagong,* relying in part on *Delgamuukw,* which was decided in Canada after *Adong.*[113]

On April 2002, the High Court of Malaysia in *Sagong Tasi &Ors v. Kerajaan Negeri Selangor & Ors*, building upon decades of evolving commonwealth jurisprudence established the strongest precedent supporting native title to date.[114] In *Sagong* the State expropriated land from the Temuan aboriginal area to construct a highway to the Kuala Lumpur International Airport. The State compensated for the loss of the Temuan's homes and crops, but refused to recognize a proprietary interest in the land and to compensate for its property value. The court disagreed with the State and adopted the stance of the previous Malaysian rulings that native title exists under common law. However, their decision advanced the definition of native title further by according a proprietary interest in native title. The court held that common law did not only allow occupation of land and the right to conduct certain activities, but also accorded rights to the land itself. The court relied highly on the ruling in the Canadian case of *Delagamuukw* that also granted an interest in the land itself: "Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights" and "aboriginal title, however, is a right to the land itself."[115] The court also rejected the claim that when the Sultanate was established in 1766 and claimed all lands belonged to the State, indigenous rights to land were extinguished. The court relied on *Mabo* and stated that "if now the aboriginal people are to be denied of the recognition of their proprietary interest in their customary and ancestral lands it would be tantamount to taking a step backward to the situation prevailing in Australia before the last quarter of the twentieth century".[116]

In May 2010 the Malaysian Highway Authority withdrew its appeal before the Federal Court, leaving intact the historic judgment in favor of the Temuan.[117]

B. International Human Rights Jurisprudence

The international human rights framework has proven to be instrumental to the advancement of indigenous rights. The 2007 adoption of the UN Declaration on the Rights of Indigenous Peoples represented the culmination of lengthy years of

[112] *Adong* at p. 5
[113] *Infra* note 116
[114] *Sagong Tasi &Ors v. Kerajaan Negeri Selangor & Ors*, [2002] 2 CLJ 543
[115] *Id.* at 569 (quoting *Delgamuukw* at 240)
[116] *Id.* at 569
[117] See. "Media Statement on the Conclusion of the Sagong Tasi Case" available at: http://hornbillunleashed.wordpress.com/2010/05/26/media-statement-on-the-conclusion-of-the-sagong-tasi-case/

negotiations towards the acceptance of indigenous peoples as distinct rights holders under international law.[118] Thirty-nine Articles of the Declaration set out - in more precise language than in any previous global document - indigenous peoples' rights on many specific issues including the protection of ancestral land.[119] While technically non-binding, the general acceptance of the principles set out in the Declaration has been recognized by key actors as helping to clarify the emergence of customary international law.[120]

At the UN Treaty Body level, the International Covenant on Civil and Political Rights (ICCPR) does not enshrine an express provision on indigenous rights. Notwithstanding this, a wealth of case law on indigenous rights has been generated under the Article 27 obligation of states to establish fair processes for recognition of customary land tenure systems.[121] In addition to land rights, these cases also touch on public participation, representation and community rights. Similarly, the UN Committee on the Elimination of Racial Discrimination has increasingly and rapidly established strong indigenous land rights protections by interpreting the right to freedom of discrimination as requiring equal protection of indigenous land systems.[122] The use of the UN Declaration on the Rights of Indigenous Peoples, based on the provisions of Article 42 of the same, provides scope for yet more robust jurisprudence on these matters.[123]

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[118] See. UN Declaratiaon on the Rights of Indigenous Peoples, available at: < http://www.un.org/esa/socdev/unpfii/en/declaration.html > (Australia, Canada, New Zealand and the United States voted against the Declaration)

[119] Articles 8, 10, 25-30 and 32. Add bit about whatever rights set out in ILO 169 – first, the Convention severely undermined by caveat set out in Art 1(3), and more importantly, the Convention remains largely irrelevant as limited to 19 signatories.

[120] United Nations, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Rodolfo Stavenhagen), UN Doc A/HRC/4/32 (2007), para 79,. daccess-ods.un.org/TMP/3658674.html

[121] "Article 27 States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process" [available at: http://www.un.org/esa/socdev/unpfii/en/drip.html]; See eg *Lubicon Lake Band v Canada*, HRC Communication No 167/1984 (26 March 1990); *Länsman v Finland*, HRC Communication No 511/1992 (14 October 1993); and *Apirana Mahuika v New Zealand*, HRC Communication No 547/1993 (27 October 2000).

[122] For examples, see Committee on the Elimination of Racial Discrimination, Decision 1(68) United States of America, 11 April 2006, CERD/C/USA/DEC/1; Committee on the Elimination of Racial Discrimination, Decision 1(67) Suriname, 18 August 2005, CERD/C/Dec/Sur/2; and Committee on the Elimination of Racial Discrimination, Decision 1(66) New Zealand Foreshore and Seabed Act 2004, 11 March 2005, CERD/C/66/NZL/Dec.1.

[123] Article 42 of the UN Declaration on the Rights of Indigenous Peoples requires that '(t)he United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and states shall promote, respect for and full application of the provisions of this Declaration'. One can therefore infer from this provision that treaty bodies, and any other UN judicial body, should produce decisions consistent with the Declaration.

As significant as normative developments have been at the international level, the most significant advances in relation to the protection of native title arguably stem from jurisprudence emanating from the Inter-American and African regional human rights systems.

i. Inter-American Court of Human Rights and *Awas-Tingni*

While a number of cases relating to the protection of indigenous peoples had been litigated before the UN Human Rights Committee through the 1990s, it was not until the year 2000 that the first legally binding decision by an international tribunal upheld the collective land and resource rights of indigenous peoples. The case in question, which was heard by the Inter-American Court of Human Rights (IACHR), related to the violated property rights of the Awas Tingni Community from the Atlantic Coast region of Nicaragua. At issue was the Government's granting of logging concessions to a foreign company within the Community's traditional lands, and by doing so, failing to adequately recognize or protect the Community's customary land tenure.[124]

While Nicaragua's constitution and laws were progressive in recognizing the rights of indigenous peoples to the lands they traditionally used and occupied, the Court found that the Government's inability and/or unwillingness to ensure that such protection was both available and effective in practice raised important violations.[125] Specifically, the Court held that in order to render the rights in question effective, the authorities were required to "carry out the delimitation, demarcation and titling of the corresponding lands (…) with *full participation* by the community and taking into account its customary laws, values, customs and mores".[126] In doing so, the Court unequivocally rejected narrow state-defined criteria that did not correspond to such customs. It equally dismissed the age-old assumption and common law principle that sovereign states enjoyed unbridled authority and discretion over land not yet official titled to private or other interests. From this point forward, the Court thus affirmed that the right to property – as enshrined in international human rights instruments – had "autonomous meaning that cannot be limited by the meaning attributed to them by domestic law."[127]

In the absence of official title to ancestral land, the Court further stressed that *possession* of land should suffice for indigenous communities lacking formal title to

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[124] For more discussion see Anaya, James and Williams, Robert A, "The Proetction of Indigenous People's Righs over Lands and Natural Resources Under the Inter-American Human Rights System", *14 Harvard Human Rights Journal,* 33-86, Spring 2001. See also *Gaining Legal Recognition of Indigenous Land Rights: The Story of the Awas Tingni Case in Nicaragua*, in Deena Hurwitz et al., eds., Human Rights Advocacy Stories 117 (Foundation Press, 2009).

[125] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Series C No. 79), IACHR (31 August 2001), at 136-139. Cited hereafter as '*Awas Tingni v Nicaragua*'.

[126] *Id.* at 164 and 173(3)-(4), emphasis added.

[127] *Awas Tingni,* above note 123, at 146.

obtain official recognition of that property.[128] This principle was elucidated further in the subsequent case of *The Moiwana Community v Suriname*, where it was established that "the members of the N'djuka people were the legitimate owners of their traditional lands despite not having possession, because they left them as a result of the acts of violence perpetrated against them".[129]

Later, in the course of its deliberations over the case of *Sawhoyamaxa v Paraguay*, the Inter-American Court held that indigenous peoples' traditional possession of their lands had equivalent effects as those of a state-granted full property title. On that basis, traditional possession entitled indigenous people to demand official recognition and registration of property title.[130] Notwithstanding this, the Court equally stressed that "the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, *maintain* property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith".[131] Finally, the Court ruled that indigenous peoples who have unwillingly lost possession of their lands as a result of lawful transfers to innocent third parties are entitled to restitution thereof, or to obtain other lands of equal extension and quality.[132] In reaching these findings, the Court concluded, "possession is not a requisite conditioning the existence of indigenous land restitution rights".[133]

The Court also recognized that possession must be sensitive to customary land and resource tenure patterns. This principle was expressly upheld in the *Awas Tingni* case, in response to the Government's challenge against the Community's ancestral entitlement to land on the basis that the village in which they lived at the time of litigation only dated back to the 1940s.[134] In refuting this challenge, the Court accepted that the Community's movements between their present and former settlements - which always remained within a set geographic area - corresponded to a pattern of land use and occupancy that dated back generations.[135]

The *Awas Tingni* case constituted the first among many subsequent Inter-American Court rulings to confirm the scope of Article 21 as one protecting property rights within a framework of communal property. In line with this broader scope of protection, the Court established in *Saramaka v Paraguay* that "any lack of clarity as to the land tenure system (…) does not present an insurmountable obstacle for the State, which has the

[128] *Id.* at 151.
[129] Case of the *Moiwana Community v Suriname* (Series C No. 124), IACHR (15 June 2005) at 134.
[130] *Moiwana Community v Suriname,* above note 127, at 128.
[131] *Id.* (emphasis added).
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Awas Tingni v Nicaragua*, above note 123, at 140(h) and 164.

duty to consult with the members of the Saramaka people and seek clarification of this issue (…) in order to comply with its obligations under Article 21 of the Convention".[136]

The Court further rejected two additional related arguments submitted by the State as to why it had failed to legally recognize and protect the land-tenure systems of indigenous and tribal communities' – alleged "complexities and sensitivities" of the issues involved and concern that legislation in favor of indigenous and tribal peoples may be perceived as being discriminatory towards the rest of the population.

Regarding the first issue, the Court rejected the possibility that the State abstain from complying with its obligations under the American Convention merely because of the alleged difficulty to do so. While acknowledging the State's concern over the complexity of the issues involved, the Court nevertheless underscored the State's duty "to recognize the right to property of members of the Saramaka people, within the framework of a communal property system, and *establish the mechanisms necessary* to give domestic legal effect to such right recognized in the Convention".[137]

The Court subsequently found the State's argument 'that it would be discriminatory to pass legislation that recognizes communal forms of land ownership' to also be without merit.[138] In reaching this conclusion, the Court drew on the well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. Legislation that recognizes said differences is therefore not necessarily discriminatory.[139] On this basis, the Court reiterated its long-held view that, in the context of members of indigenous and tribal

[136] Case of *Saramaka People v Suriname* (Series C No. 152), IACHR (28 November 2007) at 101. This obligation was read in conjunction with Article 2 of the American Convention, which requires State Parties "to adopt, in accordance with their constitutional processes and the provisions of (the) Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms (under the Convention) ".

[137] *Saramaka People v Suriname,* above note 134, at 102, emphasis added.

[138] *Id.* at 103

[139] See, for example, *Connors v. The United Kingdom*, Application No. 66746/01, 27 May 2004,, at 84, declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law). See also Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10, rev. 1, 1997, stating that "within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions"). See also U.N. International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.4 (stating that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination"), and UN CERD, *General Recommendation No. 23, Rights of indigenous peoples*, at 4, calling upon States to take certain measures in order to recognize and ensure the rights of indigenous peoples.

peoples, special measures are necessary in order to ensure their survival in accordance with their traditions and customs.[140]

In the face of such arguments, the Court has systematically affirmed that the right to property – as enshrined in international human rights instruments – has "autonomous meaning that cannot be limited by the meaning attributed to them by domestic law."[141] Special measures were thus recognized as necessary for indigenous peoples' physical and cultural survival – a survival that is inextricably linked to their special relationship with their ancestral territories.[142]

ii. The African Commission on Human and Peoples' Rights and *Endorois*

At the Pan-African level, litigation of indigenous land rights has been complicated by several factors. Chief among these was the failure, until very recently, to recognize the existence of indigenous peoples in the African context. In hand with this challenge came the lack of legal capacity for indigenous peoples to exercise rights over title at the domestic level or beyond. In a historic turn of events, the African Union adopted the ruling of *Centre for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya* in February 2010 – the first indigenous land rights claim to ever succeed before the African Commission on Human and Peoples' Rights (ACHPR).[143]

The ruling marked the culmination of 40 years of struggle led by the Endorois community, which in 1973 was dispossessed of the ancestral land it had occupied since time immemorial. Lake Bogoria, located in the heart of Kenya's Rift Valley, had become demarcated for the purposes of a wildlife reserve. The failure to compensate the Endorois with adequate grazing land to sustain their livestock, or to subsequently involve them in the management and benefit-sharing of the reserve proved to have a devastating economic impact on the community. In addition to the economic hardships endured as a result of the forced eviction, the Endorois' severed ties with their ancestral land posed serious threat to their socio-cultural and spiritual survival as a people.

The *Endorois* case is unique and unprecedented in its recognition of indigenous peoples' collective rights over ancestral land and its restitution in the African context. For the first time since the adoption of the African Charter thirty years ago, the African Commission recognized that those maintaining a traditional way of life that is dependent on ancestral land are indigenous in the African context, and thus require adequate protection. The recognition accorded to indigenous peoples in the *Endorois* decision was largely facilitated by the publication of groundbreaking reports from the ACHPR's

[140] *Saramaka People v Suriname*, above note 134, at 103.
[141] *Awas Tingni v Nicaragua*, above note 123, at 146.
[142] *Saramaka People v Suriname*, above note 134, at 86.
[143] *Centre for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya,* referred to herein as 'the Endorois case'.

Working Group on Indigenous Populations/Communities (WGIP) in 2005.[144] The WGIP's reports, along with the ACHPR's subsequent adoption of an Advisory Opinion on the United Nation's Declaration on the Rights of Indigenous Peoples assisted in drawing the fundamental distinction between the concepts of 'indigeneity' and 'indigenousness' in the African context. While all original inhabitants of the continent were acknowledged to belong to the former, the latter categorization was ultimately defined according to their occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; and finally, a group's experience of subjugation, marginalisation, dispossession, exclusion or discrimination.[145]

The African Commission drew on the IACHR case of *Saramaka v. Suriname* to reject the Kenya Government's assertion that the inclusion of the Endorois in 'modern society' had affected their cultural distinctiveness for the purposes of special protection. In *Saramuka* the IACHR rejected State claims that the Saramaka people could not be considered a distinct group by virtue of some members not identifying with the larger group.[146] The African Commission followed this principle by establishing that the Endorois could not be denied a right to juridical personality solely due to a lack of individual identification with the traditions and laws of the Endorois by some members of the Community. On this basis, it held that the question of whether certain members of the Community may assert certain communal rights on behalf of the group is a question that must be resolved by the Endorois themselves, in accordance with their own traditional customs and norms and not by the State.[147] It further called on the principle that the choice of some individual members of a Community to live outside the traditional territory in a manner that may differ from the customs upheld by members of the wider collective does not affect the distinctiveness of that group, nor its communal use and enjoyment of their property.[148]

Finally, the African Commission highlighted how the failure to recognize an indigenous or tribal group generally leads to a violation of the 'right to property.'[149] In this regard, the Commission recalled international jurisprudence, which recognized that the controversy over recognition of a Community or its leadership is precisely a natural consequence of the lack of recognition of their juridical personality – a state of affairs

[144] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", Adopted by The African Commission on Human and Peoples' Rights at its 28th ordinary session, 2005. Referred to herein as 'WGIP report (2005)'.
[145] WGIP report (2005), above note 138, at 93.
[146] *Endorois* case, above note 141, at 161, citing *Saramaka People v Suriname*, above note 134, at 164.
[147] *Id.*, at 162.
[148] *Id.*, at 192.
[149] *Id.*, at 192, citing *Saramaka People v Suriname*, above note 134, at 168-170.

which invariably poses obstacles to challenging property claims before domestic courts.[150]

In its ruling, the African Commission flatly rejected colonial legal frameworks by accepting that indigenous communities' ancestral and collective use of land was in fact worthy of legal recognition. In a move akin to its Inter-American counterpart, the African Commission further specified that indigenous peoples' property rights were to be protected within a framework of communal property, and that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.[151] This position was consistent with Articles 26 and 27 of the UN Declaration on Indigenous Peoples, which – in the absence of official title deeds - equally recognizes claims of ownership over ancestral land on the basis of land 'occupied or otherwise used'.[152]

The African Commission further stressed that the 'public interest' test was to be met with a much higher threshold in the case of encroachment of indigenous land, than in instances affecting individual private property rights. In doing so, it predicated its more stringent test for ancestral claims to land and related natural resources on the premise that limitations, if any, on the right to indigenous peoples to their natural resources must flow only from *the most urgent and compelling interest* of the state.[153] Additional emphasis on the finding that "(f)ew, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people".[154]

In accordance with the above, the African Commission drew inspiration from the United Nations Declaration on the Rights of Indigenous Peoples to award restitution and compensation on the basis that (a) indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, as well as lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent; (b) that the right to just and fair compensation be upheld where restitution is not possible; and finally, (c) that unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.[155]

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[150] *Id.*, at 192, citing *Saramaka People v Suriname,* above note 134, at 170.
[151] *Id*., case, at 190
[152] *Endorois* case, above note 141, at 207.
[153] *Id.*, at 212
[154] *Id.*, at 212 (emphasis added). Drawing on a finding published by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights in 2005, quoted in**:** Nazila Ghanea and Alexandra Xanthaki (2005) (eds). *'Indigenous Peoples' Right to Land and Natural Resources' in* Erica-Irene Daes 'Minorities, Peoples and Self-Determination', Martinus Nijhoff Publishers.
[155] *Endorois* case, above note 141, at 232, in conformity with Arts. 10, 11, 19, 28 and 32 of the UN Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007.

The African Commission further pointed to the fact that once it has been proven that land restitution rights were still current, the State was required to take the necessary actions to return them to the members of the indigenous people claiming them. It then cautioned that when a State is unable, 'on objective and reasonable grounds', to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, "it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures".[156]

This reflects standards upheld by the IACHR,[157] and the UN Committee on the Elimination of Racial Discrimination that the feasibility of restitution should only be put into question when the return of communal lands, territories and resources were "for *factual reasons* not possible", and that only under those circumstances should restitution be substituted by the right to just, fair and prompt compensation. [158]

In *Endorois*, the African Commission dismissed several Government claims over the alleged lack of feasibility over the restitution of land. In doing so, it first pointed to the fact that – as ancestral guardians of the land now gazetted as a conservation area – the Endorois were in fact best equipped to maintain its delicate ecosystems. Lack of feasibility over restitution was further questioned in light of the Endorois community's willingness to continue the conservation work begun by the Government. The fact that no other community had settled on the land in question further discredited Government assertions, though the Commission highlighted that, even in the event of encroachment, responsibility fell upon the Respondent State to address the matter in accordance with the law. The fact that the land had not been spoliated further undermined any claims of restitution being factually impossible. And finally, the Commission duly emphasized that "continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois' way of life, a consequence which clearly tips the proportionality argument on the side of indigenous peoples under international law".[159]

Of further note was the African Commission's insistence that the Endorois Community be granted the right of *ownership* over their ancestral land, rather than mere *access*.[160] Drawing on the principles of the UN Declaration on the Rights of Indigenous Peoples and its own Advisory Opinion relating to the same, the African Commission reasoned that: "(I)f international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership

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[156] *Id.*, at 234.
[157] See, for example, *Indigenous Community Yakye Axa v Paraguay* (Series C No. 146), IACHR (17 June 2005) at 149.
[158] General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee's 1235th meeting, on 18 August 1997. UN Doc. CERD/C/51/ Misc.13/Rev.4., at 5. (emphasis added).
[159] *Endoroi*s case, above note 141, at 235.
[160] *Id.*, at 204.

ensures that indigenous peoples can engage with (these entities) as active stakeholders rather than as passive beneficiaries."[161]

The *Endorois* ruling further built on Inter-American Court jurisprudence to clearly establish that "mere access or *de facto* ownership of land is not compatible with principles of international law (…) only *de jure* ownership can guarantee indigenous peoples' effective protection".[162] In this light, an express link was established between legal certainty over title and guarantees of permanent use and enjoyment of ancestral land. This enjoyment was found to be incompatible with access granted at the State's discretion.[163]

Finally, in the first decision by any international body to adjudicate upon the right to development, the *Endorois* case has illustrated how the issue of title is instrumental for the full realization of indigenous peoples' rights, and the sustainability of their well-being. As a starting point, the African Commission emphasized that development must be equitable, non-discriminatory, participatory, accountable and transparent.[164] Moreover, development that was compatible with the object and purpose of the African Charter was required to lead to the empowerment of the Endorois community. In this regard, the Commission thus held that both the choices and the capabilities of the Endorois had to improve in order for their right to development to be realized.[165]

Much of the Commission's attention on the aspect of choice turned on the quality of consultation processes – i.e. the extent to which these processes sought to obtain the community's free, prior, and informed consent, according to their customs and traditions.[166] In its assessment of the case, the Commission found that the conditions of the consultations with the Endorois had failed to meet standards of due diligence. Among other factors contributing to this finding was the fact that the Endorois had been presented with the news of their eviction as a *fait accompli*, and that this remained true in relation to any subsequent development initiative involving Lake Bogoria.[167] The decision has thus proven instrumental in placing the obligation upon States to treat indigenous peoples as active stakeholders rather than passive beneficiaries. The decision has also been instrumental in highlighting the interdependence of title with the wide spectrum of economic, social and cultural rights that are equally vital for the effective protection of indigenous peoples survival as viable communities. Litigation strategies will therefore benefit from holistic approaches that properly take this interdependence into account.

[161] *Id.* 138, at 204. See also Arts. 8(2) (b), 10, 25, 26 and 27 of the UN Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007.
[162] *Id.*, at 205.
[163] *Endorois* case, above note 141, at 206.
[164] *Id.*, at 277.
[165] *Id.*, at 283.
[166] *Id.*, at 291.
[167] *Id.*, at 281.

V. POST-*ENDOROIS* IMPACT

Concurrent development of native title in jurisdictions across commonwealth countries and in international legal frameworks has had wide-ranging effect. Modern precedent in common law courts reveal a broadened understanding of property beyond the narrow definitions applied under the classic English common law definition that underpinned earlier treatment of native title. Greater appreciation for indigenous systems of land governance, in turn, has facilitated the emergence of safeguards that have begun to pave the way for effective protection of communal interests over ancestral land. In parallel, international legal frameworks and regional court decisions have created precedent (often non-binding) that obligates member states to protect indigenous land rights and remunerate for their expropriation by state agencies. The new Kenyan Constitution and recent legislation in, *inter alia* Australia, New Zealand, Canada, India and the Philippines exhibit the influence of recent comparative and international decisions on indigenous land rights. States are increasingly willing to address the legal relics of their colonial past to reverse the historic marginalization of indigenous peoples.

For example in Kenya, changes advocated for by the Endorois before local courts, and later the African Commission, were echoed by wider civil society through the course of Kenya's lengthy constitutional review process. These combined efforts culminated in the adoption of a new Constitution in August 2010, which includes provisions that expressly recognize 'community land' as equal to public and private land.[168] In a marked shift from prior constitutional provisions, community land is now vested directly in the communities for the protection of ancestral lands and lands traditionally occupied by hunter-gatherer communities, thus doing away with the antiquated trust land regime.[169] The new Constitution also creates an enforcement mechanism in the National Land Commission that is mandated to 'initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress'.[170]

Despite the overwhelming jurisprudence in common law and international frameworks native title recognition is far from universal. Enforcement and implementation of key judicial decisions and legislation is lax. Furthermore, many important common law states such as India, the United States, and various African, Asian and Latin American countries continue not to recognize indigenous land claims or afford a full bundle of property rights.[171] Much of the important legal meta-structure has been laid and many prior, controlling legal doctrines dissolved, but challenges of domestic constitutional

[168] Chapter 5, Constitution of Kenya, August 2010.
[169] Section 63(1), Constitution of Kenya, August 2010.
[170] Section 67(2)(e).
[171] For further discussion on ongoing implementation efforts realted to *Mabo, Calder,* and other cases, See. McNeill, Kent, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence", in Hamar Foster, Heather Raven and Jeremy Weber, eds., *Let Right Be Done:* Calder*, Aboriginal Title and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007).

interpretation and legislation predominance remain. Constitutional and legislative revisions emphasizing indigenous community input and consent, such as those implemented in Kenya, are to be applauded and encouraged around the world. Concerted legal efforts are now needed to promote jurisprudence development domestically.

Establishing judicial precedent is only half the challenge. Many States ignore judgments and continue to overrun indigenous claims to land. Meanwhile government land practices have increased pressure and speculation on land and facilitated a large number of land grabs – all increasing the insecurity of land tenure for indigenous and other vulnerable groups. Massive plots of State-controlled, indigenous-occupied land in countries such as Madagascar, South Sudan, and Cambodia have been leased or sold to foreign countries and/or multinational companies without the consent, let alone benefit of indigenous communities that have lived on the land for time immemorial.

Beyond the inequitable economic implications of forced relocation of indigenous populations from State-expropriated land, the insecurity of rights to land and property destroys the value of these assets. This inability to harness assets that convey with land has gained increasing currency as a critical factor in promoting international development - in large part due to the work of development theorists such as Hernando de Soto.[172] Recognition of native title is a part of this new global paradigm for strengthening and vesting land and resource assets in local populations. By recognizing indigenous claims to land, States can further reverse patterns of over-centralized economies and the inequitable distribution of assets, at the same time creating more robust local land markets.

The adjudication and implementation of native title claims is not simple. Following the volume and structure of the precedence outlined in this article, States, courts and international tribunals should be able to effectively adjudicate native title claims taking into consideration historical indigenous occupation and use patterns and dismissing prejudicial colonial doctrines. Numerous other African countries, particularly former British colonies such as Malawi, Uganda and Sierra Leone should examine the implications of the *Endorois* decision to outstanding native claims to land and seek proactive measures for securing traditional, communal forms of tenure. Implementing these decisions will be a more difficult process. Registration and protection of continually occupied land, such as in *Awas Tingni*, is decidedly easier. Restoration of land to dispossessed communities is an option in some cases. However, most cases will entail reparations for past expropriation either in the form of monetary compensation or settlement and ownership of land with comparable value.

[172] E.g., Hernando de Soto, *The Mystery of Capital*: *Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books (2000).

VI. CONCLUSION

Recognition of native title throughout the world has advanced considerably over the past twenty years. Early colonial doctrines such as *terra nullius*, the doctrine of discovery and the *Royal Proclamation* have largely been rejected and new precedents and rights, such as the UN Declaration on the Rights of Indigenous Peoples embraced. Early Privy council decisions that gave the Crown ownership over all land it did not grant title to (the doctrine of recognition) has been replaced by decisions such as *Calder* and *Sagong* that recognize possession since time immemorial as evidence of and sufficient to vest title in indigenous communities. Common law principle long implicit in the jurisprudence of many courts have been unearthed and given formal accord in court decisions and legislation. *Mabo* extended the principle of incorporation of customs into common law to include indigenous customs of land occupation and use. Since *Mabo* many courts in other countries have joined in recognizing the extent of this principle. Most recently, in 2010, the African Commission on Human and Peoples' Rights expanded on other region precedent to reverse 40 years of Endorois ancestral land expropriation, establishing clear burden on states to demarcate, protect and compensate for indigenous land grabs.

The advances that have been made and the title rights granted to indigenous communities in a few countries are, however, only a minute fraction of all the indigenous communities in countries around the world that are systematically deprived of the land they have held since time immemorial. Furthermore, countries or regional institutions that have recognized legal native title are slow, unable or disinterested in enforcing those rights. Many barriers still exist to the efforts of native and indigenous communities to gain recognition of their title to land. Many lower courts have not heeded the jurisprudence of higher courts, or fellow common law courts and many countries still lack a definitive ruling by the highest court of the land. Most native and indigenous groups are also not aware of their newly recognized rights and have not taken the steps necessary to document their land customs and bring effect to their rights. States and courts around the world should heed this new precedent to settle outstanding native claims to land and develop restoration/reparation strategies based on each case. The potential impact is transformative. Not only will assets be more equitably devolved to local populations, it will unlock more dynamic markets and economic forces that can help lead countries to sustainable and equitable economic growth.