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

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Vestiges of colonial land regimes still plague both developing and industrialised societies and further marginalise 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 synthesising historical and modern developments in common law and international legal systems that definitively establish native title rights. It contextualises 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 consensus on indigenous rights to land.*

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I. INTRODUCTION

On February 2, 2010, the African Union (AU) approved the decision by the African Commission on Human and Peoples' 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.[2] The ruling established a major precedent on the indigenous right to ancestral land under the African Charter, the ramifications of which are still coming to bear.[3] The ACHPR decision now opens the door for potentially hundreds of indigenous land claim cases from across all AU 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 marginalise indigenous groups in and

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1. Press Release, Minority Rights Grp. Int'l, Landmark Decision Rules Kenya's Removal of Indigenous People from Ancestral Land Illegal (Feb. 4, 2010), *available at* http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html (citing Assembly of the African Union, 14th Sess., Decision, Declarations, and Resolutions, AU Doc. Assembly/AU/Dec. 268 (Jan. 31, 2010)).

2. Ctr. for Minority Rights Dev. (Kenya) and Minority Rights Grp. Int'l (on Behalf of the Endorois Welfare Council) v. Kenya, 276/2003, African Comm'n on Human & Peoples' Rights, ¶ 11 (Feb. 4, 2010).

3. This Article will use the term "native title" in reference to native, indigenous, Indian, and/or aboriginal forms of ownership of land. In his article *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, Jérémie 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." 56 INT'L & COMP. L.Q. 583, 590 (2007). The related footnote reads: "On the notion of exclusivity of such occupation, see High Court of Australia, *Commonwealth v Yarmirr* (2001) 208 CLR 1." *Id.* at 590 n.38. He further writes:

> [T]he 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."

Id. at 592 (citations omitted).

beyond Africa—even centuries after independence and the formation of sovereign nations. But international and common law jurisprudence on native title has evolved dramatically in the past decade. Landmark court cases in various countries and in international fora 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 burgeoning jurisprudence.

The evolution of common law native title has occurred rapidly over a fairly short period. As a result, many countries and legislatures 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 since been revealed to be misguided. Domestic legislation continues to be passed that either denies rights now recognised by courts or, in granting rights, does not accord the full bundle of rights recognised by common law or international charters. Even when rights are recognised, effective implementation and enforcement often lag 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 from the historical origin of native title through the recent developments that have brought greater recognition to the full range of indigenous property rights recognised under modern international 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 with a focus on the African and Inter-American systems. Parts II and III of the Article examine 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, which evolved in the seventeenth century to deal with questions posed by indigenous forms of property. The first court decisions on native title and property rights from the United States and the colonial Privy Councils considerably shaped the debate that was to follow in many common law courts. Many of these decisions used false reasoning and faulty precedents to rescind indigenous property rights that had been seemingly granted in cases prior.

Part IV 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 recognises indigenous property rights. This Part analyses 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 favour 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 eighteenth century. John Locke, Emmerich de Vattel, and Hugo Grotius 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 civilisations, particularly England, were transported to colonies and imposed out of context on lands and people with different concerns and ideologies of "property." The doctrines were often misapplied to rationalise 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. Early Property Theories

Common law property theories first developed in England shortly before the thirteenth century. Court rulings as early as 1290 considered the development of property.[4] Through the fifteenth century in England, however, property was only used to refer to goods and animals, not land.[5] It was not until the beginning of the seventeenth century that land was incorporated into theories of property. The principle of possession as the indicator of property in land has its roots in Roman law, but it was not

4. *See generally* David J. Seipp, *The Concept of Property in the Early Common Law*, 12 LAW & HIST. REV. 29, 31 (1994) (discussing the development of property doctrines in English common law).

5. *Id.* at 33.

fully embraced in English common law until Blackstone's *Commentaries* in 1769.[6] 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 colonisation. 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 Locke attempted to define universal doctrines of property—ones that could be applied to the new lands over which the Crown claimed sovereignty.[7] These writings 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."[8] Locke's *The Second Treatise of Civil Government* is most often cited for the "mixed labour" theory: property is created when the resources of nature are removed and mixed with a person's labour or combined with something that is his own.[9] A person's labour is a product of his body, which is his own property, and when combined with nature, is sufficient to remove the "something" from the common in which it exists and to exclude the common access of others.

In *The Law of Nations; or the Principles of Natural Law* (first published in 1758), Vattel espoused, "[A]ll men have a natural right to inhabit [the earth] and to draw from it what is necessary for their support . . . . 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 lands that belong to no

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6. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *258 ("Occupancy 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 occupanti conceditur*." (citations omitted)).

7. Seipp, *supra* note 4, at 30.

8. *Id.* at 34.

9. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 15 (J.W. Gough ed., Basil Blackwell 1948) (1690).

10. EMMERICH DE VATTEL, THE LAW OF NATIONS; OR THE PRINCIPLES OF NATURAL LAW bk. I, ch. XVIII, § 203, at 84 (James Brown Scott ed., Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

one.[11] Given this theory, Vattel also postulates that the tenuous occupancy of territories by wandering tribes in small numbers "can not 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."[12] 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.[13]

Neither Vattel nor Locke considered the validity of ownership and nonuse 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.[14] Locke 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."[15]

Grotius was influential in both Locke's and Vattel's theories through his 1625 work, *De jure belli ac pacis libri tres*.[16] He supported the state's ability to alienate sovereignty over a part of its territory that is uninhabited or deserted.[17] However, he cautioned that the state cannot alienate a people without their consent without violating the "voluntary compact."[18]

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

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11. *Id.* § 205.
12. *Id.* § 209, at 85.
13. *Id.*
14. *See, e.g.*, *id.* §§ 208-209:

> [N]atural 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.

See also LOCKE, *supra* note 9, at 17 ("[God gave man the right to a]s 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.").

15. LOCKE, *supra* note 9, at 22.
16. *See* Kent McNeil, *Self-Government and the Inalienability of Aboriginal Title*, 47 MCGILL L.J. 473, 491 (2002).
17. *Id.*
18. *Id.*

pieces of property. The value placed on unused land is not universal, but subjective, dependent on the person and the culture placing the value.

B. Crown Title

Of great importance to early native title issues in British colonies was the engrained principle of Crown title to land. In England, the traditional view was that the Crown ultimately holds title in all land of its subjects because the Crown is the paramount ruler of the land.[19] 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.[20] Common law developed to further support the principle that all land was held either mediately or immediately by the Crown.[21] This principle forms the basis of and is commonly referred to as the "doctrine of tenures."[22] It is now legal fiction in England.

English legislation and common law developments in the eighteenth century 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.[23] However, the original feudal principle continued to be applied in colonies and for the acquisition of foreign land. Subsequent cases from the colonies further entrenched this common law principle in the colonies and with particular force regarding native title.[24]

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19. KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 79 (1989).

20. *Id.* at 82-83. 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. *Id.* at 83-84. Nor could William I have acquired possession of all the land by conquest. *Id.* at 83. The feudal land laws from the Norman period have thus been viewed as a mere justification for the feudal system and not as proper legal precedent. *Id.* at 84.

21. *Id.* at 82.

22. *Id.* at 79.

23. *See id.* at 90 (arguing that the 1939 Act and others have limited the Crown's control over individual property).

24. *See generally Milirrpum v Nabalco* (1971) 17 FLR 141, 143 (Austl.); *In re The Ninety-Mile Beach* [1963] NZLR 461, 468 (CA) (N.Z.); Paulette v. The Queen (1976), [1977] 2 S.C.R. 628 (Can.).

C. Colonial Land Principles

The ideology of property and land use law in Britain was applied to the Crown's colonisation 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 colonisation began in earnest in the sixteenth century. However, the new role of the Crown and her subjects as colonisers 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 colonisation rather than objectively examining property and did not incorporate comprehensive, cross-cultural approaches. Philosophers such as Locke, Grotius, and Vattel developed their theories amidst massive European colonisation and in response to questions of the morality of colonisation. The theories that developed were not all a blind endorsement of colonisation, but, nevertheless, were commonly used to justify native land expropriation.

In *The Law of Nations*, Vattel states that nations are not given an unabashed licence to claim all unoccupied territory in their 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."[25] 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.[26] In his *International Law* treatise (first published in 1905), Lassa Francis Lawrence Oppenheim, too, espoused the belief that consent is required before property can be transferred to the state or cession of territory can be validated.[27]

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

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25. VATTEL, *supra* note 10, § 208, at 85.

26. *See* 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) (internal quotation marks omitted).

27. 1 LASSA FRANCIS LAWRENCE OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW § 245, at 680 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

European colonisation, four basic methods of acquiring colonial land were recognised:

(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 doctrines of *terra nullius* and discovery.[28]

British colonisation was generally given one of two constitutional statuses—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 recognised. Sovereignty was applied to native land, meaning it could not be sold to a private individual, but could only be transferred from sovereign to sovereign.[29]

As exploration and colonisation continued, Europeans began settling in occupied lands, and use of the *terra nullius* and the discovery doctrines became more common.[30] As colonialisation progressed, European powers expanded the doctrines to include lands occupied by indigenous populations considered too primitive to have an organised society.[31] This occurred despite early commentators' inability to justify such expansion.

The Royal Proclamation of 1763 (Proclamation) was a key doctrine for the British approach to colonisation and native title.[32] The Proclamation prohibited private purchase of native land and the full alienability of native title in the British colonies.[33] The Proclamation was grounded in the Crown's largely paternalistic attitude toward indigenous populations, adopted to "protect" them from unfair transactions with

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28. Geoffrey Robert Schiveley, *Negotiation and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Land Title Issues*, 33 VAND. J. TRANSNAT'L L. 427, 433 (2000) (citing Ann McGrath, *A National Story*, *in* CONTESTED GROUND: AUSTRALIAN ABORIGINES UNDER THE BRITISH CROWN 1, 1 (Ann McGrath ed., 1995)).

29. McNeil, *supra* note 16, at 496 (explaining why only the Crown was considered as having the ability to purchase native land).

30. *See* discussion *infra* Part III.D.

31. *See* Johnson v. M'Intosh, 21 U.S. 543, 563 (1823) (discussing its decision in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)). *M'Intosh* is perhaps the most influential early former colony common law decision supporting and applying the doctrine of discovery.

32. Royal Proclamation, 1763, 3 Geo. 3 (Gr. Brit.).

33. *Id.*

European settlers.[34] 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 it is tempered by a refusal to allow complete, inalienable native land control. The Proclamation also served to advance other principles of Crown title, including the discovery and conquest doctrines, discussed *infra*. 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.[35] Native peoples 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.[36] This principle was commonly referred to as the "doctrine of tenures,"[37] which necessarily encompasses the "doctrine of recognition."[38] Numerous courts and legislators, as further discussed in Part III, cited this doctrine as the rationale for denying indigenous claims to land, despite occupation of land prior to Crown acquisition of the territory.[39] An analysis of the doctrine of tenures' role in postfeudal England, however, reveals that it did not have a 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 *infra* Part III.F).[40] 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 established much later.[41]

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34. McNeil, *supra* note 16, at 477-78.
35. Royal Proclamation, 1763, 3 Geo. 3 (Gr. Brit.).
36. MCNEIL, *supra* note 19, at 82.
37. *See* McNeil, *supra* note 16, at 496.
38. *See* discussion *infra* Part III.E.
39. *E.g.*, Sec'y of State for India v. Kamachee Boye Sahaba (1859) 7 Moore, I. App. 476 (P.C.) (appeal taken from India).
40. *E.g.*, Bakare Ajakaiye v. Lieutenant–Governor, S. Provinces, [1929] A.C. 679 (P.C.); Amodu Tijani v. Sec'y, S. Nigeria, [1921] 2 A.C. 399 (P.C.); *In re* S. Rhodesia, [1918] A.C. 211 (P.C.).
41. MCNEIL, *supra* note 19, at 173.

III. EARLY JUDICIAL TREATMENT OF NATIVE TITLE

Judicial decisions on native title from 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 legitimatising colonial land-grabs. The precedent from the earliest cases had profound reverberations on the development of native title in other common law countries. 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 U.S. court system, which served to reinforce decisions in Canada, New Zealand, and additional Privy Council decisions. All of these decisions 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 it has quickly eroded. At present, all native title claims demand a comprehensive examination that emphasises contemporary common law native title precedent over the voluminous jurisprudence from centuries back.

This Part 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 subsequent Parts.

A. United States

The famous United States Supreme Court case *Johnson v. M'Intosh* (1823) set an early precedent for native title treatment under the common law in former British colonies.[42] 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 Proclamation.[43] *M'Intosh* is considered the first and most influential case regarding native title, although it also partially relied on earlier decisions by the Marshall Court in *Fletcher v. Peck*[44] and by the New York Supreme Court Judicature in

42. 21 U.S. (8 Wheat.) 543 (1823).
43. *Id.* at 563.
44. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

Jackson v. Wood.[45] 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.

Chief Justice Marshall, in both *M'Intosh* and *Fletcher*, recognised a native "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 Court held that "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."[46] The dissent in *Fletcher*, however, argued that government interest in native land could only occur by way of purchase or conquest.[47] Marshall dismissed this argument and any other notion of a fee simple estate for native title in *M'Intosh* by holding that title in the state derives from discovery, while the interest retained by the native population is only one of occupation.[48] 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."[49] As such, the land upon which they live, according to "tribunals of civilized states," is ripe for acquisition by discovery and to cultivation in a manner indicative of a developed sense of individual property.[50] Marshall espoused the philosophies of Vattel and Locke as support for his argument that the type of land use the natives practised did not create a proprietary interest.[51] Marshall also pointed to racist statutes from Virginia and other colonies as proof that the native Americans are an inferior race of people, are "under the perpetual protection and pupilage of the government," and therefore cannot hold valid title to land.[52]

The precedent established in *M'Intosh* was advanced by three more native title cases from the Marshall Court—*Worcester v. Georgia*,[53] *Cherokee Nation v. Georgia*,[54] and *Mitchel v. United States*.[55] The

45. *See M'Intosh*, 21 U.S. (8 Wheat.) at 563 (citing *Fletcher*, 10 U.S. (6 Cranch) 87; Jackson v. Wood, 7 Johns. Cas. 290 (N.Y. Sup. Ct. 1810)).
46. *Fletcher*, 10 U.S. (6 Cranch) at 142-43.
47. *Id.* at 146-47.
48. *M'Intosh*, 21 U.S. (8 Wheat.) at 569-70.
49. *Id.* at 567.
50. *Id.*
51. *Id.* at 567-70.
52. *Id.* at 569.
53. 31 U.S. (6 Pet.) 515 (1832).
54. 30 U.S. (5 Pet.) 1 (1831).
55. 34 U.S. (9 Pet.) 711 (1835).

property right held by Native Americans under the doctrine of discovery was strengthened in *Worcester* and granted a full right of occupation and all use of the land, timber, and subsurface extraction that accompanies such occupation.[56] *Mitchel* broadened the view of the Court regarding what constitutes native occupation of land to include hunting grounds and other areas with reference to a tribe's "habits and modes of life."[57] Native occupation was considered to be "as sacred as the fee simple of the whites."[58] The Court maintained, however, that native occupation was essentially a grant from the state, not equivalent to a fee simple accorded, and that the land ultimately remained inalienable.[59] As a result, the U.S. government also retained an exclusive right to extinguish title that had been used in numerous cases of U.S. expropriation of native tribal land.[60]

While courts preached the theoretical basis for "Indian title," the practical recognition of native territory was largely ignored—a challenge for implementation to this day. Native tribes were continually displaced from territory they had occupied since time immemorial and resettled in reservations. Common law developments in native title were generally inconsequential because (1) treaties between the government and native tribes were reached in a way that precluded any common law remedy, (2) Congress at all times retained the ability to extinguish native title, and (3) the political nature of the issue precluded a judicial remedy. Congress was free to displace and expropriate native land by way of legislation. The Fifth Amendment protects individuals from government expropriation of private property without just compensation.[61] However, as shown in the next paragraph, the Court did not extend its prior jurisprudence to include native land in the definition of "private property."[62]

The inherent problem with the U.S. 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 native tribes did not classify as private property and therefore were not protected by the Fifth Amendment's prohibition on government expropriation without just compensation. This classification problem reared its ugly head almost one hundred years after its initial appearance

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56. 31 U.S. (6 Pet.) at 556, 559-60.
57. 34 U.S. (9 Pet.) at 746.
58. *Id.*
59. *Id.* at 713.
60. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974); Buttz v. N. Pac. R.R., 119 U.S. 55, 64 (1886).
61. U.S. CONST. amend. V.
62. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281, 290-91 (1955).

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. United States* ruled that there exists only a right of occupancy that can be extinguished by the government at all times "without any legally enforceable obligation to compensate the Indians."[63] The subject of Native American 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 United States by Russia and never "discovered" or "conquested."[64]

B. Canada

The effect of the Proclamation on Canadian treatment of native land rights was much stronger than in the United States by way of Canada's incorporation into the Commonwealth. The Proclamation affirmed the right of indigenous peoples to remain in possession (without title) of their traditional lands and held that they were not to be "mole[s]ted or di[s]turbed" on their indigenous peoples.[65] Land within the area defined by the Proclamation could only be acquired by the Crown and only by treaty or purchase from the Indians.[66]

Canadian common law on native title first developed in *Connolly v. Woolrich* (1867), where native laws and usages were recognised as valid and not subject to abrogation upon acquisition of Crown sovereignty over the tribes.[67] The ruling implied the application of the doctrine of continuity to Crown lands.[68]

In *St. Catharine's Milling & Lumber Co. v. The Queen* (1888), the Privy Council verified the doctrine of native right to land as derived from

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63. *Id.* at 279.

64. *See id.* at 278-79 (denying Indian title proprietary status—difference between officially recognised 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); *see also* United States v. Alcea Band of Tillamooks (*Tillamooks I*), 329 U.S. 40 (1946); United States v. Alcea Band of Tillamooks (*Tillamooks II*), 341 U.S. 48, 49 (1951) (examining the effect of the Fifth Amendment Taking Clause). The finding of the Court in *Tillamooks II* was therefore that aboriginal title did not constitute private property compensable under the Amendment. *Tillamooks II*, 341 U.S. at 49. Additionally, earlier Supreme Court decisions not requiring payment of claims for expropriation of lands reserved for native populations by treaty were quickly eroded shortly after issuance, despite not being explicitly overruled by the Court. *See* Shoshone Tribe v. United States, 299 U.S. 476, 492, 494, 496 (1937); United States v. Klamath Tribe, 304 U.S. 119, 123 (1938).

65. Royal Proclamation, 1763, 3 Geo. 3 (Gr. Brit.).

66. *Id.*

67. *See* [1867] 17 R.J.R.Q. 75, 85 (Que. Super. Ct.).

68. *See id.* at 84.

the Proclamation.[69] Native lands were still subject to control by the Crown and "dependent upon the good will of the Sovereign."[70] Native title, again, was not equivalent to a fee simple, and, as stated by Lord Watson, represented a "mere burden" on the substantial and paramount estate of the Crown.[71] However, the Proclamation at its inception 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, native rights to land were not recognised 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 *infra* Part IV).

C. New Zealand

Common law native title first developed in New Zealand in *The Queen v Symonds* (1847), where the Privy Council recognised 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.[72] The judgement also verified the decision from the Land Claims Ordinance that formalised 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 Lands and Estates Forests *Fisheries* and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession."[73] The Land Claims Ordinance provided that only the Crown could preempt the right of the aboriginal inhabitants to occupy their rightful lands.[74]

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*[75] and *Nireaha Tamaki v Baker*.[76] The New Zealand Supreme Court in *Wi Parata* (1877) declared the Treaty of Waitangi to be invalid because the Maori had no civilised system of law and thus were not a civilised state with which a treaty could be entered.[77] This ruling was overturned twenty-four years later in

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69. [1888] 14 App. Cas. 46, 54-55 (P.C.) (appeal taken from Can.).
70. *See id.* at 54.
71. *Id.* at 58.
72. (1847) NZPCC 387, 391 (N.Z.).
73. Kahn, *supra* note 26, at 62, 65 (citation omitted) (internal quotation marks omitted).
74. New South Wales Act (Land Claims Ordinance) 1841, section 2 (N.Z.).
75. (1877) 3 NZ JUR. 72 (SC) 75 (N.Z.).
76. (1901) NZPCC 371 (N.Z.).
77. *Wi Parata* (1877) 3 NZ JUR. at 76-78.

Nireaha Tamaki (1901), when the Privy Council criticised the prior ruling and recognised that customary law of the Maoris could indeed be used as consideration by New Zealand courts for determining property rights.[78] The Privy Council rejected the theory that all land in New Zealand became vested in the Crown upon acquisition of sovereignty.[79] However, courts continued to recognise the earlier precedent in *Wi Parata* and in subsequent cases that allowed Crown prerogative to disregard native title.[80] The obligations of the Crown under the Treaty of Waitangi, as asserted by the Court in *Wi Parata*, were strictly moral, not legal, and to interpret otherwise would be to question the sovereign power.[81]

D. Australia

Australian colonisation occurred largely under the *terra nullius* doctrine.[82] When the Crown acquired sovereignty over Australia, all vacant land became Crown territory.[83] Because aboriginal occupation and use of land was not recognised 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" and "primitive in their social organization."[84] The Privy Council decision *Cooper v. Stuart* (1889) affirmed this expanded view of *terra nullius* as applied to Australia's colonisation.[85] The colony of New South Wales was acquired based on the *terra nullius* doctrine because the inhabitants had no "settled law" or "established system of law" at the time of annexation.[86] 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.[87]

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 *Milirrpum v Nabalco Pty.*

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78. *Nireaha Tamaki* (1901) NZPCC at 382.
79. *Id.* at 383.
80. *See In re The Ninety-Mile Beach* [1963] NZLR 461, 468 CA (N.Z.).
81. *Wi Parata* [1877] 3 NZ JUR. at 79.
82. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 32 (Austl.).
83. *Id.* at 40.
84. *Id.* at 36, 40.
85. Cooper v. Stuart, [1889] 14 App. Cas. 286 (P.C.) (appeal taken from NSW).
86. *Id.* at 291.
87. *Macdonald v Levy* [1833] Legge 39, 45 (Austl.).

Ltd.[88] The development of common law in *Milirrpum* and subsequent cases, including *Mabo v Queensland*, will be discussed in subsequent Parts of this Article.

E. India

Privy Council decisions from native land disputes in India established the doctrine of recognition—extinguishing native title in favour of automatic Crown title, unless there was explicit recognition by the Crown of these pre-existing rights. These decisions were largely contradicted by a series of African Privy Council decisions decades later (see *infra* Part III.F). The earlier decision in *Secretary of State for India v. Kamachee Boye Sahaba* (1859) accorded the Crown title to private property of the Rajah of Tanjore, seized by the East India Company while acting on the Crown's behalf.[89] The Privy 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 issue.[90] No precedent was created for the 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 antecession rights were not continuous.[91] The Privy Council ruled, "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."[92]

In *Vajesingji Joravarsingji v. Secretary of State of India*, the court cited *Kamachee Boye Sahaba* and *Bai Rajbai* as support for its holding that pre-existing property rights in general can be extinguished upon acquisition of Crown sovereignty.[93] 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.[94] According to Lord Dunedin: "Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign

88. *See* (1971) 17 FLR 141, 141-42 (Austl.).
89. (1859) 7 Moore, I. App. 476, 539-40 (P.C.) (appeal taken from India).
90. *Id.* at 540.
91. (1915) 42 I.A. 229, 234 (India).
92. *Id.* at 237.
93. Vajesingji Joravarsingji v. Sec'y of State for India, (1924) 51 I.A. 357, 360 (India).
94. *Id.*

only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing."[95] 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 recognise 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.[96]

According to Okoth-Ogendo, the first fallacy contributing to the dispossession of indigenous peoples in the African context was what he termed "denial of proprietary character."[97] The conceptualisation of this fallacy derives from principles similar to those of *terra nullius* and the doctrine of discovery. It refers to the colonisers' belief that the occupation of the land by indigenous communities "did not constitute a system of property worthy of recognition under state law."[98] The argument follows that because property rights are only conferred when "individuals or other 'jural' persons exercise jurisdiction . . . with exclusive control," the communal nature of indigenous occupation cannot amount to "real" proprietary ownership.[99]

Okoth-Ogendo points to this fallacy as the justification used by British, French, German, Belgian, and Dutch colonising authorities to declare indiscriminately all indigenous land "ownerless."[100] After appropriating the land, the colonisers began the process of imposing their

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95. *Id.*

96. H.W.O. Okoth-Ogendo, An Opinion on the Endorois Communication No. 27612003 Before the African Commission on Human and Peoples Rights' Entitled CEMIRIDE (on Behalf of the Endorois Community) v. The Republic of Kenya (Sept. 20, 2006) (unpublished expert opinion) (on file with author) [hereinafter Okoth-Ogendo, Endorois Case]; *see also* H.W.O. OKOTH-OGENDO, TENANTS OF THE CROWN: EVOLUTION OF AGRARIAN LAW AND INSTITUTIONS IN KENYA, (1991); H.W.O. Okoth-Ogendo, *Legislative Approaches to Customary Tenure and Tenure Reform in East Africa*, *in* EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA 123, 127 (Camilla Toulmin & Julian Quan eds., 2000).

97. Okoth-Ogendo, Endorois Case, *supra* note 96, at 2.

98. *Id.* ("[I]ndigenous land relations conferred . . . not property rights but mere privileges.").

99. *Id.*

100. *Id.*

own systems of property.[101] This codification of foreign law had particular effect in Kenya, where colonisers instated a regime "designed primarily for the acquisition and administration of private rights to land."[102]

The second juridical fallacy outlined by Okoth-Ogendo is called "expropriation of radical title"; this refers to the idea that land, occupied or not, can only vest in a colonial sovereign.[103] Colonialisation in Kenya by the British was marked by this doctrine.[104] The year 1939 ushered in the creation of two separate domains.[105] The first, known as "crown land," referred to radical title that "remained vested in the colonial sovereign."[106] "Native areas," on the other hand, constituted radical title that "was now vested in a Native Lands Trust Board sitting in London."[107]

"Native areas" boundaries (referred to as "trust lands" upon independence) were detailed across Kenya and entrenched in Chapter IX of the now-repealed 2009 Kenyan Constitution.[108] County Councils replaced the Native Lands Trust Board.[109] In other words, at independence, radical title to the domain of native areas was shifted to the relevant councils in whose areas of jurisdiction each unit was situated.[110] 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

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101. *Id.*
102. *Id.*
103. *Id.* at 3.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. CONSTITUTION, ch. IX, § 114 (2009) (Kenya) (repealed 2010).
109. *Id.* ch. IX, § 115:

> (1) All Trust land shall vest in the county council within whose area of jurisdiction it is situated . . . .
> (2) 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.

110. 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 to "set apart" such land for purposes not always in the interest of communities occupying it. CONSTITUTION, ch. IX, §§ 117(1), 118(1) (2009) (Kenya); Trust Land Act, (2010) Cap. 288 §§ 7-13 (Kenya). Under the new constitution, land "lawfully held as trust land"—with the exception of being certain public lands listed in section 62—is classified hereafter as community land. CONSTITUTION, § 63 (2010) (Kenya).

domain, it was always understood that the state or its agencies could "raid" land without recourse to the stringent procedures of compulsory acquisition applicable to private land.[111] Okoth-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."[112]

A third fallacy, according to Okoth-Ogendo, stemmed from the belief "that indigenous social and governance institutions were incapable of[,] or unsuitable as[,] agents for the allocation and management of . . . land."[113] As a result, colonisers felt the need to suppress these institutions by establishing "new and parallel state" systems that implemented

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111. CONSTITUTION, ch. V, § 75 (2009) (Kenya). 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 proportionality of that purpose vis-à-vis private hardship ensuing from the expropriation. *Id.* These provisions, alongside those under the Land Acquisition Act, which prescribe a comprehensive procedure for compulsory acquisition, sharply contrast with the Trust Land Act's far weaker protections—particularly with regard to communities. Land Acquisition Act, (2010) Cap. 295 § 3-7 (Kenya); *see* Korir Sing 'Oei A., The Endorois' Legal Case and Its Impacts on State and Corporate Conduct in Africa (2010) (unpublished manuscript) (on file with Tilbury Law School, Netherlands); Trust Lands Act, (2010) Cap. 288 § 7(1) (Kenya):

> 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.

112. Okoth-Ogendo, Endorois Case, *supra* note 96, at 4 (internal quotation marks omitted); *see* CONSTITUTION, ch. IX, § 117(2) (2009) (Kenya).

113. Okoth-Ogendo, Endorois Case, *supra* note 96, at 5.

foreign law and were created without any input from the indigenous communities.[114] These new systems bypassed the indigenous governance structures already in place, which gave the colonisers a wider range of power over indigenous land and allowed them to phase out the old systems, rendering them obsolete.[115]

Native title jurisprudence from the colonies further illustrates how the operation of these fallacies helped construct property regimes favourable to the colonisers. Early decisions from the Privy Council out of the British colonies of Southern Rhodesia (present-day Zimbabwe) and Southern Nigeria (present-day Nigeria) strengthened precedent in support of the fallacies through the doctrines of conquest and continuity.[116] The Privy Council in *In re Southern Rhodesia* (1919) examined the native land rights and customs that existed under the previous African ruler before that regime was overthrown by the British South Africa Company, upon order of the Queen, in establishing the colony of Southern Rhodesia.[117] Ultimately, Lord Sumner found that title had vested in the Crown by conquest; the sovereignty of the previous ruler had already been recognised by the Crown, thus the subsequent conquest vested title to land in the Crown.[118] *Southern Rhodesia* recognised 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.[119]

Amodu Tijani v. Secretary, Southern Nigeria (*Amodu Tijani*) (1921) accorded positive recognition of some native land rights even after conquest by the Crown.[120] Plaintiffs sought compensation for expropriation of land by the Crown in the colony of Southern Nigeria.[121] The Privy Council determined that while the Crown possessed ultimate title to the land, the private rights affected had to be analysed under the customary law of the inhabitants.[122] Compensation was awarded for the land, and the Privy Council recognised that a change in sovereignty alone

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114. *Id.*

115. *Id.*

116. Adeyinka Oyekan v. Musendiku Adele, [1957] 1 W.L.R. 876 (P.C.) (appeal taken from West Africa, Nigeria); Bakare Ajakaiye v. Lieutenant-Governor, S. Provinces, [1929] A.C. 679 (P.C.); Amodu Tijani v. Sec'y, S. Nigeria, [1921] 2 A.C. 399 (P.C.); *In re* S. Rhodesia, [1918] A.C. 211 (P.C.).

117. [1918] A.C. at 211, 213.

118. *See id.* at 248-49.

119. *Id.*

120. [1921] 2 A.C. at 399, 410-11.

121. *Id.* at 399-400.

122. *Id.* at 407.

could not disturb rights of private owners.[123] The decision also supported the assertion that an explicit act of state recognising native rights is not required for continuity of rights.[124]

Bakare Ajakaiye v. Lieutenant-Governor, Southern Provinces further supported the proposition that an acquisition of Crown sovereignty does not destroy all pre-existing private property rights, and that a Crown declaration recognising pre-existing property rights is not required.[125] However, *Southern Rhodesia* helped establish the judicial fallacy of denial of proprietary character by distinguishing recognition of native title based on the social sophistication and organisation of their societies.[126] Those on a lower societal scale were accorded less deference to native property customs when determining title.[127]

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. 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 supersede in modern times. The following Part highlights legal developments that have increasingly served to bridge the important normative gaps of protection required for the full and effective realisation 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.

123. *Id.* at 407, 411; *e.g.*, Adeyinka Oyekan v. Musendiku Adele, [1957] 1 W.L.R. 876, 880 (P.C.) (appeal taken from West Africa, Nigeria) ("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.").

124. *See* MCNEIL, *supra* note 19, at 172 n.45.

125. [1929] A.C. 679, 682-83 (P.C.).

126. *See* [1918] A.C. 211, 233-34 (P.C.).

127. *Id.*

National judicial systems have largely forged their own precedent, often rejecting doctrines established by Privy Councils 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 analysed and denounced the fallacies of past decisions that led to the acquisition of Crown title in former British colonies.

International legal systems such as the Inter-American Court of Human Rights (IACHR) and the 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, and informed consent. The recent adoption of the U.N. Declaration on the Rights of Indigenous Peoples has pushed states to reconsider old, unjust laws further.[128] The result has been a cross-cultural, international discussion and consensus on the property rights that should be naturally accorded to indigenous peoples.

Much of the advancement in common law native title has been furthered by the writings of native title scholars who have questioned the interpretations of past courts and reanalysed the application of property and eminent domain doctrines to colonisation.[129] Schools of native title theory now reject the past imposition of British and European property ideologies on radically different societies.

The next Part 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

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128. This adoption has also resulted in some new legislation that protects or redefines state relations with indigenous peoples. *See, e.g.*, *Native Title Act 1993* (Cth) pt 2 (Austl.); Aboriginal Peoples Act (Act No. 134/1954) (Malay.) (amended in 1974); Indigenous Peoples Rights Act of 1997, Rep. Act No. 8371, 94:13 O.G. 2276 (July 28, 1997) (Phil.) (allowing for the titling of indigenous peoples' ancestral domains as inalienable communal properties).

129. *E.g.*, MCNEIL, *supra* note 19, at 84 (purporting 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); Bradley Bryan, *Property as Ontology: On Aboriginal and English Understandings of Ownership*, 13 CAN. J. OF LAW & JURISPRUDENCE 3, 3-4 (2000); Maureen Tehan, *A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the* Native Title Act, 27 MELB. U. L. REV. 523, 525-26 (2003).

resource estate, and were 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.

1. *Milirrpum v Nabalco Pty. Ltd.*

A good place to start when analysing the development of a modern common law native title precedent is with the Australian case *Milirrpum v Nabalco Pty. Ltd.* (1971).[130] Although dismissed for lack of proof of title, the Court proceeded to analyse the rights of aborigines in dicta.[131] As discussed earlier, Australian colonisation 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."[132] The High Court of Australia in *Milirrpum* analysed the expanded doctrine and its use as justification for Crown title.[133] Considering the lack of Australian precedent, the Court looked at decisions from other common law countries, including the competing Privy Council precedents from African and Indian cases, the New Zealand cases *Wi Parata* and *Symonds*, and the more recent U.S. case *Tee-Hit-Ton*.[134] The Court determined that the expansion of the *terra nullius* doctrine did not accord with historical fact.[135] 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."[136] 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.[137] 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

130. (1971) 17 FLR 141 (Austl.).
131. *Id.* at 237, 240-41.
132. *See, e.g.*, Cooper v. Stuart, [1889] 14 App. Cas. 286, 291 (P.C.) (appeal taken from NSW).
133. *See Milirrpum* 17 FLR 141.
134. *Id.* at 237, 240-41.
135. *See id.* at 262.
136. *Id.* at 267.
137. *Id.* at 267-68.

might recognise title based on rights of people other than individuals. In accordance, he also held that any future land claims could only be recognised by development of corresponding legislation.

2. *Calder* and the Supreme Court of Canada

Calder v. Attorney General of British Columbia (1973) followed shortly after *Milirrpum* in the Supreme Court of Canada.[138] 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 of 1763, the Crown acquired title to land by unilateral declaration.[139] The Supreme Court departed from precedent and the approach of the trial and appeals courts. Citing Viscount Haldane in *Amodu Tijani*, the Court, per Justice Hall, recognised 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.[140] In doing so, the Court recognised, for the first time, the continuous existence of common law native title. The judgement in *Calder* emphasised the fact that indigenous possession of the land could form the basis for common law aboriginal title.[141] The Court further took issue with Justice Blackburn's interpretation in *Milirrpum* of the *Calder* appellate court case.[142] 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 recognised by the Crown.[143] The *Calder* Court took issue with this opinion and cited *Johnson v. M'Intosh* as support for the proposition that the burden lies with the Crown to show that each common law native title that pre-existed conquest or discovery was explicitly extinguished.[144] Per Justice Judson:

> [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 action is that they had a right to continue to live on

138. Calder v. Att'y Gen. of B.C., [1973] S.C.R. 313 (Can.).
139. *Id.* at 320, 323.
140. *See id.* at 401-02.
141. *Id.* at 404 (deciding that title had not been extinguished by the Crown).
142. *Id.* at 414-16.
143. *Id.* at 415.
144. *Id.* at 416.

> their lands as their forefathers had lived and that this right has never been lawfully extinguished.[145]

Six years after *Calder* and eight after *Milirrpum*, the High Court of Australia decided a case brought by the Wiradjeri aboriginal nation seeking recognition as a sovereign entity and sovereign title over its land.[146] Building off dicta in *Milirrpum*, the Court in *Coe v Commonwealth* stopped short of creating a binding precedent that Australian law recognises pre-existing aboriginal rights to land.[147] The Court divided on the issue, but also expressed reservations over deciding on the merits of acquisition of Crown sovereignty.[148]

The Canadian common law of native title was further developed in *Baker Lake v. Minister of Indian Affairs* (1980) when Judge Mahoney, for the Trial Division of the Federal Court of Canada, recognised the existence of title separate from the Proclamation.[149] Mahoney detailed four requirements for establishing a pre-existing native title in territory, whether ceded, conquered, or settled:

1. That they and their ancestors 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.[150]

The plaintiffs were a nomadic, hunting, aboriginal tribe, but they were able to prove their traditional, exclusive use of the land at issue since time immemorial and therefore to assert common law title.[151] Mahoney furthered the biased notion that the level of societal sophistication determines whether indigenous customary title is recognised, by requiring an "organized society" in his four-point test.[152] However, Mahoney qualified the definition of an organised society to be one that functions according to the needs of its members.[153] 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 members do not necessitate such operation. Mahoney cites *Calder* and

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145. *Id.* at 328.
146. *Coe v Commonwealth* (1979) 53 ALJR 403, 404 (Austl.).
147. *Id.* at 409.
148. *Id.* at 411-12.
149. [1980] 1 F.C. 518, 577 (Can.).
150. *Id.* at 557-58.
151. *Id.* at 559, 563.
152. *Id.* at 558; *see also In re* S. Rhodesia, [1918] A.C. 211, 233 (P.C.).
153. *Baker Lake*, [1980] 1 F.C. at 559.

Southern Rhodesia as support for a pluralistic approach to the definition of societal sophistication.[154] To determine that a society is organised according to the needs of its members is to recognise sovereignty and, as provided in *Amodu Tijani*, to give effect to the rights enjoyed under the previous regime.[155] Mahoney, however, ultimately concluded that the indigenous tribe did not have a proprietary interest in their land despite meeting the qualifications for title.[156] The Crown Charter grant to the Hudson Bay Company, he ruled, extinguished aboriginal title because it came directly into conflict with private land rights that could not be reconciled.[157] Thus, while seemingly recognising the existence of native title, when applied in practice, the Canadian common law still would not accord tangible rights to native groups.[158]

The Supreme Court of Canada took up the issue of native tangible rights in earnest in 1984 in *Guerin v. The Queen*.[159] In *Guerin*, the Court held that the Crown in right of Canada was liable for monetary damages to the Musqueam Indian tribe for its use of reserve land.[160] The Court also used common law native title as the basis for imposing a fiduciary duty, citing *Amodu Tijani* as support for the doctrine of continuity.[161] However, the Court stopped short of recognising an outright common law basis. The Court 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).[162] 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.

More than a decade later, in *Van der Peet v. The Queen*, Chief Justice Lamer recognised the need for reconciling the Crown's sovereignty with the prior occupation of North America by aboriginal peoples.[163] 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 "[t]rue reconciliation will, equally, place weight on each."[164] In this light, "the doctrine of

154. *Id.* at 558, 561.
155. *Id.* at 559 (citing Amodu Tijani v. Sec'y, S. Nigeria, [1912] 2 A.C. 399 (P.C.)).
156. *Id.* at 563, 577.
157. *Id.* at 577.
158. *See id.*
159. [1984] 2 S.C.R. 335 (Can.).
160. *Id.* at 363-64.
161. *Id.* at 378-79.
162. *Id.* at 348-49.
163. [1996] 2 S.C.R. 507, 551 (Can.).
164. *Id.*

aboriginal title" has been acknowledged as a bridge between indigenous and nonindigenous cultures, where common law doctrine coexists alongside recognition of native title.[165] The inherent recognition of indigenous peoples' pre-existing customs and claims on ancestral land establishes a clear link between the historical and present day injustices that flow from dispossession since the beginning of colonisation.[166]

3. *Mabo v Queensland*

The famous *Mabo* cases[167] 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 in 1988 to recognise native title in the Torres Strait Islands off the coast of Queensland.[168] At issue in the High Court's decision was an act by the Queensland Parliament in 1985 that declared the title in the Murray Islands (of which the Torres Strait Islands are a part) had vested in the Crown upon annexation in 1879.[169] The Court ruled that 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.[170] The Court did not decide on the existence and/or binding effect of common law native title, but implied its existence.

When *Mabo* returned to the High Court of Australia in 1992, the issue directly centered on recognition of native customs as a basis for determining native land rights and title under common law.[171] The Court made a sweeping decision that recognised native title in Australia as a common law doctrine, thus overruling past decisions (such as *Milirrpum*) and the *terra nullius* justification for Crown colonisation in Australia.[172] The Court made three major declarations:

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165. *See* Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583, 588-89 (2007).

166. *See id.* at 588.

167. *Mabo v Queensland (No. 1)* (1988) 166 CLR 186 (Austl.); *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (Austl.).

168. *Mabo (No. 1)* 166 CLR at 199.

169. *Id.*

170. *Id.* at 189, 205-06.

171. *Mabo (No. 2)* 175 CLR at 10.

172. *Id.* at 184, 198.

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.[173]

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* justification and the doctrine of tenures had ramifications for other common law countries that rationalised colonisation based on similar doctrines.

Mabo allowed for extinguishment of native title by the Crown, but established the requirement, echoing that of *Calder*, that there be a "clear and plain intention to [do so]."[174] The Court dismissed the power of a general declaration of sovereignty to a territory as being a valid extinguishment of all native title rights.[175] Indeed, 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."[176]

The plaintiffs in *Mabo* had their land returned to them,[177] but the Court did not directly address the issue of compensation for government expropriation and its corresponding terms. 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.

4. 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.[178] Native title was reaffirmed in the 1996 decision of *Wik Peoples v Queensland*, which adjudicated a conflict over native title and

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173. *See id.* at 180, 183-84.
174. *Id.* at 195.
175. *Id.* at 50-51.
176. SEÁN PATRICK EUDAILY, THE PRESENT POLITICS OF THE PAST: INDIGENOUS LEGAL ACTIVISM AND RESISTANCE TO (NEO)LIBERAL GOVERNMENTALITY 111 (2004).
177. *See Mabo (No. 2)* 175 CLR at 216.
178. *See generally Native Title Act 1993* (Cth) pt 2 (Austl.).

pastoral leases.[179] The Court determined that pastoral leases were not granted under common law and therefore did not extinguish any pre-existing native title.[180] Leases are granted by statute, and the Court concluded that nonspecific legislation cannot extinguish common law native title.[181] 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.[182]

Additional developments in common law native title occurred in other countries around the time of the landmark decisions in *Mabo* and quite often looked to the High Court of Australia's decisions for support. The Supreme Court of Canada decided *Sparrow v. The Queen* 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."[183] An objective "in the public interest," it ruled, is not sufficient and is impermissibly vague.[184]

The case *Delgamuukw v. British Columbia* (1997) is the most recent authoritative opinion on native title out of Canada.[185] 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 periods of occupation.
3. The occupation at the time the Crown asserted sovereignty must have been exclusive.[186]

Additionally, *Delgamuukw* departed from Australian jurisprudence by defining native title as exclusively a communal right.[187]

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179. (1996) 187 CLR 1, 2 (Austl.).
180. *Id.* at 21.
181. *Id.*
182. *Id.* at 36-37.
183. [1990] 1 S.C.R. 1075, 1113, 1121 (Can.).
184. *Id.* at 1113.
185. [1997] 3 S.C.R. 1010 (Can.).
186. *Id.* at 1097, 1102, 1104.
187. *Id.* at 1082.

Decisions from the Supreme Court of Canada have had a profound effect on negotiation of native land claims. For example, in 1993, the Canadian government granted an Inuit land claim, establishing the territory of "Nunavut": an independent, self-governing territory comprising approximately one-fifth of Canada.[188]

5. *Sagong Tasi* 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. The decisions established a modern precedent for common law countries that had been colonised pursuant to doctrines other than *terra nullius* or discovery.[189] The importance of this precedent is significant for its application to former British colonies in Africa, India, and Southeast Asia, all of which had similar patterns of colonisation and independence.

When the Malay peninsula was colonised, the Torrens land system was introduced, and all "unclaimed land" became Crown land.[190] Indigenous peoples who lived in the "unclaimed land" were not disturbed, but their rights in the land were not recognised when sovereignty was obtained.[191] In 1996, the High Court of Johor Bahru adjudicated the case *Adong bin Kuwau v. Kerajaan Negeri Johor* (*Adong bin Kuwau*).[192] *Adong bin Kuwau* was the first case decided in Malaysia where indigenous people sued the government for their traditional rights under property law.[193] 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.[194]

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188. Nunavut Act, S.C. 1993, c. 28 (Can.). The Nunavut Act, which implemented the Nunavut Political Accord of the year prior, would formally create the Nunavut Territory when it came into force on April 1, 1999. *Id.* § 79(1). Other important land claims inspired by decisions from the Supreme Court of Canada include the Nisga'a Treaty, by which nearly 2,000 square kilometres of land was officially recognised as Nisga'a and a 300,000 cubic decametre water reservation was created. NISGA'A NATION & GOV'T OF CAN., NISGA'A FINAL AGREEMENT 31, 50-51 (1999), *available at* http://www.nnkn.ca/files/u28/nis-eng.pdf. The provisions of the Nisga'a Final Agreement were given force of law in 2000. *See* Nisga'a Final Agreement Act, S.C. 2000, c. 7, § 4 (Can.).

189. *See generally* Sagong Tasi v. Kerajaan Negeri Selangor, [2002] 2 CLJ 543 (Malay.); Nor Anak Nyawai v. Borneo Pulp Plantation SDN BHD, [2001] 2 CLJ 769 (Malay.); Adong bin Kuwau v. Kerajaan Negeri Johor, [1997] 1 MLJ 418 (Malay.).

190. *Adong bin Kuwau*, [1997] 1 MLJ at 430.

191. *Id.*

192. *See id.*

193. *Id.* at 423-24.

194. *Id.* at 426-28.

The *Adong bin Kuwau* case involved state-controlled forestland that was also the traditional and ancestral forage land of the plaintiff tribes.[195] The State of Johor 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 Johor, but that would destroy the traditional land of the plaintiffs.[196] 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.[197] The court cited a broad common law recognition of native title throughout former British colonies; this included those colonies still practicing the Torrens land system, where native title is most often granted through native land right statutes.[198]

Common law doctrines that shaped the court's decision were extracted from native cases from around the common law world. The U.S. cases *Mitchel* and *Worcester* were cited as support for the proposition that native right of occupancy is as sacred as the European fee simple.[199] Privy Council decisions in *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 recognised under common law.[200] The court also relied heavily on the Supreme Court of Canada's holdings in *Calder* and in *Baker Lake* that granted a native right to title and to continue living on the lands "as their forefathers had done."[201] The court also relied on the decision from the High Court of Australia in *Mabo*, which held that native title is given its content by consideration of traditional laws and observance of traditional customs and that native title can be revoked if observance of the customs ceases.[202] *Mabo* also influenced the court's decision that native title is inalienable and can only be extinguished by the Crown by explicit acts.[203] The court then looked to the Federal Constitution of Malaysia and the Aboriginal Peoples Act as support for its decision.[204]

The court stated that while the Malay Sultanates were the controlling body at the time of British colonisation, aboriginal rights were recognised within the Sultanates by way of occupation of land.[205]

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195. *Id.* at 423-24.
196. *Id.*
197. *Id.* at 434-36.
198. *Id.* at 426.
199. *Id.* at 426-27.
200. *Id.* at 427-28.
201. *Id.* at 428.
202. *Id.* at 429 (citing *Pareroultja v Tickner* (1993) 117 ALR 206, 213 (Austl.)).
203. *Id.*
204. *Id.* at 430-31.
205. *Id.* at 429.

Thus, when the British colonised the area, 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."[206] The court, after careful consideration, granted the plaintiffs compensation in the sum of RM26.5m (approximately $8.7 million), taking into account their deprivation and loss of income over the past twenty-five years.[207]

The High Court of Sabah & Sarawak, which is governed by slightly different laws than Johor and Malaysian peninsula states, held native title to be valid in 2001 in *Nor Anak Nyawai v. Borneo Pulp Plantation SDN BHD* (*Nor Anak Nyawai*).[208] The court determined that the customary laws of the Iban people in Sarawak are recognised by common law, that no legislation had been created extinguishing common law native title, and that no specific legislation is needed to validate its existence.[209] Native title in Sarawak, therefore, survived the ceding of sovereignty to the Crown. The court cited *Adong bin Kuwau*, *Calder*, and *Mabo* as dispositive on the issue of common law native title.[210]

Adong bin Kuwau and *Nor Anak Nyawai* represented a seismic shift in treatment of native title in Malaysia up to that point. However, they bracketed native title in the paternalistic caveat that 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 to the land expires and the title of the Crown becomes a full beneficial title."[211] This misguided assertion of a need for cultural continuity was quickly rejected by the High Court of Malaya in *Sagong Tasi v. Kerajaan Negeri Selangor* (*Sagong Tasi*), relying in part on *Delgamuukw* (which was decided in Canada after *Adong bin Kuwau*).[212]

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206. *Id.* at 436.
207. *Id.*
208. [2001] 2 CLJ 769 (Malay.).
209. *Id.* at 773, 835.
210. *Id.* at 773-74.
211. *Adong bin Kuwau*, [2001] 1 MLJ at 428-29.
212. Sagong Tasi v. Karajaan Negeri Selangor, [2002] 2 CLJ 543, 578 (Malay.).

In April 2002, the High Court of Malaya in *Sagong Tasi*, building upon decades of evolving commonwealth jurisprudence, established the strongest precedent supporting native title to date.[213] In *Sagong Tasi*, the state expropriated land from the Temuan aboriginal area to construct a highway to the Kuala Lumpur International Airport.[214] The state compensated for the loss of the Temuan's homes and crops, but refused to recognise a proprietary interest in the land or compensate for its property value.[215] The court disagreed with the state and adopted the stance of the previous Malaysian rulings that native title exists under common law.[216] However, their decision advanced the definition of native title further by according a proprietary interest in native title.[217] The court held that common law not only allowed occupation of land and the right to conduct certain activities, but also accorded rights to the land itself.[218] The court relied heavily on the ruling in the Canadian case *Delagamuukw*, which 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 "[a]boriginal title, however, is a right to the land itself."[219] The court also rejected the claim that when the Sultanate was established in 1766 and claimed that all lands belonged to the state, indigenous rights to land were extinguished.[220] The court relied on *Mabo* and stated, "[I]f 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 . . . ."[221]

In May 2010, the Malaysian Highway Authority withdrew its appeal before the Federal Court, leaving intact the historic judgement in favour of the Temuan.[222]

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213. *See id.*
214. *Id.* at 548, 550.
215. *Id.* at 550.
216. *Id.* at 576.
217. *Id.* at 569.
218. *Id.* at 576.
219. *Id.* at 569 (quoting Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1080, 1096 (Can.) (internal citation omitted)).
220. *Id.*
221. *Id.*
222. Elizabeth Wong, *Media Statement on the Conclusion of the Sagong Tasi Case*, HORNBILL UNLEASHED (May 26, 2010, 6:29 PM), http://hornbillunleashed.wordpress.com/2010/05/26/media-statement-on-the-conclusion-of-the-sagong-tasi-case/.

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 U.N. Declaration on the Rights of Indigenous Peoples (Declaration) represented the culmination of years of negotiations on the acceptance of indigenous peoples as distinct rights holders under international law.[223] The Declaration sets out—in more precise language than in any previous global document—indigenous peoples' rights on many specific issues, including the protection of ancestral land.[224] While technically non-binding, the general acceptance of the principles set out in the Declaration has been recognised by key actors as helping to clarify the emergence of customary international law in the area of indigenous rights.[225]

At the U.N. 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 ICCPR article 27 provisions, which touch on public participation, representation, and community rights.[226] Similarly, the U.N. Committee on the Elimination of Racial Discrimination has increasingly and rapidly established strong indigenous land rights protections by interpreting the right to freedom from discrimination as requiring equal protection of indigenous land systems.[227] The use of the Declaration, based on the provisions of article

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223. *See generally* U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

224. *Id.* arts. 8, 10, 25-30, 32.

225. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Rep. on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Human Rights Council, ¶ 79, U.N. Doc. A/HRC/4/32 (Mar. 15, 2006) (by Rodolfo Stavenhagen).

226. *See, e.g.*, Apirana Mahuika v. New Zealand, U.N. Hum. Rts. Comm'n, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000); Länsman v. Finland, U.N. Hum. Rts. Comm'n, Communication No. 511/1992, U.N. Doc. CCPR/C/49/D/511/1992 (Oct. 14, 1993); Lubicon Lake Band v. Canada, U.N. Hum. Rts. Comm., Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990).

227. U.N. Comm. on the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure Decision 1(68): United States of America, ¶ 7, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006); U.N. Comm. on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, Including Early Warning Measures and Urgent Action Procedures Decision 1(67): Suriname, ¶ 4, U.N. Doc. CERD/C/DEC/SUR/2 (Aug. 18, 2005); U.N. Comm. on the Elimination of Racial Discrimination, Decision 1(66): New Zealand Foreshore and Seabed Act 2004, ¶ 1, U.N. Doc. CERD/C/66/NZL/Dec.1 (Mar. 11, 2005).

42 of the same, provides scope for yet more robust jurisprudence on these matters.[228]

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.

1. 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 U.N. 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 IACHR, related to the violated property rights of the Mayagna (Sumo) Awas Tingni Community from the Atlantic Coast region of Nicaragua.[229] At issue was the government's granting of logging concessions to a foreign company within the community's traditional lands, an action that failed to adequately recognise or protect the community's customary land tenure.[230]

While Nicaragua's Constitution and laws were progressive in recognising the rights of indigenous peoples to the lands they traditionally used and occupied, the IACHR found that the government's inability and/or unwillingness to ensure that such protection was both available and effective in practice raised important violations.[231] Specifically, the IACHR 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

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228. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 223, art. 42 ("The 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 U.N. judicial body, should produce decisions consistent with the Declaration.

229. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 25 (Aug. 31, 2001).

230. *See* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 36-37 (2001) (discussing the government's actions leading up to the *Awas-Tingni* case); *see also* S. James Anaya & Maia S. Campbell, *Gaining Legal Recognition of Indigenous Land Rights: The Story of the* Awas Tingni *Case in Nicaragua*, *in* HUMAN RIGHTS ADVOCACY STORIES 117, 118 (Deena Hurwitz et al. eds., 2009).

231. *Awas Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 136-139.

law, values, customs and mores."[232] In doing so, the IACHR 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 officially titled to private or other interests. From this point forward, the IACHR 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 it by domestic law.[233]

In the absence of official title to ancestral land, the IACHR further stressed that *possession* of land should suffice for indigenous communities lacking formal title to obtain official recognition of that property.[234] This principle was further elucidated in the case *Moiwana Village 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 as a result of acts of violence perpetrated against them.[235]

Later, in the course of its deliberations over the case *Sawhoyamaxa Indigenous Community v. Paraguay*, the IACHR held that indigenous peoples' "traditional possession of their lands" had effects equal to those granted full property title by the state.[236] On that basis, traditional possession entitled indigenous peoples to demand official recognition and registration of property title.[237] Notwithstanding this, the IACHR 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."[238] Finally, the IACHR ruled that "indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality."[239] In reaching these

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232. *Id.* ¶ 164 (emphasis added).
233. *Id.* ¶ 146.
234. *Id.* ¶ 151.
235. Preliminary Objections, Merits, and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 134 (June 15, 2005).
236. Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128 (Mar. 29, 2006).
237. *Id.*
238. *Id.*
239. *Id.*

findings, the IACHR concluded, "possession is not a requisite conditioning the existence of indigenous land restitution rights."[240]

The IACHR also recognised 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.[241] In refuting this challenge, the IACHR 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.[242]

The *Awas Tingni* case constituted the first of many subsequent IACHR rulings to confirm the scope of article 21 of the American Convention on Human Rights as extending to protect property rights within a framework of communal property.[243] In line with this broader scope of protection, the IACHR established in *Saramaka People v. Suriname*:

> [Any] lack of clarity as to the land tenure system . . . does not present an insurmountable obstacle for the State, which has the 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 . . . .[244]

The IACHR further rejected two additional related arguments submitted by the state as to why it had failed to legally recognise and protect the land-tenure systems of indigenous and tribal communities: "alleged 'complexities and sensitivities' of the issues involved, and the concern that legislation in favor of indigenous and tribal peoples may be perceived as being discriminatory towards the rest of the population."[245]

Regarding the first issue, the IACHR rejected the possibility that the state could abstain from complying with its obligations under the

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240. *Id.*

241. *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 140(h), 151 (Aug. 31, 2001).

242. *Id.* ¶ 164.

243. *Id.* ¶ 25.

244. Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 101 (Nov. 28, 2007); *see also* Organization of American States, American Convention on Human Rights "Pact of San José, Costa Rica" art. 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (requiring states parties "to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms [under the Convention]").

245. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 102.

American Convention on Human Rights because it would be difficult to do so.[246] While acknowledging the state's concern over the complexity of the issues involved, the IACHR 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."[247]

The IACHR also found the state's argument "that it would be discriminatory to pass legislation that recognizes communal forms of land ownership" to be without merit.[248] In reaching this conclusion, the IACHR 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 recognises the said differences is therefore not necessarily discriminatory.[249] On this basis, the IACHR reiterated its long-held view that, in the context of members of indigenous and tribal peoples, "special measures are necessary in order to ensure their survival in accordance with their traditions and customs."[250]

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246. *Id.*

247. *Id.* (emphasis added).

248. *Id.* ¶ 103.

249. *See* Connors v. United Kingdom, App. No. 66746/01, ¶ 84 (Eur. Ct. H.R. May 27, 2004), http://www.echr.coe.int/echr/en/hudoc (follow "Hudoc Database" hyperlink; search Application Number "66746101") (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, ch. 9 (1997) ("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."); Convention on the Elimination of All Forms of Racial Discrimination art. 1, ¶ 4, Dec. 21, 1965, 660 U.N.T.S. 195 ("Special 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 . . . ."); Office of the High Comm'r for Human Rights, General Recommendation No. 23: Indigenous Peoples ¶ 4, U.N. Doc. A/52/18, annex V (Aug. 18, 1997) [hereinafter General Recommendation No. 23] (calling upon States to take certain measures in order to recognize and ensure the rights of indigenous peoples).

250. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 103.

2. 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 recognise 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 (Kenya) & 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).[251]

The ruling marked the culmination of forty years of struggle led by the Endorois community, which in 1973 was dispossessed of the ancestral land it had occupied since time immemorial.[252] Lake Bogoria, located in the heart of Kenya's Rift Valley, had become demarcated for the purposes of a game reserve.[253] The failure to compensate the Endorois with adequate grazing land to sustain their livestock or to involve them in the management and benefit-sharing of the reserve proved to have a devastating economic impact on the community.[254] In addition to the economic hardships endured as a result of the forced eviction, the Endorois' broken ties with their ancestral land posed a serious threat to their socio-cultural and spiritual survival as a people.[255]

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 ACHPR recognised 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.[256] The recognition accorded to indigenous peoples in the *Endorois* decision was largely facilitated by the publication of a ground-breaking report from the ACHPR's Working Group on Indigenous

251. 276/2003, African Comm'n on Human & Peoples' Rights (Feb. 4, 2010).
252. *Id.* ¶ 3.
253. *Id.*
254. *See id.* ¶ 2.
255. *Id.* ¶ 19.
256. *See id.* ¶ 161.

Populations/Communities (WGIP) in 2005.[257] The WGIP's report, along with the ACHPR's subsequent adoption of an Advisory Opinion on the U.N. Declaration on the Rights of Indigenous Peoples, assisted in drawing the fundamental distinction between the concepts of "indigeneity" and "indigenousness" in the African context.[258] While all original inhabitants of the continent were acknowledged to belong to the former, the latter categorisation 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.[259]

The ACHPR drew on the IACHR case *Saramaka People* to reject the Kenyan government's assertion that the inclusion of the Endorois in "modern society" had affected their cultural distinctiveness for the purposes of special protection.[260] In *Saramaka People*, 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.[261] The ACHPR 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."[262] 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."[263] 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.[264]

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257. AFRICAN COMM'N ON HUMAN AND PEOPLES' RIGHTS, REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES (2005), *available at* http://www.chr.up.ac.za/chr_old/indigenous/acwg/AfricanCommissionbookEnglish.pdf.

258. *Id.* at 106.

259. *See id.* at 91.

260. *Ex rel. Endorois Welfare Council*, 276/2003, ¶ 161.

261. *Id.* (citing Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 164 (Nov. 28, 2007)).

262. *Id.* ¶ 162.

263. *Id.*

264. *Id.*

Finally, the ACHPR highlighted how the failure to recognise an indigenous or tribal group generally leads to a violation of the "right to property."[265] In this regard, the ACHPR recalled international jurisprudence, which found the controversy over recognition of a community or its leadership to be a natural consequence of not recognising their juridical personality; this state of affairs invariably poses obstacles to challenging property claims before domestic courts.[266]

In its ruling, the ACHPR flatly rejected colonial legal frameworks by accepting that indigenous communities' ancestral and collective use of land was in fact worthy of legal recognition.[267] In a move akin to its Inter-American counterpart, the ACHPR further specified that indigenous peoples' property rights were to be protected "within the 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."[268] This position was consistent with articles 26 and 27 of the U.N. Declaration on Indigenous Peoples, which, in the absence of official title deeds, equally recognises claims of ownership over ancestral land on the basis of land "occupied or otherwise used."[269]

The ACHPR further stressed that "[t]he '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]."[270] In doing so, ACHPR predicated its more stringent test for ancestral claims to land and related natural resources on the premise that any limitations on indigenous rights to "their natural resources must flow only from *the most urgent and compelling interest* of the state."[271] The ACHPR further stated, "Few, 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."[272]

In accordance with the above, the ACHPR drew inspiration from the U.N. Declaration on the Rights of Indigenous Peoples to award restitution and compensation based on the following:

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265. *Id.* ¶ 192.
266. *Id.* (citation omitted).
267. *Id.* ¶ 209.
268. *Id.* ¶ 190.
269. *Id.* ¶ 207 (internal quotation marks omitted).
270. *Id.* ¶ 212.
271. *Id.* (emphasis added) (internal quotation marks omitted).
272. *Id.* (internal quotation marks omitted).

> Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. 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.[273]

The ACHPR further pointed to the fact that upon proof that land restitution rights are still current, the state is required "[to] take the necessary actions to return them to the members of the indigenous people claiming them."[274] 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.[275]

This reflects standards upheld by the IACHR[276] and the U.N. 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"; only under those circumstances should restitution "be substituted by the right to just, fair and prompt compensation."[277]

In *Endorois*, the ACHPR dismissed several government claims alleging that the restitution of land was infeasible.[278] In doing so, the ACHPR first pointed to the fact that, as ancestral guardians of the land now gazetted as a conservation area, the Endorois were "best equipped to maintain its delicate ecosystems."[279] Lack of feasibility over restitution was further questioned in light of the Endorois community's willingness to continue the conservation work the government began.[280] The fact that no other community had settled on the land in question further discredited government assertions, though the ACHPR highlighted that, even in the event of encroachment, responsibility fell upon the

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273. *Id.* ¶ 232 (internal quotation marks omitted) (conforming with articles 10, 11, 19, 28 and 32 of the U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 223).

274. *Id.* ¶ 234.

275. *Id.*

276. *See* Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 149 (June 17, 2005).

277. General Recommendation No. 23, *supra* note 249, ¶ 5 (emphasis added).

278. *Ex rel. Endorois Welfare Council*, 276/2003, ¶ 235.

279. *Id.*

280. *Id.*

respondent state to address the matter in accordance with the law.[281] That the land had not been "spoliated" further undermined any claims of restitution being factually impossible.[282] Finally, the ACHPR emphasised 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."[283]

Also, of note is the ACHPR's insistence that the Endorois community be granted the right of *ownership* over their ancestral land, rather than mere *access*.[284] Drawing on the principles of the U.N. Declaration on the Rights of Indigenous Peoples and its own Advisory Opinion relating to the same, the ACHPR reasoned: "[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 ensures that indigenous peoples can engage with [these entities] as active stakeholders rather than as passive beneficiaries."[285]

The *Endorois* ruling further built on IACHR 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."[286] This established an express link 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.[287]

In the first decision by any international body adjudicating upon the right to development, the *Endorois* case illustrated how the issue of title is instrumental for the full realisation of indigenous peoples' rights and the sustainability of their well-being. As a starting point, the ACHPR emphasised that development "must be equitable, non-discriminatory, participatory, accountable and transparent."[288] Moreover, development that was compatible with the object and purpose of the African Charter

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281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* ¶ 204.
285. *Id.*; *see also* U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 223, arts. 8(2)(b), 10, 25-27.
286. *Ex rel. Endorois Welfare Council*, 276/2003, ¶ 205.
287. *Id.* ¶ 206.
288. *Id.* ¶ 277.

was required to lead to the empowerment of the Endorois community.[289] In this regard, the ACHPR thus held that both the choices and the capabilities of the Endorois had to improve before their right to development came to fruition.[290]

Much of the ACHPR'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."[291] In its assessment of the case, the ACHPR found that the conditions of the consultations with the Endorois had failed to meet standards of due diligence.[292] 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.[293] The decision has proven instrumental in placing the obligation upon states to treat indigenous peoples as "active stakeholders rather than as passive beneficiaries."[294] The decision has also highlighted 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.

V. POST-*ENDOROIS* IMPACT

Concurrent development of native title in jurisdictions across commonwealth countries and in international legal frameworks has had wide-ranging effects. Modern precedent in common law courts reveals 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 calls for protection of indigenous land

289. *Id.* ¶ 283.
290. *Id.*
291. *Id.* ¶ 291.
292. *Id.* ¶ 281.
293. *Id.*
294. *See id.* ¶ 204.

rights and remunerates for their expropriation by state agencies.[295] 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.[296] States are increasingly willing to address the legal relics of their colonial past to reverse the historic marginalisation of indigenous peoples.

For example, in Kenya, changes advocated for by the Endorois before local courts, and later the ACHPR, were echoed by wider civil society through the course of Kenya's lengthy constitutional review process.[297] These combined efforts culminated in the adoption of a new Constitution in August 2010, which includes provisions that expressly recognise "community land" as equal to public and private land.[298] 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.[299] 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."[300]

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 recognise indigenous land claims or afford a full bundle of property rights.[301] Much of the important legal meta-structure has been laid and many prior, controlling legal doctrines

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295. *See generally Ex rel. Endorois Welfare Council*, 276/2003, ¶ 205; Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 152 (Nov. 28, 2007); Moiwana Village v. Suriname, Preliminary Objections, Merits, and Reparations, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 124 (June 15, 2005); Mayanga (Sumo) Awas Tingi Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

296. *See* CONSTITUTION (2010) (Kenya).

297. *See* The Constitution of Kenya Review Act, (2008) Cap. 9, § 3.

298. CONSTITUTION, arts. 61, 63 (2010) (Kenya).

299. *Id.* art. 63.

300. *Id.* art. 67(2)(e).

301. *See* Kent McNeil, *Judicial Approaches to Self-Government Since* Calder*: Searching for Doctrinal Coherence*, *in* LET RIGHT BE DONE: ABORIGINAL TITLE, THE CALDER CASE, AND THE FUTURE OF INDIGENOUS RIGHTS 129, 130-31, 150-51 (Hamar Foster et al. eds., 2007) (discussing ongoing implementation efforts related to *Mabo*, *Calder*, and other cases).

dissolved. However, challenges of domestic constitutional interpretation and legislation predominance remain. Constitutional and legislative revisions emphasising 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 and/or multinational companies without the consent or benefit of the indigenous communities.

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 are conveyed 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.[302] Recognition of native title is a part of this new global paradigm for strengthening and vesting land and resource assets in local populations. By recognising indigenous claims to land, states can further reverse patterns of over-centralised economies and the inequitable distribution of assets, while 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 precedents 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, as well as 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

302. *E.g.*, HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 6, 12 (2000).

decisions will be a more difficult process. Registration and protection of continuously 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.

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 of 1763 have largely been rejected and new precedents and rights, such as the U.N. Declaration on the Rights of Indigenous Peoples, have been embraced. Early Privy Council decisions giving the Crown ownership over land grants that were held by indigenous peoples without the benefit of title (the doctrine of recognition) have been replaced by decisions (such as in *Calder* and *Sagong Tasi*) that recognise possession since time immemorial as evidence of title in indigenous communities.[303] Common law principles, 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 so as to include indigenous customs of land occupation and use.[304] Since *Mabo*, many courts in other countries have joined in recognising the extent of this principle. Most recently, in 2010, the African Commission on Human and Peoples' Rights expanded on other regional precedent to reverse forty years of Endorois ancestral land expropriation, thus establishing clear burden on states to demarcate, protect, and compensate for indigenous land grabs.[305]

The advances that have been made and the title rights granted to indigenous communities in a few countries are but a minute fraction of all the indigenous communities in countries around the world that are systematically being deprived of their land. Furthermore, countries or regional institutions that have recognised legal native title are slow, unable, or uninterested 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

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303. *See generally* Calder v. Att'y Gen. of B.C., [1973] S.C.R. 313 (Can.); Sagong Tasi v. Kerajaan Negeri Selangor, [2002] 2 CLJ 543 (Malay.).

304. *See generally Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 32 (Austl.).

305. Ctr. for Minority Rights Dev. (Kenya) *ex rel.* Endorois Welfare Council v. Kenya, 276/2003, African Comm'n on Human & Peoples' Rights ¶ 237 (Feb. 4, 2010).

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 recognised 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, the new precedent will unlock more dynamic markets and economic forces that can help lead countries to sustainable and equitable economic growth.