

**THE DEMARCATION OF INDIGENOUS PEOPLES' TRADITIONAL
LANDS: COMPARING DOMESTIC PRINCIPLES OF DEMARCATION
WITH EMERGING PRINCIPLES OF INTERNATIONAL LAW**

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I. INTRODUCTION

One of the most pressing issues for indigenous peoples around the globe is the state recognition and demarcation of the traditional land rights of indigenous peoples¹:

In terms of frequency and scope of complaints, the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands. Demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. Purely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked.²

While increasingly states are adopting measures to address indigenous peoples' claims to lands and natural resources, that has not always translated into demarcation on the ground. In the absence of demarcation, these lands are vulnerable to appropriation and exploitation by outsiders without regard to the territorial claims of local indigenous peoples or the negative effects of

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1. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Human Rights, *Final Working Paper: Indigenous Peoples and Their Relationship to Land*, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001) (prepared by Erica-Irene A. Daes) [hereinafter *Indigenous Peoples and Their Relationship to Land*]. The report highlights the harms from which indigenous groups need protection, including "oil and gas exploration and exploitation, geothermal energy development, mining, dam construction, logging, agriculture, ranching and other forms of economic activity ostensibly in the national interest." *Id.* ¶ 69.

2. *Id.* ¶ 50.

development on their cultures and means of subsistence. Often these actions are carried out, or sanctioned, by states. The demarcation of lands, as indicated by the above quote, involves the physical delineation of areas of land and their recognition and protection by the state. Precisely how that should occur is a controversial issue and in large part the reason why states resist demarcation.

What many indigenous peoples seek is the right to communal *ownership* of lands that are traditionally used and occupied by them. Ownership in this context is not the same as state forms of ownership (e.g., fee simple titles). Indigenous ownership of land is a communal right and will ordinarily be subject to limits on alienation. The important point is that with ownership comes the right to control access to indigenous lands.³ The demarcation of traditional lands thus envisages the creation of a territorial land base that indigenous peoples may occupy and use to the exclusion of other peoples. Demarcation on these terms leaves indigenous peoples free to maintain and reproduce their unique forms of self-determination.⁴ States resist granting rights of exclusivity in large part because of the *extent* of territory claimed and the implications of demarcation on the property rights of the state and non-indigenous interests (especially lands and natural resources appropriated by the state and titles granted by the state to non-indigenous peoples).⁵ Typically, indigenous peoples' traditional lands are not confined to discrete areas of regular and intensive use but extend to wider territories used for a range of purposes, including subsistence hunting, gardening and gathering, and various traditional activities.

A variety of reasons are advanced by states to deny claims to demarcation, but what they all share is the notion that indigenous claims cannot be sustained because of cultural differences. Thus, claims to ownership may be denied because indigenous forms of tenure do not comport with the standards

3. See, e.g., Thomas Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

4. See ECOSOC, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Final Report: Indigenous Peoples' Permanent Sovereignty over Natural Resources*, ¶¶ 6-8, E/CN.4/Sub.2/2004/30 (July 13, 2004) (prepared by Erica-Irene A. Daes) ("It has become clear that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples' having the legal authority to exercise control over their lands and territories.").

5. Indigenous peoples' claims to demarcation may also be limited by international law and common law rights. See, e.g., *Commonwealth v. Yarmirr* (2001) 208 C.L.R. 1 (Austl.) (rejecting a claim to exclusive interests in territorial waters because this would conflict with common law rights of fishing and the international right of free navigation).

states apply to establish ownership. Indigenous lands are characterized as *sui generis*, or unique, and therefore not amenable to the legal protections against expropriation extended to non-indigenous property interests. And states define the content of modern indigenous land rights with reference to ancient customary laws, thereby confining indigenous peoples to the practices carried out in the pre-colonial past. Thus, there is a strong sense of history repeating itself, with states using similar arguments to those advanced in the early years of European colonial expansion to deny the legality of indigenous peoples' forms of property rights.⁶

In fact, in the common law jurisdictions of Australia, Canada, and New Zealand—which have recently been engaged in the legal recognition of indigenous land rights—the demarcation of lands is something of a misnomer. It is extremely rare for indigenous peoples to receive legal recognition of a right to occupy lands exclusively. Instead, it is more common for states to recognize only the right to engage in specific pre-colonial traditional activities, such as hunting and fishing.⁷ The legal recognition of these lesser property rights avoids the disruption of the extensive legal interests in land appropriated by the state or granted to non-indigenous peoples.⁸

6. For example, John Locke and other classical scholars argued that uncultivated land in North America was not occupied and therefore free to be acquired by European settlers. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (P. Laslett ed., Cambridge Univ. Press 1988) (1690); EMER DE Vattel, *THE LAW OF NATIONS* (Northampton, Mass., S. Butler 1820) (1758). Similarly, the Australian decision of *Milirrpum v. Nabalco Party Ltd.*, (1971) 17 F.L.R. 141, ruled that a colony could be considered uninhabited, or *terra nullius*, at the time of sovereignty if its occupants were nomadic or had no settled law. For an illuminating discussion of the medieval origins of these theories and their extension to the Americas, see generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

7. The exceptions are the modern treaties negotiated by indigenous peoples and states. For example, the Nisga'a Final Agreement, which was negotiated between the Nisga'a Nation, British Columbia, and Canada, recognizes Nisga'a rights to roughly 2000 square kilometers of land. Nisga'a Final Agreement Act, 2000 S.C., ch. 7 (Can.).

8. Kent McNeil, *The Vulnerability of Indigenous Land Rights in Australia and Canada*, 42 *OSGOODE HALL L.J.* 271, 300 (2004) ("Despite what judges may say about maintaining legal principle, at the end of the day what really seems to determine the outcome in [indigenous land claims] is the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure.").

This Article compares state modes of demarcation with the standards set by international law.⁹ Part II briefly outlines the historical focus of indigenous land claims and the issues that typically arise as a result of this focus. Part III examines and compares state modes of demarcation in the common law jurisdictions of Australia, Canada, and New Zealand. In addition to describing the methods by which these states define indigenous peoples' rights in land, I consider how they apply rules of continuity and extinguishment—both of these principles impact considerably the question of whether indigenous land rights can be recognized by the state—and the adversarial manner in which states address claims to traditional lands. I focus on these jurisdictions because they have generated a comprehensive body of jurisprudence on claims to traditional lands. To date, this jurisprudence has developed with little regard for the international law standards of demarcation. It could be easily seized upon and applied by other states yet to embark upon a program of demarcation.

Part IV describes the standards of demarcation set by international law, drawing upon principles emerging from international instruments and the jurisprudence of human rights treaty bodies, and Part V compares them with the standards applied by individual states. These emerging international principles establish a minimum set of standards of compliance that diverge significantly from those applied by states. In particular, these international principles accord the right to ownership of those lands that indigenous peoples traditionally occupy. International law recognizes that to accord rights of ownership in only those cases where indigenous land practices strictly conform to state standards of ownership would be to penalize indigenous peoples for normative divergence and perpetuate the historical discrimination suffered by them. In addition, in contrast to the laws of states, international law accords robust remedial protections for the dispossession of indigenous lands, blurring the sharp distinction frequently drawn in domestic law between the recognition of extant land rights and claims for dispossession.

The argument advanced in this Article is that all states must ensure that their standards of demarcation comply at the very least with these international principles. In this way, demarcation can respect the effects of colonization on indigenous peoples' way of life and promote their aspirations of self-determination.

9. For a comprehensive discussion of international law and indigenous peoples, see generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford Univ. Press 2d ed. 2004).

II. THE HISTORICAL FOCUS OF INDIGENOUS PEOPLES' LAND CLAIMS

The indigenous rights movement has focused on the unique factual circumstances of indigenous peoples, given their former status as self-governing polities with territorial rights over lands now colonized, their survival as collectives with values and customs that are distinct to the dominant culture, and their continuing vulnerable status within states.¹⁰ These circumstances are said to be unique to indigenous peoples and have been used to advance indigenous rights through a variety of avenues.¹¹ What indigenous peoples seek is the restoration of the rights denied to them by history, principally their rights to a secure territorial land base and self-determination.

In the common law states of Australia and Canada (and later New Zealand), recent "breakthrough" judicial decisions opened the way for

10. Note that this set of historical factors reflects the experience of countries that were colonized by European states, and the notion of indigenous peoples is now widely accepted to include indigenous peoples in other states, for example, Asia and Africa. See Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998). The international law standards of demarcation discussed in this Article set minimum standards accessible to all indigenous peoples irrespective of the historical origins of their state.

11. Professor Kingsbury has identified and explored five conceptual structures employed in claims brought by indigenous peoples: (1) human rights, (2) minority claims, (3) self-determination claims, (4) historical sovereignty claims, and (5) claims as indigenous peoples, including claims based on treaties or other agreements between indigenous peoples and states. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189 (2001); see also S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Towards a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237 (2005) (noting that claims advanced in international fora on the basis of historical sovereignty have not been as successful as those advanced on the basis of human rights principles); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (Clarendon Press 1995) (arguing that indigenous peoples, as national minorities, should be accorded group-differentiated rights, including rights to lands and self-government, based on liberal principles of equality and, where relevant, historical agreements like treaties of cession); PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* (2001) (arguing that equality is promoted by the existence of a unique constitutional relationship between Aboriginal people and the Canadian state).

demarcation by ruling that indigenous property rights survived the assertion of English sovereignty and are capable of judicial recognition and protection.¹² The common law would give those rights legal status and protect them, but the rights themselves were treated as *sui generis* with their origins in a pre-colonial Aboriginal life and not the property system created by the state.¹³ These indigenous property rights were said to continue until such time as the Crown asserted its authority to extinguish those rights or acquire them through agreement.¹⁴ The modern recognition of indigenous property, therefore, involves detailed inquiries into colonial and especially indigenous histories, and this backward-looking focus has shaped the later development of the law.¹⁵

The historical focus of indigenous land rights litigation raises complex issues of continuity, extinguishment, and definition. In relation to continuity, do tribes need to establish that the land claimed has consistently been in their possession since pre-colonial times? And what is the status of indigenous peoples who have been displaced and are no longer in occupation of their lands? Displacement may have occurred many decades ago, or longer, through state confiscations or, more recently, through forcible relocation due to violence by paramilitary groups and drug traffickers or by state-sponsored resource projects.¹⁶ And how are indigenous land rights to be reconciled with property rights granted or appropriated by the state in the many intervening years before the breakthrough

12. For Canada, the breakthrough decision was *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. In relation to Australia, the decision of *Mabo v. Queensland II (Mabo II)*, (1992) 175 C.L.R. 1, overturned as discriminatory the common law rule that Australia was *terra nullius* when sovereignty was asserted over the country. As noted by Justice Brennan, who delivered the majority judgment, “[w]hatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.” *Id.* ¶ 42. The recent New Zealand Court of Appeal decision, *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643 (C.A.), recognized the possibility of the New Zealand foreshore and seabed being subject to Māori customary title.

13. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶ 114 (Can.).

14. For a recent restatement of these principles, see *Ngati Apa*, [2003] 3 N.Z.L.R. 643.

15. See P.G. McHugh, *Aboriginal Title in New Zealand: A Retrospect and Prospect*, 2 N.Z. J. PUB. & INT’L L. 139 (2004) [hereinafter McHugh, *Aboriginal Title in New Zealand*]; P.G. McHugh, *New Dawn to Cold Light: Courts and Common Law Aboriginal Rights*, 2 N.Z. L. REV. 485 (2005) [hereinafter McHugh, *New Dawn to Cold Light*].

16. *Indigenous Peoples and Their Relationship to Land*, *supra* note 1.

decisions of recognition? This issue, characterized as an issue of legal extinguishment, requires courts to formulate rules on how to prioritize competing claims of right.¹⁷ Generally speaking, where indigenous peoples' lands have been acquired by the state, or where the state has granted those lands to non-indigenous peoples, the indigenous interest in the lands is legally extinguished.¹⁸

Additionally, when demarcating lands, courts are required to translate indigenous land tenure systems into modern legal rights that are familiar to, and can be accommodated within, the state's legal system. It is this process of translation and rationalization of indigenous peoples' patterns of land tenure—called, in this Article, an issue of definition—that has created the most conceptual difficulties. While there is great diversity among the land tenure practices of indigenous peoples, the demarcation process has revealed some common features. Typically, land is held communally by the indigenous community as a whole, though sub-groups, and individuals may exercise subsidiary rights within the territory.¹⁹ Some indigenous peoples are relatively settled and agrarian; others lead a more nomadic existence, using and occupying lands cyclically or seasonally, and thus need access to greater areas of land.²⁰ In addition to these tenure patterns, the relationship between indigenous communities and their lands contains cultural, inter-generational, and political dimensions that are essential to their continued viability as distinctive communities.²¹ How is this to be translated? And what guiding principles are to be used by states in this translation process? As we will see, the starting premise for demarcation often

17. See *infra* Part III.D.

18. See *infra* Part III.D.

19. See the expert evidence of Dr. Rodolfo Stavenhagen in Transcript of the Public Hearing on the Merits, Nov. 16-18, 2000, at the Seat of the Court, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua Case, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter *Awas Tingni Case*], translated in 19 ARIZ. J. INT'L & COMP. L. 129, 182 (2002) (unofficial translation).

20. Speaking very generally of indigenous peoples in Latin America, Dr. Stavenhagen drew a distinction between the more settled indigenous peoples of the "high lands" and the relatively semi-nomadic indigenous peoples of the "low lands" (including the Amazonian Basin and the Caribbean region). *Id.*

21. As noted by the Inter-American Court of Human Rights: "For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations." *Awas Tingni Case*, *supra* note 19, ¶ 149.

dictates the evidential burdens placed upon indigenous peoples and the range of rights capable of recognition.

Typically, the courts in the common law jurisdictions undertake one of two modes for demarcating lands. First, states may inquire into indigenous peoples' normative systems for land ownership and specifically the substance of specific customary laws²² that create and regulate indigenous property rights. This is the approach used in Australia.²³ Second, states may attempt to recognize indigenous land rights of ownership on the basis of their traditional use and occupation of lands under their land tenure systems. This is the approach used in Canada.²⁴ Both processes endeavor to be faithful to the *indigenous* nature of the claim.

Determining the existence and nature of indigenous peoples' land rights with reference to their customary laws might make good sense to many. For both states and indigenous peoples, there is great intuitive appeal in this approach in light of the efforts by many states (even recently) to stamp out customary law and integrate indigenous peoples into the dominant culture.²⁵ And plainly it was indigenous customary law that first gave life to these property rights and governed

22. The term customary or custom law is usually applied to laws and legal systems of non-state societies. By customary law in this Article, I mean that body of law adhered to by indigenous communities that is closely linked with custom and social practice and is often unwritten.

23. The Native Title Act, 1993 (Austl.), defines Aboriginal land rights (called native title) with reference solely to customary law. The Foreshore and Seabed Act 2004, 2004 S.N.Z. No. 93, provides for the recognition of "customary rights" in the New Zealand foreshore and seabed but only if supported by Māori customary law. Prior to the enactment of the Foreshore and Seabed Act 2004, the Māori Land Act 1993, 1993 S.N.Z. No. 4, determined rights in the foreshore with regard to "Māori customary values and practices." *Id.* § 129(2).

24. *See Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

25. Indigenous peoples' custom law has been consistently denied, modified, and extinguished by successive colonial and modern governments. That situation was compounded by nineteenth- and twentieth-century state efforts to assimilate indigenous peoples into mainstream culture and force them to abandon their distinctive cultural attributes. *See* AUSTL. LAW REFORM COMM'N, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS § 31 (1986), *available at* <http://www.austlii.edu.au/au/other/IndigLRes/1986/1> (examining Australia's treatment of customary law); N.Z. LAW COMM'N, STUDY PAPER 9, MĀORI CUSTOM AND VALUES IN NEW ZEALAND LAW (2001), *available at* http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_112_288_SP9.pdf (discussing the New Zealand state's treatment of Māori customary law).

the manner in which lands and resources were used. The approach also resonates with the increasingly popular practice of states giving formal recognition to indigenous peoples' customary law in statutes and constitutions.²⁶ In the indigenous peoples' rights movement, customary law has become an important symbol of indigenous identity and self-determination. Many indigenous scholars argue that traditional solutions are better suited than Western laws to the problems facing indigenous peoples and that traditional institutions are a better expression of cultural authenticity.²⁷

Customary law may also serve an important strategic function in indigenous peoples' claims to lands. Indigenous peoples' advocates point to customary law to press the point that indigenous property rights are grounded in

26. See AUSTRALIAN LAW REFORM COMMISSION, *supra* note 25 (providing an illuminating report on modes of state recognition of indigenous law); see also *Indigenous Peoples and Their Relationship to Land*, *supra* note 1, ¶¶ 105-13 (offering a description of the many state statutes and constitutions that recognize indigenous peoples' customary law). Scholars argue that the current approach of law reformers focuses too much on pre-colonial custom rather than on inquiring into how indigenous peoples might simply make their own laws. See, e.g., Chris Cunneen & Melanie Schwartz, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, in ABORIGINAL CUSTOMARY LAWS: BACKGROUND PAPERS 429 (Law Reform Commission of W. Austl. 2006), available at <http://www.lrc.justice.wa.gov.au/Aboriginal/BackgroundPapers/BP-11.pdf>. International instruments also require states to recognize aspects of indigenous customary law. See, e.g., Proposed American Declaration on the Rights of Indigenous Peoples art. 16, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 6 (Feb. 26, 1997) [hereinafter Proposed OAS Declaration]; International Labour Organisation [ILO], Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 169 I.L.O. 1989, 28 I.L.M. 1382 (1989) [hereinafter ILO Convention No. 169]; Declaration on the Rights of Indigenous Peoples, Human Rights Council Res. 2006/2, Annex, U.N. Doc. E/CN.4/Sub.2/1994/56 (June 29, 2006), available at <http://www.ohchr.org/english/issues/indigenous/docs/declaration.doc> [hereinafter U.N. Declaration] (revised text of the Draft Declaration adopted by the U.N. Human Rights Council in June 2006).

27. MOANA JACKSON, THE MĀORI AND THE CRIMINAL JUSTICE SYSTEM: A NEW PERSPECTIVE: HE WHAIPAANGA HOU (N.Z. Dep't of Justice, Policy and Research Div. 1987); see also John Borrows, *Creating an Indigenous Legal Community*, 50 MCGILL L.J. 153 (2005); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1996-97); Robert B. Porter, *Decolonising Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL'Y 97 (1989-99).

laws that are just as complex and varied as non-indigenous property rights and are therefore deserving of recognition as “property.”²⁸ In international fora, it is often argued that indigenous peoples’ rights do not rely upon state law for their continued existence but are capable of independent recognition as inherent rights with their basis in indigenous peoples’ customary legal systems (both pre- and post-colonial).²⁹ Additionally, indigenous peoples may assert a right to lands no longer occupied by them on the basis of a connection maintained under their customary laws and values.³⁰ But it is a dangerous thing to conceive of indigenous land rights as having their basis today solely in extant indigenous customary law. It is too easy for states and state courts to move from that supposition to the next step of defining the nature or content of modern legal rights with reference to those laws. For many indigenous peoples these customary laws are, after many years of colonization, difficult to identify.³¹ In many states, indigenous peoples have been forced to abandon many of their distinctive cultural attributes and to adapt, sometimes radically, their cultures and customary laws in order to survive.³² State and state court inquiries into customary law often assume that indigenous peoples are static, self-contained tribal cultures that have essentially adhered to the normative systems extant at the point of contact with

28. *See infra* note 175.

29. The U.N. Declaration recognizes “the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.” U.N. Declaration, *supra* note 26, pmbl., para. 6.

30. *See* *Western Australia v. Ward* (2002) 213 C.L.R. 1.

31. *See* Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness – Reincorporating Customs and Traditions into Tribal Law*, 1 *TRIBAL L.J.* 1 (2000) (commenting on problems associated with incorporating custom into tribal governments in the United States); Russel Barsh, *Putting the Tribe Back into Tribal Courts: Possible? Desirable?*, 8 *KAN. J.L. & PUB. POL’Y* 74 (1999) (same).

32. With regard to Canadian Aboriginal peoples, Professor Macklem notes: “Aboriginal people are not locked into particular cultures but instead express plural cultural allegiances; they also assimilate, break cultural bonds and change cultural allegiances over time . . . aboriginal cultures undergo dramatic transformations in response to internal and external circumstances and developments.” MACKLEM, *supra* note 11, at 54. As noted by Professor Kingsbury: “Efforts to express culture and history as legal tests have tended to produce feeble and ultimately unconvincing searches to find or not find essentialized culture.” Kingsbury, *supra* note 11, at 244.

European settlers.³³ If indigenous peoples fail to conform to these stereotypes, then the law denies their claims to title.³⁴ In addition, problems with identification stem from the fact that customary law is rarely reduced to writing. Indeed in some cultures, particular practices and customary laws may have been kept secret as a defense mechanism against social and cultural colonization.³⁵ Besides these problems of identification, the translation of indigenous customary law into modern legal rights invariably prompts inquiries into the “true nature” of indigenous customary law and often results in the distortion of customary law and its ossification in judicial precedent or legal codes.³⁶

The alternative method of conferring rights of ownership on the factual basis of traditional patterns of use and occupation provides a more accessible standard for the demarcation of indigenous land rights. Such an approach focuses first on the objective standard of how lands are actually used by indigenous peoples, rather than on the underlying normative system governing use.³⁷ This

33. Some indigenous groups view custom as a relic of the past with little relevance to their modern culture. See Barsh, *supra* note 31.

34. See PAUL G. MCHUGH, *ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION* (2004) (commenting on the tendency of historians and courts to view Aboriginal histories as a simple tale of communities being overwhelmed by white settlement with little appreciation of their capacity for resistance and adaptation); Christine Choo & Shawn Hollbach, *The Role of the Historian in Native Title Litigation*, *INDIGENOUS L. BULL.*, Jan. 1999, at 7; Sharon K. Hom & Eric Yamamoto, *Collective Memory, History and Social Justice*, 47 *UCLA L. REV.* 1747, 1766-77 (2000) (commenting on the failure of indigenous peoples' legal counsel to emphasize the adaptation of Aboriginal communities to white settlement); Alexander Reilly, *The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title*, 28 *FED. L. REV.* 453 (2000); Patricia Wallace, *Grave-Digging: The Misuse of History in Aboriginal Rights Litigation*, 30 *U. MIAMI INTER-AM. L. REV.* 489, 516 (1998) (commenting on the misuse of history in the Canadian Aboriginal rights litigation process).

35. See David Ritter, *Whither the Historians: The Case for Historians in the Native Title Process*, *INDIGENOUS L. BULL.*, Jan. 1999, at 4.

36. For example, the translation of Māori tribal customary title into a fee simple title by the Native (now Māori) Land Court in New Zealand, most of which occurred between 1865 and 1900, required clearly delineated boundaries between tribes when in fact tribal land interests often overlapped and intersected with one another. See generally DAVID V. WILLIAMS, *“TE KOOTI TANGO WHENUA”: THE NATIVE LAND COURT 1864-1909* (Huia Publishers 1999).

37. For judicial application of this approach, see the Canadian decision of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

approach is thus sensitive to the difficulties that arise from proving the content of specific customary laws.³⁸ However, this approach does not necessarily avoid an inquiry into indigenous customary law and values altogether. “Occupation” is a culturally loaded term—under the common law it provides the factual basis for according rights of possession, or ownership, of lands.³⁹ The standard of occupation, therefore, needs to accommodate indigenous patterns of land use and their unique perspectives on their relationship with the land. That may involve,

38. Yet the South African Constitutional Court’s decision, *Alexkor Ltd. v. Richtersveld Community*, 2003 (12) BCLR 1301 (CC), is widely cited as an example of a progressive decision that accords substantial modern land rights to indigenous peoples on the basis of their customary laws only. The Richtersveld Community (“Community”) brought a claim to the South African Constitutional Court (“Constitutional Court”) for restitution for the dispossession of their traditional lands in the late 1920s. The ancestral lands, situated in the northwestern section of the Northern Cape Province, had been acquired by the state in the 1920s after diamonds were discovered on a portion of the lands. *Id.* ¶¶ 4, 9. The central legal issue for the Constitutional Court was whether the Community held an “interest” in these lands at the time the lands were acquired, thereby entitling them to restitution under the Restitution of Land Rights Act of 1994 (“Restitution Act”). *Id.* ¶ 18. The Constitutional Court ruled that in the 1920s, the Community did have an “interest” in their lands for the purposes of the Restitution Act, and were wrongfully dispossessed of those lands and therefore entitled to restitution. *Id.* ¶ 103. Significantly, the Court held that this interest in land was created by indigenous law and not by any state law. *Id.* ¶¶ 50-55. More specifically, based on the evidence presented, the Court held that under indigenous Nama law, the Community communally owned the land in question and all minerals beneath their lands. *Id.* ¶¶ 58-64. The evidence disclosed that not only did the Community engage in mining activities, under their laws the Community possessed a right to control access to their lands. *Id.* The decision of the Constitutional Court is significant as an endorsement of the value of indigenous peoples’ custom law. But it is clear that the Court was able to reach this decision because of the temporal nature of the claim. The Constitutional Court’s inquiry was directed at the interest held by the Community in the early twentieth century, before the discovery of minerals, when the Community in fact occupied the land to the practical exclusion of others apart from a few settlers. The Constitutional Court, in these circumstances, was easily able to find a general right under indigenous law to occupy and use lands exclusively. In addition, the Constitutional Court was not required to inquire into the questions of expiration and extinguishment of indigenous law so commonly raised in Australian native title litigation. See *infra* Part III.D.

39. Occupation is proof of possession in law, which in turn will ground title to land. See KENT MCNEIL, *COMMON LAW ABORIGINAL TITLE* 7 (Clarendon Press 1989).

but is not confined to, inquiries into the content of specific indigenous customary laws.

In Australia and Canada, the demarcation process—sparked by the breakthrough judicial decisions—has been underway for over a decade.⁴⁰ The general assessment of scholars and indigenous peoples is that the program of recognition has failed to deliver on the promises made by the breakthrough decisions.⁴¹ In many cases the process is so entrenched, with standards of demarcation well established, that there is little turning back and little potential for meaningful change. Indeed, some states have raised the demarcation standards in the face of increasing resistance from the dominant culture to what is seen as the preferential treatment of indigenous peoples.⁴² The experience in these jurisdictions is of vital importance to those indigenous peoples who are yet to receive formal legal recognition of their rights to lands. In Central and South America and other parts of the globe, such as Asia and Africa, the breakthrough judicial decisions recognizing the existence of indigenous land rights have just begun to emerge.⁴³ Yet it remains to be seen how states will actually identify and demarcate rights on the ground. Some of these states have already sought to deny rights to indigenous peoples on the basis of the strict evidential standards applied by the common law courts.⁴⁴ The task of all states is to formulate guiding

40. See, e.g., cases cited *supra* note 12.

41. See, e.g., McHugh, *New Dawn to Cold Light*, *supra* note 15.

42. For example, it is clear that the standards for proving Māori customary interests in the foreshore under the Foreshore and Seabed Act 2004 were raised as a result of high-profile criticisms of Māori preferential treatment. See Andrew Erueti, *Ngati Apa and the Environmental Management of New Zealand's Coastal Marine Area*, in *ESSAYS ON ENVIRONMENTAL LAW IN THE PACIFIC* 235, 236-37 (Alberto Costi & Yves-Louis Sage eds., N.Z. Ass'n for Comparative Law 2005).

43. In the Americas, these decisions have come from the Organization of American States' (OAS) Inter-American Commission and Court of Human Rights in relation to Belize, Nicaragua, Paraguay, and Suriname. See, e.g., *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 (2004) [hereinafter *Maya Case*]; *Awes Tingni Case*, *supra* note 19 (Nicaragua); *Yakye Axa Indigenous Cmty. v. Paraguay Case*, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Moiwana Village v. Suriname Case*, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 15, 2005). In relation to Malaysia, see *Kerajaan Negeri Selangor v. Sagong Bin Tasi* [2005] 6 M.L.J. 289 (App. Ct.).

44. See *Maya Case*, *supra* note 43. Belize argued that the claimants could not claim a common law title to their lands because under Canadian Aboriginal rights law, there must

standards for demarcation that do not penalize normative divergence and that recognize and respect the effects of colonization on indigenous peoples' way of life.

III. DEMARCATION OF INDIGENOUS PEOPLES' TRADITIONAL LANDS IN COMMON LAW JURISDICTIONS

A. Defining Indigenous Peoples' Land Rights with Reference to Indigenous Customary Laws (Australia's Approach)

The difficulties posed by defining the nature, or content, of indigenous peoples' modern legal rights with reference to customary law are well illustrated by native title jurisprudence in Australia. The Native Title Act 1993 (NTA), enacted after the "breakthrough decision" of *Mabo v. Queensland II (Mabo II)*⁴⁵ to provide a framework for the judicial determination of native title claims, uses Aboriginal customary law as the basis and standard of proof for the recognition of native title.⁴⁶ This standard is provided for in section 223 of the NTA:

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

be evidence of continuous exclusive occupation of lands. *Id.* ¶ 72. For this principle of law, Belize cited *Baker Lake v. Minister of Indian Affairs & Northern Development*, [1980] 1 F.C. 518, which has been superseded by the more recent decision of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, which does not require evidence of continuous exclusive occupation of lands. *See infra* Part III.C. The Foreshore and Seabed Act 2004, 2004 S.N.Z. No. 93, actually applies standards of demarcation adopted from Australian native title and Canadian Aboriginal rights law. *See infra* Part III.D.

45. (1992) 175 C.L.R. 1 (Austl.).

46. *See* Native Title Act, 1993 (Austl.).

- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.⁴⁷

The NTA thus directs courts to inquire into the substance of Aboriginal customary laws. The emphasis in section 223 on customary law has its source in the decision of Justice Brennan in *Mabo II* where he said that “native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.”⁴⁸ As a result, the process of demarcation is especially difficult in Australia and set against the interests of the Aboriginal inhabitants. Nevertheless, after the enactment of the NTA it was not clear what type of customary evidence would be necessary to establish native title rights, in particular, a native title right to occupy lands to the exclusion of other peoples. These questions would need to be addressed ultimately by the Australian High Court, as the country’s highest court, applying the NTA on a case-by-case basis.

The answer to these questions has been largely determined by the way in which native title has been conceptualized as a land right by the High Court. The first opportunity for the High Court to address that issue directly did not arise until the decision of *Western Australia v. Ward*, which involved a native title claim by Aboriginal communities to approximately 7900 square kilometers in the remote western and northern regions of Australia.⁴⁹ Two approaches were presented to the court: the “bundle of rights” approach argued by the state and the “interest in land” approach argued by Aboriginal claimants. The “bundle of rights” approach viewed native title as a collection of individual, stand-alone rights (e.g., the right to fish, the right to hunt, and conceivably the right to control access to native title lands).⁵⁰ Under this approach, native title claimants would be required to establish evidence of the customary laws that created each individual right in the bundle. The “interest in land” approach, on the other hand, treated native title as a proprietary interest (an interest in land) to which are attached pendant Aboriginal

47. *Id.* § 223.

48. *Mabo II* (1992) 175 C.L.R. 1, ¶ 64.

49. (2002) 213 C.L.R. 1.

50. *Id.* ¶¶ 76, 95.

rights, including, significantly, the right to exclude outsiders.⁵¹ To prove this title, it was argued that claimants need only establish that they had exclusively occupied the land claimed under an Aboriginal legal system at the time of sovereignty.⁵² The “interest in land” approach thus imposed fewer evidential burdens on native title claimants and would always include the right to control access to native title lands. In reality, this approach was an attempt by the Aboriginal claimants to shift the focus under the NTA away from specific customary laws to occupation under a general Aboriginal legal system at sovereignty.

The “interest in land” argument was influenced by the work of Canadian scholar, Professor Kent McNeil, who in his seminal text, *Common Law Aboriginal Title*, argued that indigenous peoples in colonies settled by England could claim under the common law a “possessory title” to their lands on the basis of evidence of their exclusive physical occupation of lands at sovereignty.⁵³ A possessory title

51. *Id.* ¶¶ 83-90.

52. *Id.* ¶¶ 83, 86.

53. MCNEIL, *supra* note 39, at 207 (internal citations omitted):

This presumptive title, which arises from the possession that English law would attribute to indigenous occupiers the moment a territory was acquired by settlement, is what is meant here by “common law aboriginal title”. Unless rebutted, it would be as effectual to defend or recover possession as a valid title by limitation, descent, or purchase. It would cover all lands occupied by indigenous people at the time the Crown acquired sovereignty, and would include the subsurface and any minerals (excluding precious metals, to which the Crown has a prerogative right) contained therein. It would entitle the indigenous possessors to fee simple estates, for possession is prima-facie evidence of seisin in fee simple, rebuttable only by proof that the possessor in fact holds a lesser estate. Since no other estate could have existed at the time the Crown acquired sovereignty, the estate which vested in the indigenous possessors would have to be the fee.

Counsel for the Aboriginal claimants in *Mabo II* used Professor McNeil’s arguments to argue for such a “possessory title” under Australian common law. (1992) 175 C.L.R. 1. The concept of possessory title was accepted by Justice Toohey in *Mabo II* but not applied because the claimants had conceded that such a possessory title could be extinguished in the same manner as native title. *Id.* ¶ 98. Accordingly, he found that no more favorable consequences would flow from an acceptance of the possessory title. *Id.* Professor McNeil

not only results in a fee simple title, conferring rights of exclusivity, but also removes the burden of proving specific customary laws.⁵⁴ The arguments made by the claimants in *Ward* also drew upon Canadian Aboriginal rights law, which applies a variant of Professor McNeil's possessory title argument, whereby Aboriginal communities may obtain an "Aboriginal title" from the courts—which confers the right to exclusive occupation of lands—upon proving evidence of their exclusive occupation of those lands at sovereignty.⁵⁵ Aboriginal title is characterized as a general "interest in land" to which are attached various pendant rights and interests, including the right to exclude.

The choice made by the High Court in *Ward* would not only dictate the standard of proof (i.e., whether the evidential standard would be occupation of lands at sovereignty under an Aboriginal legal system or specific customary laws); it would determine how resistant native title rights and interests would be to conflicting legal rights created by the state. This issue of legal extinguishment is often the most critical aspect of a native title inquiry due to the extensive land rights granted by Australian states to settlers since sovereignty. These land rights were often granted in disregard of the presence of Aboriginal peoples. In particular, vast areas of rural Australia are subject to pastoral leases, many of which grant the lessee a right to occupy lands exclusively and, therefore, conflict with the Aboriginal right to control access to lands.⁵⁶

If native title is conceived of as an "interest in land," then the title is more robust so that "[o]nly a law or act which has the effect of totally replacing native title by completely nullifying it will result in extinguishment of native

has argued that Justice Brennan's decision in *Mabo II* in effect was recognizing a proprietary title based on exclusive and prior occupation. Kent McNeil, *The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law*, in *EMERGING JUSTICE?: ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA* 416, 420-23, 435 (Univ. of Saskatchewan Native Law Ctr. 2001).

54. In addition, this "possessory title" is more resilient than the *sui generis* native title to extinguishment (as we will see) because it is not a pre-existing title. Rather the possessory title is based purely on common law property principles and not on Aboriginal customary law. *See infra* Part III.D.

55. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

56. *See Wik Peoples v. Queensland* (1996) 187 C.L.R. 1 (Austl.). The High Court heard unchallenged evidence that approximately 42% of Australia is covered by pastoral leases, and that in some states this may be as high as 70%-80%. *Id.* ¶ 9.

title.”⁵⁷ An example would be a fee simple title conferring as it does permanent and exclusive rights of occupation. Inconsistent rights of a lesser degree—for example, a short-term lease conferring a finite right of exclusive occupation—might impair the enjoyment of the rights and interests attached to the native title, including the right to exclude, but would not result in their extinguishment for all time. Rather, the conflicting native title rights would be “held in abeyance for the duration of the existence of the inconsistent rights or interests,”⁵⁸ supported as they are by the underlying title or interest in land. The significance of this, of course, would be that once the lease’s term expired, the native title rights and interests, including the right to exclude, would re-emerge. With the bundle of rights approach, on the other hand, where rights are not tethered to an underlying title or interest in land, each individual native title right may be extinguished separately, one by one, and forever in the event of any conflict with a non-indigenous right.

In *Ward*, the High Court majority decided it was most appropriate to view native title as a bundle of rights.⁵⁹ Relying on the NTA’s statutory reference to native title “rights and interests,” the Court noted that the metaphor of “bundle of rights” usefully reflected that there may be more than one right or interest and also that there may be several kinds of rights and interests in relation to land that exist under traditional law and customary law.⁶⁰ While the High Court considered this approach artificial and selective, it concluded this was required by the NTA:

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs

57. See *Western Australia v. Ward* (2002) 213 C.L.R. 1, ¶ 81 (quoting *Ward* (2000) 170 A.L.R. 159, ¶ 689 (North, J., dissenting)). Justice North, dissenting from the majority, considered that extinguishment of native title could only result from fundamental inconsistency that was permanent and absolute in its effect. Anything short of this would merely curtail the exercise of rights under the title. *Id.*; see also *id.* ¶ 74 (citing *Ward* (1998) 159 A.L.R. 483) (for similar findings of Judge Lee in the trial decision).

58. *Ward* (2002) 213 C.L.R. 1, ¶ 81 (quoting *Ward* (2000) 170 A.L.R. 159, ¶ 689 (North, J., dissenting)).

59. *Id.* ¶ 95.

60. *Id.*

into rights and interests which are considered apart from the duties and obligations which go with them.⁶¹

The practical implications of this finding are now well apparent. Aboriginal claimants to native title, including those in *Ward*, have struggled to obtain a native title right to occupy lands exclusively. In terms of proof, the bundle of rights approach imposes the onerous standard of Aboriginal peoples establishing that each native title right and interest claimed is supported by existing and specific customary laws.⁶² Additionally, all identified and proved native title rights are extinguished indefinitely in the event of conflict with non-indigenous interests.⁶³ As a result, the right to control access to native title lands, even if established in evidence, is frequently extinguished by the many rights of exclusivity granted by states. After the *Ward* decision, native title decisions typically result in the recognition of rights to engage in particular Aboriginal practices only, for example, the right “to hunt, fish, and gather” or to “conduct ceremony.”⁶⁴

B. Defining Indigenous Peoples' Land Rights with Reference to Indigenous Patterns of Land Use (Canada's Approach)

In Canada, the courts have adopted a very different approach towards proving Aboriginal land rights. “Aboriginal rights” have explicit constitutional protection under section 35 of the Canadian Constitution Act of 1982.⁶⁵ The overall purpose of section 35, according to the Canadian Supreme Court, is to provide “the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies . . . is acknowledged and reconciled with

61. *Id.* ¶ 14.

62. More recently, the evidential onus has been increased by the High Court's imposition of a strictly linear approach towards proving those customary laws that create native title rights. See *Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 C.L.R. 422 (Austl.). For example, the customary laws must have their origins in a pre-sovereignty Aboriginal legal system and cannot be new customary laws that have emerged after sovereignty. *Id.*; see also *infra* Part III.C.

63. *Ward* (2002) 213 C.L.R. 1, ¶ 82.

64. See, e.g., *De Rose v. South Australia* (No. 2) [2005] F.C.A.F.C. 110.

65. Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, pt. II, § 35 (U.K.).

the sovereignty of the Crown.”⁶⁶ In interpreting the phrase “Aboriginal rights,” Canadian courts have identified several species of Aboriginal rights that fall along a spectrum according to their degree of association with land. On one end of the spectrum, “Aboriginal rights” are rights to engage in practices that are shown to be “integral to the distinctive culture” of the claimant group before contact with settlers.⁶⁷ These practices may relate to a general territory (i.e., non-site-specific rights) or be connected to a particular area of land (i.e., site-specific rights). At the other end of the spectrum, “Aboriginal title” confers the right to occupy an area of land exclusively where claimants establish evidence of exclusive occupation of the land at sovereignty.⁶⁸

What sets Canadian Aboriginal rights law apart from Australian native title law is the fact that in Canada Aboriginal rights are defined with reference to Aboriginal land *practices* and not Aboriginal customary *law*.⁶⁹ The Canadian courts have been sensitive to the evidential difficulties that arise from seeking evidence of specific customary laws.

In Canada, the key right, as one might expect, is Aboriginal title given that it confers the modern legal right to exclusive occupation of lands.⁷⁰ In contrast, Aboriginal rights, both site- and non-site-specific, are not only difficult

66. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 31 (Can.). Section 35(1) states, “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, pt. II, § 35(1) (U.K.). Section 35(1) is supreme law by virtue of section 52 of the Constitution Act, which provides “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” *Id.* ch. 11, pt. VII, § 52.

67. *See Van der Peet*, [1996] 2 S.C.R. 507, ¶ 46.

68. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

69. *See Kent McNeil, Legal Rights and Legislative Wrongs: Māori Claims to the Foreshore and Seabed*, in *MĀORI PROPERTY RIGHTS IN THE FORESHORE AND SEABED: THE LAST FRONTIER* (Claire Charters & Andrew Erueti eds., forthcoming May 2007); *see also* Shaunnagh Dorsett, *An Australian Comparison on Native Title to the Foreshore and Seabed*, in *MĀORI PROPERTY RIGHTS IN THE FORESHORE AND SEABED: THE LAST FRONTIER*, *supra*.

70. *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 118-24. This, however, is subject to an inherent limit preventing uses that are irreconcilable with the attachment to the land giving rise to the Aboriginal title. *Id.* ¶¶ 125-32; *see* Kent McNeil, *The Post-Delgamuukw Nature and Content of Aboriginal Title*, in *EMERGING JUSTICE?: ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA* (Univ. of Saskatchewan Native Law Ctr. 2001) (offering a critical comment on this limit).

to establish in evidence—claimants must meet the *integral to the distinctive culture* requirement—but provide only the right to engage in specific traditional activities, such as hunting and fishing.⁷¹ A great deal turns, therefore, on the standard of proof set for determining Aboriginal title. As noted, in order to ground a claim to Aboriginal title, claimants must establish evidence of exclusive occupation of the land claimed at sovereignty. This principle was established by Chief Justice Lamer in the leading Aboriginal title decision of *Delgamuukw v. British Columbia*.⁷² The question of what factual circumstances amount to exclusive occupation, however, is highly contentious.

In *Delgamuukw*, the state had argued before the Canadian Supreme Court that the standard of occupation must be that set by the common law for according rights of possession or ownership of lands.⁷³ That implied the need for evidence of regular and intensive use of the lands. On the other hand, the Aboriginal claimants (the Gitksan nation) argued that Aboriginal title might be established by reference to Aboriginal patterns of land holdings.⁷⁴ The motivation for this argument plainly was that Aboriginal land tenure systems at sovereignty did not always strictly conform to the types of occupation and use that would ordinarily qualify as occupation under the common law. The claimants, therefore, sought to have the common law test of occupation moderated to accommodate indigenous forms of land tenure. In response, Chief Justice Lamer decided that both common law and Aboriginal “perspectives” must be taken into account when determining occupation since Aboriginal title involved reconciling the original Aboriginal

71. The “integral to the distinctive culture” test has been subjected to strong academic criticism. See, e.g., Russel Barsh & James Henderson, *The Supreme Court's Van der Peet Trilogy: Native Imperialism and Ropes of Sand*, 42 MCGILL L.J. 993 (1997); Catherine Bell, *New Directions in the Law of Aboriginal Rights*, 77 CAN. BAR REV. 36, 44-50 (1998); John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37 (1997); Chilwin Chienhan Cheng, *Touring the Museum: A Comment on R. v. Van der Peet*, 55 UNIV. TORONTO FACULTY L. REV. 419 (1997); Douglas Lambert, *Van Der Peet and Delgamuukw: Ten Unresolved Issues*, 32 UNIV. BRIT. COLUM. L. REV. 249 (1998) (noting that in the claim of Aboriginal rights, too much emphasis is placed on the Aboriginal activity and not on the rights); Bradford W. Morse, *Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon*, 42 MCGILL L.J. 1011 (1997).

72. [1997] 3 S.C.R. 1010.

73. *Id.* ¶¶ 146-47.

74. *Id.*

occupation of lands with the Crown's assertion of sovereignty.⁷⁵ The Aboriginal perspective could be gleaned in part, but not exclusively, from Aboriginal systems of law (including a land tenure system or laws governing land use).⁷⁶

In relation to the common law test, Chief Justice Lamer noted that occupation might be established in a variety of ways:

[R]anging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources . . . In considering whether occupation sufficient to ground title is established, one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed.⁷⁷

Significantly, then, it is clear that even the common law standard of occupation requires consideration of a broad range of circumstances, including the nature of the land and the "manner of life" pursued by indigenous peoples. Indeed, there is much common law authority for the view that occupation is a highly contextual standard dependent on matters such as the character of the land and the purposes for which it could be reasonably used.⁷⁸

As noted, there must also be evidence that the occupation at sovereignty was exclusive. But again, Chief Justice Lamer noted that the determination of exclusivity must consider both common law and Aboriginal perspectives, placing equal weight on each:

[E]xclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by the intention and capacity to retain exclusive control . . . Thus, an act of trespass, if isolated, would not undermine a

75. *Id.* ¶ 148.

76. *Id.* ¶¶ 147-48.

77. *Id.* ¶ 149.

78. *See* R. v. Marshall, [2003] 218 N.S.R.2d 78, ¶¶ 113-38, *rev'd*, [2005] 2 S.C.R. 220 (Can.) (discussing relevant common law authorities); MCNEIL, *supra* note 39.

general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation.⁷⁹

In addition, Chief Justice Lamer noted the possibility of “shared exclusivity,” anticipating cases where two Aboriginal nations shared in the occupation of certain lands at sovereignty.⁸⁰ In any event, the Supreme Court in *Delgamuukw* did not come to any final determination on the issue of Aboriginal title to the land in question as the case was directed back to the trial court for rehearing.⁸¹

It was not until the very recent decision of *R. v. Marshall; R. v. Bernard*⁸² that the Supreme Court directly addressed the issues of occupation and exclusivity. The *Marshall; Bernard* decision concerned two separate appeals from criminal convictions for the logging of timber on state lands without authorization in the adjacent eastern seaboard provinces of Nova Scotia and New Brunswick.⁸³ In each case, the defendants were Mi'kmaq Indians who claimed a logging right on the specific tracts of lands for commercial purposes pursuant to Aboriginal title.⁸⁴

In the *Marshall* case, the evidence at trial showed that the Mi'kmaq, at the date of sovereignty, were comprised of small communities living in most of mainland Nova Scotia and there was no other Aboriginal group there at that time.⁸⁵ The Mi'kmaq were described as “moderately nomadic” peoples who did not have permanent settlements and “moved with the seasons and circumstances to follow their resources.”⁸⁶ Nonetheless, the trial judge found that the Mi'kmaq were familiar with their territory and considered all of Nova Scotia to be their

79. *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 156.

80. *Id.* ¶ 158.

81. *Id.* ¶ 174.

82. *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 (Can.).

83. *R. v. Marshall*, [2003] 218 N.S.R.2d 78, ¶ 136 (Nova Scotia Ct. App.), *rev'd*, [2005] 2 S.C.R. 220; *R. v. Bernard*, [2003] 262 N.B.R.2d 1, ¶ 119 (New Brunswick Ct. App.), *rev'd*, [2005] 2 S.C.R. 220.

84. *See supra* note 83. The defendants also raised a treaty right to harvest timber as a defense based on friendship treaties (not involving the cession of Aboriginal lands) that recognized a right to trade in items traditionally traded in 1760-1761. *Marshall; Bernard*, [2005] 2 S.C.R. 220, ¶¶ 7-15. This argument also failed in the Supreme Court. *Id.* ¶ 17.

85. *Marshall; Bernard*, [2005] 2 S.C.R. 220, ¶ 79 (citing *R. v. Marshall*, [2001] 191 N.S.R.2d 323, ¶ 142).

86. *Id.*

territory.⁸⁷ In the *Bernard* case, the trial evidence disclosed a similar nomadic existence for Mi'kmaq residing within New Brunswick.⁸⁸

The central issues were whether the Mi'kmaq had satisfied the *Delgamuukw* tests of occupation in relation to the specific cutting sites and whether that occupation was exclusive.⁸⁹ The trial courts in each case concluded that exclusive occupation required proof of intensive, regular use of the cutting sites and that this had not been established in evidence.⁹⁰ On appeal, both the Nova Scotia and New Brunswick Courts of Appeal ruled that these standards were too strict and that there was no need for the appellants to prove regular use of the cutting sites to establish Aboriginal title.⁹¹ In *Marshall*, the appellate court ruled that it was sufficient to prove occasional entry and acts on the logging sites.⁹² The appellate court in *Bernard* similarly concluded that it was only necessary to show that the Mi'kmaq had occupied an area near the cutting site, since “[t]his proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq.”⁹³

In the Supreme Court, Chief Justice McLachlin, delivering the majority judgment, rejected the more expansive approach adopted by the appellate courts. According to Chief Justice McLachlin, the court’s central task was to determine whether the pre-sovereignty Aboriginal practice comported with the modern legal right claimed.⁹⁴ If the claim related to Aboriginal title—conferring a right to exclusive use and occupation of land—then it was essential that the pre-sovereignty practice demonstrate some correlation with that right.⁹⁵ This did not require “absolute congruity” provided “the practices engage the core idea of the modern right.”⁹⁶ If the pre-sovereignty practice did not indicate exclusive occupation and use, it was still possible that the corresponding modern legal right was an Aboriginal right (either site- or non-site-specific).⁹⁷ The Aboriginal

87. *Id.*

88. *Marshall; Bernard*, [2005] 2 S.C.R. 220, ¶ 81 (citing *R. v. Bernard*, [2000] 3 C.N.L.R. 184, ¶¶ 107-08, 110).

89. *Id.* ¶ 40.

90. *Id.* ¶ 41.

91. *Id.*

92. *Id.* ¶ 42 (citing *R. v. Marshall*, [2003] 218 N.S.R.2d 78, ¶ 136).

93. *Id.* ¶ 43 (citing *R. v. Bernard*, [2003] 262 N.B.R.2d 1, ¶ 119).

94. *Marshall; Bernard*, [2005] 2 S.C.R. 220, ¶ 48.

95. *Id.* ¶¶ 48, 51.

96. *Id.* ¶ 50.

97. *Id.* ¶ 54.

perspective, according to Chief Justice McLachlin, would assist the Court in its assessment of the true nature of the pre-sovereignty right or practice.⁹⁸

From the outset of Chief Justice McLachlin's reasoning, we begin to see a significant departure from the principles outlined by Chief Justice Lamer in *Delgamuukw*. It is clear in *Delgamuukw* that the "Aboriginal perspective" was not employed as a mere interpretive tool to determine whether a pre-sovereignty practice corresponded with the rights embodied in Aboriginal title or Aboriginal rights.⁹⁹ The "Aboriginal perspective" was used to temper the common law standards of occupation and exclusivity.¹⁰⁰ Chief Justice Lamer ruled that the Aboriginal and common law perspective together, with equal weight being placed on both, would determine occupation and exclusivity.¹⁰¹ In Chief Justice McLachlin's analysis, the modern legal right becomes the focal point of the inquiry and sets the appropriate standard of proof. As Chief Justice McLachlin baldly stated, "[Aboriginal title] is established by aboriginal practices that indicate possession similar to that associated with title at common law."¹⁰²

Thus, to demonstrate occupation, the appellants needed to prove that the cutting sites were used on a regular and intensive basis at sovereignty. In relation to exclusivity, Chief Justice McLachlin considered that there was no need to produce evidence of overt acts of exclusion, especially in these cases where lands were sparsely occupied at sovereignty, but that there was a need to show "effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so."¹⁰³ Based on these propositions, the judge concluded that both trial decisions had correctly ruled that the Mi'kmaq had not occupied the logging sites in question on a regular and exclusive basis.¹⁰⁴

To obtain an Aboriginal title, then, Aboriginal peoples must show regular, intensive, and exclusive use of their lands at sovereignty. That approach will likely result in Aboriginal title being recognized in relation to principal habitations and more immediate gardens and possibly, depending on the evidence,

98. *Id.* ¶¶ 48-50.

99. *See Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

100. *Id.* ¶¶ 112, 114.

101. *Id.*

102. *Marshall; Bernard*, [2005] 2 S.C.R. 220, ¶ 54.

103. *Id.* ¶ 65.

104. *Id.* ¶¶ 70, 72.

less immediate hunting and fishing grounds.¹⁰⁵ Other areas of land are, therefore, rendered in effect *terra nullius* subject only to the possibility of the recognition of site-specific or non-site-specific Aboriginal rights, which as noted are extremely difficult to prove. Aboriginal rights, then, are likely to be the only rights available to “nomadic peoples” but only in relation to those activities considered integral to their culture.¹⁰⁶

Chief Justice McLachlin’s approach clearly reflects her view that moderating the common law standard of occupation to accommodate less intensive use of land would expand the rights of the Mi’kmaq Indians:

As discussed, the task of the court is to sensitively assess the evidence and then find the equivalent modern common law right. The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, *would transform the ancient right into a new and different right.*¹⁰⁷

105. For example, the trial judge in *Marshall* concluded that the Mi’kmaq “likely had aboriginal title to lands around some bays and rivers” on the basis of his findings that “the Mi’kmaq made intensive use of bays and rivers and at least nearby hunting grounds.” [2001] 191 N.S.R.2d 323, ¶¶ 5, 142, *rev’d*, [2003] 218 N.S.R.2d 78, *aff’d*, [2005] 2 S.C.R. 220, ¶ 77 (Can.).

106. Clearly the reason for the claim to Aboriginal title in *Marshall; Bernard*, apart from the robust rights provided, was that an Aboriginal right to harvest timber would have been difficult to establish. It was not clear on the evidence that harvesting timber was an “integral” aspect of their culture at contact.

107. *Marshall; Bernard*, [2005] 2 S.C.R. 220, ¶ 77 (emphasis added). In addition, Chief Justice McLachlin’s reasoning is influenced in large part by the distinction drawn by the Supreme Court between Aboriginal rights and Aboriginal title. Aboriginal title, with its modern legal right of exclusive occupation, logically requires a higher evidential threshold than an Aboriginal right, which confers simply the right to engage in a specific Aboriginal activity. To lower the standard of occupation would, in Chief Justice McLachlin’s words, “obliterate the distinction that [the Supreme Court] has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to land.” *Id.* It is clear Chief Justice McLachlin saw the harvesting of timber as better suited to an Aboriginal rights claim.

Failing to adjust the common law standard to accord with Aboriginal forms of land tenure has the effect of penalizing Aboriginal peoples for normative divergence.¹⁰⁸ The *Marshall; Bernard* view of occupation is consistent with an agricultural society that reflects traditional common law values. It posits not large expanses of land under Aboriginal title but rather specific tracts of land. Admittedly, the Aboriginal title right to exclusive occupation is an extensive right, and granting such a title where there is no evidence of regular and intensive use at sovereignty may, as Chief Justice McLachlin put it, “transform the ancient right into a new and different right.”¹⁰⁹ But that is an approach that accepts cultural difference and accords modern legal rights on the basis of indigenous forms of tenure. Instead of attempting to pour Aboriginal forms of tenure into common law molds, principles of nondiscrimination, cultural integrity, and self-determination require that occupation and exclusivity be determined by indigenous standards only. This, as will be shown below, is the approach mandated by international law principles. To deny title to less intensive use of land is to employ the discriminatory policies applied in less enlightened times to deny property rights to indigenous peoples.¹¹⁰

Indigenous forms of occupation will require consideration of the way the land is actually used by the Aboriginal community in terms of the practices

108. The minority decision of Justice LeBel in *Marshall; Bernard*, [2005] 2 S.C.R. 220, ¶¶ 110-45, disagreed with the standard of occupation set by the majority. In his view,

[A]boriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.

Id. ¶ 127 (LeBel, J., dissenting). Justice LeBel placed great emphasis on the “Aboriginal” nature of the claim, especially Aboriginal prior occupation of, and special relationship with, their lands. In his view, “[O]ccupation should therefore be proved by evidence not of regular and intensive use of the land but of the traditions and culture of the group that connect it with the land.” *Id.* ¶ 140.

109. *Id.* ¶ 77 (majority opinion).

110. See LOCKE, *supra* note 6; VATTEL, *supra* note 6.

conducted on the land—i.e., the construction of habitations and the use of particular gardens and hunting sites—as well as their spiritual, cultural, and socio-political attachment to the land.¹¹¹ Aboriginal customary laws relating to land tenure and use will assist with this inquiry but so too will their manner of life, habits, and ideas.

C. The Requirement of Continuity of Indigenous Peoples' Land Rights

The Australian Native Title Act 1993 (NTA) is directed at the recognition of native title rights that are supported by customary laws extant at the date of the judicial inquiry.¹¹² The NTA thus assumes the continuous existence of

111. See Kent McNeil, *Aboriginal Title and Aboriginal Rights: What's the Connection?*, 36 ALTA. L. REV. 117, 118-23 (1997).

To survive in what were often harsh environments, hunting and gathering peoples had to have an intimate knowledge of the land and the seasonal and other resources it provided. Rather than wander indiscriminately, they would return on a regular basis to the places where food and the other materials for the maintenance of their ways of life were available. They formed deep attachments with the land they knew and used, usually involving obligations to care for and conserve it as they derived their sustenance from it, all of which was intertwined with their spiritual and socio-political as well as their physical existence . . . Although of a different nature, the connection of hunter-gatherers with the land would be just as integral to their distinctive cultures as that of horticulturalists. Evaluating their connection with the land on the basis of their conditions of life and their own perspectives, they would no doubt be in occupation.

Id. at 127.

112. Native Title Act, 1993, § 223 (Austl.). An issue not addressed to date in the common law jurisdictions is whether at the time of British sovereignty the indigenous claimant group possessed legitimate customary rights in lands *vis-à-vis* other indigenous peoples. The issue is avoided by the courts assuming tribes in possession at sovereignty hold legitimate customary rights. This issue has arisen before the New Zealand Waitangi tribunal in the context of the historical claims process. See WAITANGI TRIBUNAL TE WHANGANUI A TARA ME ONA TAKIWA, REPORT ON THE WELLINGTON DISTRICT (Legislation Direct 2003), available at <http://www.waitangitribunal.govt.nz/reports/northislandwest>. So

a customary land tenure system since sovereignty. This notion of continuity has its origins in the judgment of Justice Brennan in *Mabo II*, where he stated:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. . . . However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.¹¹³

This requirement of continuity has been elaborated in subsequent High Court decisions applying the NTA. First, there has to be some continuity between those who formerly occupied the land at sovereignty and the present claimants.¹¹⁴ Second, “traditional” law or custom, for the purposes of the NTA, must have its origins in the normative rules of the Aboriginal societies that existed before the Crown acquired sovereignty.¹¹⁵ In relation to this second requirement, there is some room for adaptation of customs, but the law of native title cannot give effect to rights and interests that are sourced in new customs established after sovereignty.¹¹⁶ Third, Aboriginal claimants must produce evidence of substantial maintenance of a connection with their native title lands through customary law

far, the tribunal has sought to address the issue by prioritizing competing tribal claims to land on the basis of the customary laws applied by Māori tribes at the time of sovereignty. *Id.* ch. 1.

113. *Mabo v. Queensland II (Mabo II)* (1992) 175 C.L.R. 1, ¶ 66 (Austl.).

114. *Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 C.L.R. 422 (Austl.).

115. It is only those normative rules that can be “traditional” laws and customs. *Id.* ¶ 46. The customary laws must also have a normative basis. That does not mean that the laws have to resemble Western laws, but they must possess “normative content.” *Id.* ¶ 42.

116. *Id.* ¶¶ 43-44. The justification for this rule is that after sovereignty, indigenous normative systems could not create new rights and interests that are recognized by the new sovereign order as “there could be no parallel law-making system after the assertion of sovereignty.” *Id.* ¶ 44.

from the date of the judicial inquiry back to the time of sovereignty.¹¹⁷ If this connection ceases, there can be no native title. This connection does not necessarily have to be supported by evidence of physical occupation,¹¹⁸ and the High Court has yet to determine whether a spiritual connection with the land will establish the traditional connection.¹¹⁹ Yet, it is difficult to identify a decision in Australia where native title has been found in the absence of evidence of a continuous physical presence on the land. These standards applied together create significant evidential obstacles for Australian Aboriginal peoples, especially those who have felt the full effects of Western settlement and expansion.¹²⁰

117. *Id.* ¶¶ 46-47.

118. *Western Australia v. Ward* (2002) 213 C.L.R. 1, ¶ 64 (“[T]he absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection. Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by ‘connection’ by those laws and customs.”).

119. *Id.* But see the comments of Justice Callinan in *Ward* rejecting the notion that a religious connection with the land, in the absence of an actual physical presence, can give rise to native title rights in relation to the land. *Id.* ¶¶ 648-50 (Callinan, J., dissenting).

120. See *Yorta Yorta* (2002) 214 C.L.R. 422. In *Yorta Yorta*, the High Court concluded that native title did not exist because the society or community claiming it was not the same society with the same or similar rules as existed at the time sovereignty was acquired and which had continued to exist since that time. *Id.*; see also Kirsten Anker, *Law in the Present Tense: Tradition and Cultural Continuity in Members of the Yorta Yorta Aboriginal Community v. Victoria*, 28 MELB. U. L. REV. 1 (2004); Richard Bartlett, *An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South*, 31 W. AUSTL. L. REV. 35 (2003); Shaunnagh Dorsett & Shaun McVeigh, *An Essay on Jurisdiction, Jurisprudence, and Authority: The High Court of Australia in Yorta Yorta (2001)*, 56 N. IR. L.Q. 1 (2005); Ben Golder, *Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law*, 9 DEAKIN L. REV. 41 (2004); David Lavery, *A Greater Sense of Tradition: The Implications of the Normative System Principles in Yorta Yorta for Native Title Determination Applications*, MURDOCK U. ELECTRONIC J.L., Dec. 2003, available at <http://www.murdoch.edu.au/elaw/issues/v10n4/lavery104.html>; Greg McIntyre, *Native Rights After Yorta Yorta*, 9 JAMES COOK U. L. REV. (SPECIAL ISSUE) 268 (2002-03); Noel Pearson, *The High Court's Abandonment of "The Time-Honoured Methodology of the Common Law" in Its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta*, 8 AUSTL. INDIGENOUS L. REP. 1 (2003); Peter Poynton, *Is Yorta Yorta Applicable in Queensland?*, 9 JAMES COOK U. L. REV. (SPECIAL ISSUE) 268 (2002-03); Peter Seidel, *Native Title: The Struggle for Justice for the Yorta Yorta Nation*, 29 ALTERNATIVE L.J. 70 (2004).

In Canada, the courts have also developed rules of continuity. First, Aboriginal claimants must show that the group claiming rights today is connected with the group that held the rights at the time of sovereignty.¹²¹ Second, claimants of Aboriginal rights must show that the modern legal right claimed falls within the scope of the activity exercised in pre-colonial times.¹²² So, as noted in Chief Justice McLachlin's decision in *Marshall; Bernard*, to claim an Aboriginal title (with its rights of exclusivity), claimants must show exclusive occupation at sovereignty.¹²³ Third, continuity arises where there is no evidence of exclusive occupation of the lands claimed at sovereignty (to establish Aboriginal title) or an Aboriginal practice at the time of contact (to establish Aboriginal rights).¹²⁴ In such cases, claimants are able to establish Aboriginal title and Aboriginal rights indirectly by relying on evidence of current occupation or the current exercise of Aboriginal activities provided they show the substantial maintenance of occupation of the land in the case of Aboriginal title or of their pre-European contact practices in the case of Aboriginal rights.¹²⁵ This continuity requirement is not used to determine whether rights have expired in the Australian sense, but to assist Aboriginal claimants in proving their rights.¹²⁶ The Canadian Supreme Court has not imposed an Australian-type requirement of continuous occupation or pre-contact practices, acutely aware as it must be of the discriminatory effect of that rule on native title claimants in Australia.¹²⁷ Thus, if Aboriginal title or rights

121. *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, ¶ 67 (Can.).

122. *Id.*

123. *See supra* note 107 and accompanying text.

124. This analysis relies upon Professor Kent McNeil's discussion of the continuity issue in his recent article, *Continuity of Aboriginal Rights*, in *ADVANCING ABORIGINAL CLAIMS: VISIONS, STRATEGIES, DIRECTIONS* (K. Wilkins ed., Purich Publ'g Ltd. 2005).

125. *See Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶¶ 152-54 (Can.). In relation to Aboriginal title, where current occupation is relied upon, that occupation does not have to be strictly continuous—there is no need to establish “[a]n unbroken chain of continuity” between the present and occupation at sovereignty. *Id.* ¶ 153. And changes in the nature of occupation will not ordinarily preclude a claim for Aboriginal title. *Id.* ¶ 154.

126. *See* McNeil, *supra* note 69.

127. While there are some conflicting and equivocal judicial comments on whether the Australian-type continuity test applies in Canada, Professor McNeil convincingly illustrates that, to date, the Supreme Court has not imposed such a test. McNeil, *supra* note 124; *see also* *R. v. Marshall*, [2003] 218 N.S.R.2d 78, ¶¶ 157-81, *rev'd*, [2005] 2 S.C.R. 220 (Can.) (reaching independently the same conclusion). The confusion seems due in part to the

are established directly, there is no need to show that those rights have been consistently maintained.¹²⁸ Yet it remains to be seen whether the Supreme Court will impose an Australian-type continuity of connection test even in those cases where Aboriginal title and rights are established directly.¹²⁹ While the Supreme Court has not imposed a test to date, it should be noted that it has not explicitly rejected such a test either.¹³⁰

different types of continuity tests applied by the courts, making it unclear as to which particular form of continuity the judges are referring.

128. Clearly, to obtain an Aboriginal title in such a case, the claimants would also need to show that they are connected with the group that held rights in the land at the time of sovereignty (the first continuity requirement) and that the lands have not been extinguished by the state. Justice Cromwell, of the Nova Scotia Court of Appeal, noted to the possibility of abandonment, but it is clear he was speaking of abandonment prior to, or at the time of, sovereignty and not subsequently since he expressly rejected the possibility of abandonment in cases where occupation was established at sovereignty. *Marshall*, [2003] 218 N.S.R.2d 78, ¶ 241, *rev'd*, [2005] 2 S.C.R. 220. Compare this to Professor McHugh, who notes that Justice Cromwell's reference to abandonment suggests the retention of a form of continuity of connection even in cases where occupation is established at sovereignty. McHugh, *Aboriginal Title in New Zealand*, *supra* note 15, at 165. Professor McHugh, in contrast to Professor McNeil, argues that Aboriginal title law in Canada necessitates proof of continuous occupation even where there is evidence of occupation at sovereignty. See McHugh, *New Dawn to Cold Light*, *supra* note 15, at 511.

129. Nevertheless, in those cases where Aboriginal title claimants rely on their present occupation of lands to establish Aboriginal title, they will be required to provide evidence of a reasonably continuous connection to the land back to the time of sovereignty. That is a very long time, and in Canada, as with Australia, there is a well-known history of state oppression of Aboriginal peoples and tribal displacement. But note that Professor McNeil argues that Aboriginal title claimants relying on present occupation should not need to establish continuity all the way back to the time of sovereignty. McNeil, *supra* note 124, at 140. Otherwise, claimants could rely upon evidence of occupation at sovereignty to acquire an Aboriginal title. *Id.* All that should be required in his view is "sufficient evidence of post-sovereignty occupation . . . to raise a presumption that the land was occupied at the time of Crown assertion of sovereignty." *Id.* Note that in applying Professor McNeil's "possessory title" analysis, proof that an Aboriginal community had exclusive occupation of land at any time after the Crown's assertion of sovereignty should give rise to a presumptive title. See MCNEIL, *supra* note 39.

130. Justice Cromwell, of the Nova Scotia Court of Appeal, ruled that "continuity of occupation from sovereignty to the present is not part of the test for aboriginal title if exclusive occupation at sovereignty is established by direct evidence of occupation before and at the time of sovereignty." *Marshall*, [2003] 218 N.S.R.2d 78, ¶ 181, *rev'd*, [2005] 2

D. The Extinguishment of Indigenous Peoples' Land Rights

As noted, the judicial recognition of indigenous peoples' land rights in Australia and Canada is a recent phenomenon. Indigenous peoples seeking demarcation of traditional lands will often find that their lands are now subject to competing rights and interests granted and acquired by the state. The question raised is: How does a state reconcile these non-indigenous interests with the land rights sought by Aboriginal peoples? As pointed out earlier, the Australian courts apply a standard whereby all identified native title rights and interests in land established are compared with the legal rights and interests created by the state.¹³¹ To the extent there is a conflict between the legal incidents of the two sets of rights, the state-created right prevails.¹³² The basis for this rule, laid down in the breakthrough decision of *Mabo II*, is that the assertion of British sovereignty "carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory."¹³³ This reflects the courts' adherence to the common law principle of parliamentary sovereignty—excepting constitutional protection of property rights, the legislature may lawfully acquire private property. What is significant in Australia, however, is that the High Court has ruled that governmental grants of lands can effect extinguishment of native title even in the absence of clear statutory authority for the grant.¹³⁴ This is a clear departure from the fundamental common law principle that the Crown in its executive capacity cannot infringe or take away vested rights, especially rights in relation to land, without unequivocal statutory authority.¹³⁵ Native title interests are subordinated to these non-indigenous grants because of the High Court's view that native title, as a *sui generis* title with its source in pre-sovereignty customary laws, is not amenable to the same protections that extend to property interests derived from

S.C.R. 220. Also, in *Bernard*, Justice Daigle said that the "requirement of continuity only applies in cases where present occupation is relied on as proof of pre-sovereignty occupation." [2003] 262 N.B.R.2d 1, ¶ 58, *rev'd*, [2005] 2 S.C.R. 220. Chief Justice McLachlin's decision does not expressly endorse this approach, though the opportunity was there for her to do so. See *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220.

131. *Western Australia v. Ward* (2002) 213 C.L.R. 1, ¶¶ 73-82.

132. *Id.*

133. *Mabo v. Queensland II (Mabo II)* (1992) 175 C.L.R. 1, ¶ 73 (Austl.).

134. *Id.* ¶¶ 81-83.

135. In *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, 569 (H.L.) (U.K.), Lord Parmoor said: "Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown."

the state.¹³⁶ Native title rights will, as a result, be extinguished by the numerous conflicting non-indigenous grants issued by the state during the ever-expanding process of settlement. In addition, at common law, fair compensation is to be provided for the state expropriation of private property unless expressly denied by legislation.¹³⁷ But the High Court majority in *Mabo II* rejected the need for compensation in cases of extinguishment of native title.¹³⁸ Subsequent decisions handed down under the NTA have endorsed that approach.¹³⁹ Compensation in respect of some acts of extinguishment are provided for in the NTA and certain provincial laws.¹⁴⁰ But those seeking compensation under the NTA must first demonstrate the existence of native title in the relevant lands at the time of the act of extinguishment, which is not an easy task as we have seen.¹⁴¹

In Canada, Aboriginal rights in existence in 1982 are accorded constitutional protection under section 35 of the Constitution Act and therefore, after 1982 cannot be extinguished by executive grant or the legislature in the same

136. *Mabo II* (1992) 175 C.L.R. 1, ¶¶ 64-83. According to the High Court, it is the *indigenous* quality of land rights that makes indigenous land rights susceptible to extinguishment by Crown grant. *Id.* ¶ 74. Professor McNeil notes that this approach has also been applied under the NTA with the court ignoring the fact that there is no justification in legal principle or precedent to deny native title protection from executive action simply because that title is not derived from Crown grant. See McNeil, *supra* note 8. Justice Brennan relied solely on American authority for his position on extinguishment in *Mabo II*. However, as noted by Professor McNeil, American law does not in fact support it. See McNeil, *Extinguishment of Native Title: The High Court and American Law*, 2 AUSTL. INDIGENOUS L. REP. 365, 369 (1997). Compare also New Zealand law, where it is clear a Crown grant cannot extinguish customary title. See *Faulkner v. Tauranga Dist. Council*, [1996] 1 N.Z.L.R. 357, 363 (H.C.); *Nireaha Tamaki v. Baker*, [1901] N.Z.P.C.C. 371 (P.C.).

137. See *Att'y-Gen. v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.) (U.K.).

138. Compare *Mabo II* (1992) 175 C.L.R. 1, ¶¶ 2, 61, with *Te Runanganui o te Ika Whenua Inc. Soc'y v. Att'y-Gen.*, [1994] 2 N.Z.L.R. 20, at 24 (C.A.) (*obiter dicta* comment of President Cooke noting that upon the extinguishment of customary title, there was an assumption that compensation would be paid).

139. See *Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 C.L.R. 422 (Austl.); *Western Australia v. Ward* (2002) 213 C.L.R. 1; *Commonwealth v. Yarmirr* (2001) 208 C.L.R. 1 (Austl.).

140. Native Title Act, 1993, §§ 17, 20, 23J (Austl.).

141. See, e.g., *Jango v. Northern Territory* (2006) 152 F.C.R. 150 (Austl.) (denying the compensation claim because the Aboriginal claimants were unable to establish native title rights in the land at the time of extinguishment).

manner as Australian native title.¹⁴² But Aboriginal rights established under section 35 may still be “infringed” under federal legislation where this infringement is justified by the needs of the larger society.¹⁴³ The question of when infringement is justified has been developed by the courts on a case-by-case basis, but it is now clear, after *Delgamuukw*, that infringement in relation to Aboriginal title may occur in a broad range of circumstances, including the development of agriculture, forestry, and mining, and the “settlement of foreign populations to support those aims.”¹⁴⁴ Constitutional protection thus does not act as an absolute shield against conflicting non-indigenous interests.

In addition, the constitutional protection afforded to Aboriginal rights does not extend to extinguishments that occurred before 1982. Prior to 1982, the Canadian federal legislature had the power to extinguish Aboriginal rights provided the legislature’s intention to do so was clear and plain.¹⁴⁵ Like Australia, the rationale for this is that Crown sovereignty vests this power in the legislature.¹⁴⁶

Compensation will ordinarily be available for those Aboriginal rights in existence at 1982 and subsequently infringed upon by the state.¹⁴⁷ And on

142. See *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 28 (Can.) (“Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*.”); see also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶¶ 160-69 (Can.).

143. *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 160-64.

144. *Id.* ¶ 165.

145. The Canadian federal legislature acquired this exclusive right upon confederation under section 91(24) of the Constitution Act, 1867 (then known as the British North America Act), which gave the federal legislature exclusive jurisdiction over “Indians, and Lands reserved for the Indians.” Constitution Act, 1867, 30 & 31 Vict. Ch. 3, s. 91(24) (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985). According to Chief Justice Lamer, “While the requirement of clear and plain intent does not, perhaps, require that the Crown use language which refers expressly to its extinguishment of aboriginal rights . . . the standard is still quite high.” *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 180.

146. See Kent McNeil, *Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion*, 33 OTTAWA L. REV. 301, 320-22 (2001-02); McNeil, *supra* note 8.

147. See *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶ 169 (“In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.”).

standard common law principles, compensation should also be available for Aboriginal interests that are found by judicial inquiry to have been extinguished before 1982.¹⁴⁸ In Canada, the question also arises as to the status of those lands that were subjected to treaties of cession in the early years of settlement. Extensive areas of Canada are subject to these treaties.¹⁴⁹ These treaties contain “extinguishment clauses” that, according to the Canadian judiciary, preclude Aboriginal peoples from asserting Aboriginal rights (including title) to their ancestral lands in the courts.¹⁵⁰ Canadian scholars have been highly critical of these treaties. Patrick Macklem, for example, notes:

Assuming it can be proved that the aboriginal signatories actually consented to the extinguishment of their title, distributive justice demands more than the mere enforcement of such an agreement . . . and the judiciary should scrutinise the adequacy of consideration received in light of the actual agreement, concerning the extinguishment of aboriginal title.¹⁵¹

There is a process in Canada for addressing Aboriginal claims of non-compliance by the state with the terms of these treaties,¹⁵² but no means to pursue issues of consent and adequacy of consideration.¹⁵³

148. *See* Att’y-Gen. v. De Keyser’s Royal Hotel Ltd., [1920] A.C. 508 (H.L.) (U.K.).

149. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 66 (1999).

150. *See* R. v. Howard, [1994] 2 S.C.R. 299; *cf.* Indian and Northern Affairs Canada, Peace and Friendship Treaties, http://www.ainc-inac.gc.ca/ps/clm/atr/pft_e.html (last visited Jan. 21, 2007) (Peace and Friendship Treaties were aimed at promoting peace between the British and Canadian Aboriginal peoples and did not involve the cession of traditional lands).

151. MACKLEM, *supra* note 11, at 183.

152. Efforts are afoot to reform this process due to its shortcomings. *See* STANDING SENATE COMM. ON ABORIGINAL PEOPLES, SPECIAL STUDY ON THE FEDERAL SPECIFIC CLAIMS PROCESS, FINAL REPORT, NEGOTIATION OR CONFRONTATION: IT’S CANADA’S CHOICE (2006), <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/abor-e/rep-e/rep05dec06-e.pdf> (last visited Jan. 21, 2007).

153. While there has been no statewide process to date, there are initiatives in the provinces of Manitoba and Saskatchewan. In Saskatchewan, the Federal Government, the Saskatchewan Provincial Government, and the Federation of Saskatchewan Indian Nations (FSIN) have agreed to establish various fora—the Common Table, Treaty Table, Fiscal

E. The Process of Recognizing Indigenous Peoples' Rights to Land

It must be emphasized that the judicial recognition of indigenous traditional lands is an adversarial process dealing with highly contentious legal rights and, as a result, is intensely political. Judges, as one would expect in such circumstances, tend to err on the side of conservatism. As illustrated by native title and Aboriginal rights law in Australia and Canada, judges are accorded a high degree of discretion when determining issues of definition, continuity, and extinguishment, and that has not always resulted in favorable outcomes for indigenous peoples.

Additionally, litigating rights is not only an emotionally taxing, expensive, and time-consuming enterprise, it creates friction between and within indigenous claimant groups and is unable to address the unique cultural and political dimensions of indigenous property claims.¹⁵⁴

Many judges, aware of the limits of litigation, have expressed their preference for indigenous claims to lands to be addressed through a system of negotiation or arbitration.¹⁵⁵ This illustrates the importance of states establishing

Relations Table, and Governance Table—to begin a process of revisiting and discussing treaty-based governance. See Federation of Saskatchewan Indian Nations, <http://www.fsin.com/treatygovernance/index.html> (last visited Jan. 21, 2007). The historical practice of engaging in extinguishment treaties with indigenous peoples resonates with the general practice applied in the first years of settlement in the United States. See Russel Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 1, 80 (1982). Again, no satisfactory process has been established in the United States to address these issues of consent and consideration. The Indian Claims Commission (ICC), established in the mid-twentieth century, was directed at these issues but has been criticized by many as simply inadequate. See, e.g., *Mary & Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.116, doc. 47 ¶ 128 (2002) [hereinafter *Dann Case*] (criticizing ICC conduct in relation to the Western Shoshone Nation in the Inter-American Human Rights Commission report).

154. Litigation naturally pits the claims of indigenous peoples against other indigenous peoples in relation to overlapping claims and often leads to internecine conflicts over who should represent sub-groups in litigation.

155. For example, the comments of Justice McHugh in *Ward* suggest the creation of “an arbitral system that declares what the rights of the parties ought to be according to the justice and circumstances of the individual case.” *Western Australia v. Ward* (2002) 213 C.L.R. 1, ¶ 561. Also, Justice McHugh explained that “[i]t might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold

mechanisms for recognition that are not weighed down by strict legal criteria and are sympathetic to the effects of colonization on indigenous communities. Negotiation of these claims enables all parties to seek mutually acceptable solutions and to address issues that litigation might otherwise foreclose. Canada has, since the early 1990s, established a system of negotiation in relation to claims to Aboriginal title.¹⁵⁶ The process entails negotiating modern treaties in those areas where it is clear Aboriginal title has not been extinguished by historical treaties, which includes large areas in western, eastern, and northern Canada.¹⁵⁷ Also, in Australia, Aboriginal communities have made some significant gains through negotiated agreements with local governments and private businesses.¹⁵⁸ To date in Canada, only a few treaties have been negotiated, but they have all resulted in the demarcation of large areas of territory and recognition of forms of self-determination.¹⁵⁹ These alternatives to litigation would appear to offer better outcomes for indigenous peoples, but they are far from perfect. Indigenous negotiators will almost invariably have to grapple with the disparate bargaining powers of the parties and the good-faith intentions of the state.¹⁶⁰ In addition, the

native title rights into the common law.” *Id.* ¶ 970. In relation to Canada, see the comments of Chief Justice Lamer in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶ 186 (“Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* to be a basic purpose of s. 35(1)—‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’”).

156. *See, e.g.*, Nisga’a Final Agreement Act, 2000 S.C., ch. 7. In 1993, the Canadian government passed the Nunavut Land Claims Agreement Act, 1993 S.C., ch. 29, and the Nunavut Act, 1993 S.C., ch. 28, both of which grant significant land and political rights to the Inuit who inhabit the North West Territories. *See also* Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, May 25, 1993, available at http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav_e.pdf. Significantly these treaties tend to be confined to geographically isolated areas where the impact of new land rights on non-indigenous peoples is minimal.

157. *See supra* note 156.

158. *See* 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 (2003) (noting that despite problems with the process of negotiating agreements and in the substance of those agreements, there is, at least after *Mabo II*, a new environment where negotiations and agreement are now commonplace).

159. *See supra* text accompanying note 156.

160. *See* Ciaran O’Faircheallaigh, *Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada* (Griffith Univ., Ctr. for

standards of proof forged in litigation have an enduring influence in these negotiations. If Aboriginal peoples' potential claims to common law title are weak, they possess much less potential to negotiate meaningful agreements than if their claims were strong. In Canada and Australia, there is no doubt that the impetus for states to negotiate has diminished with recent court decisions denying rights to indigenous peoples.

F. Conclusions on Domestic Practice

In relation to Australia, it is clear that the manner in which modern rights are defined—with a focus on specific Aboriginal customary laws—has hampered Aboriginal efforts to acquire exclusive rights to their lands. It is clear too that this is due to the manner in which the NTA has been interpreted and applied by the High Court. Characterizing native title as a “bundle of rights” not only imposes extraordinary evidential burdens on Aboriginal communities—with each right having to be proved—it leaves native title rights and interests vulnerable to Australian standards of extinguishment. The application of strict tests of continuity, especially the requirement that customs be rooted in pre-sovereignty “traditional” custom, means that many native title claims stumble at the first hurdle. For those communities who have lost their connection to their lands, even if they have been forcibly removed, there is no means to pursue native title and no right to compensation. Thus, the law of native title neglects those dispersed and less cohesive groups, who may have been subjected to an even more disruptive and violent history than other indigenous groups.

In Canada, the inquiry into Aboriginal practices and unique continuity tests alleviates the evidential burden considerably. The reference to Aboriginal perspectives in Aboriginal title claims also aims to accommodate indigenous differences. While it is clear these principles have emerged in the context of

Australian Pub. Sector Mgmt., Research Paper No. 13, 2003), *available at* http://www.griffith.edu.au/school/gbs/ppp/research/research_papers/paper13.pdf; Ciaran O’Faircheallaigh, Research Paper, *Negotiating a Better Deal for Indigenous Land Owners: Combining “Research” and “Community Service,”* (Griffith Univ., Ctr. for Australian Pub. Sector Mgmt., Research Paper No. 11, 2003), *available at* http://www.griffith.edu.au/school/gbs/ppp/research/research_papers/paper11.pdf; Pearson, *supra* note 120; David Ritter, *So, What’s New? Native Title Representative Bodies and Prescribed Bodies Corporate After Ward*, 21 *AUSTL. MINING & PETROLEUM L.J.* 302, 304-05 (2002).

section 35 of the Canadian Constitution Act's theme of reconciliation, there is no reason why similar standards cannot be adopted in other jurisdictions that lack constitutional protections for indigenous land rights.¹⁶¹ These states are also faced with reconciling pre-existing indigenous rights with the rights asserted by a new sovereign.

The occupation standard recently applied by the Canadian Supreme Court in *Marshall; Bernard*, however, will confine Aboriginal title to those areas of land used on a regular and intensive basis at sovereignty and will deny rights of title to tribes with a nomadic tradition. As with Australia, Aboriginal rights are vulnerable to extinguishment in relation to pre-1982 Aboriginal rights, and to infringement in relation to Aboriginal rights constitutionally protected after 1982.

The end result for these two jurisdictions is simply this: Few tribes will be able to establish a modern legal right to occupy their lands to the exclusion of others. The rights capable of legal recognition are those less intrusive rights to engage in the activities conducted in the distant past. While rights are recognized, the demarcation of lands—an essential step towards indigenous peoples maintaining and revitalizing their forms of self-determination—remains elusive.

It remains to be seen how this body of law will influence other states faced with indigenous claims to traditional lands, especially states in the Americas, Asia, and Africa. In Central and South America, for example, many states have enacted laws that purport to recognize indigenous communal property, yet this has rarely translated into the actual demarcation of indigenous lands.¹⁶²

The standards developed through common law litigation provide an attractive menu from which states may simply pick and choose those standards that will result ultimately in the recognition of only non-exclusive indigenous interests in land. This potential risk is most clearly illustrated by New Zealand's response to a recent "breakthrough" judicial decision, *Attorney-General v. Ngati Apa*, recognizing that Māori tribes could claim customary interests in the New

161. Cf. Kirsten Matoy Carlson, *Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title*, 22 ARIZ. J. INT'L & COMP. L. 449 (2005) (suggesting that it is unlikely that these principles would have emerged in the absence of section 35 of the Canadian Constitution Act, 1982).

162. See *Indigenous Peoples and Their Relationship to Land*, *supra* note 1. For example, Nicaragua's constitution and statutory law declare that indigenous peoples' property rights are recognized and protected, yet the state has failed to demarcate the lands of indigenous groups on the Atlantic Coast. *Awasi Tingni Case*, *supra* note 19.

Zealand foreshore and seabed area.¹⁶³ New Zealand's response to this decision has been to establish a statutory scheme for the recognition of customary interests—the Foreshore and Seabed Act 2004 (FSA)¹⁶⁴—which borrows heavily from both Canadian Aboriginal rights and Australian native title law.¹⁶⁵

The FSA provides for the recognition by the High Court of a right akin to Canadian Aboriginal title called a “territorial customary right order” (TCRO).¹⁶⁶ To obtain such an order, Māori tribes must prove that the foreshore land in question has been continuously occupied and exclusively so, without substantial interruption, from the date of the assertion of Crown sovereignty to January 2005.¹⁶⁷ Thus, the standard of proof is made more onerous than Canada's by the application of the Australian continuity of connection test. “Occupation” is not defined by the FSA, and neither is “exclusive,” leaving it open to argument whether both terms should be judicially determined with reference to the perspectives of Māori claimants and not common law tests. However, the FSA states that “exclusivity” will not be established where “any other group” has ever used the same area of foreshore (other than for rights to navigation) without the express or implied permission of the claimant group.¹⁶⁸ Additionally, if such a right is proved, the TCRO holders are not entitled to the land; rather, the holders are entitled to enter into negotiations with government officials to discuss possible

163. *Att’y-Gen. v. Ngati Apa*, [2003] 3 N.Z.L.R. 643 (C.A.). Compare P.G. McHugh, *Aboriginal Title in New Zealand*, *supra* note 15, with F.M. (Jock) Brookfield, *Māori Claims and the “Special” Juridical Nature of Foreshore and Seabed*, 2 N.Z. L. REV. 179 (2005) (offering conflicting comments on the possible judicial implications of the *Ngati Apa* decision).

164. Foreshore and Seabed Act 2004, 2004 S.N.Z. No. 93, §§ 3-4.

165. For comment on how the Foreshore and Seabed Act 2004 adopts aspects of Canadian and Australian law, see sources cited *supra* note 69.

166. Foreshore and Seabed Act 2004, 2004 S.N.Z. No. 93, §§ 32-39.

167. *Id.* § 32.

168. These non-members must also recognize the group's authority to exclude. *Id.* § 32(5). In addition, the FSA imports an evidential requirement that claimants establish in evidence that they have maintained ownership of dry land adjacent to the foreshore claimed from 1840 to January 2005. *Id.* § 32(2)(b). In addition, in determining occupation, the courts may not take into account “any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource.” *Id.* § 32(3).

forms of redress.¹⁶⁹ To obtain a Customary Rights Order (CRO)—which confers the right to engage in traditional activities—tribes must prove that the activity is “integral” to tribal customary law and has been practiced in a substantially uninterrupted manner from 1840 to the commencement of the FSA.¹⁷⁰ Therefore, not only is the Australian continuity of connection test applied, CROs incorporate the widely-criticized “integral to distinctive culture” test from Canadian “Aboriginal rights” law and require Māori claimants to support their claims with evidence of specific customary laws. In relation to extinguishment, the CROs may be extinguished by a broad range of conflicting non-indigenous rights, irrespective of whether the rights are permanent or only finite in duration (i.e., the Australian extinguishment standards), and there is no right under the FSA to compensation for the extinguishment of those rights.¹⁷¹ It is possible for Māori tribes to pursue compensation for the loss of these interests through the state’s historical claims process—a process distinct to the FSA.¹⁷² However, this process has been heavily criticized for its failure to provide Māori with adequate forms of compensation and, in particular, lands and natural resources.¹⁷³

The evidential standards contained in the FSA are thus an inelegant amalgam of the evidential standards applied in Australia and Canada. What is more, the standards taken together are more onerous than those applied in either Canada or Australia. Despite the obvious historical and constitutional disparities

169. *Id.* §§ 37-38. The term “redress” suggests that compensation will not be paid. In fact there is no guarantee that any redress will be provided, and there is no independent mechanism for determining the nature of any redress to be provided. *See id.* There is also the option of establishing a “reserve” for the environmental co-management of the land with the government. But no property interest in the foreshore is conferred. *Id.* § 40.

170. *Id.* § 50(1)(b).

171. *See id.* §§ 50(1)(c), 51(2).

172. The negotiation of historical claims is administered by the New Zealand Office of Treaty Settlements, which reports to the Minister in Charge of Treaty of Waitangi Negotiations. *See* New Zealand Office of Treaty Settlements, <http://www.ots.govt.nz> (last visited Jan. 26, 2007).

173. *See* ECOSOC, The Special Rapporteur, *Report of the Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, Mission to New Zealand*, ¶¶ 26-27, U.N. Doc. E/CN.4/2006/78/Add.3 (Mar. 13, 2006) (prepared by Rodolfo Stavenhagen); *see also* Craig Coxhead, *Where Are the Negotiations in the Direct Negotiations of Treaty Settlements?*, 10 WAIKATO L. REV. 13 (2002); Annie Mikaere, *Settlement of Treaty Claims: Full and Final, or Fatally Flawed?*, 17 N.Z. U. L. REV. 425 (1997).

between New Zealand and these jurisdictions (most notably the fact that Māori tribes entered into a treaty guaranteeing their rights to lands), and Australia's and Canada's very different approaches to land rights recognition, New Zealand has simply chosen the standards that, when applied together, set extraordinary standards of proof that can only result in the legal recognition of traditional activities and not rights to exclusive occupation. There is precious little appreciation of the effects colonization has had on Māori traditional tribes and tribal customary law.¹⁷⁴

IV. INTERNATIONAL LAW STANDARDS FOR DEMARCATION OF TRADITIONAL LANDS

A. International Instruments Directed at Indigenous Peoples' Rights

While there is great diversity among the ways of life of indigenous peoples and their relationships with lands,¹⁷⁵ the emerging international law standards for demarcation of traditional lands are quite uniform and directed at the demarcation and titling of lands that are currently occupied and used by

174. See, e.g., WAITANGI TRIBUNAL, REPORT ON THE CROWN'S FORESHORE AND SEABED POLICY, WAI 1071, at 3.7.2 (2004), available at <http://www.waitangi-tribunal.govt.nz/reports/generic> (reporting on the state confiscation of Taranaki tribal traditional lands in the nineteenth century).

175. As noted by Professor Anaya and Professor Williams:

Because each indigenous community possesses its own unique social, political, and economic history, each has adapted and adopted methods of cultural survival and development suited to the unique environment and ecosystem inhabited by that community . . . each indigenous community creates its own customary laws for governing its lands and resources. This process of *jurisgenesis* means that indigenous societies' property rights systems possess the same particularity and divergence that characterize the property systems of non-indigenous societies.

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, 43-44 (2001).

indigenous peoples in accordance with their land tenure patterns.¹⁷⁶ As noted by the former U.N. special rapporteur, Jose Martinez Cobo:

Recognition [of indigenous traditional lands] here means acknowledgment of a *de facto* situation that provides a basis for the existence of a right. Official recognition and subsequent registration should follow as a matter of course, once possession and economic occupation are proved.¹⁷⁷

The reason for the protection of rights in lands currently inhabited by indigenous peoples is quite clear. International law has sought to protect those indigenous peoples who have historical continuity with a general territory and occupy lands under their land tenure systems, but have not received any official state recognition of their land rights.¹⁷⁸ Significantly, international instruments are directed at according rights of *ownership* to indigenous peoples in relation to those lands occupied and used under traditional tenure.¹⁷⁹ As noted, ownership in this context is not the same as state forms of ownership (e.g., fee simple titles); the right of ownership of traditional lands is a communal right and will ordinarily be subject to limits on alienation.¹⁸⁰ But with ownership comes the all-important right to control access to traditional lands and natural resources.¹⁸¹ The objective is to provide indigenous property with the fullest form of protection available

176. See *infra* Parts IV.A.1-3, IV.B.1.

177. See ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, at 217 U.N. Doc. E/CN.4/SUB.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1986) (prepared by Jose Martinez Cobo).

178. See *Indigenous Peoples and Their Relationship to Land*, *supra* note 1, ¶ 50-54; see also cases *infra* Part IV.B.1.

179. See *infra* Part IV.A.1-3.

180. See, e.g., ILO Convention No. 169, *supra* note 26, art. 17(2) (“[T]he peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands . . . outside their community.”); Proposed OAS Declaration, *supra* note 26, art. 18(3)(i)-(ii) (noting states shall recognize traditional lands as “permanent, exclusive, inalienable” and shall have such title changed only by “mutual consent” when indigenous peoples have “full knowledge and appreciation of the nature or attributes of such property”); U.N. Declaration, *supra* note 26, art. 26.

181. See *supra* note 4.

from the state.¹⁸² This secure land base allows indigenous peoples to enjoy their rights to equality, culture, and self-determination free from outside intrusions.¹⁸³ The demarcation of lands in this manner, then, promotes a broad range of indigenous and human rights and firmly rejects the notion that indigenous forms of property are not capable of state recognition.

The requirement to recognize indigenous peoples' rights of ownership on the basis of their traditional patterns of occupation and use is explicitly referred to in the ILO Convention on Indigenous and Tribal Peoples, No. 169 of 1989 ("ILO Convention No. 169"),¹⁸⁴ the U.N. Declaration on the Rights of Indigenous Peoples ("U.N. Declaration"),¹⁸⁵ and the Organization of American States' (OAS) Proposed American Declaration on the Rights of Indigenous Peoples ("Proposed OAS Declaration").¹⁸⁶ All of these instruments list an extensive range of indigenous and human rights. Additionally, these international instruments set standards of definition, continuity, and remedies for dispossession that far exceed those currently applied by the common law states. The principles contained in these instruments are not yet fully established principles of international law. However, they reflect growing support among states for the recognition and protection of indigenous peoples' rights, especially the need to demarcate indigenous lands and restore their lands in cases of dispossession.¹⁸⁷

182. See *Indigenous Peoples and Their Relationship to Land*, *supra* note 1, ¶ 50-54; see also cases *infra* Part IV.B.1.

183. For example, the international instruments recognize the right of indigenous communities to create their own laws (including customary laws) in relation to the regulation and use of traditional lands as between members (transmission of use rights, dispute resolution, etc.). See ILO Convention No. 169, *supra* note 26, art. 17(1); Proposed OAS Declaration, *supra* note 26, arts. 18(1), 18(3)(iii); U.N. Declaration, *supra* note 26, art. 32 ("Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.").

184. See ILO Convention No. 169, *supra* note 26. ILO Convention No. 169 is a partial revision of ILO Convention No. 107—the Indigenous and Tribal Populations Convention, 1957. *Id.* pmb. ILO Convention No. 107 contained strong protections for indigenous lands but was widely criticized as pursuing assimilationist goals. See Anaya & Williams, *supra* note 175, at 34.

185. U.N. Declaration, *supra* note 26.

186. Proposed OAS Declaration, *supra* note 26.

187. This general right to recognition and protection of indigenous property is so widely recognized that it is considered by scholars to be an established principle of customary international law. See, e.g., ANAYA, *supra* note 9; Wiessner, *supra* note 149.

The ILO Convention No. 169 is the only established international treaty directed specifically at indigenous peoples' rights.¹⁸⁸ While the treaty has not been universally adopted by states,¹⁸⁹ this has been due in part to indigenous peoples' objections to their limited input into its formulation and to their belief that it does not sufficiently promote indigenous peoples' self-determination.¹⁹⁰ Nevertheless, the ILO Convention No. 169 has assumed a key role in the international indigenous movement. It is frequently referred to in the decisions and reports of U.N. and OAS human rights treaty bodies.¹⁹¹ And, despite the ambivalence of some indigenous peoples towards the Convention, it has served as an important point of reference in the formulation of the rights contained in the U.N. Declaration and Proposed OAS Declaration.¹⁹²

The most significant instrument in relation to indigenous peoples' rights (including land rights) is the U.N. Declaration, drafted with considerable input from indigenous peoples and intended as a declaration of universal application by all states once it is adopted by the U.N. General Assembly.¹⁹³ The U.N. Declaration is the most progressive and comprehensive international instrument dealing with indigenous rights. While technically not legally binding on states, it requires that "states in consultation and cooperation with indigenous peoples . . . take the appropriate measures, including legislative measures, to achieve the ends of the Declaration."¹⁹⁴ The original version of the U.N. Declaration was promulgated by the U.N. Working Group on Indigenous Populations in 1993, after almost a decade of discussions in which both states and indigenous peoples from throughout the world participated.¹⁹⁵ That original version was then submitted to a further U.N. Working Group for elaboration, and again, both states and representatives of indigenous peoples participated in vigorous discussions on the

188. See ILO Convention No. 169, *supra* note 26.

189. The eighteen states that have ratified ILO Convention No. 169 include Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru, Spain, and Venezuela. See ILOLEX Database of International Labour Standards, <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited Jan. 26, 2007).

190. See ANAYA, *supra* note 9, at 59.

191. See, e.g., *Maya Case*, *supra* note 43; *Awás Tingni Case*, *supra* note 19.

192. Many of the rights enumerated in both the U.N. Declaration and Proposed OAS Declaration are adapted from those in the ILO Convention No. 169.

193. U.N. Declaration, *supra* note 26, pmbl.

194. *Id.* art. 38.

195. See ANAYA, *supra* note 9.

specific wording and policy underpinning the rights in the Declaration. The final version of the U.N. Declaration was adopted by the U.N. Human Rights Council at its first meeting in June 2006.¹⁹⁶

The Proposed OAS Declaration is an initiative of the OAS General Assembly intended for application to all state members of the OAS.¹⁹⁷ The original draft was prepared by the Inter-American Commission on Human Rights in consultation with OAS member states and representatives of indigenous peoples.¹⁹⁸ Like the U.N. Declaration, the Proposed OAS Declaration is not binding on states, though it expressly provides that the OAS and its entities shall promote respect for, and full application of, rights enumerated in the Declaration.¹⁹⁹

In addition to these instruments, other sources for these emerging principles can be found in the decisions and reports of international human rights treaty bodies, which vet state compliance with various human rights instruments through reporting mechanisms and complaint procedures. Most significant are recent decisions and reports of the OAS Inter-American Court and Inter-American Commission, which consider treaties that have been widely ratified by OAS members, and the U.N. Racial Discrimination Committee²⁰⁰ and U.N. Human

196. U.N. Declaration, *supra* note 26.

197. All thirty-five independent countries of the Americas have ratified the OAS Charter and belong to the Organization. See OAS Member States, <http://www.oas.org/documents/eng/memberstates.asp> (last visited Jan. 6, 2007).

198. Commentary by OAS member states in relation to the Proposed OAS Declaration has reflected a range of views and some concern over terminology. But the commentary reflects a substantial core of consensus on basic principles of indigenous peoples' rights, including land rights. See generally OAS Permanent Council, Comm. on Juridical & Political Affairs, Working Group to Prepare the Proposed Am. Declaration on the Rights of Indigenous Populations, *Report of the Chair*, O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.5/99 (Dec. 1, 1999), available at <http://www.oas.org/consejo/CAJP/docs/cp06506e09.doc>; Inter-Am. C.H.R., *Report on the First Round of Consultations Concerning the Future Inter-American Legal Instrument on Indigenous Rights*, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-93, OEA/Ser.L/V/II.83, doc. 14, corr. 1, ch. Vb, at 263 (Mar. 12, 1993), available at <http://www.cidh.oas.org/annualrep/92eng/chap.5b.htm>.

199. Proposed OAS Declaration, *supra* note 26, art. 27.

200. This committee is also called the Committee on the Elimination of Racial Discrimination (CERD) and is charged with implementing the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD], G.A. Res. 2106, Annex, U.N. Doc. A/RES/2106/ANNEX (Dec. 21, 1965).

Rights Committee,²⁰¹ which vet compliance with U.N. treaties that have been ratified by many states around the globe.²⁰²

As noted, the general principle of demarcation is that indigenous peoples are accorded rights of ownership in those lands that they traditionally occupy and use. But just how must states apply these principles on the ground? What does occupation mean in the international instruments? Or more precisely what is *traditional* occupation? And must indigenous peoples have occupied their lands since pre-colonial times to be accorded rights of ownership today? And what is the status of those lands no longer occupied by indigenous peoples? The interpretation offered below not only accords with the language used in the international instruments—applying a literal or formalistic approach—it is commensurate with modern conceptions of property, the interpretative approach of international human rights treaty bodies, and the fundamental principles of cultural integrity, self-determination, and nondiscrimination.²⁰³

1. The ILO Convention on Indigenous and Tribal Peoples, No. 169 of 1989 (“ILO Convention No. 169”)

The ILO Convention No. 169 contains strong measures for the demarcation and state recognition of indigenous lands.²⁰⁴ The cultural and

201. This committee monitors the implementation of the International Covenant on Civil and Political Rights [ICCPR], G.A. Res. 2200A, U.N. Doc. A/6316 (Dec. 16, 1966).

202. In 2004, the International Covenant on Civil and Political Rights (ICCPR) was ratified by 152 states, and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was ratified by 169 states. Office of the U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (June 9, 2004), <http://www.unhchr.ch/pdf/report.pdf>.

203. Professor James Anaya advocates a realist approach to the interpretation of international treaties. For example, he notes that it is possible to interpret the right to property in human rights treaties as supportive of indigenous peoples’ land rights if one avoids formalism in favor of this realist approach. Anaya, *supra* note 11.

204. See Russel Barsh, *An Advocate’s Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209 (1990); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677 (1990) (discussing the standards set in the ILO Convention No. 169 and the process leading to its establishment).

spiritual significance of traditional lands to indigenous peoples is emphasized by article 13(1) of ILO Convention No. 169, which states:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.²⁰⁵

Article 14 provides for the legal recognition of indigenous lands and the creation of mechanisms to address claims of dispossession:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.²⁰⁶

Article 14(1) requires states to recognize indigenous peoples' rights of "ownership and possession" to the lands they "traditionally occupy."²⁰⁷ The

205. ILO Convention No. 169, *supra* note 26, art. 13(1).

206. *Id.* art. 14; *see also* ILO, Comm. of Experts on the Application of Conventions & Recommendations, *General Report and Observations Concerning Particular Countries*, 81st Sess., rpt. 3, pt. 4A, at 348-52 (1994) (regarding land rights of indigenous peoples in Bangladesh and Brazil).

provision thus focuses on the factual standard of occupation and not the content of specific customary laws. The reference to “traditional” occupation indicates that the factual inquiry into occupation is to be determined with regard to indigenous perspectives and not state conceptions of what amounts to occupation. In this regard, customary laws or land tenure rules may provide insights into the indigenous perspective. Additionally, there is no suggestion in article 14 that indigenous peoples must have continuously occupied the land in question from pre-colonial times; only that the occupation be an established fact at the time of demarcation—the reference to “occupy” is in the present tense—and that it be “traditional.”²⁰⁸

Article 14(1) makes a specific reference to nomadic peoples and shifting cultivators.²⁰⁹ It draws a distinction between lands traditionally occupied and those areas not occupied exclusively but to which indigenous peoples have traditionally had access for subsistence and traditional activities.²¹⁰ This suggests that the right to own land is confined to only those areas of land occupied exclusively by indigenous peoples. Therefore, ILO Convention No. 169, in similar ways to Canadian Aboriginal rights law, draws distinctions based on indigenous peoples’ degree of association with lands. However, once again, the reference to “traditionally occupy” would indicate that the factual inquiry into whether there is exclusive occupation must be considered through the eyes of the relevant indigenous peoples. If, in applying that standard, areas of lands are not occupied exclusively, indigenous peoples nonetheless obtain a right to use lands traditionally accessed for subsistence and traditional activities.

The focus on present occupation of lands might appear to rule out claims for the legal recognition of traditional lands that are no longer occupied by indigenous peoples. This is a real concern for indigenous peoples and scholars. Professor James Anaya, for example, has argued that the ILO Convention No. 169’s requirement in article 13(1) of respect for cultural values related to land would suggest that “a sufficient present connection with lost lands may be

207. ILO Convention No. 169, *supra* note 26, art. 14(1). The fact that indigenous peoples possess the ownership right to exclude third parties from their lands is confirmed by article 18 of the ILO Convention No. 169, which provides that “adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.” *Id.* art. 18.

208. *See id.* art. 14.

209. *Id.* art. 14(1).

210. *See id.*

established by a continuing cultural attachment to them, particularly if dispossession occurred recently.”²¹¹ Professor Anaya also notes that in cases of dispossession, indigenous peoples may rely upon the remedial provisions in article 14(3) of the ILO Convention No. 169, which requires states to create adequate procedures to resolve land claims by the peoples concerned.²¹² Anaya notes there is no temporal limitation imposed by this provision, meaning that it extends to historical forms of dispossession.²¹³ For the purposes of assessing restitution or compensation in relation to historical forms of dispossession, the extent of territory lost—in terms of the lands once traditionally occupied—ought to be determined from the perspective of the affected indigenous community.²¹⁴

In terms of the process of demarcation and claims to dispossessed lands, the ILO Convention No. 169 mandates that indigenous peoples be consulted in relation to the establishment of these processes,²¹⁵ and that states respect indigenous peoples’ social, cultural, religious, and spiritual values.²¹⁶

211. ANAYA, *supra* note 9, at 144.

212. *Id.* at 144.

213. *Id.*

214. *See* ILO Convention No. 169, *supra* note 26, art. 16. Similarly, the ILO Convention No. 169 addresses state endeavors to relocate indigenous communities. Where (in “exceptional cases and under prescribed conditions”) indigenous peoples are to be relocated from their lands, article 16 of the ILO Convention No. 169 provides indigenous peoples with the right to return to those lands as soon as the grounds for relocation cease to exist. *Id.* art. 16. Where the lands are unable to be returned to indigenous peoples, they are entitled to new lands of “quality and legal status at least equal to that of the lands previously occupied by them” or, if they so decide, compensation. *Id.* art. 16(4). In addition, the reference to “relocation” instead of removal implies that where indigenous peoples are relocated they must be given new lands. For the purposes of assessing compensation or the provision of new lands, the extent of territory lost, in relation to lands traditionally occupied, should be determined from the perspective of the affected indigenous community.

215. *Id.* art. 6.

216. *Id.* art. 5.

2. U.N. Declaration on the Rights of Indigenous Peoples (“U.N. Declaration”)

The U.N. Declaration recognizes the importance of land demarcation in promoting indigenous peoples’ rights to culture, equality, and self-determination. This is clearly set out in the Declaration’s preamble, which recognizes that:

[C]ontrol by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.²¹⁷

Article 25 of the U.N. Declaration emphasizes the inter-generational and spiritual dimensions of indigenous land ownership:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.²¹⁸

The actual demarcation of traditional lands is provided for in article 26:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be

217. U.N. Declaration, *supra* note 26, pmb., para. 9.

218. *Id.* art. 25.

conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.²¹⁹

Article 27 of the U.N. Declaration requires states to establish a fair process for the legal recognition of traditional lands:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.²²⁰

According to article 26(2), the right of indigenous peoples to “own, use, develop and control” their lands, territories, and resources arises where indigenous peoples currently possess lands and resources “by reason of traditional ownership or other traditional occupation or use.”²²¹ That is, the evidential standard for recognizing traditional lands is essentially the same as that provided for in article 14 of ILO Convention No. 169—the present possession of lands that are traditionally owned or occupied and used by indigenous peoples. Thus, factual occupation and use, and not specific, extant customary laws, provides the touchstone standard for defining lands. The reference to “traditional” ownership again suggests that ownership, occupation, and use are to be determined from the perspective of indigenous peoples. The use of the indigenous perspective is also supported by the requirement in articles 26(3) and 27 to conduct legal recognition with due respect to the customs, traditions, and land tenure systems of the indigenous peoples concerned.²²² As with article 14 of ILO Convention No. 169,

219. *Id.* art. 26.

220. *Id.* art. 27.

221. *Id.* art. 26(2).

222. *Id.* arts. 26(3), 27. Additionally, the right of ownership is not confined to those areas traditionally owned or occupied but extends to lands subject to traditional use. In this way, the U.N. Declaration indicates that lands traditionally used, but not occupied, would be entitled to rights of ownership.

there is no suggestion that indigenous peoples must have occupied the land in question from pre-colonial times.

Article 28 of the U.N. Declaration contains remedial measures in relation to the dispossession of traditional lands:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. 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 or of monetary compensation or other appropriate redress.²²³

In those cases where indigenous peoples have been deprived of their lands, whether this occurred recently or many years ago, indigenous peoples are entitled to redress. This may involve the return of the lands actually taken (i.e., restitution) or other lands equal in quality, size, and legal status to those taken. Like the ILO Convention No. 169, it is clear that for the purposes of assessing redress, the extent of territory lost must be determined from the perspective of the affected indigenous community. This is clear because redress is provided for the loss of those “lands, territories and resources which they have traditionally owned or otherwise occupied or used.”²²⁴

What is curious, though, is that the U.N. Declaration also contains a general right to lands traditionally owned and occupied²²⁵ and a right to pursue

223. U.N. Declaration, *supra* note 26, art. 28.

224. *Id.* art. 28(1). In addition, the U.N. Declaration strictly prohibits relocation of indigenous peoples from their lands without their “free, prior and informed consent” and only “after agreement on fair and just compensation . . . with the option of return.” *Id.* art. 10. In these cases too, the extent of territory lost (those lands traditionally occupied) for the purposes of compensation would need to be assessed from the perspective of indigenous peoples.

225. *Id.* art. 26(1).

that right through mechanisms established by the state,²²⁶ but does not describe what that right might be. Presumably, it relates to a right to legal ownership of lands formerly occupied by indigenous peoples but that have not been “confiscated, taken, occupied, used or damaged.”²²⁷ An example could be lands formerly occupied by an indigenous community that have not been expropriated by the state or third parties.

In terms of the process of demarcation, article 27 requires that indigenous peoples participate in the design of a fair and transparent process that accommodates indigenous peoples' values and traditions.²²⁸

3. OAS Proposed American Declaration on the Rights of Indigenous Peoples (“Proposed OAS Declaration”)

The Proposed OAS Declaration requires that all OAS member states give “maximum priority on the demarcation and recognition of properties and areas of indigenous use.”²²⁹ In terms of demarcation, indigenous peoples have the right to the “legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.”²³⁰ This provision clearly seeks to recognize existing indigenous patterns of land ownership and use as seen through indigenous peoples' eyes. Again, the provision's focus is on the legal recognition of the present *de facto* circumstances of indigenous peoples and not whether the lands occupied are “ancestral” lands. Once demarcated, these lands are to be recognized as “permanent, exclusive, inalienable, imprescriptible and indefeasible” titles.²³¹

The Proposed OAS Declaration recognizes that indigenous peoples may have been dispossessed of their lands due to the lands being “confiscated,

226. *Id.* art. 27.

227. *Id.* art. 28.

228. *Id.* art. 27; *see also id.* art. 18 (“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights.”).

229. Proposed OAS Declaration, *supra* note 26, art. 18(8).

230. *Id.* art. 18(1).

231. *Id.* art. 18(3)(i). That the right to ownership and property confers rights of exclusivity is confirmed by article 18(8), which provides: “The states shall take all measures, including the use of law enforcement mechanisms, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons to take possession or make use of them.” *Id.* art. 18(8).

occupied, used or damaged” by the state and presumably third parties.²³² In cases of confiscation, occupation, use, or damage, indigenous peoples have the right to the restitution of traditional lands or, when restitution is not possible, the right to compensation.²³³ Again, as with the ILO Convention No. 169 and U.N. Declaration, the extent of territory lost in cases of dispossession must be determined from the perspective of the affected indigenous peoples.²³⁴

Indigenous peoples also have the right to “ownership” of “lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.”²³⁵ This provision contains no temporal limitation—it refers to lands “historically occupied” in the past tense—and so it could extend to lands formerly occupied and used by indigenous peoples. However, the provision, like the first paragraph of article 26 of the U.N. Declaration, seems to be directed at those lands no longer occupied by indigenous peoples and which have not been clearly expropriated by the state or third parties.

B. Decisions of International Human Rights Treaty Bodies

International treaty bodies have increasingly been called upon to consider indigenous peoples’ claims to traditional lands. The most progressive and comprehensive decisions from treaty bodies on traditional lands have come from the Inter-American system of human rights established by the OAS.²³⁶ The Inter-American Commission and Court (the top appellate forum) have heard petitions from indigenous peoples in Nicaragua, Belize, and the United States alleging breach of specific rights, especially the right to property, in OAS human rights treaties.²³⁷ In addressing these petitions, the Commission and Court have made

232. *Id.* art. 18(7).

233. *Id.*

234. *Id.* art. 18(6). The Proposed OAS Declaration also recognizes that states may relocate indigenous peoples in “exceptional and justified circumstances.” *Id.* In cases of relocation, the Proposed OAS Declaration guarantees “prior compensation and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status” and “the right to return if the causes that gave rise to the displacement cease to exist.” *Id.*

235. Proposed OAS Declaration, *supra* note 19, art. 18(2).

236. *See* ANAYA, *supra* note 9.

237. *See infra* Part IV.B.1.

important rulings on matters of definition, continuity, extinguishment, and process.²³⁸ What is significant in these cases is that the aforementioned international standards have been argued before and applied by the Commission and Court.

The U.N. Racial Discrimination Committee and the U.N. Human Rights Committee have also issued strong statements, observations based on state reports, and decisions critical of the modes of demarcation in Australia and New Zealand, and many other states.²³⁹

1. OAS Inter-American Human Rights System

The *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*²⁴⁰ decision of the Inter-American Court and the *Maya Indigenous Communities of the Toledo District v. Belize*²⁴¹ decision of the Inter-American Commission both apply the aforementioned international law standards in relation to the demarcation of indigenous lands and thus illustrate alternatives to the modes of demarcation seen in the common law jurisdictions of Australia, Canada, and New Zealand.²⁴² There

238. *Id.*

239. *See infra* Part IV.B.2.

240. *Awas Tingni Case*, *supra* note 19.

241. *Maya Case*, *supra* note 43. Where the Inter-American Commission on Human Rights brings the case, it acts as the victim's representative before the Court.

242. The Inter-American Commission on Human Rights hears petitions from individuals or groups who claim the violation of any right under the American Convention on Human Rights, and the American Declaration on the Rights and Duties of Man. *See* OAS, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V.II.82, doc.6 rev.1, at 17 (1992) [hereinafter American Declaration]. While the Inter-American Commission's decisions are recommendatory, if states fail to respond, appeals can be made to the Inter-American Court of Human Rights, a judicial body which may issue binding decisions if the state concerned is a party to the American Convention and has consented to the Court's jurisdiction. The *Awas Tingni* decision resulted from a petition lodged by the Inter-American Commission on behalf of the Awas Tingni indigenous communities of the Atlantic Coast after Nicaragua had failed to comply with a direction from the Commission to demarcate and officially

are many similarities between the circumstances that led to the two decisions, indicating the status of many indigenous peoples throughout Central America. In each case, the communities were in occupation of traditional lands but, despite repeated efforts domestically, had been unable to obtain legal recognition of their right to own those lands.²⁴³ In the meantime, the states had treated the lands as state lands and granted concessions over them to third parties for resource exploitation.²⁴⁴

The indigenous communities' principal argument before the Commission and Court was that the states were in violation of the "right to property" under OAS human rights treaties.²⁴⁵ It was argued that the reference to property in these human rights treaties should be interpreted to encompass not only Western property rights recognized by the state, but also the property interests that arise from indigenous systems of land tenure.²⁴⁶ In fact, the states' key arguments were not so much that indigenous forms of tenure could not amount to property, but rather that the *extent* of territory claimed was excessive, given the size of the communities, and overlapped with the claims of adjacent indigenous groups.²⁴⁷ The evidence in each case was that the land claimed was not confined to principal habitations but extended to surrounding gardens and forest lands that were used for subsistence and other traditional purposes. For example, in the *Maya* decision, the evidence disclosed the use of extensive areas of land emanating from several

recognize their lands. See *Awas Tingni Case*, *supra* note 19, ¶¶ 1-3. The *Maya* decision resulted from a petition lodged by representatives of Maya communities of the Toledo District of Southern Belize. See *Maya Case*, *supra* note 43, ¶ 1.

243. See *Maya Case*, *supra* note 43, ¶ 5; *Awas Tingni Case*, *supra* note 19, ¶ 103.

244. See sources cited *supra* note 243.

245. *Maya Case*, *supra* note 43, ¶¶ 18-19; *Awas Tingni Case*, *supra* note 19, ¶ 140(b). The "right to property" is grounded in the American Convention, *supra* note 242, art. 21 ("Everyone has the right to the use and enjoyment of his property."), and the American Declaration, *supra* note 242, art. 23 (affirming the right of every person "to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home"). In the *Maya* decision, it was also alleged that the states breached numerous other rights, including the rights to life, equality, family, and a fair trial. *Maya Case*, *supra* note 43, ¶ 5.

246. See *supra* note 245.

247. See *Awas Tingni Case*, *supra* note 19, ¶ 141(g); Reply of the Republic of Nicaragua to the Complaint Presented Before the Inter-American Court of Human Rights in the Case of the Mayagna Community of Awas Tingni, *reprinted in* 19 ARIZ. J. INT'L & COMP. L. 101 (2002).

villages in concentric zones, including agricultural zones extending up to ten kilometers from villages (where crops were planted on a rotational system) and a broader zone of up to nineteen kilometers comprised of forest lands used for hunting and the gathering of food.²⁴⁸ Nicaragua and Belize thus objected to the demarcation and titling of this *form* of indigenous property.

In addition, the states in both cases argued that the claims lacked continuity in that the lands under claim had not been possessed by the claimants in pre-colonial times. Belize, for example, argued that as a common law colony the law of Aboriginal rights would apply, and in order to obtain an Aboriginal title, the Maya communities would need to show that they had continuously occupied the lands claimed since sovereignty.²⁴⁹ In relation to the *Awes Tingni* case, Nicaragua argued that the community was a recent migrating group, with a nomadic life-style, that had traveled to the land in question after splitting from an original community in the mid-twentieth century.²⁵⁰ According to Nicaragua, their claims were not, therefore, “ancestral,” as their ancestral lands were elsewhere.²⁵¹ From the evidence, it was clear that the Maya and especially the *Awes Tingni* communities had not historically been confined to any one area but had varied the location of their settlements over time within a general territory that had been used and occupied by their ancestors for many generations (in the Maya communities’ case, well before the arrival of Spanish settlers in the sixteenth century).²⁵²

In the *Awes Tingni* and *Maya* decisions, the Court and Commission, respectively, upheld the claimants’ arguments that they possessed a “property” right to lands and natural resources for the purposes of the OAS human rights treaties based on their “traditional, ancestral patterns of use and occupation.”²⁵³

248. *Maya Case*, *supra* note 43, ¶¶ 122-23.

249. *Id.* ¶¶ 20-21.

250. *Awes Tingni Case*, *supra* note 19, ¶ 141.

251. *Id.*

252. *Maya Case*, *supra* note 43, ¶¶ 122-30; *Awes Tingni Case*, *supra* note 19, ¶¶ 83, 103.

253. *See Maya Case*, *supra* note 43, ¶¶ 20-21 (“The State violated the right to property enshrined in Article [23] of the American Declaration to the detriment of the Maya people, by failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, without detriment to other indigenous communities, and to delimit, demarcate and title or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists.”); *Awes Tingni Case*, *supra* note 19, ¶¶ 138, 164.

The Commission and Court found that these indigenous forms of property rights existed independently of state laws for the recognition of property and were recognized and upheld by international human rights law.²⁵⁴ In reaching this conclusion, the Commission and Court employed an evolutionary interpretive approach taking into account normative developments internationally since the inception of the OAS human rights treaties, including the ILO Convention No. 169, the U.N. Declaration, and the Proposed OAS Declaration.²⁵⁵

According to the Commission and Court, while it was recognized that any process of demarcation must consider the rights of adjacent communities, the land to be demarcated and recognized as the communal property of the Maya and Awas Tingni communities would be that land which they *traditionally occupied and used*.²⁵⁶ For example, in the *Maya* decision, the Commission recommended that Belize:

[P]rovide the Maya people with an effective remedy, which includes recognising their communal property right to the lands that they have traditionally occupied and used, without detriment to other indigenous communities, and to delimit, demarcate and title the territory in which this communal

254. See sources *supra* note 253.

255. See *Awas Tingni Case*, *supra* note 19, ¶ 148.

256. It should be noted that in the *Awas Tingni* decision, this point is more equivocal than the statements made in the *Maya* decision. The Court's final direction to Nicaragua is that it must identify and demarcate the Awas Tingni lands "in accordance with their customary law, values, customs and mores." *Id.* ¶ 164. However, in the judgment summary, the Court noted that "[a]s a result of customary *practices*, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property." *Id.* ¶ 151. That statement indicates that "possession of the land" arises from land tenure practices or traditional occupation and not customary laws only. The Court also observed that, pursuant to the Constitution of Nicaragua, "the members of the Awas Tingni Community have a communal property right to the lands they currently *inhabit*." *Id.* ¶ 153 (emphasis added). The Court's reference to "customary law, values, customs and mores" suggests, in my view, that custom law may play a role in determining the nature and extent of those lands occupied (like the Canadian Aboriginal title decisions) but is not to be limited to that criterion only. In addition, the Court in its reasoning relied a great deal on the international instruments that set traditional *occupation* as the standard for demarcation of traditional lands. *Id.*

property right exists, in accordance with the customary land use practices of the Maya people.²⁵⁷

In their decisions, the Commission and Court did not identify precise territorial boundaries, which is seen as the task of the state, but the decisions do provide useful guiding standards for any domestic body established to demarcate traditional lands. The extent of territory to be demarcated is that area of land occupied and used by the indigenous communities in accordance with their unique traditions and perspectives.²⁵⁸ Therefore, the lands to be demarcated would not be limited to only those areas of land occupied on a regular basis, such as principal habitations, but would extend to other surrounding areas occupied on a traditional basis.²⁵⁹

On the issue of continuity, the Commission and Court clearly rejected the claim that there must be evidence of a continuous connection to the lands claimed from the time of sovereignty.²⁶⁰ There was a clear historical continuity between the communities and pre-colonial peoples, and the communities had occupied and used the land in question for a long duration.²⁶¹ The fact was that due to the passage of time and the effects of colonization, these communities could not be expected to have continuously resided within fixed ancestral territories from pre-colonial times.²⁶²

In terms of remedies, in each case the Commission and Court directed the states to adopt in their domestic law the legislative, administrative, and other measures necessary to “create an effective mechanism for the delimitation,

257. *Maya Case*, *supra* note 43, ¶ 6.

258. *Id.* ¶ 197; *Awas Tingni Case*, *supra* note 19, ¶ 164.

259. In *Moiwana Village v. Suriname Case*, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 15, 2005), the Inter-American Court of Human Rights reached similar conclusions in relation to a claim from the N'djuka community to traditional lands from which they were expelled by force. The traditional lands claimed included their village sites and traditional hunting, farming, and fishing territory, which extended for tens of kilometers into the forest outside of these villages. The Court ruled that “their traditional occupancy of Moiwana Village and its surrounding lands—which has been recognized and respected by neighboring N'djuka clans and indigenous communities over the years—should suffice to obtain State recognition of their ownership.” *Id.* ¶ 133.

260. *See Maya Case*, *supra* note 43, ¶¶ 127-30.

261. *See id.*

262. *See id.*

demarcation, and titling of the property of indigenous communities.”²⁶³ It was also emphasized that the process of demarcation had to take place with the full participation of the indigenous communities.²⁶⁴

Of importance also is the Inter-American Commission’s decision in *Mary and Carrie Dann v. United States*²⁶⁵ on U.S. domestic extinguishment policy and process in relation to demarcation of lands. The petitioners, members of the Shoshone Nation, argued before the Commission that the United States had consistently failed to recognize their traditional rights to lands occupied by them since pre-colonial times and therefore breached the rights to property, equality, and fair trial under the relevant OAS human rights treaty.²⁶⁶ The United States in response argued that the lands in question, over twenty million acres, had been determined by the Indian Claims Commission (ICC)—established in the mid-twentieth century to inquire into indigenous claims to lands—to be extinguished in the late eighteenth century by “the gradual encroachment of Western settlers.”²⁶⁷ On the facts, the Commission ruled that the ICC had failed to adequately consider the issue of extinguishment and that Western settlement was not a sufficient justification for the extinguishment of indigenous claims, including those of the Western Shoshone.²⁶⁸ The Commission also noted that the ICC failed to ensure that all members of the Shoshone Nation participated in its process of inquiry. According to the Commission, the ICC process of inquiry was “not sufficient to comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests.”²⁶⁹ Any inquiry into the status of lands had to be “based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole.”²⁷⁰

263. *Awas Tingni Case*, *supra* note 19, ¶ 164; *see also Maya Case*, *supra* note 43, ¶ 190.

264. *See cases cited supra* note 263; *see also Dann Case*, *supra* note 153 (concluding that any determination of indigenous peoples’ interests in land must be based on a process of informed and mutual consent by the indigenous community as a whole); Brief for the National Congress of American Indians as Amici Curiae Supporting Petitioners, *Awas Tingni Case*, *supra* note 19 (No. 11.555), *available at* http://www.law.arizona.edu/Depts/iplp/advocacy_clinical/awas_tingni/documents/AmicusATbrief-NCAI.pdf.

265. *Dann Case*, *supra* note 153, ¶ 128.

266. *Id.* ¶¶ 2, 35-43.

267. Barsh, *supra* note 153 (accounting the inception and work of the ICC).

268. *Dann Case*, *supra* note 153, ¶ 145.

269. *Id.* ¶ 139.

270. *Id.* ¶ 140.

Thus, the Commission concluded that the United States had failed to comply with the rights to property, equality, and fair trial under the OAS human rights treaty and recommended that the U.S. government provide a fair legal process to determine the Danna's and other Western Shoshones' land rights.²⁷¹

2. U.N. Racial Discrimination Committee and Human Rights Committee

While it has not provided detailed indications on how to demarcate lands, the U.N. Racial Discrimination Committee has issued strong statements and decisions encouraging states to demarcate lands and restore lands taken from indigenous peoples. The Racial Discrimination Committee, in a special statement on indigenous peoples issued in 1997, noted that in many regions of the world, indigenous peoples have been, and are still being, discriminated against, especially with regard to the loss of their traditional lands, and that it is therefore vital that states recognize and respect indigenous peoples' distinct culture and identity.²⁷² On the subject of traditional lands, the statement requests states to:

[R]ecognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.²⁷³

The Committee, through its evaluation of state reports, has urged states to recognize indigenous property rights and has expressed concern at the standards of proof imposed in the demarcation of lands.²⁷⁴ In recent years, the Committee

271. *Id.* ¶¶ 172-73.

272. U.N. Comm. on the Elimination of Racial Discrimination [CERD], *General Recommendation No. 23: Indigenous Peoples*, Annex V, U.N. Doc. A/52/18/Annex (Aug. 18, 1997).

273. *Id.* ¶ 5.

274. *See, e.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Brazil*, ¶ 15, U.N. Doc. CERD/C/64/CO/2 (Apr. 28, 2004) (noting the "fact that effective possession and use of indigenous lands and resources continues to be threatened and restricted by recurrent acts of aggression against indigenous

has invoked its early warning procedure to hand down important decisions criticizing Australia and New Zealand in relation to the NTA and the FSA.²⁷⁵ In each case, the decisions stress the inequality present in those statutes, favoring non-indigenous property rights over the property rights of indigenous peoples and call upon the states to establish procedures, with indigenous peoples, that comply with principles of equality.²⁷⁶

In 2006, the Racial Discrimination Committee directed its attention to the United States and its failure to recognize the land rights of the Shoshone

peoples”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, ¶ 12, U.N. Doc. CERD/C/64/CO/9 (Apr. 28, 2004) (recommending “urgent action by the State party in cooperation with the indigenous and tribal peoples concerned to identify the lands which those peoples have traditionally occupied and used”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Argentina*, ¶ 16, U.N. Doc. CERD/C/65/CO/1 (Aug. 24, 2004) (urging Argentina to “adopt, in consultation with indigenous peoples, a general land tenure policy and effective legal procedures to recognize indigenous peoples’ titles to land and demarcate territorial boundaries”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Uganda*, ¶ 14, U.N. Doc. CERD/C/62/CO/11 (June 2, 2003) (expressing concern at reports of “the difficult human rights situation of the Batwa people, particularly in relation to the enjoyment of their rights over lands traditionally occupied by them”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, ¶ 330, U.N. Doc. A/57/18 (Nov. 1, 2002) (expressing concern about “the difficulties which may be encountered by Aboriginal peoples before the courts in establishing Aboriginal title over land”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, U.N. Doc. A/49/18 (Sept. 19, 1994) (expressing its concern with the NTA’s continuity of connection test and extinguishment provisions).

275. After reviewing Australia’s state report in February/March 2005, the U.N. Racial Discrimination Committee criticized the priority afforded to certainty over “indigenous title” under the Australian Native Title Act 1993. CERD, *Australia*, Decision 2(54), ¶ 21(2), U.N. Doc. A/54/18 (Mar. 18, 1999); see also CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, ¶ 16, U.N. Doc. CERD/C/AUS/CO/14 (Mar. 2005). The Racial Discrimination Committee criticized the removal by the FSA of the right of Māori to claim a customary title in the New Zealand foreshore and seabed. CERD, *New Zealand Foreshore and Seabed Act 2004*, Decision 1(66), U.N. Doc. CERD/C/DEC/NZL/1 (Mar. 11, 2005); see also Claire Charters & Andrew Erueti, *Report from the Inside: The CERD Committee’s Review of the Foreshore and Seabed Act 2004*, 36 VICTORIA U. WELLINGTON L. REV. 257 (2005) (commentary on the decision and the events preceding it).

276. See sources cited *supra* note 275.

Nation.²⁷⁷ Under its early warning procedure, the Committee noted, with reference to the Inter-American Human Rights Commission's findings in the *Dann* decision, the procedural flaws inherent in the Indian Claims Commission operations and the lack of any legitimate determination as to the legal status of the Shoshone Nation traditional lands.²⁷⁸ The Committee recommended that the United States desist from intrusions onto the Shoshone lands and enter into a dialogue with the Shoshone Nation with the aim of reaching a determination as to the land's status that complies with the due process of law and the Racial Discrimination Convention.²⁷⁹

Many of the Human Rights Committee's decisions on indigenous peoples relate to communications in relation to article 27 of the International Covenant of Civil and Political Rights (ICCPR), which affirms the right of individual members of minorities to enjoy their right to culture.²⁸⁰ Individual members of indigenous communities have invoked this provision in communications to the Human Rights Committee to protect their right to membership of a traditional tribe,²⁸¹ rights to lands and natural resources,²⁸² and right to engage in specific traditional activities.²⁸³ The Human Rights Committee, in comments on state reports, has consistently encouraged states to demarcate indigenous peoples' lands.²⁸⁴ In addition, through the state reporting process, the

277. CERD, *Early Warning and Urgent Action: United States of America*, Decision 1(68), U.N. Doc. CERD/C/68/USA/Dec.1 (Mar. 10, 2006).

278. *Id.*

279. *Id.*

280. International Covenant on Civil and Political Rights (ICCPR) art. 27, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

281. *See, e.g.,* *Lovelace v. Canada*, Human Rights Comm. Commc'n. No. 24/1977, U.N. Doc. CCPR/C/OP/1, at 37 (1984).

282. *See* *Chief Ominyak & the Lubicon Lake Band v. Canada*, Human Rights Comm. Commc'n No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40), at 1 (1990). The Human Rights Committee found a violation of article 27 of the ICCPR due to the historical failure to provide the band with a land base to which it had a strong claim, the poor economic conditions of the band members, and the exploitation of resources on their traditional lands. *Id.*

283. *See* *Kitok v. Sweden*, Human Rights Comm. Commc'n No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (1988).

284. ECOSOC, Human Rights Comm., *Concluding Observations of the Human Rights Committee: Canada*, ¶ 8, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006) (expressing its concern at the state's practice of extinguishing Aboriginal title in modern treaties);

Human Rights Committee has joined the Racial Discrimination Committee in criticizing Australia and the effect of the NTA on Aboriginal claims to native title.²⁸⁵

V. COMPARING INTERNATIONAL STANDARDS WITH DOMESTIC STANDARDS OF DEMARCATION

The emerging international law principles for demarcation are directed at formalizing the *de facto* rights of property held by indigenous peoples. According to these principles, indigenous peoples should be accorded rights of ownership to lands they traditionally occupy and use, even if their traditional practices do not conform to Western common law standards of occupation. It is the indigenous peoples' perspective that determines the meaning of occupation and use. It is clear these international principles seek to transform Aboriginal practices into more expansive and robust modern legal rights. This is plainly a reaction to the long-held practice of states not viewing indigenous peoples' traditional land tenure as constituting real property rights. The international law principles are directed at addressing these injustices by recognizing their right to occupy their territories on an exclusive basis. This approach as we have seen accords with modern conceptions of property and several fundamental human rights norms, including the rights to self-determination, culture, and nondiscrimination.

In addition, the international law principles do not require that indigenous land rights be defined with reference only to indigenous custom laws. Rather, custom law may provide a useful *indication* as to whether lands are traditionally occupied. Finally, the international principles reject the need for indigenous peoples to establish that the lands occupied by them are ancestral lands

ECOSOC, Human Rights Comm., *Concluding Observations of the Human Rights Committee: Suriname*, ¶ 21, U.N. Doc. CCPR/CO/80/SUR (May 4, 2004) (expressing its concern at "the lack of legal recognition and guarantees for the protection of indigenous and tribal rights to land and other resources"); ECOSOC, Human Rights Comm., *Concluding Observations of the Human Rights Committee: Guyana*, ¶ 21, U.N. Doc. CCPR/C/79/Add.121 (Apr. 25, 2000) (expressing concern "that the right of Amerindians to enjoy their own culture is threatened by logging, mining and delays in the demarcation of their traditional lands, that in some cases insufficient land is demarcated to enable them to pursue their traditional economic activities").

285. ECOSOC, Human Rights Comm., *Concluding Observations of the Human Rights Committee: Australia*, ¶¶ 498-528, U.N. Doc. A/55/40 (July 24, 2000).

that have been occupied since pre-colonial times. There is recognition, then, of the extraordinary effects colonization has had on their cultures and way of life. Without doubt there will often be contests in relation to overlapping claims and issues of extinguishment, but international law mandates the implementation of an open, inclusive, and culturally appropriate process for resolving these issues. In appropriate cases, that may result in the recognition of areas of shared exclusivity by two or more indigenous groups

These international law principles should provide direction for states and state courts proposing to demarcate indigenous peoples' lands (especially in the Americas, and Asian and African states). And they should also influence the future development of the common law jurisprudence in Australia, Canada, and New Zealand. As we have seen, the demarcation of indigenous lands typically raises issues of definition, continuity, and extinguishment. In addressing these issues, states—whether through their executive, legislative, or judicial organs—have a great deal of discretion, and there is no reason why they should not be guided by these international principles, especially if they would provide advantages to indigenous peoples in proving or protecting their land rights.²⁸⁶ The jurisprudence of the Inter-American Commission and Court, for example, illustrates how these international law principles may be used by judicial organs to formulate rules for the demarcation of indigenous lands that do not penalize indigenous peoples for normative divergence and recognizes the effects of colonization on their way of life.

As we have seen, in the common law jurisdictions of Australia, Canada, and New Zealand, the choices made by courts and lawmakers have made it extremely difficult for indigenous peoples to obtain legal recognition of their rights to land, especially the right of exclusive occupation. What is also clear is that to date these courts and lawmakers have made little use of these international law principles when formulating standards of proof.²⁸⁷ In relation to these

286. ANAYA, *supra* note 9, at 156; *see also* John D. Smelter, *Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in U.S. and Australian Domestic Courts*, 15 PAC. RIM L. & POL'Y J. 301 (2006). Smelter argues that the common law courts should be guided by these emerging principles of international law when addressing indigenous peoples' rights. He argues that this should apply with particular force to Australia and the United States given that these states were first established under principles of international law. *Id.*

287. As noted by Professor Anaya in relation to Australian native title jurisprudence:

jurisdictions, several specific points can be made. First, international law standards require that the characterization of occupation and exclusivity in Aboriginal title claims in Canada should be determined with reference to indigenous conceptions only. The same principle would extend to the requirement in New Zealand to demonstrate “exclusive use and occupation” of foreshore lands to acquire Territorial Customary Rights Orders under the Foreshore and Seabed Act of 2004. Second, Australia should not use specific customary laws, rooted in the pre-colonial past, as the sole basis for recognizing contemporary land rights. Rather, the international law standard of traditional occupation and use provides a more accessible means of determining the nature and extent of indigenous territories. Third, Australia and New Zealand should not expect indigenous peoples to comply with strict tests of continuity (and Canada should not impose such a test in future decisions). Fourth, international law requires that indigenous peoples are involved in the establishment of processes for demarcation and that these processes are consistent with indigenous peoples’ values and traditions.

That brings us to the issue of legal extinguishment and the expiration of land rights where continuous occupation has been disrupted. As pointed out earlier, one perceived difficulty with the international standard of demarcation is that it does not appear to accommodate those cases where indigenous peoples have been dispossessed (even recently) of their lands through measures such as confiscation and forced removal. Demarcation is directed at the present

[T]he Court in *Mabo* may be faulted for not invoking contemporary international human rights norms that have developed specifically with regard to indigenous land rights in order to inform its assessment of the incidents of native title. Recourse to contemporary international standards, which require attention to the cultural and spiritual significance that indigenous peoples typically attach to lands and to a larger territorial environment, may well have strengthened the character of the land rights recognized in *Mabo*.

ANAYA, *supra* note 9, at 199. In the Australian High Court, Justice Kirby, frequently the dissenting judge in these native title decisions, has been one of the few judges to draw upon international human rights law in his decisions. *See, e.g.,* *Western Australia v. Ward* (2002) 213 C.L.R. 1, ¶¶ 566-67, 575 (Justice Kirby’s application of principles of equality); *see also* *Kartinyeri v. Commonwealth* (1998) 195 C.L.R. 337 (Austl.). In addition, Canada has made little use of these international standards in Aboriginal title decisions. This is all the more significant because Canada is subject to the Proposed OAS Declaration—the treaty applied by the Inter-American Human Rights Commission in the *Maya* decision.

occupation of lands. This corresponds with state practice. As noted, the common law doctrine of Aboriginal rights and native title generally holds that where indigenous peoples' lands have been acquired by the state, or where the state has granted those lands to non-indigenous peoples, the indigenous interest in the lands is "extinguished." Additionally, in Australia and New Zealand, where indigenous peoples have lost their physical connection with the land (even though this may be due to the effects of settlement), indigenous property rights can "expire." The common law recognizes only *extant* rights (with Canadian Aboriginal rights law providing the exception that proves the rule). In addition, the opportunities for seeking compensation for the extinguishment and expiration of indigenous lands are extremely limited. Domestically, the legal recognition of extant interests in traditional lands is often an all-or-nothing game for indigenous peoples.

Where continuous occupation has been disrupted, indigenous peoples might see the appeal of relying upon a cultural or spiritual connection established through customary law to demonstrate a right to unoccupied lands.²⁸⁸ There is some support for that notion in Australian native title law.²⁸⁹ Alternatively, indigenous peoples in states with a common law tradition might argue for the type of "Aboriginal title" recognized by Canadian law, so that evidence of occupation at sovereignty would ground a modern legal right to exclusive occupation of lands.²⁹⁰

But what is clear is that international law imposes strong remedial guarantees for those indigenous peoples dispossessed of their lands, whether it occurs through legal extinguishment or the expiration of rights. Accordingly, international law blurs the sharp distinction drawn in the common law states between the legal recognition of extant rights and claims for the dispossession of lands. Under international law, states must either restore lands or provide

288. An advantage of relying on traditional laws and customs rather than occupation as the basis of title is that it emphasizes that the title gets its strength from an alternative system of governance, and it allows for claims to title to be made where continuous occupation has been disrupted though a strong spiritual connection has been maintained with the land. Lisa Strelein, *Conceptualising Native Title*, 23 SYDNEY L. REV. 95, 115 (2001).

289. Nevertheless, as noted, it is difficult to identify a decision in Australia where native title has been found in the absence of some physical presence on the land. See *Ward* (2002) 213 C.L.R. 1, ¶¶ 57-61, 252.

290. Additionally, indigenous peoples could argue that they have a right to ownership of lands based not on Aboriginal rights law but on the "possessory title" advocated by Kent McNeil. See McNEIL, *supra* note 39.

compensation, usually in the form of lands equal in size and status to those traditionally occupied by indigenous peoples. As noted, in these claims for redress, the extent of territory lost—in terms of the lands once traditionally occupied—is to be determined with regard to indigenous peoples' perspectives. Indeed, the remedial provisions in international instruments are arguably of greater significance than the land recognition provisions, given the pervasive and long history of expropriation of indigenous peoples' lands in many states.²⁹¹

VI. CONCLUSION

The demarcation of indigenous peoples' lands is a critical issue for indigenous peoples around the globe. There is recognition that indigenous peoples need a secure land base so they may exercise effectively their unique forms of self-determination free from outside intrusions. Demarcation in this manner is, however, all too rare. States resist demarcation in large part because of the disruption this would cause to non-indigenous peoples' interests as well as those held by the state. This Article has considered the various modes by which this is achieved in the common law states of Australia, Canada, and New Zealand. Additionally, we have seen that, domestically, these states generally offer little remedies to those indigenous peoples who have been dispossessed of their lands. In international law, we see the emergence of quite different standards of demarcation. These seek to accord rights of ownership in relation to those lands that indigenous peoples traditionally occupy. Also, international law accords robust remedial protections for the dispossession of indigenous lands.

What is all too clear is that so far the domestic movement for the demarcation of indigenous peoples' lands in the common law jurisdictions has evolved with little regard for these international principles. For states yet to embark upon a program of demarcation, there are clear choices: either select the standards, or variations of them, that have emerged from the common law countries to deny rights of exclusivity, or respect indigenous rights and develop standards that are consistent with those now set by international law.

291. In cases of dispossession, however, indigenous peoples will still need to show continuity in the sense of a continuing community that descends from the group that originally lost the land. If dispossession occurred many years ago, continuity in this sense may be difficult to establish.