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Defending the Polygon: The Emerging Human Right to Communal Property

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DEFENDING THE POLYGON: THE EMERGING HUMAN RIGHT TO COMMUNAL PROPERTY

THOMAS T. ANKERSEN* & THOMAS K. RUPPERT**

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*All the policies of Latin American States, for almost 180 years, were geared toward the elimination of forms of collective property and autonomous forms of government of the indigenous peoples. . . . [T]hose communities which have managed to attain collective property of the land and have received some sort of support from the State to develop an economy within those spaces [have] prove[n] that maintaining the communal system becomes a very powerful force for transformation and development for the benefit of these communities and of the respective countries.****

*** *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at 40 (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

I. Introduction: The Polygon¹ Explained

For many peoples in the developing world, “homeland security” has a meaning very different from its post-September 11 meaning in the United States. In many cases, peoples who have a shared cultural conception of “territory” within nation-states have begun to adopt the dominant western property paradigm of land titling to formalize their rights to that territory.² Many view this paradigm and the individualization of property rights it facilitates as an inevitable outcome of the inexorable march of social evolution, evidenced by the end of the twentieth century collapse of communism.³ The Enlightenment era conception of fungible individual property emerged triumphant. Moreover, it has been enshrined in the fundamental human rights charters and domestic constitutions of the twentieth century.⁴ Yet a closer inspection yields a much more nuanced analysis of the nature and forms of property ownership around the world and its treatment within the rights-based framework of humanitarian law. The literature suggests that communally held lands, often referred to as “common property,” have remained robust and adaptable in the face of the forces of globalization, and continue to persist in even the most developed nations.⁵

1. The word “polygon” appears in various Latin American legal documents referring to communal land. For example, article 1 of a law in Panama refers to the “polígono” which is the object of the law. Ley No. 24, 12 Jan. 1996, Por la cual se crea la Comarca Kuna de Madungandi [By Which the the Kuna de Madungandi Region Is Created] ch. I, art. 1, Gaceta Oficial [G.O.], 15 Jan. 1996 (Pan.), available at http://www.asamblea.gob.pa/NORMAS/1990/1996/1996_138_0699.PDF. For another example, see Decreto Supremo No. 25,920, 6 Oct. 2000, art. 150 (Bol.), available at <http://www2.iadb.org/sds/IND/ley/docs/BO-7.htm>.

2. ROGER PLANT & SOREN HVALKOF, LAND TITLING AND INDIGENOUS PEOPLES (Inter-Am. Dev. Bank, Sustainable Dev. Dep’t Best Practices Series No. IND-109, 2001), available at <http://www.iadb.org/sds/doc/IND-109E.pdf>.

3. This school of thought says that when land becomes a scarce resource due to population pressure, market integration occurs, and this drives increasing individualization of land rights as the most efficient form of land use. This development, in turn, leads to establishment of a formalized system of the state to protect individualized private property. This is referred to as the evolutionary theory of land rights (ETLR). For an overview and critique of ETLR in its development application to Africa, see Jean Philippe Platteau, *The Evolutionary Theory of Land Rights as Applied to Sub-Sahara Africa: A Critical Assessment*, 27 DEV. & CHANGE 29 (1996) (Neth.). A more recent critique of ETLR notes that the theory is just that — a theory — and is not based on concrete examples. LYNN ELLSWORTH, A PLACE IN THE WORLD: TENURE SECURITY AND COMMUNITY LIVELIHOODS, A LITERATURE REVIEW 9 n.7 (2002).

4. See, e.g., *infra* notes 64-67 and accompanying text; see also, e.g., CONSTITUCIÓN ARGENTINA [CONST. ARG.] art. 17 (noting that private property is inviolable).

5. See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 65-69 (1990); Robert McC. Netting, *What Alpine Peasants Have in Common: Observations on Communal Tenure in a Swiss Village*, 4 HUM.

Formal recognition of communal land rights may be increasing in some parts of the world. We contend that the international human rights system, through its generationally described “progressive development,” represents a key factor in this trend, as states seek to reconcile the dominant western liberal model of property as a marketable commodity with deeply rooted non-Western cultural conceptions of property as homeland. In the parlance of the common law of property, the “bundle of sticks” that is the human right to property includes the associated and indivisible rights to life and health, religion, and culture among others. A recent World Bank research report acknowledged that noneconomic factors, including human rights, must be considered in the development of land policy, even at a cost to market efficiencies.⁶ In many cases, the report concludes, land policy will best be served by recognizing and guaranteeing customary land tenure arrangements,⁷ a conclusion reached by a growing number of nations, by domestic courts, and most recently, by international human rights tribunals.⁸

This Article begins with a brief review of the literature of common property — an area of intense and interdisciplinary scholarly interest sparked by Garrett Hardin’s famous essay, *The Tragedy of the Commons*.⁹ In Part II we briefly review the modern view of common property and its relationship with international development theory. Part III describes the historical development of the three-generational conceptual framework for international human rights law and the right to property within that framework. Part IV discusses key national jurisprudence that has attempted to reverse the colonial legacy of indigenous homeland alienation and the inter-American human rights system.

In Part V, we turn our attention to the basis for finding an international human right to communal property. Part VI examines the nature and quality of the property rights conferred on communal lands, especially the distinction

ECOLOGY 135 (1976) (Neth.) (discussing the stability of a mix of communal and individual property in Swiss villages from the thirteenth century until the present and ascribing this to the appropriateness of communal tenure to certain areas based on the land use); José Heder Benatti, *The Common Property and the Community Forest Management in the Brazilian Amazon Forest* 3 n.7 (Aug. 2004) (unpublished manuscript, presented at the Tenth Conference of the International Association for the Study of Common Property held in Oaxaca, Mex.), http://dlc.dlib.indiana.edu/archive/00001341/00/Benatti_Common_040512_Paper251b.pdf.

6. KLAUS DEININGER, WORLD BANK GROUP, *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION*, at xlv (2003).

7. *Id.* at 66-67.

8. See, e.g., *infra* Part IV.A.3 (discussing aboriginal title in Canada); *id.* Part IV.A.4 (discussing native title in Australia); *id.* note 225 and accompanying text (discussing domestic laws evidencing the importance of recognizing communal lands).

9. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

between a title and the reservation or trust theories often used to confer territorial rights within states. We conclude that in many cases, there is little substantive distinction, and that any preference for titles represents as much a political as a legal determination. In Part VII we address the application of this developing form of international property law to both nonindigenous and tribal peoples. We conclude that the international human rights system represents a key driver in the formalization of communal property arrangements in Latin America, and that the spatial extent of such formally recognized land may be increasing as a result. Whether this represents a long-term trend, or a bubble that will be burst by forces both within and without “the polygon,” remains to be determined.

II. The Commons Literature of Common Property

Most commentators trace the enterprise of common property scholarship to Garrett Hardin’s famous 1968 essay, *The Tragedy of the Commons*.¹⁰ Hardin theorized that, in the absence of the ability to exclude that comes with individualized property ownership, a tragedy would ensue as the number of individuals with unlimited access to a resource sought to exploit that resource. Hardin’s work assumed that the commons had no rules controlling access and use. Nevertheless, this is not the reality for most of the tenure situations Hardin had in mind, which actually include sophisticated property relationships involving group ownership and management of land and resources. These tenure regimes have come to be known as “common property resources” or CPR. The CPR movement, led by the intellectual leader of the common property movement, Elinor Ostrom, sought to debunk the oversimplification of Hardin’s commons. In a series of publications, Ostrom and others distinguished Hardin’s “open access” regimes — as she preferred to call them — with the complex, highly organized, rules-based regimes for property held in the name of a group of persons — common property regimes.¹¹ Foremost among these rules is that basic notion of western property law — the ability to exclude those without proprietary rights. Ostrom pointed to successful group property management regimes throughout the world that have endured for centuries, surviving the inexorable march of

10. *Id.*

11. See LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS (Robert O. Keohane & Elinor Ostrom eds., 1995); ELINOR OSTROM, CRAFTING INSTITUTIONS FOR SELF-GOVERNING IRRIGATION SYSTEMS (1992) [hereinafter OSTROM, CRAFTING INSTITUTIONS]; OSTROM, *supra* note 5; ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005); THE COMMONS IN THE NEW MILLENNIUM (Nives Dolšak & Elinor Ostrom eds., 2003); Elinor Ostrom, *How Types of Goods and Property Rights Jointly Affect Collective Action*, 15 J. THEORETICAL POL. 239 (2003).

colonial property law.¹² Ostrom's work kindled an academic movement that has yielded its own scholarly association,¹³ digital database,¹⁴ and a plethora of followers — many of whom are seeking viable alternatives to the neoliberal development model of unfettered individualization and commoditization of property.

Common property terminology can be confusing and sometimes politicized. Other common terms for the same or similar concept include group, cooperative, communal, and collective ownership. The latter two conjure up visions of the socialist state. In Latin America the term common property is translated to "*propiedad collective*," literally "collective property." These are merely labels, however, for a variety of forms of property ownership, some of which are staples of the neoliberal political economy. Cooperatives, condominiums, and even corporations all enjoy a place on the continuum of group property arrangements. Common property scholars also employ the term "common-pool resources" in describing shared ownership of natural resources such as fisheries, irrigation systems, forests, pastures, and hunting grounds.¹⁵ The term "commons" is also employed to describe physical spaces outside of the jurisdiction of domestic legal regimes, such as the high seas and the upper atmosphere.¹⁶ More recently common property literature has spilled from its tangible origins into the realm of intellectual property and the internet, evidenced by the work of legal scholar Carol Rose.¹⁷

12. See, e.g., OSTROM, CRAFTING INSTITUTIONS, *supra* note 11, at 10-11, 67-79; OSTROM, *supra* note 5, at 58-102. For an example of work by another author looking at communal land in modern times, see RUTH BEHAR, SANTA MARÍA DEL MONTE 189-264 (1986).

13. See International Association for the Study of the Commons Home Page, <http://www.indiana.edu/~iascp/> (last visited Apr. 13, 2007).

14. See Digital Library of the Commons, <http://dlc.dlib.indiana.edu/> (last visited Apr. 13, 2007).

15. Thomas Dietz et al., *Introduction* to NAT'L RESEARCH COUNCIL, THE DRAMA OF THE COMMONS 3 (Elinor Ostrom et al. eds., 2002) [hereinafter THE DRAMA OF THE COMMONS]; Nives Dolšák & Elinor Ostrom, *The Challenges of the Commons*, in THE COMMONS IN THE NEW MILLENNIUM, *supra* note 11, at 3, 7-8; see also David Feeny, Fikret Berkes, Bonnie J. McCay & James M. Acheson, *The Tragedy of the Commons: Twenty-two Years Later*, 18 HUM. ECOLOGY 1, 3-5 (1990).

16. Scholars usually take care to distinguish between "common-pool resources" and "public goods."

A public good is something to which everyone has access but, unlike a common-pool resource, one person's use of the resource does not necessarily diminish the potential for use by another. Public radio stations, scientific knowledge, and world peace are public goods in that we all enjoy the benefits without reducing the quantity or quality of the good.

Dietz et al., *supra* note 15, at 3-5.

17. See, e.g., Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003).

Central to the discourse concerning the viability of common property regimes is the effort to understand why humans cooperate, particularly when faced with the choice between sacrifice and self-preservation. This discussion is rooted in social sciences and often expresses itself through something known as “rational choice theory.”¹⁸ The archetypal manifestation of this is the famous “prisoner’s dilemma” in which the rational choice is to rat on your accomplice in exchange for freedom, rather than each of you refusing to admit guilt (without knowing what the other will do) and thereby securing freedom for both.¹⁹ Laden with assumptions, this game theory model remains a staple in the theoretical discussion of approaches to human social organization, and to “commons dilemmas” as they are sometimes called.²⁰

The evolutionary end game for many property theorists is the individualization of property and its treatment as a commodity for market.²¹ Common property theory tends to confound rational choice dogma and its expression in property theory, since it is based on cooperation. Yet some contend that common property regimes simply represent an evolutionary strategy of group rather than individual selection, based on human cultural evolution.²²

18. Peter J. Richerson, Robert Boyd & Brian Paciotti, *An Evolutionary Theory of Commons Management*, in *THE DRAMA OF THE COMMONS*, *supra* note 15, at 403.

19. The history of the prisoner’s dilemma is itself quite interesting:

Puzzles with this structure were devised and discussed by Merrill Flood and Melvin Dresher in 1950, as part of the Rand Corporation’s investigations into game theory (which Rand pursued because of possible applications to global nuclear strategy). The title “prisoner’s dilemma” and the version with prison sentences as payoffs are due to Albert Tucker, who wanted to make Flood and Dresher’s ideas more accessible to an audience of Stanford psychologists. Although Flood and Dresher didn’t themselves rush to publicize their ideas in external journal articles, the puzzle attracted widespread attention in a variety of disciplines. Christian Donninger reports that “more than a thousand articles” about it were published in the sixties and seventies. A bibliography (Axelrod and D’Ambrosio) of writings between 1988 and 1994 that pertain to Robert Axelrod’s research on the subject lists 209 entries. Since then the flow has shown no signs of abating.

Steven Kuhn, *Prisoner’s Dilemma*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2003), <http://plato.stanford.edu/entries/prisoner-dilemma/>.

20. Shirli Kopelman, J. Mark Weber & David M. Messick, *Factors Influencing Cooperation in Commons Dilemmas: A Review of Experimental Psychological Research*, in *THE DRAMA OF THE COMMONS*, *supra* note 15, at 113.

21. *See, e.g.*, Platteau, *supra* note 3 (describing the evolutionary theory of property rights).

22. *Cf.* PETER J. RICHERSON & ROBERT BOYD, *NOT BY GENES ALONE: HOW CULTURE TRANSFORMED HUMAN EVOLUTION* 197-229 (2005) (discussing cooperation among groups in the context of human cultural evolution).

The holy grail of common property research has been the discovery of those factors that contribute to durable and successful common property regimes wherever they are found. Considerable ink has been spilled describing and applying “design principles” to different common property arrangements around the world. Ostrom identified eight “principles” necessary for the success of common property regimes,²³ which another scholar refers to as “critical enabling conditions.”²⁴ These have all been applied empirically in literally thousands of contexts around the world.²⁵ Ostrom’s principles include (1) clearly defined access rights and boundaries; (2) rules governing resource use and contribution of labor, material, or money; (3) participation rights in rules modification; (4) resource monitoring systems; (5) graduated sanctions; (6) conflict resolution mechanisms; (7) recognition of legitimacy by external governments or institutions; and (8) for larger systems, “nested enterprises” to tackle complementary responsibilities.²⁶

The study of common property is closely linked to another scholarly pursuit that has significant implications beyond the pages of arcane social science journals — development theory.²⁷ Researchers and policymakers alike have been desperately seeking to identify those governance institutions that yield the greatest return on development assistance investments, especially in marginalized rural areas. Fifty years of development assistance policy from western democracies to developing countries has yielded a low return on investment.²⁸ Only one country — Botswana — has “graduated” from the ranks of “least-developed countries,” and poverty remains at extraordinarily high levels.²⁹ Moreover, most development assistance makes implicit or explicit assumptions concerning the institutional and economic models most

23. OSTROM, *supra* note 5.

24. Arun Agrawal, *Common Resources and Institutional Sustainability*, in *THE DRAMA OF THE COMMONS*, *supra* note 12, at 41.

25. *E.g.*, Catherine Tucker, *Common Property Design Principles and Development in a Honduran Community*, *PRAXIS: FLETCHER J. DEV. STUD.*, May 1999, <http://fletcher.tufts.edu/praxis/archives/xv/Tucker.pdf>.

26. OSTROM, *supra* note 5.

27. *See, e.g.*, World Bank Group, *Common Property Resources: A Missing Dimension of Development Strategies*, Rep. No. WDP169 (Aug. 31, 1992) (prepared by N.S. Jodha), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/09/17/000178830_98101903551568/Rendered/PDF/multi_page.pdf.

28. *See, e.g.*, GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 35 (1999) (quoting Mary Robinson, U.N. Human Rights Commissioner).

29. The Secretary-General, *Ensuring a Smooth Transition of Countries Graduating from Least Developed Country Status*, ¶ 10, delivered to the Economic and Social Council, U.N. Doc. E/2001/94 (July 27, 2001), available at <http://www.un.org/documents/ecosoc/docs/2001/e2001-94.pdf>. Latin America demonstrates the tenacity of the problem of poverty. *See generally* Jaime Saavedra & Omar S. Arias, *Stuck in a Rut*, *FIN. & DEV.*, Dec. 2005, at 18.

likely to lead to development and often imposes conditions on assistance designed to promote those models. The development of individual property markets has been one of the most vigorously promoted development assistance policies. Peruvian economist Hernando De Soto and his book *The Mystery of Capital* have been highly influential in this regard.³⁰ Land titling and registration projects are a staple in the portfolio of international lending institutions such as the World Bank and the Inter-American Development Bank,³¹ and over one billion U.S. dollars have been invested in these efforts in Latin America and the Caribbean since 1996.³² Market-based land reform represents the latest addition to this portfolio.³³

More recently, common property regimes have been promoted by human rights advocates seeking to secure a place in the world for indigenous groups and traditional societies whose values and traditional tenure conflict with the dominant western property paradigm.³⁴ The wisdom of “protecting” common property through use of property titles is debatable; due to its basis in western property law, title may not be the best instrument for accommodating complex, communal/individual property systems.³⁵

III. The Emergence of a Rights-Based Approach to Property

While the individualization of property and the development of western legal institutions to protect individual property may have developed in ancient Rome,³⁶ the modern concept of individual property ownership as a right that

30. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

31. See, e.g., DEININGER, *supra* note 5, at xxviii-xxix.

32. Kevin Barthel, Grenville Barnes & Trevor Greening, *Effective Tools for Cadastral Surveying in Latin America and the Caribbean* (Oct. 2005) (unpublished PowerPoint presentation, presented at the Trimble Dimensions 2005 User Conference held in Las Vegas, Nev.) (on file with authors).

33. See, e.g., Env'tl. Def., *Fact Sheet: World Bank Market Based Land Reform* (Apr. 2002), http://www.environmentaldefense.org/documents/2367_WorldBankMarketBasedLandReform.pdf.

34. See, e.g., Indian Law Resource Center, *Land Rights and Environment*, <http://www.indianlaw.org/main/projects/landrights> (last visited Apr. 12, 2007). The Indian Law Resource Center participated in the *Awat Tingni* case. Indian Law Resource Center, *Nicaragua / Awat Tingni Case*, http://www.indianlaw.org/main/projects/past_projects/nicaragua (last visited Apr. 12, 2007). The Indian Law Resource Center also supported the Danns in their complaint to the Inter-American Commission on Human Rights. Indian Law Resource Center, *Western Shoshone / Dann Case*, http://www.indianlaw.org/main/projects/past_projects/ws_dann (last visited Apr. 12, 2007).

35. E-mail from Grenville Barnes, Assoc. Professor of Geomatics, Univ. of Fla., to Thomas Ruppert, Asst. in Env't'l Law, Univ. of Fla. (Feb. 15, 2007, 12:16 PM) (on file with authors).

36. Property records and alienation of property through sale had existed for more than a

offers individual protection against state interference did not fully manifest itself until much later. In the interim period of western history, property went through tremendous changes and experienced radically different treatments in different areas. For example, in most of Europe two thousand years ago, lands were communal and were frequently reapportioned according to the changing needs of the community.³⁷ Despite the rise of individual private property, some communal lands have persisted in developed western countries well into the twentieth century.³⁸

The importance of land in feudal Europe made property largely synonymous with power. Arbitrary exercise of power by kings led to development of the *Magna Carta* in 1215 as a means to limit the authority of the state. The *Magna Carta* foreshadowed the political expression of property ownership as a basic attribute of humanity by forbidding unwarranted interference in the possession of private property.³⁹ This early expression of the rights of man against the sovereign provided that no person could be dispossessed of property “except by the lawful judgement [sic] of his peers or by the law of the land.”⁴⁰ Centuries passed after the *Magna Carta* before the next important documents supporting a human right to property appeared in the Enlightenment era. While not all declarations that were intended to limit the arbitrary exercise of sovereign power included a reference to property,⁴¹ most did.⁴²

millennium in the Middle East before the Western legal tradition began to develop these in the Roman era. See, e.g., Johannes M. Renger, *Institutional, Communal, and Individual Ownership or Possession of Arable Land in Ancient Mesopotamia from the End of the Fourth to the End of the First Millennium B.C.*, 71 CHL.-KENT L. REV. 269, 290-93 (1995).

37. See, e.g., JOHN W. JEUDWINE, *THE FOUNDATIONS OF SOCIETY AND THE LAND* 32 (1975); cf. *id.* at 34 (noting that land for cultivation was apportioned not to individuals but to extended family groups or clans).

38. See, e.g., RUTH BEHAR, *SANTA MARÍA DEL MONTE 189-264* (1986) (describing current communal attributes of a rural Spanish village as a “web of use rights”).

39. See *MAGNA CARTA* art. 39 (1215) (Eng.), translated in JAMES CLARKE HOLT, *MAGNA CARTA* 327 (1965).

40. *Id.* (“No free man shall be taken or imprisoned or dispossessed or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement [sic] of his peers or by the law of the land.”).

41. The Bill of Rights of England of 1689 (an Act declaring the rights and liberties of the subject and settling the succession of the crown) sought to limit the permissible powers of the sovereign authority but did not contain any express reference to property. See DAVID ROBERTSON, *A DICTIONARY OF HUMAN RIGHTS* 246-49 (Paul Kelly ed., 2d ed. 2004). See generally *Bill of Rights, 1689*, 1 W. & M. 67, c. 36 (Eng.).

42. See, e.g., U.S. CONST. amend. V; DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] art. 17 (Fr. 1789), translated at Avalon Project: Declaration of the Rights of Man, <http://www.yale.edu/lawweb/avalon/rightsof.htm> (last visited Apr. 13, 2007) (“Since property is an inviolable and sacred

Before delving deeper into the development of an international human right to property, a brief review of human rights law itself will contribute to a better understanding of the philosophical bases of the right to property and the nexus between the two.

A. The Rise of Universality, Natural Law, and International Law

The philosophic and historic foundations for human rights go back millennia. The trend began in the west with the ancient Greeks, who placed considerable value on the dignity and rights of the individual person.⁴³ Christianity also plays a role in the early beginnings of human rights due to the focus in Christianity on the importance of each individual person,⁴⁴ and because of Christianity's concept of universalism — the assertion that there is one truth and law that applies to all.⁴⁵ An even more important historical growth of universalism appeared when the ancient Romans espoused the concept of Natural Law.⁴⁶ Natural law posits existence of a law independent of human authority. Natural law can flow from a divine power, human rationality, or nature itself.⁴⁷ While a full examination of the natural law concept is beyond the scope of the present work, suffice it to state here that the late medieval theologian St. Thomas Aquinas served to link the natural law exposition of Aristotle to the secular Enlightenment thinkers and down to the present.⁴⁸

right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.”); CODE CIVIL [C. CIV.] art. 544 (Fr.), *translated at* Napoleon Series, French Civil Code, http://www.napoleon-series.org/research/government/code/book2/c_title02.html (last visited Apr. 13, 2007) (“Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes.”) The Napoleonic code was first published in 1804.

43. A DOCUMENTARY HISTORY OF HUMAN RIGHTS: A RECORD OF THE EVENTS, DOCUMENTS, AND SPEECHES THAT SHAPED OUR WORLD 4 (Jon E. Lewis ed., 2003).

44. *Id.* at 5.

45. HUMAN RIGHTS IN WESTERN CIVILIZATION, 1600 TO THE PRESENT 1 (John A. Maxwell & James J. Friedberg eds., 2d ed. 1994) [hereinafter HUMAN RIGHTS].

46. The Romans inherited the concept of natural law — *lex naturæ* — from the Greek Stoics. For the Stoics “nature” meant the sum of the universe of things, and this universe had a determining force: the law of nature. This law governed not only nature but also the actions of man and thus became associated with morality. As recipients of the Greek conception of natural law related to morality, Romans incorporated the natural law idea into their practice of law by appealing to nature when strict adherence to the written law would have created a moral wrong. HUMAN RIGHTS, *supra* note 45, at 1; THOMAS COLLETT SANDARS, THE INSTITUTES OF JUSTINIAN 15 (1st Am. ed., Chicago, Callaghan & Co. 1876).

47. HUMAN RIGHTS, *supra* note 45, at 1 n.1.

48. *Cf.* Eduardo Moises Penalver, *Redistributing Property: Natural Law, International*

Ultimately, the development of human rights law and international law cannot be separated. As early as the sixteenth century, the Spanish lawyer, theologian, and philosopher, Franciscus de Vitoria, argued on secular natural law grounds for greater respect of the rights of Native Americans.⁴⁹ This foreshadowed by about a century the writings of Hugo Grotius, a Dutch Protestant often considered the founding father of international law, who wrote *The Law of War and Peace*.⁵⁰ Many know this work as the first comprehensive collection of rules governing aspects of warfare, but the importance of Grotius's work extends beyond rules of warfare: it also represented a legal treatise assuming that individuals have rights to certain minimum standards of treatment under international law.⁵¹

Norms, and the Property Reforms of the Cuban Revolution, 52 FLA. L. REV. 107, 156 (2000). Some argue that even modern Catholic doctrine supports the natural-law right to property, but that this "right" to property is properly construed as very limited since "the goods of this world are *originally meant for all*." Brendan Hennigan, A Comparison of Henry George's Economic Theory of Justice with the Catholic Church's Social Teachings Concerning the Right to Private Property in Land n.10 (July 23, 2004) (unpublished manuscript, presented at the Council of Georgists Organizations Conference held in Albuquerque, N.M.), http://www.cooperativeindividualism.org/hennigan-brendan_hgeorge_and_catholic_teachings.html (citing THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-II., Q. 66, art. 2; POPE PAUL VI, POPULORUM PROGRESSIO [ON THE DEVELOPMENT OF PEOPLES] No. 22 (1967); VATICAN II, GAUDIUM ET SPES [JOY AND HOPE] pt. II, ch. 3, § 2, No. 69, at 248-49 n.78 (1965)). The inherent limitations on private property have been compared to a "social mortgage." *Id.* Similarly, the Jesuits in Latin America have long been known for their stance on liberation theology. To this day, the Jesuits continue to take a stance they believe promotes the interests of the poor by arguing that all private property must serve a social function and that private property is subject to a "social mortgage." RICARDO ANTONCICH, COORDINADORES DEL APOSTOLADO SOCIAL, HISTORIA DEL SECTOR SOCIAL (13): PRIMER ENCUENTRO [A HISTORY OF THE SOCIAL SECTOR (13): FIRST ENCOUNTER] ¶ 211 (1991), <http://www.cpalsj.org/cgi/cgilua.exe/sys/start.htm?sid=6> (search "Texto" for "hipoteca social"; then follow "Historia del Sector Social (13): Primer Encuentro" hyperlink).

49. See, e.g., Kenneth H. Bobroff, *Francisco de Vitoria, John Marshall y las justificaciones jurídicas de la colonización de América* [*Francisco de Vitoria, John Marshall, and Legal Justifications for Colonization in the Americas*], 5 REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD DE GRANADA 641 (2002) (Spain), translated at <http://lawschool.unm.edu/faculty/bobroff/Bobroff%20Spain%20Final%20Draft.pdf>.

50. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* (Francis W. Kelsey trans., Clarendon Press 1925) (1646).

51. HUMAN RIGHTS, *supra* note 45, at 2. The rise of natural law has not been linear; it has ebbed and flowed over time. For instance, during the nineteenth century, positivism — a focus on empirical phenomenon and exclusion of theology or metaphysical assumptions — gained ground over natural law. *Id.* at 6. Such ascendance particularly dealt with war; many international lawyers and scholars of the nineteenth century felt that the right to wage war was an inherent part of state sovereignty and thus could not, by definition, be limited by anyone.

As with the Spaniard Vitoria and St. Thomas Aquinas before him, Grotius founded his arguments and beliefs on natural law. However, Grotius separated natural law from the divine and believed that human reason could uncover natural law.⁵² This secularization of natural law continued with the Enlightenment in Europe during the seventeenth century, with a focus on those certain “inalienable truths” from which all other law flows. Foremost among Enlightenment thinkers was John Locke, generally credited with enshrining the individual right to property among the higher order “self-evident” truths that include life and liberty.⁵³ These natural law “truths” formed the bases for fundamental human rights.

B. Liberté, Égalité, and Fraternité: Three Generations of Human Rights Laws

The contemporary international system of human rights emerged in the aftermath of World War II.⁵⁴ This progressive development of human rights is often described generationally, inspired by the serial application of the themes of the French Revolution — liberty, equality, and fraternity.⁵⁵ Under this admittedly crude framework, the first generation of rights (liberty)

Id. After the world witnessed the slaughter of World War I, it became apparent that advocating the right of any state to wage war when it wished, combined with increasingly modern warfare, created a recipe for tremendous destruction. *Id.* The short-lived League of Nations represented the realization that war should not be an acceptable way for countries to interact and that aggressive war was illegal. Positivism’s unlimited concept of sovereignty never, however, entirely replaced the belief that sovereignty is limited by some higher moral authority than the state. *Id.* at 3.

52. *Id.* at 2.

53. Locke played an important role in developing the western world’s sense of property. See L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT’L L. REV. 263, 266-70 (1997). While John Locke may be the best-known advocate of private property as a part of natural law, he is not the only one. *Id.* Locke’s influential writing about property appears in his *Second Treatise of Civil Government*. JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 25-34 (Lester DeKoster ed., William B. Eerdmans Publ’g Co. 1978) (1690).

54. See, e.g., Victor Rodríguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 596 (2000) (citing PEDRO NIKKEN, *LA PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS: SU DESARROLLO PROGRESIVO* [THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: ITS PROGRESSIVE DEVELOPMENT] 39 (1987)).

55. See DAVID H. OTT, *PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD* 238 (1987); Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT’L ENVTL. L. REV. 309, 317 (1998); GREG MAGGIO & OWEN J. LYNCH, *CTR. FOR INT’L ENVTL. L., HUMAN RIGHTS, ENVIRONMENT, AND ECONOMIC DEVELOPMENT: EXISTING AND EMERGING STANDARDS IN INTERNATIONAL LAW AND GLOBAL SOCIETY* pt. V (Nov. 15, 1997), <http://www.ciel.org/Publications/olp3v.html>.

represent the Enlightenment-inspired individual civil and political rights,⁵⁶ such as the right to judicial remedies, the right to be free from racial discrimination, the right to be free from arbitrary deprivation of the right to life, the right to be free from torture, the right to be free of slavery, the rights to liberty and security of the person, the right to be presumed innocent of a crime until proven guilty, and the right to recognition as a person before the law.⁵⁷ Second-generation human rights (equality) emerged as part of the late nineteenth- and early twentieth-century growth of socialism in response to social and economic disparity that interfered with the full exercise of first-generation rights.⁵⁸ Included among these are the right to education, the right to health care and social security, the right to protection of the family, and the right to form unions.⁵⁹ Nascent third-generation rights (fraternity) remain amorphous, but are generally characterized as group or community rights to global resources and power sharing such as the right to the self-determination of peoples,⁶⁰ language, culture, and the emerging right to a healthy

56. MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ASSESSING THE ECONOMIC DEFICIT 14 (2004).

57. International Covenant on Civil and Political Rights arts. 2, 6-9, 14, 16, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

58. Cf. DOWELL-JONES, *supra* note 56, at 14.

59. International Covenant on Economic, Social, and Cultural Rights arts. 8-10, 12-13, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

60. See, e.g., PEOPLE'S RIGHTS 1-2 (Philip Alston ed., 2001) (referring to the right to self-determination as the "single most important and most frequently invoked of the [third-generation] rights"). Note that the Proposed American Declaration on the Rights of Indigenous Peoples specifically states that use of the word "peoples" does not "hav[e] any implication with respect to any other rights that might be attached to that term in international law." Inter-Am. Comm'n on Human Rights, *Proposed American Declaration on the Rights of Indigenous Peoples*, art. I, ¶ 3, OEA/Ser.L/V/II.95, doc. 7 rev. (Mar. 14, 1997), available at <http://www.cidh.org/indigenas/indigenas.en.01/preamble.htm>. Drafters added this clause to address concerns that use of the word "peoples" could subsequently invoke the right to self-determination accorded to peoples under the International Covenant on Civil and Political Rights, *supra* note 57, art. 1, and the International Covenant on Economic, Social, and Cultural Rights, *supra* note 59, art. 1. At one point, some argued that the concept of self-determination meant that indigenous peoples should have complete independence from the countries that de facto controlled them; the international community roundly rejected this view. RHONA K. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 272 (2003). Most of those involved in indigenous issues recognize the reality that the right to self-determination means neither absolute, independent sovereignty for indigenous groups nor that the states in which they find themselves are an homogenous whole without responsibility to give considerations to the self-determination rights of indigenous groups within their borders. See, e.g., 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, 222-24 (2001).

environment.⁶¹ These generational classifications are neither ironclad nor mutually exclusive. The human right to property cuts across all three.

1. First-Generation Human Rights: Property as Liberté

The Lockean notion of property as an inherent right derived from nature was incorporated into the fundamental political charters of the Enlightenment: the French Declaration of Rights of Man and the Citizen⁶² and the American Bill of Rights.⁶³ These charters in turn served as the basis for the “first generation” of human rights: individual guarantees of civil and political freedom.

The foundation of the contemporary human rights system is the 1948 Universal Declaration of Human Rights, which represents a codification of the first generation of human rights. Included among these is the right to property. Article 17 of the Universal Declaration provides, “Everyone has the right to own property alone as well as in association with others.”⁶⁴ The right to property is also enshrined in article 21 of the 1969 American Convention on Human Rights: “Everyone has the right to the use and enjoyment of his property.”⁶⁵ The American Declaration of the Rights and Duties of Man protects the right to own property in article 23: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”⁶⁶ This

61. Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307, 307 (1982); see also Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 442-50 (1981).

62. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] art. 17 (Fr. 1789), translated at Avalon Project: Declaration of the Rights of Man, <http://www.yale.edu/lawweb/avalon/rightsof.htm> (last visited Apr. 13, 2007) (“Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.”).

63. U.S. CONST. amend. V. The American Declaration of Independence did not include the right to property in its listing of “self-evident truths,” which included life and liberty but substituted the pursuit of happiness for property. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

64. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 17, U.N. Doc. A/810 (Dec. 10, 1948).

65. Organization of American States, American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

66. Int'l Conference of Am. States, American Declaration of the Rights and Duties of Man, Res. XXX, art. XXIII, OEA/ser.L/V/I.4 (May 2, 1948), reprinted in 3 INTERNATIONAL LAW & WORLD ORDER doc. III.B.23 (Burns H. Weston & Jonathan C. Carlson eds., Mar. 2003).

international recognition of individual property rights can also be found in other regional charters.⁶⁷

2. *Second-Generation Human Rights: Property as Égalité*

The expression of second-generation social and economic rights emerged in the political context of the rise of twentieth-century socialism and thus did not find the same universal application first-generation rights have found. These rights are expressed in the United Nations' Covenant on Economic, Social, and Cultural Rights, and include, inter alia, the rights to work, to form trade unions, to access to universal compulsory education, to social security, to health care, to culture, and to freedom from hunger.⁶⁸ Some assert that second-generation rights are distinct from first-generation rights in that second-generation rights require positive action on the part of the state for their realization.⁶⁹ Regardless of where one tries to draw the line between first- and second-generation rights, the recognition of second-generation rights as part of the development of modern socialism should not obscure that many second-generation rights have much deeper and more varied roots than the socialism with which they are often associated.⁷⁰

The influence of the socio-political philosophy from which the second generation of human rights emerged has influenced the role that property fills in some societies. This can be found in the development of the legal gloss of "social function" found in most Latin American constitutions and codes,⁷¹ and in the American Convention on Human Rights.⁷² Under the

67. *E.g.*, Council of Europe, Protocol (No. 1) to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 221, Europ. T.S. No. 9 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions."); Organization of African Unity, African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 21 I.L.M. 58 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

68. International Covenant on Economic, Social, and Cultural Rights, *supra* note 59, arts. 6, 8-9, 11-12, 13-15.

69. RICARDO Z. ZELEDÓN, DERECHO AGRARIO Y DERECHOS HUMANOS [AGRARIAN LAW AND HUMAN RIGHTS] 27 (2003). Others, however, question the validity of such a simple distinction. For example, some first-generation rights — such as that to a speedy trial — require a substantial positive investment on the part of the state, whereas some second-generation rights — such as the right to unionize — require little expenditure on the part of the state. DOWELL-JONES, *supra* note 56, at 4.

70. DOWELL-JONES, *supra* note 56, at 14 (citing Richard L. Siegel, *Socioeconomic Human Rights: Past and Future*, 7 HUM. RTS. Q. 255, 260 (1985) (noting that socioeconomic rights also have "feudal, mercantilist, Methodist, utilitarian, radical, conservative, Roman Catholic[,] and even liberal" roots)).

71. *See generally* Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social*

social function doctrine, individualized property retains an obligation to serve society or the property is at risk of expropriation.⁷³ In Latin America the social function doctrine has served as the basis for twentieth-century agrarian reform movements and massive land redistribution programs designed to break up large land holdings.⁷⁴

3. *Third-Generation Human Rights: Property as Fraternité*

Third-generation human rights represent the latest “progressive development” in this area of international law.⁷⁵ Third-generation rights, most of which have not yet found their way into binding human rights charters, include the right to peace, development, and a healthy environment,⁷⁶ as well as the notion of intergenerational equity.⁷⁷ Included among these, and especially relevant for the purposes of this discussion, are the rights to culture and community. A key attribute of the third generation is the recognition of what have come to be called “group rights.” Through the domestic and international cases and treaties discussed in this Article, these rights have been seized upon by indigenous groups and their advocates and related back to the first-generation individual right of property to create

Function Doctrine and Land Reform in Latin America, 19 TUL. ENVTL. L.J. 69 (2006).

72. American Convention on Human Rights, *supra* note 65, art. 21, para. 1 (providing that “[t]he law may subordinate such use and enjoyment [of property] to the interest of society”); *see also* ZELEDÓN, *supra* note 69, at 41-48 (reviewing the historical development of the social function doctrine and arguing for the progressive interpretation of human rights law to include agrarian rights as a second-generation human right); Steven E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, 18 B.C. INT’L & COMP. L. REV. 1, 7-8 (1995) (reviewing the constitutional bases for the social function doctrine in Latin American constitutions).

73. Ankersen & Ruppert, *supra* note 71, at 98-99.

74. *Id.* at 98-106.

75. Taylor, *supra* note 50, at 318-19. These rights have also been referred to as “solidarity rights.” PEOPLES’ RIGHTS, *supra* note 54, at 2.

76. PEOPLES’ RIGHTS, *supra* note 60, at 1.

77. *See, e.g.*, United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 3, U.N. Doc. A/CONF.151/5/Rev.1 (June 13, 1992) (“The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”), *reprinted in* 31 I.L.M. 874, 877 (1992); United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Stockholm Declaration*, princ. 2, U.N. Doc. A/CONF.48/14 (June 16, 1972) (“The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.”), *reprinted in* 11 I.L.M. 1416, 1419 (1972); *see also* Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198 (1990).

a human right to communal property⁷⁸ — one that can be used as both a shield and a sword against the state.⁷⁹

The most explicit expression of the communal right to property can be found in the International Labour Organization's Convention 169 on Tribal and Indigenous Peoples (ILO 169),⁸⁰ which provides special protections for the relationship of indigenous groups and the land that such groups live on or use.⁸¹ While the concept of a human right to communal property sometimes resonates outside of indigenous communities,⁸² unique,

78. Our use of the term "communal property" simply means that the western legal system's recognition of a title or property right is not specific to an individual but to a defined group of individuals. The property rights assigned by those within the group may run the gamut from systems that assign extensive land rights to individuals over specific parcels (virtually making the individual the "owner" of the parcel) to systems in which individuals have little or no rights to a specific land area. *See, e.g.,* Alejandro Diaz, *Interculturalidad y Comunidades: Propiedad Colectiva y Propiedad Individual [Interculturalism and Communities: Collective Property and Individual Property]*, 36 DEBATE AGRARIO 71, 73-79 (2003) (Peru) (discussing the internal property tenure systems of Peruvian peasants).

79. The emphasis on the importance of a communal right to property as opposed to an individual right to property here largely assumes that readers understand the social and policy implications of granting individual titles within indigenous homelands. *See, e.g.,* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Prot. of Human Rights, *Final Working Paper: Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship to Land*, ¶ 74, 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*] (noting that individual titles "invariably weaken the indigenous community, nation or people and usually result in the eventual loss of most or all of the land"); *see also* PLANT & HVALKOF, *supra* note 2, at 8. United States history also gives a depressing example of the negative consequences of imposing standard, western-style titles to land on individual members of indigenous tribes. The Dawes Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.), accomplished this. Allotment resulted in large loss of land and cultural devastation because the property regimes of disparate tribes were no longer adapted to the tribes' cultures, environments, and needs. *See generally* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

80. International Labour Organization [ILO], Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO 169]. As of early 2007, eighteen states have ratified ILO 169, including thirteen states in Latin America and the Caribbean. International Labour Organization, ILOLEX: Conventions, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (last visited May 26, 2007). The Latin American and Caribbean countries include Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, and Venezuela. *See id.*

81. ILO 169, *supra* note 80, arts. 13-19.

82. Increasingly minority groups, such as those of African descent in Latin America, are beginning to demand communal property and recognition of their unique tenure regimes. *See, e.g.,* PLANT & HVALKOF, *supra* note 2, at 47-48; *see also infra* Part VII.

community-based property tenure is most frequently associated with indigenous groups. Thus, much of this Article focuses on indigenous land and land rights since these groups and their advocates comprise much of the driving force for development of the human right to communal property. ILO 169 requires participating states to guarantee indigenous peoples “*rights of ownership and possession*” of their traditional territories.⁸³ Exactly what “rights of ownership and possession” entail will be addressed further below.

In addition to ILO 169, several draft international law instruments also address the right to communal property. For example, the U.N. Working Group on Indigenous Populations began drafting a Declaration of the Rights of Indigenous Peoples in 1985.⁸⁴ The draft states that indigenous peoples have the collective and individual right to be free from any act “which has the aim or effect of dispossessing them of their lands, territories or resources.”⁸⁵ Furthermore, the Draft Declaration states that

Indigenous peoples have the right to *own*, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.⁸⁶

Similarly, the Proposed American Declaration on the Rights of Indigenous Peoples specifically notes the right of indigenous peoples to legal recognition of their ownership and property rights in traditional lands.⁸⁷

83. ILO 169, *supra* note 80, art. 14 (emphasis added) (“The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.”).

84. Office of the High Commissioner for Human Rights, U.N. Fact Sheet No. 9 (Rev. 1), The Rights of Indigenous Peoples, <http://www.unhchr.ch/html/menu6/2/fs9.htm> (last visited May 26, 2007).

85. Draft United Nations Declaration on the Rights of Indigenous Peoples, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities Res. 1994/45, Annex, art. 7, U.N. Doc. E/CN.4/Sub.2/RES/1994/45 (Aug. 26, 1994) [hereinafter Draft U.N. Declaration].

86. *Id.* art. 26 (emphasis added).

87. *Proposed American Declaration on the Rights of Indigenous Peoples, supra* note 60, art. XVIII. This article provides:

1. 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

Since the fall of the communist Soviet Union, the debate in human rights circles between civil/political (i.e., first-generation rights) versus economic/social rights (i.e., second-generation rights) has lost some of its importance.⁸⁸ Most human rights scholars now largely accept the interdependence of civil/political and economic/social rights.⁸⁹ The most challenging human rights problems now deal with tensions between individual versus minority or communal rights as well the third-generation rights of self-determination and environmental rights.⁹⁰ As the jurisprudence discussed below suggests, both challenges are clearly presented by the emerging international right to communal property.

IV. Jurisprudence on the International Right to Communal Property

Many of Latin America's indigenous tribes lost their land during colonial times. Some land dispossessions occurred by application of the *terra nullius* doctrine,⁹¹ while others were lost with adoption of new civil codes after 1850.⁹² The civil codes only recognized private, individualized holdings.⁹³

territories and property.

2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to 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.

3. i) Subject to 3.ii), where property and user rights of indigenous peoples arise from rights existing prior to the creation of those states, the states shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.

ii) Such titles may only be changed by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.

iii) Nothing in 3.i) shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.

Id. ¶¶ 1-3.

88. Adamantia Pollis, *A New Universalism*, in *HUMAN RIGHTS: NEW PERSPECTIVES, NEW REALITIES* 9, 9 (Adamantia Pollis & Peter Schwab eds., 2000).

89. *Id.*

90. *Id.* at 9-10.

91. *See infra* Part IV.B.

92. PLANT & HVALKOF, *supra* note 2, at 13.

93. *Id.*; *cf.* RAFAEL COLINA GAREA, *LA FUNCIÓN SOCIAL DE LA PROPIEDAD PRIVADA EN LA CONSTITUCIÓN ESPAÑOLA DE 1978* [THE SOCIAL FUNCTION OF PRIVATE PROPERTY IN THE SPANISH CONSTITUTION OF 1978] 21-29 (Jose Maria Bosch ed., 1997) (describing the eighteenth- and nineteenth-century movement of law and civil codes toward an understanding of the individual as the focus of law).

While presumably indigenous peoples with a claim to land could have taken advantage of such individualized titles, few did.⁹⁴

In this part we first examine a few select domestic law cases; each case recognized some level of indigenous rights, but the cases vary dramatically on how closely circumscribed was the right. The Canadian and Australian cases particularly merit close attention since both have been extensively cited in international cases. We then proceed to the international level where we examine a doctrine of international law that was frequently applied by European nations to dispossess indigenous peoples of their land. We then look specifically at cases in the Inter-American human rights system that lead up to pronouncement of a human right to communal property.

A. Domestic Precursors to an International Human Right to Communal Property

International law often looks to jurisprudential trends in domestic legal cases,⁹⁵ even as the domestic cases also frequently look toward analogous cases in other jurisdictions.⁹⁶ While this may be accepted in commonwealth countries with a history of looking to precedents in other commonwealth countries, it represents something very new for civil law countries.⁹⁷ The United States has tended to give little weight to any foreign jurisprudence other than that directly giving birth to independent U.S. common law.⁹⁸ Furthermore, philosophical hostility to the concept of communal property runs deep in the United States. This hostility led to the partitioning and allotment to individuals of the land of Native Americans through the Dawes Act of 1887.⁹⁹ Supporters of allotment claimed that communal land holds

94. PLANT & HVALKOF, *supra* note 2, at 13.

95. *See, e.g.*, Statute of the International Court of Justice, art. 38, ¶ 1(d), June 26, 1945, 59 Stat. 1055, 3 Bevens 1153 (noting that domestic judicial decisions form a “subsidiary means for the determination of rules of law”); Maya Indigenous Cmty. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 168 (2004); *cf.* Thomas T. Ankersen, *Shared Knowledge, Shared Jurisprudence: Learning to Speak Environmental Law Creole* (Criollo), 16 TUL. ENVTL. L.J. 807, 809, 822 n.86, 826-29 (2003).

96. *See, e.g.*, *Alexkor Ltd. v Richtersveld Cmty. & Others* 2003 (12) BCLR 1301 (CC) at 1329 (S. Afr.), available at <http://www.constitutionallaw.co.za/alert/cases/alexkor.pdf>.

97. Ankersen, *supra* note 95, at 808-09.

98. *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829) (Story, J.) (“The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their own situation.”).

99. *See* General Allotment Act, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

Native Americans back because such land systems lack “selfishness, which is at the bottom of civilization.”¹⁰⁰ Supporters of allotment also claimed that “[c]ommon property and civilization cannot co-exist. . . . At the foundation of the whole social system lies individuality of property.”¹⁰¹

Below we briefly consider a few examples of early domestic cases, from the United States as well as other nations, that helped dispossess indigenous peoples of their lands before considering cases that began the move toward acknowledging that indigenous peoples have a collective right to their homeland.

1. *Johnson v. M’Intosh*

Decided by the U.S. Supreme Court in 1823, *Johnson v. M’Intosh*¹⁰² revolved around a dispute where the plaintiffs claimed ownership of a property based on a sale of the land from Native Americans to a private party.¹⁰³ The defendant, M’Intosh, claimed ownership based on a land grant from the U.S. government.¹⁰⁴ None of the purchasers ever had possession of the land, but they did seek acknowledgment and confirmation of their titles by the U.S. government at various times from 1781 until 1816.¹⁰⁵ Chief Justice Marshall emphasized the principle that property claims in the New World were rooted in the discovery doctrine.¹⁰⁶ When European Christians discovered a territory, “that discovery gave title to the government by whose subjects, or by whose authority, it was made against all other European governments, which title might be consummated by possession.”¹⁰⁷ The Court also declared the principle that lands held by Christians by virtue of their discovery could be granted to individuals by the government that held title, regardless of whether or not Native Americans lived on the granted land.¹⁰⁸ Furthermore, recognition of a right of Native Americans to alienate lands already claimed by the discovery doctrine would

100. Bobroff, *supra* note 79, at 1564 (citing LAKE MOHONK CONFERENCE, PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIAN 43 (Phila., Lake Mohonk Conference 1885)).

101. *Id.* at 1566 (citing REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H.R. DOC. NO. 25-219, at 454-55 (1839)).

102. 21 U.S. (8 Wheat.) 543 (1823).

103. *Id.* at 553-55, 571-72.

104. *Id.* at 560.

105. *Id.* at 561-62.

106. *Id.* at 576-77, 587. The Court also, however, largely justified the dispossession of Indians and the right of whites to the land by a theory of conquest. *Id.* at 588-91.

107. *Id.* at 573.

108. *Id.* at 579-80.

contradict the discovery doctrine because discovery vests absolute title in the discoverer.¹⁰⁹

The Court essentially declared that once Native American lands were “discovered,” the Native Americans lost both their sovereignty *as well as their right to convey property in their possession*. Subsequently, Native Americans could only convey the property if they conveyed it to the state.¹¹⁰ Thus, the Court concluded that “native title” did not allow for a transfer of property interest that could withstand a competing land grant from the U.S. government.¹¹¹

2. Tee-Hit-Ton Indians v. United States

More than a century later, in *Tee-Hit-Ton Indians v. United States*,¹¹² the U.S. Supreme Court relied in large part on its decision in *M’Intosh*. In *Tee-Hit-Ton*, the Tee-Hit-Ton clan claimed a taking of property under the Fifth Amendment as a result of the U.S. government granting a timber concession to a third party on land claimed and occupied by the Tee-Hit-Ton.¹¹³ The Court rejected this claim and said that the occupancy right of Indians, which the government has the power to unilaterally extinguish, does not give rise to a sufficient property interest to support a takings claim.¹¹⁴

United States case law indicates that the Supreme Court ratified the view of early colonists and settlers that the Indians did not even qualify for the protections of private property that most individuals qualify for under accepted standards of international law. International law posits that a change in sovereignty over land *does not* alter private ownership of the land.¹¹⁵ Yet *M’Intosh* and its progeny repeatedly indicate that when the

109. *Id.* at 587-88. This argument does not address the fact that the discovery doctrine in theory requires *empty* territory to apply. *See, e.g. infra* Section IV.B., especially notes 186-89 and accompanying text (discussing inapplicability of the doctrine of discovery as a basis for exercising sovereignty over territory inhabited by indigenous peoples).

110. *Id.* at 585, 592.

111. *Id.* at 604-05. The district court opinion affirmed that a “title to lands, under grants to private individuals, made by Indian tribes or nations . . . cannot be recognised in the Courts of the United States.” *Id.* at 562.

112. 348 U.S. 272 (1955).

113. *Id.* at 273.

114. *Id.* at 285, 288-90.

115. *See Alvarez v. United States*, 42 Ct. Cl. 458, 478 (1907) (noting that when the United States appropriated sovereignty of Puerto Rico from Spain through war, the “cession or conquest of territory does not affect the rights of private property”), *aff’d*, 216 U.S. 167 (1910); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 209 cmt. a (1987) (distinguishing between public and private property in state succession, noting that a change in sovereignty does not usually affect the private property of individuals). *See generally* L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from*

Indians lost their right to sovereignty due to discovery or conquest, the Indians simultaneously lost the equivalent of their *private rights* to their land. This represents confusion on the part of U.S. courts regarding what the Australian Supreme Court in the *Mabo* case would later define as the radical versus the beneficial title of property.¹¹⁶ The confusion of jurisdiction and ownership in the United States has been well captured in Placido Gomez's *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, which details this problem in lands ceded by Mexico to the United States by the Treaty of Hidalgo.¹¹⁷

Subsequent case law in the United States has done little to soften the hard edges of *M'Intosh* and *Tee-Hit-Ton*,¹¹⁸ and the United States has largely ignored international effort to encourage recognition of communal property rights in the United States.¹¹⁹

3. Delgamuukw v. British Columbia (*Canada*)

In this case before the Supreme Court of Canada, two indigenous chiefs, on behalf of their respective peoples, sued the province of British Columbia for recognition of their tribes' claims to land in British Columbia.¹²⁰ The

Sovereignty in International Law, 13 AM. U. INT'L L. REV. 263, 266-70 (1997).

116. See *infra* text accompanying notes 152-59.

117. Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039 (1985).

118. For example, in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the U.S. Supreme Court confronted the question of whether an Indian tribe could revive its sovereignty claim over land that it had purchased since the land composed part of the reservation that had been sold in violation of the law generations before. The Court said,

[W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue.

Id. at 202-03.

119. See, e.g., Inbal Sansani, *American Indian Land Rights in the Inter-American System: Dann v. United States*, HUM. RTS. BRIEF, Winter 2003, at 2, 2-5, available at <http://www.wcl.american.edu/hrbrief/10/2indian.cfm>

(noting that the United States rejected the Inter-American Commission's preliminary report in its entirety, confiscated cattle of the Danns in 2002, and auctioned them off despite a request by the Commission to return the cattle to the Danns).

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

court stated that aboriginal title was *sui generis*,¹²¹ inalienable to anyone other than the government,¹²² inherently communal, and thereby incapable of being held by an individual.¹²³

The court in *Delgamuukw* also indicated that aboriginal title includes restrictions on usage of the land.¹²⁴ While the court stated that it sought to avoid placing a “straitjacket” on indigenous peoples,¹²⁵ it forbade indigenous peoples from using aboriginal title lands in a form “irreconcilable” with the special relationship of the people to the land that justifies such a title.¹²⁶

The limitations on indigenous rights to their land in *Delgamuukw* are not as severe as those in *Johnson v. M’Intosh* and *Tee-Hit-Ton*. For instance, *Delgamuukw* stated that aboriginal title entails more than mere rights to exclusive use and occupation of land to engage in activities that are themselves rights of indigenous peoples.¹²⁷ However, the court in *Delgamuukw* then noted that the right remains something less than absolute fee simple ownership of the land.¹²⁸ The court concluded that aboriginal title to land can only be understood by reference to “western” and indigenous conceptions of land.¹²⁹

4. *Mabo v. Queensland (Australia) — Domestic Law Leading the Way for International Law*

Mabo v. Queensland represents the leading domestic law case on communal property rights in the common law system.¹³⁰ The case involved issues of international law — for example, whether the legal theory of *terra nullius* applied — as well as common law principles and colonial constitutional law.¹³¹ The case is crucial to understanding the progressive nature of the development of the international human right to property because the *Mabo* decision reevaluated the common law treatment of indigenous people’s land rights. In doing so, *Mabo* blazed a new path for

121. *Id.* at 1080-82. *Sui generis* is from Latin and means “[o]f its own kin or class; unique or peculiar.” BLACK’S LAW DICTIONARY 1448 (7th ed. 1999).

122. *Delgamuukw*, [1997] 3 S.C.R. at 1081, 1090.

123. *Id.* at 1082-83.

124. *Id.* at 1081-82, 1088-91.

125. *Id.* at 1091.

126. *Id.* at 1088.

127. *Id.* at 1080.

128. *Id.* at 1080-81.

129. *Id.* at 1081.

130. *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.).

131. *Id.* at 180 (Toohey, J.). The decision noted that municipal courts did not have the authority to determine *whether* title to the land in question had been acquired by the Crown, but on the *effect* of the Crown’s acquisition of title. *Id.* at 31-32 (Brennan, J.).

future international case law. In part, it accomplished this by recognizing the need for the law to evolve to a point where the common law does not “offend[] the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.”¹³²

Eddie Mabo was a member of the Meriam people on the Murray Islands, off the northeast coast of Australia.¹³³ The Meriam people had only sporadic contact with Europeans beginning in the early nineteenth century.¹³⁴ Few Europeans lived on or visited the islands before they were annexed to Queensland in 1879.¹³⁵ The Meriam were left in possession of much of their land after the annexation.¹³⁶ Mabo and his co-plaintiffs claimed a right to protection of their property and usufruct rights based on native title.¹³⁷ While the plaintiffs did not question Australia’s exercise of sovereignty over the Murray Islands, they questioned whether this meant that the Meriam people lost all rights to their property.¹³⁸

First, the *Mabo* court examined the doctrine of *terra nullius*. During the rise of colonialism, colonial powers struggled with the legal justifications for claiming sovereignty over land where indigenous or tribal peoples already lived. International law at the time already recognized the legal theory of *terra nullius*: this theory provided that unoccupied land could be claimed by the first country to claim and occupy it.¹³⁹ Of course since Europeans were the ones making the law at this time, “countries” meant the recognized states of Europe.¹⁴⁰

Early European colonialists expanded the concept of *terra nullius* to include not only unoccupied land — understood literally as land where no one lived — but also land occupied by those peoples who did not have formalized, individual property systems similar to those of the colonizers or by peoples who did not practice similar types of settled agriculture as the colonizers, or who, for any other reason, were considered “barbarous.”¹⁴¹ The first two of these reasons for the expanded notion of “*terra nullius*” apparently grew from John Locke’s labor theory of property: a people who did not mix its labor with the land in a form of agriculture recognizable to

132. *Id.* at 30 (Brennan, J.).

133. *See id.* at 16-17; *id.* at 120-21 (Dawson, J., dissenting).

134. *Id.* at 18 (Brennan, J.).

135. *Id.* at 20.

136. *Id.* at 22, 61.

137. *Id.* at 121 (Dawson, J., dissenting); *id.* at 176 (Toohey, J.).

138. *Id.* at 30 (Brennan, J.).

139. *Id.* at 32.

140. *Id.*

141. *Id.* at 36-40.

the colonizers does not have real “ownership” of the land.¹⁴² Thus, the Australian aborigines did not have ownership of the land because the aborigines were not “civilized,”¹⁴³ nor did they practice European-style sedentary agriculture.¹⁴⁴

Because sovereignty claims were never questioned, the court did not need to consider the implications of rejection of the expanded notion of *terra nullius* on Australia’s exercise of sovereignty over the Murray Islands.¹⁴⁵ In fact, the court expressly noted that it lacked authority to issue a judgment on the validity or invalidity of claims of Australian sovereignty.¹⁴⁶ The court merely considered the theory of *terra nullius* as a precursor to determining the effect of the common law in the case.¹⁴⁷

Even though international law provided persuasive precedent for rejecting the notion that the aborigines and their legal system should be ignored,¹⁴⁸ the court held that its ability to modify the common law did not extend to altering fundamental principles of property embedded in the common law.¹⁴⁹ To ensure proper decision of the case without doing violence to the “skeletal” structure of property in the common law,¹⁵⁰ the court launched into a complex and detailed historical analysis of the history of property in the common law. This analysis led the court to distinguish between the common law’s recognition of two distinct types of “ownership” of land by a sovereign: the right of the sovereign to exercise legal jurisdiction over the land and the right of the sovereign to claim “ownership” as commonly understood in the sense that any natural or juridical person can own

142. See LOCKE, *supra* note 53, at 25-34; see also Bruce Kercher, *Native Title in the Shadows: The Origins of the Myth of Terra Nullius in Early New South Wales Courts*, in COLONIALISM AND THE MODERN WORLD: SELECTED STUDIES 100, 104, 118 nn.21-22 (Gregory Blue et al. eds., 2002) (noting that Vattel’s *Law of Nations* said that people were obliged to cultivate the soil and that nomadic, tribal people could not be thought of as in possession of land and had no right to complain if more industrious peoples appropriated the land for greater production).

143. *Mabo*, 175 C.L.R. at 39 (Brennan, J.); *id.* at 83-84 (Deane & Gaudron, JJ.); Matthew C. Miller, *An Australian Nunavut? A Comparison of Inuit and Aboriginal Rights Movements in Canada and Australia*, 12 EMORY INT’L L. REV. 1175, 1191 n.101, 1192 (1998).

144. Ann McGrath, *A National Story*, in CONTESTED GROUND: AUSTRALIAN ABORIGINES UNDER THE BRITISH CROWN 1, 12-13 (Ann McGrath ed., 1995).

145. *Mabo*, 175 C.L.R. at 30 (Brennan, J.).

146. *Id.* at 31.

147. *Id.* at 33-34. The court said that the common law of England applied to the land at issue even though the court rejected the theory of *terra nullius*. *Id.* at 37-38.

148. See Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31 (Oct. 16). For discussion of this advisory opinion, see *infra* notes 184-89 and accompanying text.

149. *Mabo*, 175 C.L.R. at 43 (Brennan, J.).

150. *Id.*

property.¹⁵¹ The court identified the former type of ownership as “radical” title.¹⁵² If a sovereign holds radical title *and* ownership as commonly understood (i.e., beneficial title), then the sovereign has absolute title. However, the court also noted that an individual’s ownership of land does not necessarily end simply because of a change of the sovereign that holds radical title — or jurisdiction over the land.¹⁵³

In *Mabo*, the state claimed that the Crown’s exercise of sovereignty over the land in question had given it all of the possible property rights available over the land in question — both radical and beneficial title — and that, as a result, no one could hold any rights to that land without an express grant of such rights from the Crown.¹⁵⁴ The court, however, asked whether the common law at the time of the Crown’s exercise of sovereignty over the land at issue in *Mabo* recognized an ownership interest of the aborigines in the case.¹⁵⁵ If so, how did this affect the rights of the Crown to the land?

After lengthy inquiry into the history of the common law, the court concluded that, while the concept of “radical” title to the land is essential to the common law structure and cannot be disrupted, a recognition of indigenous land rights based on occupation predating the Crown’s assertion of sovereignty is not inconsistent with the fundamental principles of property in the common law.¹⁵⁶ The assumption that had prevented recognition of indigenous land rights after a declaration of sovereignty was the confusion between the fiction of “radical” title, belonging to the sovereign by virtue of the sovereign’s right to apply its laws over the territory, and the beneficial title, which belongs to the property owner who may or may not be the sovereign.¹⁵⁷ If the sovereign holds both the radical title and the beneficial title, then the sovereign is said to hold absolute title.¹⁵⁸ However, if the beneficial title is held by another party independent of a grant from the sovereign, then the sovereign only holds radical title, subject to the rights of the beneficial title holder.¹⁵⁹

151. *Id.* at 43-46; *id.* at 82 (Deane & Gaudron, JJ.). The court assumed that the first type of “ownership” was valid, a point that was not challenged in the *Mabo* case. See *supra* text accompanying notes 145-46. The second type of “ownership” is that protected by the first-generation right to property.

152. *Mabo*, 175 C.L.R. at 48 (Brennan, J.).

153. *Id.* at 43-46.

154. *Id.* at 26.

155. *Id.* at 29.

156. *Id.* at 48-49.

157. *Id.* at 51.

158. *Id.* at 48.

159. *Id.* at 48, 52.

Once the court removed the legal impediment to possible recognition of aboriginal rights in land, it assessed the weight of common law authority to determine if the land rights of Mabo and the Murray Islanders had survived. The court ruled that the land rights of the Meriam could endure because “mere change in sovereignty is not to be presumed as meant to disturb rights of private owners.”¹⁶⁰ Importantly for this analysis, the *Mabo* court also explicitly rejected the notion that the common law was restricted to recognition of individual property rights and could not recognize communal property rights.¹⁶¹

Underlying much of the court’s reasoning was a concern with racism.¹⁶² The court observed that any attempt to simply ignore the traditional customs of aborigines in their land tenure could only be founded on inherently racist justifications repugnant to modern sensibilities.¹⁶³ Thus, the court concluded that the common law had in the past and could now recognize the land rights of aboriginal people with what the court called “common law native title.”¹⁶⁴ The attributes of common law native title are primarily determined by the traditional tenure practices of the natives in question.¹⁶⁵ This conclusion resulted in the recognition of communal aspects of title and the inalienability of the title to anyone but the state.¹⁶⁶ Finally, the court also concluded that the state may extinguish native title by passing legislation inconsistent with the native title.¹⁶⁷

160. *Id.* at 56 (quoting *Amodu Tijani v. Sec’y, S. Provinces*, [1921] 3 N.L.R. 21 (S.C.) (Nig.). In reality, this statement alone did not result in the finding that the land rights of the Meriam people had survived. This statement merely recognized that the rights could have survived. The *Mabo* court subsequently considered whether the land customs of the Meriam people were compatible with the common law and whether the Meriam had maintained exclusive possession of the claimed land, *id.* at 59-61; whether a sufficiently coherent tenure system existed among the Meriam to allow for ascertainment of the rights that native title grants the Meriam, *id.* at 61; and whether or not the native title of the Meriam people had been extinguished by Australia, *id.* at 63-69.

161. *Id.* at 84 (Deane & Gaudron, JJ.).

162. *See, e.g., id.* at 40-42, 58 (Brennan, J.).

163. *Id.* at 41-43.

164. *Id.* at 87-88 (Deane & Gaudron, JJ.).

165. *Id.* at 88.

166. *Id.* at 88-89.

167. *Id.* at 64 (Brennan, J.); *id.* at 111 (Deane & Gaudron, JJ.). *But see id.* at 89-94 (examining the tension and ambiguity between the possibility of extinguishment at the will of the sovereign and the possibly illusory nature of the title). The possibility of the state extinguishing native title through inconsistent legislation resulted from the historical analysis of the common law and the observation that the common law had held that an occupying or conquering sovereign does not automatically extinguish the laws that existed before conquest or occupation, but that conquest or occupation gave the new sovereign the inherent right to alter the laws. While all the justices in the opinion agreed on this point, they disagreed as to whether

Mabo remains a watershed case as it held that exercise of sovereignty and subsequent application of the common law did not automatically extinguish aboriginal land rights in Australia. The case also further diminished *terra nullius* as a justification for the colonial exercise of sovereignty over indigenous people. Despite these advances, *Mabo* still allows a sovereign to unilaterally extinguish the property rights of indigenous people. Now that change was in the air, however, the power to extinguish seemed destined for change as well, at least as a matter of international human rights law.

B. Terra Nullius in International Law

One with little background in property law could be excused for wondering why *Mabo* should be such a watershed case. After all, *Mabo* was only an Australian case, not an international law case; surely the international system had long since abandoned the concept of *terra nullius*. In fact, *terra nullius* had been treated as the unquestioned rule of law through most of the twentieth century. In the 1933 case of *Legal Status of Eastern Greenland*,¹⁶⁸ Denmark asked the Permanent Court of International Justice to determine the validity of a Norwegian declaration of sovereignty over part of the eastern portion of Greenland.¹⁶⁹ Both Denmark and Norway had been dancing around the delicate issue of the legal status of eastern Greenland since 1814, when Norway and Denmark separated.¹⁷⁰ While Denmark clearly had engaged in sufficient activity and settlement in much of western Greenland to claim sovereignty, Norway contended that eastern Greenland was still *terra nullius*.¹⁷¹ In 1931, even as the conflict between Norway and Denmark over eastern Greenland was heating up, Norway claimed sovereignty over part of eastern Greenland due to occupation by Norwegians.¹⁷² The court ultimately concluded that Denmark indeed had sovereignty over the entire island of Greenland.¹⁷³

such a change in law extinguishing common law native title would give rise to a compensable taking of land. See, e.g., *id.* at 112 (suggesting that legislative reforms allow for the compensation of native titleholders); *id.* at 126 (Dawson, J., dissenting) (“There is . . . no general proposition to be found, either in law or in history, that the Crown is legally bound to pay compensation for the compulsory acquisition of land . . .”); *id.* at 216 (Toohey, J.) (“The traditional title of the Meriam people . . . may not be extinguished without the payment of compensation or damages to the traditional titleholders of the Islands.”).

168. *Legal Status of E. Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

169. *Id.* at 6.

170. See *id.* at 13-17. Prior to separation, Norway and Denmark had been united under the same crown since 1380. *Id.* at 9.

171. *Id.* at 22, 26.

172. *Id.* at 25.

173. See *id.* at 50-51, 55.

The struggle over which Europeans would exercise sovereignty over Greenland occurred, however, without ever considering Greenland's indigenous inhabitants — the Inuit. While the decision mentions the existence of indigenous peoples living on Greenland,¹⁷⁴ it does not consider whether they have any sort of claim to the land.¹⁷⁵ In fact, after noting that most sovereignty questions involve two competing “Powers,” the decision notes that “[o]ne of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty.”¹⁷⁶ The meaning of “Power” becomes clear in the following paragraph in which the court states that “the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other *State* could not make out a superior claim.”¹⁷⁷ Thus, the court only appears to consider the interests of “Powers” conceived of as “States” within the definition of western legal thought. The court even seems to indicate that aboriginals do not have the same rights or ability to establish sovereignty by the means that “States” do.¹⁷⁸ Such legal reasoning lends support to those that claim that international law has inherent biases because of its Eurocentric roots.¹⁷⁹ Thus, even though “[t]he Danish claim is not founded upon any particular act of occupation,”¹⁸⁰ the Danish had more “rights” to Greenland than even the aboriginals who had lived there for thousands of years.

All this is not to say that application of *terra nullius* to dispossess indigenous people enjoyed universal support. The early international legal scholar de Victoria questioned its use,¹⁸¹ as did Blackstone in his *Commentaries on the*

174. See, e.g., *id.* at 10, 14, 19, 21, 29.

175. Cf. *id.* at 28.

176. *Id.*

177. *Id.* (emphasis added).

178. *Id.* at 29 (noting that it does not qualify as “conquest” if aboriginals massacre a settlement since “conquest” only applies to a conflict between two “States”).

179. See, e.g., Obiora Chinedu Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 HARV. INT’LL.J. 503, 516-17 (2000).

180. *Legal Status of E. Greenland*, 1933 P.C.I.J. at 27.

181. FRANCISCUS DE VICTORIA, *De Indis et De ivre belli Relectiones* [“Of Indians” and “Of the Law in Time of War” Lectures], in RELECTIONES THEOLOGICAE XII (Johann Georgii ed., 1696), reprinted and translated in 6 THE CLASSICS OF INTERNATIONAL LAW 115-28 (Ernest Nys & James Brown Scott eds., John Pawley Bate trans., 1917) (denying that the Indians in the New World lost their lands due to their sins or infirmity of mind); *id.* at 129-49 (criticizing the supposed rights of the Spaniards that gave them title to Indian lands in the New World); see also, e.g., Bobroff, *supra* note 49, at 641, 649-50, translated at <http://lawschool.unm.edu/faculty/bobroff/publications.php> (follow “English Version” hyperlink; then view pp. 10-11). Franciscus de Victoria’s magnanimity towards the Indians in the New World did, however, have

Law.¹⁸² Still, *terra nullius* remained an integral part of international law until 1975. In that year, the International Court of Justice, in an advisory opinion, rejected the application of the *terra nullius* doctrine as the basis for exercising sovereignty over indigenous peoples.¹⁸³

The advisory opinion arose out of a dispute primarily between Morocco and Spain. The International Court of Justice found it had jurisdiction to answer the following question: “Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?”¹⁸⁴ The Court noted that it had to decide the case based on the law in effect at the time of Spain’s colonization.¹⁸⁵ Evidence during general colonization of the period led the Court to conclude that, despite disagreements among jurists, state practice at the time indicated that “sovereignty was not generally considered as effected unilaterally through ‘occupation’ of *terra nullius* by original title but through agreements concluded with local rulers.”¹⁸⁶ Thus, said the Court, because Western Sahara was inhabited by “peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them,”¹⁸⁷ and Spain had entered into agreements with the chiefs of local tribes and relied upon these agreements in royal decrees and international negotiations, Spain could not reasonably assert that its claim of sovereignty was based on *terra nullius*.¹⁸⁸ The *Mabo* court cited this advisory opinion in its own opinion for the proposition that international law required that an area be *actually uninhabited* before the doctrine of *terra nullius* could form the basis for an assertion of sovereignty through mere occupation.¹⁸⁹

very strict limits. Thus, Victoria asserted that the Indians had: no right to refuse Spaniards the right to travel in the lands of the Indians, VICTORIA, *supra*, at 151-52; no right to prevent Spaniards from trading among the Indians, *id.* at 152-53; no right to prevent Spaniards in sharing whatever the Indians shared among themselves, *id.* at 153; and no right to prevent Spaniards from preaching Christianity in the lands of the Indians, *id.* at 156.

182. WILLIAM BLACKSTONE, 2 COMMENTARIES *7 (“[S]o long as [colonization] was confined to the stocking and cultivation of desert [sic] uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising on countries already peopled, and driving out or massacring [sic] the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.”).

183. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 39 (Oct. 16).

184. *Id.* at 37.

185. *Id.* at 38-39.

186. *Id.* at 39.

187. *Id.*

188. *Id.*

189. *Cf. Mabo v. Queensland II* (1992) 175 C.L.R. 1, 40-42, 181-82 (Austl.) (Brennan, J.). The *Mabo* court quoted a separate opinion added to the *Western Sahara* proceedings by the

The abandonment of *terra nullius* as the legal basis for the dispossession of indigenous lands set the stage for increased recognition of the rights of indigenous peoples to their lands as a matter of international law.

C. Jurisprudence in the Inter-American System

The developing doctrine of aboriginal title has served as the jurisprudential foundation for a series of seminal cases in the Inter-American system that forcefully develop a human right to communal property — at least for indigenous peoples.¹⁹⁰ Before examining these cases, we briefly describe the Inter-American human rights system.

1. The Inter-American Human Rights System

The Inter-American human rights system has developed within the context of the Organization of American States (OAS). The OAS was not founded until 1948, but concern about indigenous peoples in the western hemisphere had already given rise to conferences and congresses about indigenous peoples as

Vice-President of the Court, Judge Fouad Ammoun. *Id.* at 41 (quoting *Western Sahara*, 1975 I.C.J. at 85-86). In that opinion, Judge Ammoun had stated:

[T]he concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned. It is well known that in the sixteenth century, Francisco de Vittoria protested against the application to the American Indians, in order to deprive them of their lands, of the concept of *res nullius*.

This approach . . . , which was adopted . . . in the nineteenth century, was hardly echoed at all at the Berlin Conference of 1885. It is however the concept which should be adopted today.

Western Sahara, 1975 I.C.J. at 86-87.

190. The term “indigenous peoples” has come to be recognized as a unique classification within international law during the past decades. Marcus Colchester et al., *Indigenous Land Tenure: Challenges and Possibilities*, LAND REFORM, LAND SETTLEMENT & COOPERATIVES, 2004/1, at 9, 9, available at <ftp://ftp.fao.org/docrep/fao/007/y5407t/y5407t00.pdf>. An exact definition of “indigenous peoples” has, however, proved difficult to formulate. The ILO 169 defines “tribal peoples” as those

in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

ILO 169, *supra* note 80, art. 1, para. 1.

early as 1933.¹⁹¹ Such concern did not express itself institutionally within the OAS until the 1970s when, spurred by land invasions by non-indigenous settlers into indigenous territories and resulting violence as well as other forms of discrimination against indigenous peoples, the Inter-American Commission on Human Rights (IACHR) (founded in 1959) began making formal proclamations on human rights violations against indigenous peoples.¹⁹² By the 1980s, many indigenous groups and activists had mobilized to defend the property of indigenous peoples as necessary to their survival.¹⁹³

The Inter-American human rights system has in part emerged as a leader in establishing the human right to property because the system, based on the Charter of the Organization of American States and the American Convention on Human Rights, allows individuals to bring international law cases.¹⁹⁴ Allowing individuals access to international fora by application of public international law is a comparatively recent development,¹⁹⁵ which has not, as of yet, been adopted by all other international tribunals.

Procedurally the Inter-American human rights system has another unusual aspect. Complainants do not have direct access to the Inter-American Court of Human Rights. Complaints are first lodged with the Inter-American Commission on Human Rights.¹⁹⁶ If the Commission does not feel that the case has been resolved in a reasonable time after issuance of the Commission's report, then the Commission may recommend the case to the Inter-American Court of Human Rights.¹⁹⁷ The Court then retains discretion to accept or reject the case.¹⁹⁸ The cases below represent both reports of the Commission and adjudications of the court.

191. SHELTON H. DAVIS, *LAND RIGHTS AND INDIGENOUS PEOPLES: THE ROLE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS*, at iii (1988).

192. *Id.* at 7-8.

193. *See, e.g., infra* Part IV.C.2 (discussing the *Yanomami* case).

194. *See* American Convention on Human Rights, *supra* note 65, art. 44.

195. *See, e.g.,* Rules of Procedure of the Inter-American Court of Human Rights art. 23 (Dec. 4, 2003), available at <http://www.corteidh.or.cr/reglamento.cfm?&CFID=239923&CFTOKEN=47883149>; Pedro Nikken, *Observaciones sobre el fortalecimiento del sistema Interamericano de derechos humanos en vísperas de la Asamblea General de la OEA [Observations on the Strengthening of the Inter-American System of Human Rights on the Eve of the General Assembly of the OAS]*, 30-31 *REVISTA IIDH* 13 (2001) (Costa Rica) (outlining the changes to the Inter-American Court of Human Rights procedural changes adopted over the years until, effective in 2001, victims of human rights abuses are allowed to appear directly before the court as complainants).

196. JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 6, 19 (2003); *see also* American Convention on Human Rights, *supra* note 65, art. 61.

197. PASQUALUCCI, *supra* note 196, at 6-7, 19.

198. *Id.*

2. *The Yanomami Case (Brazil)*¹⁹⁹

Several nongovernmental organizations and others filed a petition before the Inter-American Commission on Human Rights in 1980 against the government of Brazil, alleging violations of the human rights of the Yanomami Indians.²⁰⁰ The Yanomami inhabit the Brazilian state of Amazonas and the Territory of Roraima, on the border with Venezuela.²⁰¹ Road building and discovery of mineral deposits brought non-Yanomami into Yanomami territories.²⁰² Alleged violations of human rights included threats to the Yanomami's right to life, liberty, and personal security; right to equality before the law; right to religious freedom and worship; right to the preservation of health and well being; right to education; right to recognition of juridical personality and of civil rights; and right to property.²⁰³

The alleged violations stemmed from actions and incidents including construction of a road through Yanomami territory that displaced the Yanomami; failure to effectively secure a legislatively-mandated Yanomami Park to protect the cultural heritage of the Yanomami; granting authorization for exploitation of subsurface minerals in Yanomami territory; permitting outsiders to invade Yanomami territory, thus bringing in contagious diseases; and displacing the Yanomami from their ancestral lands.²⁰⁴

After reviewing the evidence, the Inter-American Commission on Human Rights found that Brazil had failed to protect the human rights of the Yanomami.²⁰⁵ Specifically, the Commission found that the Yanomami's rights to life, liberty, personal security, residence and movement, and preservation of health and well-being had all been violated.²⁰⁶ The Commission did not explicitly find a violation of the right to property. Even so, the case still represented an important step because the Commission recommended that Brazil protect the land of the Yanomami by establishing and demarcating its boundaries as part of the solution to human rights violations.²⁰⁷

199. *Coulter v. Brazil (Yanomami)*, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985), available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>.

200. *Id.* ¶ 1 (Background).

201. *Id.* ¶ 2(a) (Background).

202. *See id.* ¶ 2(f)-(g) (Background).

203. *Id.* ¶ 1 (Background).

204. *Id.* ¶ 2 (Considering).

205. *Id.* ¶ 11 (Considering).

206. *Id.* ¶ 1 (Resolves).

207. *Id.* ¶ 3(b) (Resolves).

3. *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*²⁰⁸

In the case known popularly as *Awas Tingni*, the indigenous right to communal property was squarely presented. The Inter-American Court for Human Rights ruled that the government of Nicaragua had violated the right to property of the Awas Tingni, an indigenous group on the Atlantic Coast of Nicaragua.²⁰⁹ The case arose because the Awas Tingni community had for many years been attempting to secure titling and demarcation²¹⁰ of land they claimed under constitutional and other legal protections for indigenous land in Nicaraguan law.²¹¹ Not only were the Awas Tingni frustrated in this attempt, but during the process, the state granted a logging concession on land claimed by the Awas Tingni without consulting the Awas Tingni.²¹² Although the Awas Tingni continued to fight this concession in the legal system of Nicaragua,²¹³ they also filed a complaint to the Inter-American Commission on Human Rights.²¹⁴ The Commission concluded that Nicaragua had violated articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the American Convention on Human Rights.²¹⁵ The Commission recommended that Nicaragua invalidate and renounce the logging concession on disputed lands as well as take immediate action to identify, title, and demarcate the traditional lands of the Awas Tingni.²¹⁶ The Commission then gave Nicaragua two months to report on the recommendations

208. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf. For articles on this case, see S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157 (1996); S. James Anaya & Claudio Grossman, *The Case of the Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002).

209. *Awas Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153.

210. Demarcation (*sanamiento* in Spanish) is the physical process of visibly delineating on the ground the boundaries of land to which a legal title has been issued. PLANT & HVALKOF, *supra* note 2, at 23; see also *Indigenous Peoples and Their Relationship to Land*, *supra* note 79, ¶¶ 17-20.

211. See *Awas Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 83 (testimony of Jaime Castillo Felipe, member of the Awas Tingni Community).

212. See *id.*

213. The Constitutional Court of the Supreme Court of Nicaragua declared the granted concession invalid for failure to follow proper procedures. *Id.* ¶ 17.

214. *Id.* ¶¶ 1, 6.

215. See *id.* ¶ 25. See generally American Convention on Human Rights, *supra* note 65, arts. 1-2, 21, 25.

216. *Awas Tingni*, Case 11.577, Inter-Am. C.H.R., Report No. 27/98, OEA/Ser.L/V/II.98, doc. 35 (1998).

made by the Commission.²¹⁷ Three months later the Commission transferred the case to the contentious jurisdiction of the court in San José, Costa Rica for an adversarial hearing on the matter.²¹⁸

The court noted that Nicaraguan law contained protections of the right to communal property of indigenous groups such as the Awas Tingni over their traditionally occupied land.²¹⁹ The court, however, also declared that constitutional provisions and laws guaranteeing protection of this right did not satisfy the obligations of Nicaragua as a signatory to the American Convention on Human Rights because Nicaragua did not have effective *processes* in place to protect the rights that domestic law supposedly granted.²²⁰

It is unclear in the opinion whether the court would have ruled that Nicaragua had violated the right to property of the Awas Tingni had Nicaragua not had domestic legislation mandating protection of the communal ownership and land rights of indigenous peoples.²²¹ The opinion emphasized that article 29(b) of the American Convention on Human Rights forbids interpreting part of the Convention as “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party.”²²² Thus, since Nicaraguan law protected the right to the traditionally occupied communal territory of the Awas Tingni, the court was required to interpret the Convention in the *Awas Tingni* case to consider the Nicaraguan law as part of the protection of property in the Convention.²²³

Equally important in the case was the court’s recognition of rights associated with the right to property. The court noted that the ability of indigenous groups

217. *Awas Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 25.

218. *Id.* ¶ 1.

219. *Id.* ¶¶ 115-22.

220. *Id.* ¶¶ 114, 123-27.

221. Ley No. 445, 13 Dec. 2002, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Communal Property Law of the Native Towns and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio, and Maíz Rivers], La Gaceta [L.G.], 23 Jan. 2003 (Nicar.), available at <http://legislacion.asamblea.gob.ni/Normaweb.nsf/d0c69e2c91d9955906256a400077164a/f59730333b3f6fa5062571b200559533?OpenDocument>.

222. *Awas Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 147-48, 153 (quoting American Convention on Human Rights, *supra* note 65, art. 29(b)).

223. At the same time, the court might have reached the same conclusion even without Nicaraguan recognition of the right possessed by the Awas Tingni with regard to their traditionally occupied lands. The court emphasized that “[t]he terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.” *Id.* ¶ 146. This may have allowed the court to interpret the property protections in the Convention to protect the Awas Tingni regardless of Nicaraguan law.

to “preserve their cultural legacy and transmit it to future generations” requires that indigenous peoples enjoy secure possession of their land, because the land is a “fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”²²⁴ The general connection of land tenure systems and indigenous law with cultural survival has meant that recognition of traditional land tenure systems also often involves broader general recognition of the customary laws of indigenous populations.²²⁵

In light of these conclusions, the Court ordered Nicaragua to “adopt the legislative, administrative, and any other measures required to create an *effective* mechanism for delimitation, demarcation, and titling of the property of indigenous communities”²²⁶ and awarded costs in the amount of \$30,000.²²⁷

224. *Id.* ¶ 149.

225. *See, e.g.*, Ley No. 160, 3 Aug. 1994, Por la cual se crea el Sistema Nacional de Reforma Agraria y Desarrollo Rural Campesino, se establece un subsidio para la adquisición de tierras, se reforma el Instituto Colombiano de la Reforma Agraria y se dictan otras disposiciones [By Which the National System of Agrarian Reform and Rural Development Is Created, a Subsidy for the Acquisition of Lands Is Established, the Colombian Institute of the Agrarian Reform Is Reformed, and Other Dispositions Are Dictated] ch. XIV, art. 85, Diario Oficial [D.O.], 5 Aug. 1994 (Colom.), *available at* http://www.secretariassenado.gov.co/leyes/L0160_94.htm (recognizing indigenous property rights); *id.* art. 87 (subjecting indigenous lands to the social function “*in conformity with the uses, culture, and customs of the land’s inhabitants*”) (translation by authors); Ley No. 24, 12 Jan. 1996, Por la cual se crea la Comarca Kuna de Madungandi [By Which the Kuna de Madungandi Region Is Created] ch. I, art. 1, G.O., 15 Jan. 1996 (Pan.), *available at* http://www.asamblea.gob.pa/NORMAS/1990/1996/1996_138_0699.PDF (creating the indigenous special administrative territory of Comarca Madungandi and granting a communal title to the land to the Kuna Indians); Decreto Ejecutivo No. 228, 3 Dec. 1998, Por el cual se adopta la Carta Orgánica Administrativa de la Comarca Kuna de Madungandi [By Which the Administrative Article of Incorporation of the Kuna de Madungandi Region Is Adopted] art. 28, G.O., 8 Dec. 1998 (Pan.), *available at* http://www.asamblea.gob.pa/GACETAS/1990/1998/23687_1998.PDF (explicitly recognizing the customary and traditional laws of the Kuna in the Madungandi Region as long as they do not conflict with the laws of Panama or the Panamanian constitution). *See also* Ley No. 1715, 18 Oct. 1996, Ley del Servicio Nacional de Reforma Agraria [Law of the National Service of Agrarian Reform] tit. I, ch. 1, art. 3 (Bol.), *available at* <http://www.inra.gov.bo/portaly2/Uploads/Normas/ley1715.pdf> (granting communal property rights and stating that “application of agrarian laws and their regulations should consider the habits and customary law of the affected communities” (translation by authors)); MANUELA TOMEI & LEE SWEPSTON, INT’L LABOUR ORG., ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL 26-28 (rev. ed. 2003), *available at* <http://www.ilo.org/public/english/standards/norm/egalite/itpp/convention/manual.pdf> (noting increased recognition of the customary laws of indigenous groups in Norway, Mexico, and the Philippines).

226. *Awas Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 164.

227. *Id.* ¶ 173(7). Furthermore, while the court found its sentence constituted a form of reparation, *id.* ¶ 173(5), the court also mandated that Nicaragua invest \$50,000 during the twelve months after the decision in works to benefit the Awas Tingni community, *id.* ¶ 167.

Since this ruling by the Inter-American Court of Human Rights, the Nicaraguan legislature adopted a comprehensive law for titling and demarcation of indigenous lands along Nicaragua's Atlantic coast and the president of Nicaragua appointed his personal advisor to supervise implementation of the Court's decision.²²⁸ Unfortunately, the Nicaraguan state has been slow to implement the protections ordered by the Inter-American Court in the *Awastingni* case, resulting in additional human rights violations.²²⁹

4. *The Dann Case (United States)*²³⁰

The next case to address the communal right to property came as a result of a petition by two Shoshone Indian sisters to secure rights to aboriginal property in the United States.²³¹ The sisters presented a petition to the Inter-American Commission on Human Rights in 1993 and alleged that the U.S. government violated articles II (right to equality before the law), III (right to religious freedom and worship), VI (right to a family and protection thereof), XIV (right to work and fair remuneration), XVIII (right to a fair trial) and XXIII (right to property) of the American Declaration of the Rights and Duties of Man.²³² The

228. See Indian Law Resource Center, Nicaragua/Awas Tingni Case, http://www.indianlaw.org/main/projects/past_projects/nicaragua (last visited May 27, 2007). The law requiring titling of lands such as those of the Awas Tingni community is Law 445. See Ley No. 445, 13 Dec. 2002, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Communal Property Law of the Native Towns and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio, and Maíz Rivers], L.G., 23 Jan. 2003 (Nicar.), available at <http://legislacion.asamblea.gob.ni/Normaweb.nsf/d0c69e2c91d9955906256a400077164a/f59730333b3f6fa5062571b200559533?OpenDocument>.

229. See, e.g., *Awastingni vuelve a la Corte Interamericana de Derechos Humanos* [Awastingni Returns to the Inter-American Court of Human Rights], BOLETÍN INFORMATIVO: EL CASO AWASTINGNI V. NICARAGUA (Univ. of Ariz. Indigenous Peoples Law & Policy Program, Tuscon, Ariz.), Mar. 2006, <http://www.law.arizona.edu/depts/iplp/advocacy/awastingni/newsletter/newsletterMar2006.htm>.

230. *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm>.

231. *Id.* ¶¶ 92, 94.

232. *Id.* ¶¶ 1-2. The OAS created the Inter-American Commission on Human Rights in 1959. See What Is the IACHR?, www.cidh.oas.org/what.htm (last visited May 30, 2007). Since then, the power and duties of the Inter-American Commission on Human Rights have expanded to allow it to request information from OAS member states and to hear petitions from individuals concerning violations of the American Declaration and the subsequent American Convention on Human Rights. See *supra* notes 194-95 and accompanying text. The American Convention on Human Rights, which entered into force in 1978, created the Inter-American Court on Human Rights, see American Convention on Human Rights, *supra* note 65, arts. 52-

factual basis for the complaint included threats by the United States to remove the Danns and their livestock from land the Danns claimed was traditionally-occupied land of the Shoshone tribe.²³³ The Danns also complained that the United States had granted or allowed gold mining activities on ancestral Shoshone lands.²³⁴ The United States responded that any Shoshone land rights had been extinguished in the late 1800s due to encroachment by nonindigenous settlers, and that the U.S. government paid the Shoshone just compensation for the loss of their land.²³⁵

The Danns claimed that they and other Shoshone tribe members had a valid claim to ancestral Shoshone lands “through traditional patterns of use and occupancy of those lands and its natural resources.”²³⁶ This, said the Danns, constitutes a “customary land tenure system,” and U.S. law purports to recognize customary land tenure.²³⁷ Additionally, regardless of the domestic law of the United States, the Danns asserted that the right to property in article XXIII of the American Declaration, coupled with the principle of nondiscrimination, indicates that such “customary land tenure systems” should receive legal recognition.²³⁸ The Danns cited ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, article 14, as support for this claim.²³⁹ They also cited to article XVIII of the proposed American

65, which only has jurisdiction over states parties to the Convention or states that voluntarily assent to the Court’s jurisdiction, *see id.* arts. 61-62. The United States has not ratified the American Convention on Human Rights. Office of Int’l Law, Org. of Am. States, American Convention on Human Rights Pact of San Jose, Costa Rica, <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited May 30, 2007). Thus, the Commission may interpret United States compliance with the American Declaration but not with the American Convention on Human Rights. *See* Rules of Procedure of the Inter-American Commission of Human Rights art. 49 (Oct. 27, 2006), available at <http://www.cidh.org/Basicos/basic16.htm>.

233. *Dann*, Inter-Am. C.H.R., Report No. 75/02, ¶ 2.

234. *Id.*

235. *Id.* ¶¶ 82-87, 116.

236. *Id.* ¶ 45.

237. *Id.*

238. *Id.* ¶ 46.

239. *Id.* Article 14 of the ILO Convention (No. 169) provides that:

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

Declaration of the Rights of Indigenous People and article 26 of the Draft United Nations Declaration on the Rights of Indigenous Peoples for the principle that the United States should recognize the laws, customs, and land tenure system of the Shoshone.²⁴⁰

The Danns complained that the United States failed to give them equal protection under the law since the United States did not afford the same level of protection to the Danns' aboriginal property rights as the State offers for the property rights of non-Indians.²⁴¹ As evidence, the Danns cited the State's justification of "encroachment" as a method of extinguishing indigenous property rights; the Danns claimed that this amounted to little more than a legal reward for trespassers and cited a United Nations report that such transfers of property as a result of trespass constitute systemic discrimination against indigenous people.²⁴² Finally, even were the State to claim that the State had granted title over the land to others, such an action did not occur with the protections of the 5th Amendment.²⁴³ The Danns cited to the *Mabo* case for the proposition that legislation that purports to extinguish native title may be unfair and discriminatory towards indigenous peoples.²⁴⁴

To counter these claims, the United States specifically rejected the claim of a violation of article XXIII (right to property) on the basis that the right protects *only* individual property rights, not those of groups such as the Shoshone.²⁴⁵ The

to resolve land claims by the peoples concerned.

ILO 169, *supra* note 80, art. 14. The United States has not signed or ratified ILO 169, *see* ILOLEX: Conventions, <http://www.ilo.org/ilolex/english/convdisp1.htm> (follow "C169" hyperlink; then follow "See the ratifications for this Convention" hyperlink) (last visited May 30, 2007), but some legal commentators assert that ILO 169 has become binding customary international law regardless of whether a particular country has signed it or not. *See, e.g.,* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 14-15 (2004). In some cases in the Inter-American human rights system, ILO 169 has played an important role. *See, e.g., infra* notes 297, 309-12 and accompanying text (discussing Paraguay's ratification of ILO 169 and its importance in the *Yakye Axa* case).

240. *Dann*, Inter-Am. C.H.R., Report No. 75/02, ¶ 47 (citing Draft U.N. Declaration, *supra* note 85, art. 26; *Proposed American Declaration on the Rights of Indigenous Peoples*, *supra* note 60, art. XVIII).

241. *Id.* ¶¶ 53, 56.

242. *Id.* ¶ 54 (citing U.N. ECOSOC, Comm'n on Human Rights, *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Relations Between Indigenous Peoples and States*, 5, U.N. Doc. E/CN.4/1989/22, HR/PUB/89/5 (Feb. 8, 1989)).

243. *Id.* ¶ 55.

244. *Id.* ¶ 58 (citing *Mabo v. Queensland I* (1988) 166 C.L.R. 186 (Austl.)).

245. *Id.* ¶ 93. As of the drafting of the Restatement (Third) of the Foreign Relations Law of the United States in 1987, all countries appeared to acknowledge certain core rights to private property. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. k (1987). Still, disagreement among countries about the scope of the human right to

United States also argued that the Proposed American Declaration on the Rights of Indigenous People and ILO 169 do not form appropriate bases for the petition to the Inter-American Commission on Human Rights since the United States has not signed or ratified these agreements.²⁴⁶ The United States also defended its actions by arguing that the ownership of the land in question had been part of a lengthy administrative process to determine ownership.²⁴⁷ The United States admitted that the Shoshone had traditionally occupied much of Nevada, that the United States does recognize the rights of aboriginal peoples to occupy and use their traditional lands, and that the land in question had been ceded to the United States by Mexico in 1848 subject to the occupancy of the Native Americans.²⁴⁸ The United States claimed, however, that it had subsequently treated much land traditionally occupied by the Shoshone as federal land.²⁴⁹ Under the ruling of the *Mabo* case, such treatment of land inconsistent with the recognition of aboriginal title would effectively extinguish that title. Thus, the United States acknowledged that it had taken land of the Shoshone.²⁵⁰ The United States claimed, however, that this taking had been compensated for by payment according to proper legal processes.²⁵¹

In analyzing the case, the Commission noted that interpretation of the American Declaration should take place in light of all its provisions as well as other cases and developments in international human rights law since the American Declaration was written.²⁵² Furthermore, the Commission emphasized that such developments in international human rights law specifically included the American Convention on Human Rights as an “authoritative expression of the fundamental principles set forth in the American Declaration.”²⁵³

In its considerations, the Commission noted that the human rights of indigenous groups have unique qualities. For instance, the Commission said that there exists a

collective aspect of indigenous rights, in the sense of rights that are realized in part or in whole through their guarantee to groups or

property led drafters to conclude that such disagreements meant that the right to property had *not* become a principle of customary international law. *Id.* (noting that the right to property is not an international human right).

246. *Dann*, Inter-Am. C.H.R., Report No. 75/02, ¶ 94.

247. *Id.* ¶¶ 76, 82-91.

248. *Id.* ¶ 80.

249. *Id.*

250. *Id.* ¶¶ 83-84.

251. *Id.* ¶¶ 83-85. Compensation of over \$26 million was based on the 1872 estimated land value of fifteen cents per acre plus loss of gold and other resources. *Id.* ¶ 85.

252. *Id.* ¶¶ 96-98.

253. *Id.* ¶ 97.

organizations of people. And this recognition has extended to acknowledgement of a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection. The Commission has observed, for example, that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples and that control over the land refers both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group.²⁵⁴

In setting out its findings of fact, the Commission concluded that the question of whether Shoshone aboriginal title rights had been extinguished was never effectively litigated.²⁵⁵ While the Commission commended the United States for having established an administrative procedure for dealing with indigenous land claims,²⁵⁶ the Commission also concluded that the procedure had failed to live up to contemporary international law protections of the rights of indigenous peoples to their traditional lands.²⁵⁷ The Commission found that the process did not afford an opportunity for the Danns to participate, failed to offer the same protections given to others in a takings case, and failed to argue fairly on the merits where and when indigenous land rights had been extinguished.²⁵⁸ As a result, the Commission found that the United States had violated articles II, XVIII, and XXIII of the American Declaration of the Rights and Duties of Man by failing to equally protect the rights of the Danns to property.²⁵⁹ The Commission recommended that the United States review its laws, procedures, and practices and adopt necessary legislation or procedures to protect the right of indigenous peoples — including the Danns — to property, as required by the American Declaration.²⁶⁰

The United States has largely disregarded the recommendations of the Commission. According to one source, the U.S. government continues to threaten the Danns with huge fines for grazing cattle on land the U.S.

254. *Id.* ¶ 128 (footnotes omitted).

255. *Id.* ¶ 137.

256. *Id.* ¶ 138.

257. *Id.* ¶ 139.

258. *Id.* ¶¶ 135-45.

259. *Id.* ¶ 172.

260. *Id.* ¶ 173.

government claims it owns, and continues to threaten the Danns with cutting off their access to ancestral lands and taking the cattle and horses that the Danns pasture on what the Danns say are traditional Shoshone lands.²⁶¹

5. *The Mopan Maya Case (Belize)*²⁶²

The 2004 case of the Maya Indigenous Communities of the Toledo District of Belize provides a compelling example of the international human right to communal property. On facts similar to those in *Awas Tingni*, the Inter-American Commission on Human Rights found an analogous property right for the Mopan Maya of southern Belize, but this time the Commission grounded the right squarely in international law, and applied it in a common law jurisdiction.

The Mopan Maya submitted a petition to the Inter-American Commission alleging that the government of Belize had violated, inter alia, articles II (right to equality before the law), XVIII (right to a fair trial), and XXIII (right to property) of the American Declaration on the Rights and Duties of Man.²⁶³ The Mopan Maya based these allegations on four primary factual bases: (1) the Mopan Maya had traditionally used and occupied the area in question; (2) the state had failed to delineate, demarcate, and legally recognize the land of the Mopan Maya; (3) the state had granted logging and oil concessions in

261. See Indian Law Resource Center, Western Shoshone / Dann Case, http://www.indianlaw.org/main/projects/past_projects/ws_dann (last visited Apr. 12, 2007). In addition, the U.N. Committee on the Elimination of Racial Discrimination has expressed concern that U.S. treatment of the Shoshone fails to meet the international standards to which the United States has bound itself by treaty. See, e.g., Erica Bulman, *U.N. Backs Shoshone's Dispute*, DESERET MORNING NEWS (Salt Lake City, Utah), Mar. 11, 2006, at B06.

262. Maya Indigenous Cmty's. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004), available at <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm> The Inter-American Commission released Report No. 96/03 in 2003 for this same case. *Id.* ¶ 188. Subsequent to Report No. 96/03, the Commission received a request from Belize for permission to publish the report. *Id.* ¶ 190. The Commission received no other communication from Belize during the sixty days following transmission of Report No. 96/03 to Belize. *Id.* ¶ 191.

263. *Id.* ¶ 2. The Mopan Maya also claimed violations of articles I, III, VI, XI, and XX, but the Commission only found violations of II, XVIII, and XXIII. *Id.* at ¶¶ 2, 194-96. The Commission also reaffirmed that the American Declaration of the Rights and Duties of Man constitutes an international legal obligation for all members of the Organization of American States. *Id.* ¶ 85.

Belize, like the United States, is not subject to the American Convention on Human Rights but solely to the American Declaration on the Rights and Duties of Man. See Office of Int'l Law, Org. of Am. States, American Convention on Human Rights Pact of San Jose, Costa Rica, <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited May 30, 2007). Thus the case could not be referred to the Inter-American Court. See American Convention on Human Rights, *supra* note 65, art. 62.

areas claimed by the Maya without consulting the Maya; and (4) the Maya had been subjected to unreasonable delay in their domestic legal proceedings to protect their property right.²⁶⁴

The Maya asserted in their petition that the common law recognized their aboriginal rights,²⁶⁵ but then went on to argue that, even if it did not, the domestic law of Belize is not determinative of their property rights because international law grants rights to which the common law must conform.²⁶⁶ Belize, in turn, argued that it was factually unclear that the Maya had land rights and claimed a common law test different than that advocated by the Maya.²⁶⁷ In its analysis, the Commission pointed out that the problem in this case was not so much that the state owns the land through a reservation system, but that there is no clarity or certainty in the tenure of the Mayans on their traditional lands because the lands were never delimited or demarcated, nor were the rights of the Maya to these lands defined.²⁶⁸

Both parties applied the *Mabo* test for aboriginal title, focusing on the facts most favorable to their position.²⁶⁹ The Commission, however, emphasized that international law had continued to develop an obligation of states to respect the traditional communal property of indigenous peoples due to its importance to their cultural survival.²⁷⁰ Thus, the Commission made it clear that it was not relying on domestic property law for its conclusions. Instead, citing to cases in the European human rights system, the court stated:

[T]he organs of the inter-American human rights system have recognized that the property rights protected by the system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that *the right*

264. *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶ 20.

265. *Id.* ¶¶ 40, 48. The Maya noted that, barring contradictory domestic precedent, Belize typically looked to precedents in other countries. *Id.* ¶ 48. The Maya then went on to cite precedents from several common law countries. *Id.* ¶ 48 n.39 (citing *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116-18 (1938); *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 69 (Austl.) (Brennan, J.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.); *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 (Can.); *Adong bin Kuwau v. Kerajaan Negeri Johor*, [1997] 1 M.L.J. 418 (H.C.) (Malay.); *Amodu Tijani v. Sec'y, S. Provinces*, [1921] 3 N.L.R. 21 (S.C.) (Nig.)).

266. *Id.* ¶ 40.

267. *Id.* ¶ 72.

268. *Id.* ¶¶ 108, 133. For the importance of title to land versus reservations and the security of indigenous land tenure, see *infra* Part VI.

269. See *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶ 59 n.52, ¶ 72 n.57.

270. *Id.* ¶¶ 113-14, 117.

*to property has an autonomous meaning in international human rights law.*²⁷¹

The Commission concluded that “the communal property right of the Maya people is not dependent upon particular interpretations of domestic judicial decisions concerning the possible existence of aboriginal rights under common law.”²⁷² The Commission reasoned that this right must be viewed as a *collective right* in the case of indigenous peoples, because in these communities “rights and freedoms are frequently exercised and enjoyed . . . in a collective manner, in the sense that they can only be properly ensured through their guarantee to an indigenous community as a whole.”²⁷³

6. *The Case of Yakye Axa Indigenous Community v. Paraguay*

During the summer of 2005 the Inter-American Court of Human Rights released its latest opinion related to the human right to communal property — the *Yakye Axa* case.²⁷⁴ The case presents the clearest example to date of the court explaining the importance of land to indigenous peoples and finding a *sui generis* right to communal property. In fact, for the first time, the court names the right as the human right to communal property.²⁷⁵

The Yakye Axa community consists of indigenous people that historically engaged in hunting and gathering — thus utilizing a large area of land — but that are now sedentary.²⁷⁶ The Chaco area of Paraguay where they reside underwent occupation by non-indigenous people at the end of the nineteenth and beginning of the twentieth century.²⁷⁷ During this period, parts of the Chaco were sold on the London stock market and missionaries began to enter

271. *Id.* ¶ 117 (emphasis added).

272. *Id.* ¶ 131.

273. *Id.* ¶ 113.

274. *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005). *Yakye Axa* is no longer the final word from the Inter-American Court on Human Rights regarding the international human right to communal property. After completion of the manuscript for this Article, the court issued its opinion in *Sawahoyamoxa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. (ser. C) No. 146 (March 29, 2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_esp2.pdf. The *Sawhoyamoxa* case involves similar issues to the *Yakye Axa* case. For example, the Court found that Paraguay violated article 21 of the American Convention on Human Rights. *Id.* at 144. The *Sawhoyamoxa* case also considered the conflict between existing rational use of land and claims to that land by indigenous people. *Id.* at ¶¶ 135, 139, 210-15.

275. *See, e.g., Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005). ¶¶ 50.108, 96, 154, 202, 215 (referring to the *derecho a la propiedad comunitaria* and the *derecho a la propiedad comunal* of indigenous peoples).

276. *Id.* ¶¶ 50.2-.3.

277. *Id.* ¶ 50.2.

the indigenous territory that had been sold.²⁷⁸ Anglican missionaries began operation of cattle ranches in the area, including the first one in the area to employ indigenous people living on the ranch.²⁷⁹

In 1979, the Anglican church began a project in which the church acquired various new ranches with a plan to resettle indigenous communities currently on other ranches and supply them with agricultural and educational assistance.²⁸⁰ One of these ranches was *El Estribo*.²⁸¹ The Yakye Axa community, located on the *Loma Verde* ranch — part of the ancestral territory of the Yakye Axa community — suffered from a severe lack of food and health services, unpaid or very low wages, and sexual exploitation of the women by Paraguayan workers.²⁸² Thus, in 1986, the community moved to the resettlement ranch of *El Estribo* even though that ranch was located far away from the land on which the community traditionally lived.²⁸³ However, another indigenous group already lived at *El Estribo* and marginalized the newly-arrived Yakye Axa community.²⁸⁴ The Yakye Axa suffered from a lack of food and water at this new site as well, and many of the youngest and oldest community members died as a result.²⁸⁵

By 1993 the Yakye Axa community decided to begin the administrative process of reclaiming their ancestral land in and around the *Loma Verde* ranch.²⁸⁶ The process began with the community asking the state to formally recognize the community's leaders and the legal personhood of the community — a process which lasted eight years.²⁸⁷ In 1993, the community approached the Institute of Rural Welfare (IRW) to inform the agency that the community wished to reclaim its original territory in and around the *Loma Verde* and other ranches.²⁸⁸

In 1998, a legal consultant for the IRW determined that the *Loma Verde* ranch indeed comprised part of the “traditional habitat” of the Yakye Axa community,²⁸⁹ and opined that the constitution of Paraguay indicated the rights of the indigenous people to their ancestral territory is “prior to and superior

278. *Id.* ¶ 50.10.

279. *Id.* ¶ 50.11.

280. *Id.* ¶ 50.12.

281. *Id.* *Estribo* means stirrup.

282. *Id.* ¶ 50.13.

283. *Id.* ¶¶ 50.12-.14.

284. *Id.* ¶ 50.15. This marginalization prevented the Yakye Axa community from freely exercising their cultural practices. *Id.*

285. *Id.*

286. *Id.* ¶ 50.16.

287. *Id.* ¶¶ 50.17-.22.

288. *Id.* ¶ 50.24.

289. *Id.* ¶ 50.37.

to” the rights of the private landowners now claiming the land.²⁹⁰ A few months after this, the IRW declared that the *Loma Verde* ranch was being “rationally exploited,”²⁹¹ thus removing the authority of the IRW to expropriate the property.²⁹²

The Paraguayan Indigenous Institute and IRW sought to enter into negotiations with the corporations that owned the land claimed by the community, but to no avail.²⁹³ The Paraguayan Senate (*camara de sendadores*) then considered laws to provide for expropriation of *Loma Verde*, but twice rejected such laws before approving a law in October 2003 to give title of a smaller and different piece of land to the Yakye Axa community and another indigenous community.²⁹⁴ The Yakye Axa community rejected this offer since they had never even been consulted about this option.²⁹⁵ By this time ten years had passed since the Yakye Axa had first begun their efforts to reclaim their ancestral territory.

During these events, the community had been engaged in legal battles to protect themselves and their claims. The community filed a suit for protection of their constitutional rights in March of 1997.²⁹⁶ In this suit, the community noted that they had been denied entry into their traditional lands to hunt or

290. *Id.* The legal consultant based this opinion on an interpretation of article 62 of Paraguay’s constitution, which states that “[t]his Constitution recognizes the existence of the indigenous villages, defined as cultural groups prior to the formation and organization of the State of Paraguay.” CONSTITUCIÓN POLÍTICA DEL PARAGUAY DE 1992 art. 62 (“Esta Constitución reconoce la existencia de los pueblos indígenas, definidos como grupos de cultura anteriores a la formación y organización del Estado paraguayo.”).

291. *Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 50.38.

292. *Id.* ¶¶ 97, 142 (citing Ley No. 904/81, 18 Dec. 1981, Que establece el Estatuto de las Comunidades Indígenas [That Establishes the Statute of Indigenous Communities] (Para.); Ley No. 854/63, 29 Mar. 1963, Que establece el Estatuto Agrario [That Establishes the Agrarian Statute] (Para.)). This represents part of the doctrine of the social function of land in Latin America: if agricultural land is fulfilling the social function, it may be expropriated by the state, and conversely, if the land *is* fulfilling the social function, it may not be expropriated for land reform. *See generally* Ankersen & Ruppert, *supra* note 71, at 69.

293. *Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 50.40-44. The three corporations were the Livestock Capital Group, Inc.; Florida Agricultural Corporation; and Agricultural Development, Inc. *Id.* ¶ 50.40. The Florida Agricultural Corporation and Agricultural Development, Inc., were corporations registered in the state of Florida, United States, until their administrative dissolution for failure to file their 2003 annual report. *See* Fla. Dep’t of State, Div. of Corps., Inquire by Name <http://www.sunbiz.org/corinam.html> (search for either “Florida Agricultural” or “Agricultural Development”; then follow “Florida Agricultural Corporation [Document No.] S02074” hyperlink or “Agricultural Development, Inc. [Document No.] S02904” hyperlink, respectively) (last visited May 30, 2007).

294. *Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 50.56-60.

295. *Id.* ¶ 50.61.

296. *See id.* ¶ 50.62.

fish, and that this denial violated both the Paraguayan constitution as well as the Paraguayan law that ratified ILO 169.²⁹⁷ The suit was dismissed on procedural grounds.²⁹⁸

Not only did the community fail in its constitutional suit, but a judge ruled against the community in a suit for trespass and forbid any members of the community from hunting, cutting trees, or even drinking water on the land they claimed in the *Loma Verde* ranch.²⁹⁹ The court went as far as ordering removal of the community from their roadside encampment where the Yakye Axa had been residing since attempting to return to their previous *Loma Verde* ranch home and being refused entry.³⁰⁰

After noting these and other findings, the Inter-American Court of Human Rights concluded, inter alia, that the administrative delays by Paraguay and the ineffectiveness of the administrative measures designed to protect the Yakye Axa community's right to communal property constituted violations of the right to judicial protection.³⁰¹ Much like in the *Awás Tingni* case,³⁰² the court here found a lack of judicial protection because the domestic procedures of Paraguay failed to live up to the legal protections written in Paraguay's domestic law. For example, the court noted that the constitution of Paraguay guarantees indigenous peoples rights to communal property and that they may not be transferred or removed from their land without their express consent.³⁰³ Despite this and other laws supposedly protecting indigenous rights to communal property, the court noted that the administrative process of the state failed to effectively secure these rights.³⁰⁴

The court then considered whether Paraguay had violated the right to property of the community that is protected by article 21 of the American Convention on Human Rights.³⁰⁵ The Court began by making several crucial observations that guided its reasoning. First, the court emphasized the cultural importance of land to indigenous people.³⁰⁶ Second, the court noted that

297. *See id.* *See generally* Ley No. 234/93, 10 Aug. 1993, Que ratifica el Convenio No. 169 sobre Pueblos Indígenas y Tribales en Países Independientes de la Organización Internacional del Trabajo [That Ratifies ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries] art. 14 (Para.).

298. *See Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 50.63.

299. *See id.* ¶ 50.85.

300. *See id.* ¶ 50.87.

301. *Id.* ¶¶ 86-89, 94, 97-98, 104.

302. *See supra* text accompanying note 220.

303. *Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 74 (citing CONSTITUCIÓN POLÍTICA DEL PARAGUAY DE 1992 art. 64).

304. *Id.* ¶¶ 94, 97.

305. *Id.* ¶¶ 120-56.

306. *See, e.g., id.* ¶¶ 50.11, 124, 216.

international human rights law is dynamic and evolutionary in the context of changing times and circumstances.³⁰⁷ Third, the American Convention on Human Rights forbids the court from interpreting the Convention to limit rights under a country's domestic law or any treaty signed by the country.³⁰⁸ Since Paraguay had ratified the International Labour Organization's Convention No. 169 on Indigenous Peoples and incorporated it into domestic law,³⁰⁹ the court interpreted the American Convention with the aid of ILO 169.³¹⁰ This interpretation, along with recognition of the unique and close association of indigenous cultures with their land and resources,³¹¹ led the court to conclude that all of the cultural needs of indigenous people related to property should receive the protection of property guaranteed by article 21 of the American Convention on Human Rights.³¹²

This conclusion led the court to address Paraguay's argument that the property rights of the private owners with title to the ancestral land of the Yakye Axa community were also protected by the American Convention on Human Rights.³¹³ While the court agreed,³¹⁴ it emphasized that the Convention and the court's own jurisprudence provided guidelines on how to proceed and which restrictions are acceptable in conflicts between indigenous rights to property and the rights of private individuals.³¹⁵ Infringement of indigenous rights to property often affects other basic rights of an entire community,³¹⁶ whereas infringement of individual private property rights may be necessary to achieve societal aims and may be offset by payment of just compensation — a right also recognized by the American Convention.³¹⁷

307. *Id.* ¶ 125 (citing Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; American Convention on Human Rights, *supra* note 65, art. 29).

308. *Id.* ¶ 129 (citing American Convention on Human Rights, *supra* note 65, art. 29(b)).

309. *Id.* ¶ 130; *see also* Ley No. 234/93, 10 Aug. 1993, Que ratifica el Convenio No. 169 sobre Pueblos Indígenas y Tribales en Países Independientes de la Organización Internacional del Trabajo [That Ratifies ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries] art. 14 (Para.).

310. *Yakye Axa*, 2005 Inter-Am. Ct. H.R. (Ser. C) No. 125, ¶¶ 127, 130.

311. *See, e.g., id.* ¶¶ 131, 135, 147, 154.

312. *Id.* ¶ 137.

313. *Id.* ¶¶ 142-43.

314. *Id.* ¶ 143.

315. *Id.* ¶ 144.

316. *Id.* ¶ 147.

317. *Id.* ¶ 148 (citing American Convention on Human Rights, *supra* note 65, art. 21, para. 2). The Court added that this does not necessarily mean that when state or private property rights conflict with indigenous property rights, the latter will always prevail over the former. *Id.* ¶ 149. But if a state cannot return indigenous land to the indigenous community, the resulting compensation should be oriented towards the important relationship between indigenous cultures and their lands. *Id.*

The court thus held that Paraguay violated the right to property in article 21 of the American Convention on Human Rights.³¹⁸ The court awarded the Yakye Axa community \$15,000 in material damages and costs,³¹⁹ and \$950,000 for all other damages.³²⁰ Furthermore, the court ordered Paraguay to grant free title of traditional Yakye Axa land to the community, to adopt domestic procedures to secure the legal rights Paraguayan law grants indigenous peoples, and to acknowledge publicly the human rights violations that harmed the Yakye Axa community.³²¹

The *Yakye Axa* case resembles in many respects the *Awes Tingni* case.³²² Both cases resulted in a judgment requiring the violating state to delimit, demarcate, and title land to the plaintiff indigenous communities.³²³ In both cases the Inter-American Court of Human Rights' analysis contained dual pillars consisting of domestic legal protections and international legal protections;³²⁴ the court, however, never made clear if either independently resulted in a violation of the American Convention's property protections, or if both were necessary. In *Awes Tingni*, the court concluded that Nicaragua had failed to provide effective administrative processes to realize the right to delimiting, demarcating, and titling indigenous land as provided for by law,³²⁵ and in *Yakye Axa* the court said the same of Paraguay's procedures.³²⁶

Yakye Axa does, however, apply more textual legal analysis and strengthen the analytical foundations for protection of indigenous property rights under article 21 of the American Convention on Human Rights. Additionally, the court emphasized the need of the state to cooperate with indigenous communities rather than simply presenting a *fait accompli* to the community that the state assumes resolves the issue.³²⁷ Potentially, however, the most important parallel between *Awes Tingni* and *Yakye Axa* lies in the future. Just as *Awes Tingni*'s court relied on the dual pillars of favorable domestic law and

318. *Id.* ¶ 242(2).

319. *Id.* ¶¶ 193-94, 232.

320. *Id.* ¶¶ 199-206.

321. *Id.* ¶ 207(a), (c)-(d).

322. One difference, however, is that the Yakye Axa community sought to reclaim ancestral lands they did not currently occupy whereas the Awes Tingni were seeking protection primarily for land they still occupied. The judgment in *Yakye Axa* also, like *Awes Tingni*, demands that the state pass laws and regulations to bring itself into compliance with the American Convention on Human Rights. *Id.* ¶ 207. *Yakye Axa* added the additional requirement on the state of creating and funding a community development fund for the community. *Id.* ¶ 205.

323. *See id.* ¶ 215, 233; *supra* text accompanying note 226.

324. *See supra* text accompanying notes 219-23, 301-12.

325. *See supra* text accompanying note 220.

326. *See supra* text accompanying notes 301-04.

327. *Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 152.

international law, so does *Yakye Axa*. And just as the *Awes Tingni* holding of a right to delimiting, demarcating, and titling subsequently stood on its own in the Commission's *Mopan Maya* case without the favorable domestic law of the *Awes Tingni*, the future likely holds a case where the Inter-American Court will find an indigenous right to communal property in the absence of Paraguay's favorable domestic law.

During the two decades spanning the Inter-American Commission on Human Rights' decision in *Yanomami* and the Inter-American Court of Human Rights' decision in *Yakye Axa*, the inter-American human rights system made important pronouncements related to the emerging human right to communal property. These included statements on the important role land and resources play for indigenous peoples;³²⁸ the need to demarcate indigenous lands;³²⁹ the need for effective domestic systems to protect indigenous land rights;³³⁰ the role of discrimination in indigenous land issues;³³¹ the existence of an independent international basis for the human right to communal property;³³² and the dynamic, progressive nature of human rights law and its interpretations.³³³ Taken together, these cases articulate a vision of property that can be held communally, and they indicate a duty on the part of governments to recognize indigenous rights in that property. The precise nature and quality of that right, however, remains shrouded in ambiguity.

328. See, e.g., *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 114, 116, 120 (2004), available at <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm>; *Coulter v. Brazil (Yanomami)*, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1 ¶ 2 (Considering) (1985), available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>; *id.* ¶ 3(b) (Resolves); *Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 120(c), 124, 131-37; *Mayagna (Sumo) Awes Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

329. See, e.g., *Yanomami*, Inter-Am. C.H.R., Report No. 12/85, ¶¶ 1-3 (Resolves); *Awes Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153.

330. See, e.g., *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶¶ 131, 140 (2002), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm>; *Awes Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 114, 138.

331. See, e.g., *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶¶ 95-97, 167; *Dann*, Inter-Am. C.H.R., Report No. 75/02, ¶ 125.

332. See, e.g., *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶¶ 117, 131.

333. See, e.g., *id.* ¶¶ 113-14, 117; *Dann*, Inter-Am. C.H.R., Report No. 75/02, ¶¶ 167-68; *Awes Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 146.

V. The Analytical Basis for the International Human Right to Communal Property

Analysis of the emerging right to communal property can be viewed from two theoretical foundations. The first consists of the traditional western concept of a right to property free from arbitrary government interference, combined with a right to be free from racial, ethnic, or cultural discrimination. The other foundation arises from the simple assertion that the indigenous right to property is truly *sui generis* in the western property paradigm. This latter view often relies on the necessity of positing the *sui generis* right to property for indigenous peoples to realize other group-based human rights as a distinct, and distinctly different, “bundle of rights.” This Part examines these two conceptual foundations and their meaning for the developing right to communal property.

A. One Plus One Equals Three: The Third-Generation Right to Communal Property as a Combination of First-Generation Rights

The Inter-American cases arguably demonstrate an expansion from a “negative” right to property to what could be termed a “positive” right to property for indigenous people.³³⁴ The negative “first-generation” right to property only required that governments not interfere with or actively eliminate private property. A positive right to property goes further. It specifically requires that governments take some affirmative steps to protect, or create, private property, in this case communally-owned indigenous land.³³⁵ For example, one such positive step might be enacting legislation and regulations to create effective legal processes for identifying, demarcating, and titling indigenous lands.³³⁶ The negative right to property has become so

334. Cf., e.g., Marc Bossuyt, *International Human Rights Systems: Strengths and Weaknesses*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 47, 52 (Kathleen E. Mahoney & Paul Mahoney eds., 1992) (noting that civil rights primarily require state abstention from action whereas social rights require active intervention from the state).

335. One common misperception is that communal property cannot be private property. See *supra* text accompanying notes 10-12 (distinguishing between open access and property owned by a defined group and noting that the latter is “private” in that the those outside the defined group of owners may be excluded).

336. See, e.g., *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶ 132 (“Accompanying the existence of the Maya people’s communal right to property under Article XXIII of the Declaration is a correspondent obligation on the State to recognize and guarantee the enjoyment of this right. In this regard, the Commission shares the view of the Inter-American Court of Human Rights that this obligation necessarily requires the State to effectively delimit and demarcate the territory to which the Maya people’s property right extends and to take the appropriate measures to protect the right of the Maya people in their territory, including official recognition of that right.” (footnote omitted)).

widely accepted as a first-generation right that it appears in the constitution of every country in the western hemisphere,³³⁷ as well as most human rights documents.³³⁸ The human right to communal property has not enjoyed the same level of support.

One complaint raised against second and third-generation rights is that they represent nonjusticiable issues and require costly positive actions on the part of states that may lack the resources to enforce these rights.³³⁹ The facile effort to classify rights as “negative” or “positive,” however, fails to take account of the fact that some rights commonly conceived of as first generation or “negative” rights (such as that to a speedy trial) require a substantial positive investment on the part of the state, whereas some rights considered “positive” (such as the right to unionize) require little expenditure on the part of the state.³⁴⁰

This same argument applies for the protection of property rights. Some might claim that the right to communal property is a “positive” right since it

337. See, e.g., U.S. CONST. amend. V; CONSTITUCIÓN ARGENTINA [CONST. ARG.] art. 17; CONSTITUCIÓN DE BELICE DE 1981 § 3(d); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE BOLIVIA DE 1967 art. 7; CONSTITUIÇÃO FEDERAL [C.F.] art. 5, §§ 22-23 (Braz.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 art. 19, no. 24; CONSTITUCIÓN POLÍTICA DE 1991 art. 58 (Colom.); CONSTITUCIÓN DE 1985 CON LAS REFORMAS DE 1993 art. 39 (Guat.); CONSTITUCIÓN POLÍTICA DE 1982 arts. 61, 103, 105-06 (Hond.); JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 arts. 13, 18; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] [Constitution] tit. I, art. 5, La Gaceta [L.G.] 9 Jan. 1987, *as amended by Ley No. 192*, 1 Feb. 1995, Reforma Parcial a la Constitución Política de la República de Nicaragua, L.G., 4 July 1995; CONSTITUCIÓN POLÍTICA DEL PARAGUAY DE 1992 art. 109; CONSTITUCIÓN POLÍTICA DEL PERU DE 1993 arts. 2, 70; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA ORIENTAL DEL URUGUAY DE 1967 CON LAS MODIFICACIONES HASTA 1996 arts. 7, 32; *cf. supra* Part III.B.1. While the first-generation right to property enjoys virtually uniform acceptance, the scope of the right varies tremendously. See, e.g., Ankersen & Ruppert, *supra* note 71. Even Cuba recognizes first-generation property rights, though they may be more limited in scope than in other countries. See, e.g., CONSTITUCIÓN POLÍTICA DE 1976 CON REFORMAS HASTA 2002 arts. 19, 21-24 (Cuba), available at <http://www.cuba.cu/gobierno/cuba.htm>.

338. African Charter on Human and Peoples' Rights, *supra* note 67, art. 14; American Convention on Human Rights, *supra* note 65, art. 21; International Covenant on Civil and Political Rights, *supra* note 57, art. 1, para. 2; International Covenant on Economic, Social, and Cultural Rights, *supra* note 59, art. 25; Protocol (No. 1) to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 61, art. 1; Universal Declaration of Human Rights, *supra* note 64, art. 17; American Declaration of the Rights and Duties of Man, *supra* note 66, art. XXIII. This history of explicit protection of the right to property goes back much farther in the western legal tradition, beginning in written form with the Magna Carta in 1215. See *supra* notes 39-42 and accompanying text (referring to Magna Carta's protection of the possession and use of property).

339. See, e.g., DOWELL-JONES, *supra* note 56, at 14-19.

340. See, e.g., *id.* at 4.

will impose affirmative burdens on states to identify, demarcate, and title indigenous lands. These costs, however, do not differ greatly from those incurred in protection of the popular notions of private property by the public, the state, and the judicial system. Costs of protecting these rights include: filing fees for titles, local and state expenditures to develop property registry systems and maintain them, and the tremendous contribution of the judicial system in conflict resolution, including quiet-title actions. Considered in this light, the costs to recognize the international human right to communal property only appear greater because the costs come due all at once, as western governments have refused to pay any of the costs for centuries.

Viewed from this perspective, treating the human right to communal property as a “positive” right says more about the past refusal of western legal systems to recognize the communal property rights of indigenous peoples than it says about the present difficulty of recognizing and protecting such interests. This past refusal to recognize indigenous property rights rests largely on discrimination.³⁴¹ Nevertheless, international treaties, covenants, and declarations clearly prohibit discrimination on many bases and require equality of treatment for all peoples.³⁴² International cases reiterate this requirement.³⁴³ Similarly, most states have various levels of constitutional or statutory protections for equality and prohibitions on discrimination.³⁴⁴

341. See, e.g., *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 40-42 (Austl.) (Brennan, J.); *Alexkor Ltd. v. Richtersveld Cmty. & Others* 2003 (12) BCLR 1301 (CC) ¶¶ 92-99 (S. Afr.), available at <http://www.constitutionallaw.co.za/alert/cases/alexkor.pdf>; *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 140(b) (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

342. See, e.g., U.N. Charter art. 1, para. 2; *id.* art. 13, para. 1(b); *id.* art. 55; African Charter on Human and Peoples' Rights, *supra* note 67, art. 2; American Convention on Human Rights, *supra* note 65, art. 1; International Covenant on Civil and Political Rights, *supra* note 57, art. 2, para. 1; International Covenant on Economic, Social, and Cultural Rights, *supra* note 59, art. 2, para. 2; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 312 U.N.T.S. 221, Europ. T.S. No. 5; Universal Declaration of Human Rights, *supra* note 64, art. 2.

343. *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 164-65 (2004), available at <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm> (citing *Juridical Condition & Rights of Undocumented Migrants*, Advisory Opinion, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 83, 173 (Sept. 17, 2003)) (asserting that equality and nondiscrimination form part of general international law and have risen to the level of *jus cogens*).

344. See, e.g., U.S. CONST. amend. XIV; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA art. 33; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 art. 19; CONSTITUCIÓN [C.E.] art. XIV (Spain).

Freedom from state-structured discrimination is a civil and political, or “first generation,” human right.³⁴⁵

If we treat indigenous peoples “equally,” we cannot help but recognize their distinct forms of land tenure. “Equality before the law must encompass cultural diversity and difference, or it risks being discriminatory by failing to recognise that cultural diversity.”³⁴⁶ For example, what, other than racial or cultural discrimination, could explain the failure to recognize the property rights of native people living on Greenland when Denmark and Norway were fighting in the International Court of Justice for control over the island?³⁴⁷ In *Mabo* the court noted that the justifications for applying the *terra nullius* doctrine to indigenous lands were founded on a failure to appreciate cultural differences in land tenure practices.³⁴⁸ Commentators have noted racism in the United States’ “plenary power” doctrine towards North American Indians.³⁴⁹ The IACHR also implied a charge of racism against the United States when it concluded that the United States had not protected the land of Shoshone Indians to the same degree as it protected the land of non-Indians.³⁵⁰ Once we acknowledge that many indigenous groups traditionally hold land collectively, prohibitions on racial discrimination dictate that the state must protect that right the same as the state protects the property of an individual under the first generation of human rights. The negative, or first generation, human right to be free from arbitrary deprivation of property, coupled with prohibitions on discrimination, lead to protection of indigenous communal property rights.³⁵¹

Thus, one theoretical approach is that an assiduous application of antidiscrimination law and private property protections will suffice to protect

345. See *supra* text accompanying notes 56-57.

346. RACHEL SIEDER, CUSTOMARY LAW AND DEMOCRATIC TRANSITION IN GUATEMALA 53 (1997).

347. See *supra* notes 168-80 and accompanying text.

348. See, e.g., *supra* text accompanying notes 162-63 (detailing the culturally biased basis for a broad conception of *terra nullius*).

349. *Indigenous Peoples and Their Relationship to Land*, *supra* note 79, ¶ 48 (describing the plenary power doctrine, in which the “United States Congress may exercise virtually unlimited power over indigenous nations and tribes and their property. No other population or group is subject to such limitless and potentially abusive governmental power.”).

350. *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶¶ 143-45 (2002), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm>.

351. See, e.g., *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 157-71 (2004), available at <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm>; see also S. James Anaya, *Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests*, 7 BUFF. ENVTL. L.J. 1 (2000).

the right of indigenous peoples to communal land. Under this analysis, the developing international human right to property simply demonstrates that one (first-generation right to property) plus one (first-generation freedom from discrimination) equals three (third-generation right to communal property).

B. The Sui Generis Nature of the Communal Right to Property

Some observers are less sanguine about the use of antidiscrimination law and traditional property protections to secure the land rights of indigenous peoples because antidiscrimination laws may, in some instances, be used as a bar to protection of indigenous lands.³⁵² Despite the appeal of the argument that the international human right to communal property represents nothing more than an acknowledgement of the failure to incorporate communal property into western property protections, this conclusion seems too facile because the right also appears different in two important respects: (1) the purpose of the right is partly founded on the right of indigenous groups to maintain their cultural identity and, related to this, (2) the right requires that the legal norms governing communal tenure are the customary laws of the indigenous group.³⁵³ The first-generation human right to property does not necessarily consider either of these differences,³⁵⁴ even as the sui generis right to property could impose limitations on communal titles granted to indigenous people that may impede the evolution of indigenous property rights.

The differences between traditional western notions of “right to property” and the right of indigenous peoples to communal property may be so great that the international human right to communal property truly is sui generis.³⁵⁵ One reason for ascribing a fundamentally different nature to the international human right to communal property is that the right, in part, developed from the practical necessity of this right to indigenous peoples’ ability to exercise other human rights.³⁵⁶

352. Kingsbury, *supra* note 60, at 197-99 (citing the Australian case of *Gerhardy v. Brown* (1985) 159 C.L.R. 70, in which a trespass defendant challenged as discriminatory the law under which he was being prosecuted and which sought to protect the property of a defined indigenous group).

353. *Cf.* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151 (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf; see also *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶ 6.

354. See, e.g., Kingsbury, *supra* note 60.

355. *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 89 (Austl.) (Deane & Gaudron, JJ.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1081 (Can.).

356. I.e., the rights to a healthy environment, self-determination, religion, etc. See *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶ 114-154; *id.* ¶ 154 (observing that, in addition to violating the right to property, “the failure of the State to engage in meaningful consultation with the Maya people in connection with the logging and oil concessions in the Toledo District,

The human right of indigenous people to their culture provides a dramatic example. International law increasingly recognizes the right of indigenous populations to maintain their own culture.³⁵⁷ Treaties such as ILO 169 emphasize this right,³⁵⁸ as do draft declarations such as the Draft United Nations Declaration on the Rights of Indigenous Peoples,³⁵⁹ and the Proposed American Declaration on the Rights of Indigenous Peoples.³⁶⁰ The United Nations' Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities emphasizes the right to culture as well.³⁶¹ International case law also indicates that indigenous cultures have a right to maintain their tradition.³⁶² Even the constitutions and laws of many countries explicitly protect this right.³⁶³

and the negative environmental effects arising from those concessions, constitute violations of several other rights under international human rights law, including the right to life under Article I of the American Declaration, the right to religious freedom and worship under Article III of the American Declaration, the right to a family and to protection thereof under Article VI of the American Declaration, the right to preservation of health and well-being under Article XI of the American Declaration, and the 'right to consultation' implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and the principle of self-determination"); *id.* ¶ 156 ("[T]he Commission considers that the additional claims raised by the Petitioners are subsumed within the broad violations of Article XXIII of the American Declaration determined by the Commission in this case and therefore need not be determined."); *see also* ILO 169, *supra* note 80, art. 13.

357. One of the earliest examples of this right in international law came with the International Covenant on Civil and Political Rights: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." International Covenant on Civil and Political Rights, *supra* note 57, art. 27. For discussion of international cases based on article 27 of the ICCPR, see Kingsbury, *supra* note 60, at 203-08.

358. ILO 169, *supra* note 80, arts. 4, 5(a); *id.* art. 7, paras. 1, 3; *id.* art. 13, para. 1.

359. Draft U.N. Declaration, *supra* note 85, art. 9 ("Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.").

360. *Proposed American Declaration on the Rights of Indigenous Peoples*, *supra* note 60, art. 2, para. 2 ("Indigenous peoples have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Accordingly the states recognize *inter alia* the right of the indigenous peoples to . . . their cultures.").

361. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, arts. 1-2, U.N. Doc. A/Res/47/135/Annex (Dec. 18, 1992).

362. *See, e.g.*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

363. *Cf., e.g.*, CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE BOLIVIA DE 1967 art. 171; C.F.

Protections for culture go hand in hand with protections for the lands of indigenous peoples.³⁶⁴ The Inter-American Commission on Human Rights highlighted this connection by stating that property for indigenous peoples provides resources and “the geographical space necessary for the cultural and social reproduction of the group.”³⁶⁵ In a report on Peru, the IACHR stated that “[l]and, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community's integrity.”³⁶⁶

Similarly, in the *Mopan Maya* case, the Commission stated that it

has emphasized *the distinct nature of the right to property* as it applies to indigenous people, whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality. As the Commission has

art. 231 (Braz.); CONSTITUCIÓN POLÍTICA DE 1991 art. 330 (Colom.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 art. 86; CONSTITUCIÓN POLÍTICA DEL PARAGUAY DE 1992 art. 63; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE VENEZUELA art. 119. The examples given here are limited to Latin America as that is the focus of this article. However, many countries outside of Latin America also have explicit legal protections for the cultures of indigenous populations. Cf., e.g., KONGERIGET NORGES GRUNDLOV [Constitution] art. 110a (Nor.); Native Title Act, 1993 (Austl.), cited in U.N. ECOSOC, Sub-Comm. on the Promotion & Prot. of Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples*, Annex I, ¶ 3, U.N. Doc. E/CN.4/Sub.2/2004/30/Add.1 (July 12, 2004) (prepared by Erica-Irene A. Daes); Ob Obshchikh printsipakh organizatsii obshchin korennykh malochislennykh narodov Severa, Sibiri i Dal'nego Vostoka Rossiiskoi Federatsii [On Basic Principles of Organizing Communities of Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2000, No. 30, Item 3122, cited in *Prevention of Discrimination and Protection of Indigenous Peoples*, supra, Annex I, ¶ 11; O garantiakh prav korennykh malochislennykh narodov Rossiiskoi Federatsii [On Guarantees of Rights of Indigenous Peoples of the Russian Federation], SZ RF 1999, No. 18, Item 2208, cited in *Prevention of Discrimination and Protection of Indigenous Peoples*, supra, Annex I, ¶ 11.

364. See Colchester et al., supra note 190, at 10-11; see also Ley No. 24, 12 Jan. 1996, Por la cual se crea la Comarca Kuna de Madungandi [By Which the Kuna de Madungandi Region Is Created] ch. II, art. 2, G.O., 15 Jan. 1996 (Pan.), available at http://www.asamblea.gob.pa/NORMAS/1990/1996/1996_138_0699.PDF (granting land collectively to the Kuna of the region); id. ch. III, arts. 4-7 (granting qualified recognition of traditional Kuna authorities).

365. Inter-Am. Comm'n on Human Rights, *Report on the Situation of Human Rights in Ecuador*, ch. IX, at 115, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1997) (quoting Rodolfo Stavenhagen, *Indigenous Peoples: Emerging Actors in Latin America*, in ETHNIC CONFLICT AND GOVERNANCE IN COMPARATIVE PERSPECTIVE 1, 11 (Woodrow Wilson Int'l Ctr. for Scholars, Working Paper No. 215, Ralph Espach ed., 1995)).

366. Inter-Am. Comm'n on Human Rights, *Second Report on the Situation of Human Rights in Peru*, ch. X, ¶ 16, OEA/Ser.L/V/II.106, doc. 59 rev. (June 2, 2000).

previously recognized in respect of the right to property and the right to equality, “[f]or indigenous people, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture.”³⁶⁷

Much of what it means to be “indigenous” resides in the collective nature of landholdings in indigenous cultures.³⁶⁸ In *Awas Tingni*, the Inter-American Court on Human Rights noted that the right to property and community control of land and land tenure are inseparable parts of indigenous culture.³⁶⁹ Finally, *Dann* reiterated the link between land and culture:

The Commission has observed, for example, that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples and that control over the land refers both to its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group.³⁷⁰

Inter-American human rights system cases and reports have emphasized that the right of indigenous communities to their communal lands serves as a foundation for other human rights, including the right to religion,³⁷¹ the right to family,³⁷² the right to a healthy environment,³⁷³ and the right to self-

367. *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, ¶ 155 (2004) (emphasis added) (quoting *Report on the Situation of Human Rights in Ecuador*, *supra* note 365, ch. IX, at 103), available at <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm>.

368. *See, e.g., id.* ¶¶ 113-14.

369. *See, e.g., Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

370. *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 128 (2002) (citing *Report on the Situation of Human Rights in Ecuador*, *supra* note 365, ch. IX, at 115), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm>.

371. *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶ 155 (“[T]he concept of family and religion within the context of indigenous communities, including the Maya people, is intimately connected with their traditional land, where ancestral burial grounds, places of religious significance and kinship patterns are linked with the occupation and use of their physical territories.”); *id.* ¶¶ 114, 120 (quoting Inter-Am. Comm’n on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, pt. II.B, ¶ 15, at 81, OEA/Ser.L/V/II.62, doc. 10 rev. 3 (Nov. 29, 1983)); *id.* ¶ 124.

372. *Id.* ¶ 155.

373. *Cf. Coulter v. Brazil (Yanomami)*, Case 7615, Inter-Am. C.H.R., Report No. 12/85,

determination.³⁷⁴ Indeed, the relationship between other rights and property is so critical that in the *Mopan Maya* case the Inter-American Commission on Human Rights noted that the “distinct nature of the right to property as it applies to indigenous people” meant that additional claims of human rights violations by Belize were “subsumed within the broad violations of Article XXIII (right to property) of the American Declaration determined by the Commission in this case and therefore need not be determined.”³⁷⁵

Thus, indigenous communal property clearly involves a plethora of human rights not usually associated with the more narrow concept of the first-generation right to property. This bundle of human rights tied together by the right to communal property constitutes a significant theoretical departure from the typical first-generation right to property and its associated bundle of sticks and may not be adequately explained as one plus one equals three.

VI. *The Scope of the Human Right to Communal Property*

Just as the justifications for the right to communal property sometimes differ from those of the first-generation right to property, so may the scope of the right to communal property. This Part examines what rights fall within the right to communal property, including why limitations that apply to this right do not apply generally to the first-generation right to property.

A. *On Native Title and “Rights of Ownership and Possession”*

An excellent place to begin an inquiry into the scope of the right to communal property is the provision in the International Labour Organization’s Convention No. 169 stating that indigenous peoples have “rights of ownership and possession.”³⁷⁶ This language resulted from protracted negotiations on the topic of land rights that almost doomed the entire negotiation process of ILO 169.³⁷⁷ Even though an earlier ILO convention had ostensibly protected the

OEA/Ser.L/V/II.66, doc. 10 rev. 1 ¶ 1 (Resolves) (1985), available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> (finding a violation of the right to preservation of health and well being).

374. *Awes Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79. The concept of self-determination is an inherently collective right that can only be exercised by a group. SMITH, *supra* note 60, at 269.

375. *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶¶ 155-56. I.e., claimed violations of articles I (right to life, liberty, and personal security), III (right to religious freedom and worship), VI (right to a family and protection thereof), XI (right to preservation of health and well-being), and XX (right to vote and participate in government). *Id.*

376. ILO 169, *supra* note 80, art. 14.

377. Russel Lawrence Barsh, *An Advocate’s Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209, 210, 224 (1990).

“ownership” of lands traditionally occupied by indigenous people,³⁷⁸ it did not protect resources on land used by but not physically occupied by indigenous people, nor did it address the issue of lands that had already been taken from indigenous peoples. The desire of indigenous people to add such considerations during the drafting of ILO 169 met with fierce opposition.³⁷⁹ At two different times a “working party” was established to negotiate wording on ownership of lands, but both times consensus proved impossible.³⁸⁰ Several states worried that granting ownership to indigenous peoples would either result in huge tracts of land being owned by indigenous groups or that it would result in irreconcilable constitutional land disputes.³⁸¹ These difficulties finally led to an unusual step: the chairman of the drafting conference personally conducted closed-door negotiations with representatives of the interests involved, which led to creation and acceptance of the “package” of land provisions included in ILO 169.³⁸² This atypical approach resulted in a lack of a record of negotiation to shed light on the phrase “rights of ownership and possession.”³⁸³

Despite the lack of drafting history around the phrase “rights of ownership and possession,” the ILO has said that the phrase does not necessarily mean that indigenous peoples always have the right to title to all land they traditionally occupied.³⁸⁴ The phrase refers not to “a” right to ownership, but to “rights” of ownership and possession; the implication is that “rights” of ownership and possession can be interpreted to be rights related to ownership and possession, rather than necessarily being ownership and possession themselves.³⁸⁵ Instead of always mandating full ownership, this reading of ILO 169 seeks to give indigenous peoples the greatest degree of land rights attainable, taking into account the many different situations that may exist,³⁸⁶ and to afford sufficient security of tenure so that indigenous peoples may exercise the full bundle of

378. ILO, Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries art. 11, June 26, 1957, 328 U.N.T.S. 247.

379. Barsh, *supra* note 377, at 224.

380. *Id.*

381. *Id.* at 224-25.

382. *Id.* at 224. This process was unusual because the typical procedure for the drafting committee included discussing and voting on each single article separately. *Id.* The fact that the parties chose to develop a “package” deal relating to property tends to indicate that the parties involved were not necessarily in agreement on individual property-related articles but all felt that they could live with the parts of which they did not approve as long as other articles were also included. *Id.*

383. *Id.*

384. TOMEI & SWEPSTON, *supra* note 225.

385. *Cf. id.*

386. *Id.*

communal property rights. Thus, in some situations, the right to possession and use of land traditionally occupied by indigenous people may be guaranteed under ILO 169 if there have been assurances that such use and possession would continue. This might be the case where indigenous peoples are accorded reservations but do not receive land titles, as is the case in the United States, Belize, Costa Rica, and many other countries. In evaluating competing interpretations as to the level of protection required for indigenous land rights, ILO 169 points out in article 13 that

[i]n 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.³⁸⁷

While ILO 169 does not, by its terms, explicitly require that states title the traditionally-occupied land of indigenous peoples, the case law in the inter-American human rights system sometimes has. For example, in *Awas Tingni* the Inter-American Court of Human Rights ruled that Nicaragua not only must identify and physically demarcate communal property, but also *title* the land to the indigenous people.³⁸⁸ The requirement to issue title likely arose in *Awas Tingni* because the *domestic* law of Nicaragua provided for titling. Thus fulfillment of the right to communal property, as it currently stands, does not necessarily require a title in most nations. *Yakye Axa* does not state that titling is an absolute requirement of domestic law,³⁸⁹ but the domestic law of Paraguay does have substantial protections for indigenous lands,³⁹⁰ and these protections may imply titling of indigenous lands.³⁹¹ In the *Mopan Maya* case, however, the

387. ILO 169, *supra* note 80, art. 13.

388. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 164 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

389. *See, e.g., Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 155 (June 17, 2005) (noting that Paraguay does protect indigenous communal property in its laws).

390. *Id.* ¶ 120(b); *cf. id.* ¶ 50.62 (noting that Paraguay has, by article 14 of Law No. 234/93, ratified ILO 169 and the protections of indigenous rights to land contained in articles 13 through 19 of that convention).

391. The constitution of Paraguay states, in article 64, that “[t]he State will, free of charge, provide [indigenous villages] with land, which lands shall be free of property tax, immune to credit judgments, indivisible, nontransferable, not susceptible to acquisition by adverse possession, not eligible to serve as collateral, and which may not be rented.” CONSTITUCIÓN POLÍTICA DEL PARAGUAY DE 1992 art. 64 (translation by authors), *quoted in Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 138. Such restrictions are often imposed on titles of

Inter-American Commission on Human Rights first concluded that the Maya had property rights to their traditionally occupied land and that “the State has not delimited, demarcated and titled *or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists.*”³⁹²

Jurisprudence of the inter-American human rights system appears to reflect the text of ILO 169 and commentary on it by asserting that the ideal way to protect the right to communal property of indigenous peoples is through titling of communal land. The real purpose, however, is to protect the rights of the indigenous people to continue using their traditionally occupied lands as a necessary part of their culture and survival; if this may be accomplished with less than a legal title, then that may be acceptable.³⁹³ The reservation system also avoids the question of whether indigenous land rights must include the first-generation right to alienate property. What is *not* acceptable in the eyes of international law is for indigenous populations to remain in a constant state of uncertainty and fear about the security and extent of the land to which they have rights.³⁹⁴

B. Restraints on Alienability and Related Restrictions

It is often assumed that private communal land titles offer greater protection and more extensive land rights over indigenous lands than does a state-

indigenous lands.

392. *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, ¶ 133 (2004) (emphasis added), available at http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm#_ftnref127.

393. The acceptability of systems like those in Canada, Costa Rica, and the United States — where indigenous land and resources are controlled by the state under trusteeship for the indigenous peoples — increasingly have been subjected to criticism. See, e.g., *Indigenous Peoples and Their Relationship to Land*, *supra* note 79, ¶ 37.

394. Cf. *Maya*, Inter-Am. C.H.R., Report No. 40/04, ¶ 132 n.135 (noting that “[i]n its judgment in the *Awas Tingni* Case, the Inter-American Court determined that the failure of the State to effectively delimit and demarcate the collective property of the Mayagna Community of *Awas Tingni* had created a climate of constant uncertainty among the members of the *Awas Tingni* Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property”); *Yakye Axa*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 2 (noting that the Inter-American Commission on Human Rights observed that failure to satisfactorily resolve indigenous land claims of the *Yakye Axa* community resulted in a state of constant uncertainty and vulnerability of the community for food, medical care, and sanitation as well as threatening the continued existence of members of the community and the community itself); *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

administered system of indigenous reserves. A closer examination questions this assumption.

For example, indigenous “rights of ownership and possession,” as stated in ILO 169, could not mean exactly the same as the first-generation right to “ownership” of individual private property as commonly understood. If “rights of ownership and possession” meant the same, states could not restrain the alienation of indigenous title any more than they could that of individual property owners.³⁹⁵ Indeed, most Latin American countries, and many others, provide that lands titled communally to indigenous groups are *inembargable* (cannot be taken as part of any lien, mortgage foreclosure, or credit judgment),³⁹⁶ *imprescriptible* (are not susceptible to acquisition by prescription), *indivisible* (cannot be subdivided),³⁹⁷ and *inalienable* (may not be alienated by any type of title).³⁹⁸ Why is it that some or all of these restrictions on the property rights of communally held land do not violate prohibitions on discrimination even though these same restrictions do not apply to land held individually by nonindigenous people? The answer to this question involves both traditional indigenous systems governing communal property and international law.

First, because the cultural uniqueness of the indigenous groups to whom the international human right to communal property applies serves as a primary justification for that right, it includes, as part of the right to culture, the right of the indigenous group to utilize their traditional land tenure system to control the land. Traditional indigenous systems of land tenure often incorporate substantial communal elements. One typical prohibition in indigenous land tenure systems is the prohibition on selling or giving land within the community to anyone outside of the community. Thus, the real answer to the question of why limitations on alienability and severability of title (in the western legal structure) are not discriminatory is that such limitations on titles granted to

395. TOMEI & SWEPSTON, *supra* note 225.

396. *See, e.g.*, PEDRO GERMÁN NÚÑEZ PALOMINO, DERECHO Y COMUNIDADES CAMPESINAS EN EL PERÚ 1969-1988 [JUSTICE AND RURAL COMMUNITIES IN PERU 1969-1988] 61 (1996) (noting that the 1979 constitution of Peru did not allow peasant communities to mortgage their land or use it as collateral for loans).

397. *See, e.g.*, C.F. art. 231(4) (Braz.); CONSTITUCIÓN POLÍTICA DE 1991 art. 329 (Colom.); Law No. 426, Nov. 14, 1984, art. 12, Boletín Oficial de la Provincia de Formosa No. 2856, at 1 (Arg.); Ley No. 1715, 18 Oct. 1996, Ley del Servicio Nacional de Reforma Agraria [Law of the National Service of Agrarian Reform] tit. I, ch. I, art. 3(III) (Bol.), *available at* <http://www.inra.gov.bo/portalsv2/Uploads/Normas/ley1715.pdf>; Ley No. 19.253, 5 Oct. 1993, Ley Indígena [Native Law] art. 13 (Chile).

398. This has changed in some countries in Latin America recently. Four countries have “removed blanket protections prohibiting the sale of indigenous lands in the 1990s: Nicaragua (1990), Mexico (1992), El Salvador (1992) and Peru (1993).” Colchester et al., *supra* note 190, at 12. These changes represent increased neoliberalization of land policy. *Id.*

indigenous groups often represent a codification in western law of the traditional law of the indigenous group itself.

Second, limitations on alienability, severability, and use of land as collateral may be acceptable from an international law standpoint, because a primary justification for the international human right to communal property is protection of the right to culture. History has demonstrated that individualization of plots of indigenous land to members of the community has often led to the demise of the culture of the group.³⁹⁹ The Canadian case of *Delgamuukw* clearly presented this justification for title limitations when the court stated that the past relation of the indigenous group with its land should be protected from incompatible uses in the future as well, thus limiting acceptable uses of land to those compatible with past and present practices.⁴⁰⁰

Even though the *Delgamuukw* court's intentions may have been benign,⁴⁰¹ one might also argue this justification for limitations on the use or disposal of indigenous land by the indigenous owners of the land represents the sort of paternalism that leads to ossification of the indigenous culture, effectively preventing the very type of self-determination that control of land could bring. *Delgamuukw* supposedly seeks to avoid putting indigenous peoples into a "straitjacket" with limitations on aboriginal title.⁴⁰² Indigenous law, however, like all law, changes in response to other, extra-legal changes. "It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life."⁴⁰³ Patterns of life for indigenous peoples change most rapidly at the very times when the indigenous group has increased interaction with western cultures. Thus, the limitations on indigenous communal title may most limit change in indigenous tenure systems at the moment when indigenous tenure systems may most need to adapt.⁴⁰⁴

399. *Indigenous Peoples and Their Relationship to Land*, *supra* note 79, ¶ 74; PLANT & HVALKOF, *supra* note 2, at 8.

400. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1089 (Can.).

401. *Id.* at 1090 (noting that this seeks to preserve the same nonfungible, noneconomic values of land that justify granting an indigenous right to property).

402. *Id.* at 1091 ("This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.")

403. *Alexkor Ltd. v. Richtersveld Cmty. & Others*, 2003 (12) BCLR 1301 (CC) ¶ 52 (S. Afr.), available at <http://www.constitutionallaw.co.za/alert/cases/alexkor.pdf>.

404. Limitations on mortgaging land have similar justifications: mortgaging should be forbidden because it may lead to loss of indigenous lands, *Indigenous Peoples and Their Relationship to Land*, *supra* note 79, ¶ 48 (saying that use of indigenous land as collateral for

C. Subsurface Rights and Other Natural Resources

Many Latin American countries with Spanish or Portuguese colonial histories typically have property systems in which subsurface mineral rights belong to the state regardless of private ownership of the land.⁴⁰⁵ Latin American constitutions often explicitly provide that the state owns subsurface and other resource rights.⁴⁰⁶ State exploitation of subsurface and surface resources on indigenous land has been a consistent source of violations of the human rights of indigenous peoples in Latin America and around the world.⁴⁰⁷

Existing and draft treaties as well as international and domestic cases contribute to the developing international law determining the rights of

loans is likely to lead to loss of the land or resources), especially since the indigenous peoples — some of whom may have less experience in understanding modern lending practices — may fall victim to unscrupulous lenders. Some assert that the inability of indigenous people to access credit with their land as collateral essentially makes their property “dead capital.” See, e.g., Robin Edwards, *Native Title: Dead Capital?*, 2003 SING. J. LEGAL STUD. 80 (Sing.) (citing to Hernando de Soto’s book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, and others).

405. See, e.g., Rodrigo Sánchez-Mejorada V, *Mining Law in Mexico*, 9 MIN. RESOURCES ENGINEERING 129, 130 (2000), available at <http://www.smv.com.mx/art2e.htm> (noting that during the beginning of colonization, current Mexico was subject to the laws of Spain, which gave ownership of subsurface minerals to the Spanish Crown).

406. See, e.g., CONST. ARG. art. 124; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE BOLIVIA DE 1967 arts. 136, 139; C.F. art. 20, § 1 (Braz.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 art. 19, no. 24; CONSTITUCIÓN POLÍTICA DE 1991 art. 332 (Colom.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 art. 254. However, some states allow for consultation, exploitation, or profit sharing with regard to subsurface resources below land owned by indigenous groups. See, e.g., Ley No. 24, 12 Jan. 1996, Por la cual se crea la Comarca Kuna de Madungandi [By Which the Kuna de Madungandi Region Is Created] ch. II, art. 2, G.O., 15 Jan. 1996 (Pan.), available at http://www.asamblea.gob.pa/NORMAS/1990/1996/1996_138_0699.PDF (granting authority to the indigenous people to reach internal agreements to seek subsurface exploitation concessions from the state); Ley No. 22, 8 Nov. 1983, Por la cual se crea la Comarca Emberá de Darién [By Which the Emberá de Darién Region Is Created] ch. 4, art. 20, G.O., 17 Jan. 1984 (Pan.) (guaranteeing the indigenous people in the *comarca* established by the law the economic and social benefits derived from subsurface resource exploitation on their land).

407. See, e.g., LILY LA TORRE LÓPEZ, ALL WE WANT IS TO LIVE IN PEACE: LESSONS LEARNED FROM THE OIL OPERATIONS IN INDIGENOUS TERRITORIES OF THE PERUVIAN AMAZON (1999) (detailing how oil exploration in the Amazon has affected indigenous peoples); see also *supra* Part IV.C.2 (discussing the *Yanomami* case, in which the government of Brazil approved a plan for the exploitation of natural resources in the Amazon region without taking adequate steps to protect the indigenous lands of the region); *supra* Part IV.C.3 (discussing the *Awás Tingni* case, which involved Nicaragua’s exploitation of forestry on indigenous lands); *supra* Part IV.C.5 (discussing the *Mopan Maya* case, in which Belize had granted logging and oil concessions in indigenous lands).

indigenous peoples to the resources on and beneath their traditional lands.⁴⁰⁸ For example, ILO 169 requires governments that retain subsurface rights to take action to protect the rights of indigenous people:

In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.⁴⁰⁹

Whether a group has title or occupies land under a reserve system, “one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories.”⁴¹⁰

The exhortation for state consultation presents the problem of what constitutes “meaningful consultation.” Plainly this mandate does not mean that the indigenous group must have veto authority or the ultimate decision-making power in such matters. At the other extreme, the mandate does not mean, for example, that a government may simply arrive one day on indigenous territory and announce that the government has granted logging concessions for a portion of the indigenous group’s land. Problems arise between these two extremes. What happens when a government, after negotiations with a private company, then goes to an indigenous group with a “proposal” to grant a concession for oil exploration over a substantial portion of the indigenous group’s territory? Can any “meaningful consultation” be accomplished once the government and the

408. In at least one case, in Africa, a domestic court case recognized the rights of indigenous peoples to the subsurface below their land. See *Alexkor Ltd. v. Richtersveld Cmty. & Others*, 2003 (12) BCLR 1301 (CC) (S. Afr.), available at <http://www.constitutionallaw.co.za/alert/cases/alexkor.pdf> (noting that even after annexation by the British, the indigenous inhabitants retained their private property rights to land in accordance with the laws and practices of the indigenous people; since the indigenous people in question clearly exercised exclusive control over subsurface rights at the time of annexation, that right survived annexation).

409. ILO 169, *supra* note 80, art. 15, para. 2.

410. *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, ¶ 142 (2004), available at http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm#_ftn135.

private company have already settled on the details of a deal? What about decisions by the government to grant timber concessions on communal lands?

Reasonable attention to the matrix of concerns surrounding the international human right to property may offer criteria to consider in the substantive standard for determining whether meaningful consultation has occurred. The substantive standard should examine whether consultation has resulted in reasonable conclusions regarding whether the proposed action would harm the ability of the indigenous group to maintain the group's culture and traditions. Only meaningful consultation will provide the government or a private entity the opportunity to understand the use of the land by the indigenous population — a definite prerequisite to understanding whether a proposed activity would adversely impact the ability of the indigenous group to exercise its right to culture and other associated human rights.

Such questions highlight the differences between consultation and consent. While informed consent cannot take place without meaningful consultation, meaningful consultation may occur even if consent is not subsequently forthcoming. The United Nations Draft Declaration on the Rights of Indigenous Peoples would require “free and informed consent” of indigenous people before allowing exploitation of natural resources on their land.⁴¹¹ The Organization of American States' Proposed American Declaration on the Rights of Indigenous Peoples gives less power to indigenous interests but still offers some amount of protection.⁴¹²

411. The Draft Declaration states:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their *free and informed consent* prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Draft U.N. Declaration, *supra* note 85, art. 30 (emphasis added).

412. See, e.g., *Proposed American Declaration on the Rights of Indigenous Peoples*, *supra* note 60, art. XVIII, ¶ 4 (“Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.”); *id.* art. XVIII, ¶ 5 (“In the event that ownership of the minerals or resources of the subsoil pertains to the state or that the state has rights over other resources on the lands, the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any program for planning, prospecting or exploiting existing resources on their

Regardless of whether we call the international human right to property *sui generis* or view it as simply the logical, nondiscriminatory application of the first-generation right to property, the right clearly is not the same in application as the first-generation right to property. The many limitations to which the right to communal property is subject make this distinction clear. The most problematic of these limitations — the ability of central governments to make resource-development or other decisions affecting the land of indigenous peoples without the consent of the “owners” — threatens to relegate the third-generation right to communal property to status as a second-class right.

VII. Beyond Indigenous Communities: Who May Invoke the Human Right to Communal Property?

It is not always clear which indigenous groups should be able to avail themselves of the emerging human right to communal property.⁴¹³ Some cases appear relatively clear. For example, the Kuna Indians of Panama appear to be a group deserving this protection. The semi-autonomous Kuna regions of Panama, while not without vulnerabilities, enjoy a greater level of legitimacy, recognition, and protection than the land claims of many indigenous groups.⁴¹⁴ In large part, this result appears due to the tenacity with which the Kuna have clung to many elements of their cultural past and to their distrust of outsiders.⁴¹⁵ But maintenance of traditional culture is not universal among indigenous peoples, as many have incorporated attributes of western culture to varying degrees. This leads to difficult questions: Should a particular type of land tenure system or a specific type of relationship with the natural environment form a

lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation, on a basis not less favorable than the standard of international law for any loss which they may sustain as a result of such activities.”); *id.* art. XXI, ¶ 2 (“Unless exceptional circumstances so warrant in the public interest, the states shall take necessary measures to ensure that decisions regarding any plan, program or proposal affecting the rights or living conditions of indigenous peoples are not made without the free and informed consent and participation of those peoples, that their preferences are recognized and that no such plan, program or proposal that could have harmful effects on those peoples is adopted.”).

413. PLANT & HVALKOF, *supra* note 2, at 9.

414. Ley. No. 24, 12 Jan. 1996, Por la cual se crea la Comarca Kuna de Madungandi [By Which the Kuna de Madungandi Region Is Created] ch. II, art. 2, G.O., 15 Jan. 1996 (Pan.), available at http://www.asamblea.gob.pa/NORMAS/1990/1996/1996_138_0699.PDF; Decreto Ejecutivo No. 228, 3 Dec. 1998, Por el cual se adopta la Carta Orgánica Administrativa de la Comarca Kuna de Madungandi [By Which the Administrative Article of Incorporation of the Kuna de Madungandi Region Is Adopted], G.O., 8 Dec. 1998 (Pan.), available at http://www.asamblea.gob.pa/GACETAS/1990/1998/23687_1998.PDF.

415. JAMES HOWE, *THE KUNA GATHERING: CONTEMPORARY VILLAGE POLITICS IN PANAMA* 55-56 (1986).

prerequisite to application of the human right to communal property?⁴¹⁶ What criteria should be used?⁴¹⁷ Can minority groups that are not, strictly speaking, “indigenous” be considered if their tenure system is sufficiently “communal”?⁴¹⁸ This Part examines different criteria relevant to these questions and concludes that a functioning land tenure system, with at least some communal aspect, that demonstrates cultural uniqueness should form the main determinant of who may invoke the right to communal property.

Dispossession, coupled with cultural and racial discrimination, may explain why indigenous peoples comprise the dominant force for a human right to communal property, particularly when the indigenous groups retain a current culture and way of life similar to how they lived historically. The importance of indigenous culture also contributes to an understanding of the basis for a *sui generis* approach to indigenous property rights. Questions become more difficult when groups that may not be “indigenous”⁴¹⁹ begin to assert the human right to communal property. Bolivia’s Agrarian Law resolves this issue by recognizing the communal property of both indigenous communities *and* communities that do not identify themselves as indigenous.⁴²⁰ Afro-

416. Cf. PLANT & HVALKOF, *supra* note 2, at 20 (discussing the complexity and possible metrics for defining who is indigenous).

417. *Id.*

418. *Id.* Care must also be exercised not to encourage a dynamic in which peasants feel that indigenous people get “better” treatment than the peasants; rather, the treatment is simply different with this distinction based on the cultural uniqueness of the indigenous group that may have developed over a very long period of time. TOMEI & SWEPSTON, *supra* note 225. Conflicts of this type occurred in Colombia as indigenous land received earlier and greater protection, sometimes incorporating lands of Afro-Colombian peasants. See, e.g., Etnias de Colombia, Territorios Colectivos de Comunidades Negras [Collective Territories of Black Communities], http://www.etniasdecolombia.org/grupos_afro_territorios.asp (last visited May 31, 2007).

419. See *supra* note 190.

420. See, e.g., Ley No. 1715, 18 Oct. 1996, Ley del Servicio Nacional de Reforma Agraria [Law of the National Service of Agrarian Reform] tit. III, ch. I, art. 41 (Bol.), available at <http://www.inra.gov.bo/portav2/Uploads/Normas/ley1715.pdf>. Article 41 of this law states that “lands of communal origins are the geographic spaces that constitute the habitat of the indigenous villages and communities that have traditionally had access to the land and that have developed and maintained their own distinctive forms of economic, social, and cultural norms such that these have assured the development and survival of the community and their lands. These lands are inalienable, indivisible, collective, composed of communities, not subject to mortgage foreclosure, liens, or credit judgments, and may not be acquired through prescription.” *Id.* art. 41(I)(5) (translation by authors) (“Las Tierras Comunitarias de Origen son los espacios geográficos que constituyen el habitat de los pueblos y comunidades indígenas y originarias, a los cuales han tenido tradicionalmente acceso y donde mantienen y desarrollan sus propias formas de organización económica, social y cultural, de modo que aseguran su sobrevivencia y desarrollo. Son inalienables, indivisibles, irreversibles, colectivas, compuestas por

Caribbean peoples also claim land communally in various parts of Latin America.⁴²¹ Communal tenancy of the land often represents the single most important identifying factor for some of these nonindigenous groups.⁴²²

In another illustrative example, special communal land rights have been given to “black communities”⁴²³ in Colombia. Examination of the legal regime for recognition of “black communities” in Colombia helps shed light on criteria for determining what sort of nonindigenous social organizations might be in a favorable position to assert the human right to communal property.⁴²⁴ In Colombia the government and constitution have recognized “black communities” and their rights to the land they inhabit.⁴²⁵ The Colombian congress passed an implementing law on August 27, 1993,⁴²⁶ and from 1995 to 1999, 1,532,099 hectares of land were communally titled to black communities under this law.⁴²⁷ The law sought to recognize black communities that had been

comunidades o mancomunidades, inembargables e imprescriptibles.”).

421. See generally CLARE RIBANDO, CONG. RESEARCH SERV., PUBL’N NO. 05-RL-32713, AFRO-LATINOS IN LATIN AMERICA AND CONSIDERATIONS FOR U.S. POLICY (2005), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=460484>. Afro-Caribbean collective land movements have been particularly strong in Nicaragua, Honduras, Colombia, and Brazil. All of these countries, and Ecuador, have passed laws providing for special land rights for certain Afro-Caribbeans. Eva T. Thorne, *Land Rights and Garífuna Identity*, NACLA REP. ON AM., Sept.-Oct. 2004, at 21, 22-23 (citing C.F. art. 68 (Braz.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR DE 1998 art. 83; Ley No. 70, 27 Aug. 1993, Por la cual se desarrolla el artículo transitorio 55 de la Constitución Política [By Which Transitory Article 55 of the Political Constitution Is Developed], D.O., 31 Aug. 1993 (Colom.)), available at <http://www.utexas.edu/law/academics/centers/humanrights/adjudicating/papers/ThorneArticle-yes.pdf>.

422. See generally Diaz, *supra* note 78.

423. In Spanish: *comunidades negras*.

424. Nicaragua also has a law allowing communal land claims of Afro-Caribbean peoples. Ley No. 445, 13 Dec. 2002, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Communal Property Law of the Native Towns and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio, and Maíz Rivers], L.G., 23 Jan. 2003 (Nicar.), available at <http://legislacion.asamblea.gob.ni/Normaweb.nsf/d0c69e2c91d9955906256a400077164a/f59730333b3f6fa5062571b200559533?OpenDocument>.

425. See, e.g., CONSTITUCIÓN POLÍTICA DE 1991 art. 55 (Colom.) (“Within the two years following the entry into effect of the present Constitution, Congress will issue . . . a law which will recognize the right to collective property of the Black communities which occupy uncultivated lands in the rural zones adjoining the rivers of the Pacific Basin, in accordance with their traditional cultivation practices. This law will apply to the area stipulated therein.” (translation by authors)).

426. Ley No. 70, 27 Aug. 1993 (Colom.).

427. Etnias de Colombia, *supra* note 418.

occupying “empty lands”⁴²⁸ in accordance with their traditional production methods and the right to communal property, in order to protect the cultural and ethnic identity of these groups as well as to foment their social and economic development.⁴²⁹

Recognition of a right to communal property under this Colombian law demands several prerequisites. First, the land occupied by the community must be considered “empty” rural land owned by the state.⁴³⁰ Second, there must be a “black community” occupying the land.⁴³¹ A “black community” is defined in the law as a group of families of African descent that possess their own culture, shared history, unique customs, and traditions of the relation between land and population, all of which reveal and conserve an identity that distinguishes them from other ethnic groups.⁴³² This definition of “black community” demonstrates the important emphasis on a unique culture. Furthermore, the collective nature of land holding forms an integral part of that unique culture.⁴³³ Third, and finally, the community must be occupying the land in accordance with their traditional production practices.⁴³⁴

Despite the fact that the Afro-Latino communities described above are not “indigenous” in the usual conception of the word,⁴³⁵ the focus on their cultural uniqueness seems to be the driving force behind their claim of a right to recognition of their communal property. Also, like the communal property rights granted to indigenous peoples, the land of the black communities has

428. In Spanish: *tierras baldías*.

429. Ley No. 70, 27 Aug. 1993, art. 1 (Colom.).

430. *Id.* art. 4 (requiring that the land be “*tierras baldías*”).

431. *Id.*

432. *Id.* art. 2, § 5 (“Comunidad Negra. Es el conjunto de familias de ascendencia afrocolombiana que poseen una cultura propia, comparten una historia y tienen sus propias tradiciones y costumbres dentro de la relación campo-poblado, que revelan y conservan conciencia de identidad que las distinguen de otros grupos étnicos.”).

433. *Id.* art. 2, § 6 (stating that collective occupation means the historic and ancestral black communities on lands used collectively by them and where they currently engage in their traditional production practices: “Ocupación Colectiva. Es el asentamiento histórico y ancestral de comunidades negras en tierras para su uso colectivo, que constituyen su hábitat, y sobre los cuales desarrollan en la actualidad sus prácticas tradicionales de producción.”).

434. *Id.* art. 4.

435. In many cases ethnic or racial groups form bonds to the land that resemble those of indigenous groups. Jennifer Goett, Informe del Desarrollo Humano de la Costa Atlántica de Nicaragua: Tenencia de las tierras comunales indígenas y afro-descendientes en la RAAS [Report on the Human Development of the Atlantic Coast of Nicaragua: Indigenous and Afro-Descendent Communal Land Tenure in the South Atlantic Autonomous Region] 5 (Apr. 28-29, 2005) (unpublished manuscript), available at <http://www.utexas.edu/law/academics/centers/humanrights/adjudicating/papers/JenniferGoettPNUD.doc> (noting the similarity of ties with the land in Nicaragua between indigenous and Afro-Caribbean groups).

similar limitations on its title. Typically, the portion of the land designated for community use cannot be alienated, taken by prescription, or subject to a lien or mortgage.⁴³⁶ In Colombia, portions of land designated by internal regulations to specific families in nonindigenous groups may only be alienated due to dissolution of the family or other reasons noted in internal regulations.⁴³⁷ The right to occupy lands designated to families even upon dissolution remains limited to members of the community or, failing that, to members of the same ethnic group.⁴³⁸

While the basis for the international human right to communal property cannot always be neatly categorized because the right serves to protect so many other rights, the existence of a current and viable communal system of land tenure is the most important indicator of whether or not a group may claim territory under the right to communal property. Though a functioning land tenure system different from that of the official legal system is itself culturally unique, it may be less compelling if the group otherwise exhibits political, religious, familial, and social traits typical in the rest of the dominant society. On the other hand, general cultural uniqueness combined with a shared group history makes a more compelling case. In countries such as Colombia, Ecuador, Brazil, and Nicaragua, domestic law creates a right to communal property for certain Afro-Caribbeans,⁴³⁹ yet the question remains as to whether there exists an independent *international* human right to communal territory for such groups (as was found for the Maya in the *Mopan Maya* case).

These various situations and cases demonstrate the virtual impossibility of drawing a bright line based on one criterion that justifies applying the dominant western law of property to one group (i.e., the first-generation right to property) while assigning a substantially different right to communal property to another group (i.e., the international human right to communal property). The importance of the rights at stake requires that one closely examine the factors contributing to a decision as to who enjoys a human right to communal property. Some factors to examine when determining to which groups the international

436. Ley No. 70, 27 Aug. 1993, art. 7 (Colom.).

437. *Id.*

438. *Id.*

439. See C.F. art. 68 (Braz.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR DE 1998 art. 83; Ley No. 70, 27 Aug. 1993 (Colom.); Ley No. 445, 13 Dec. 2002, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Communal Property Law of the Native Towns and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio, and Maíz Rivers], L.G., 23 Jan. 2003 (Nicar.), available at <http://legislacion.asamblea.gob.ni/Normaweb.nsf/d0c69e2c91d9955906256a400077164a/f59730333b3f6fa5062571b200559533?OpenDocument>.

human right to communal property applies include: race, history, culture, religion, types of use of the land, and traditional tenure practices.

VIII. Conclusion

Analysis of land tenure and land rights has progressed far beyond the bifurcation of either private property or open access as represented in Garrett Hardin's *The Tragedy of the Commons*. Scholars from many fields have cataloged the complexity and subtlety of many land tenure systems once treated with scorn as "primitive." For example, in both conservation and international development, experts have come to appreciate that communal property holds an important place in both fields because many impoverished people depend on forest resources that were traditionally held communally, and many of these areas are some of the most biologically diverse areas on earth.⁴⁴⁰

Over the past two decades, the inter-American human rights system has given increased attention to the indigenous peoples' right to property as it becomes impossible to ignore the injustices surrounding the frequent dispossession of lands belonging to indigenous peoples and the concomitant impact to the culture, economy, religion, and physical environment of indigenous people. This attention has culminated in the explicit recognition of the human right to communal property for indigenous groups in many nations. Examination of the roots of this progression in law and jurisprudence from other parts of the world evidences two primary possible foundations for the protection of indigenous rights to property. First, the right to communal property may rest on the argument that true nondiscrimination (i.e., recognition of the legal systems/norms of other cultures) coupled with the classic, western protection of private property results in the human right to communal property for certain groups. Second, the right to communal property of indigenous people may be *sui generis* — so unique that it is without precedent or comparison.

Regardless of the justification and the legal reasoning behind them, both approaches appear to acknowledge that the most important single criterion for recognition of a communal right to property is the extent of a unique, functioning tenure system that is understood, accepted, and controlled by the local community and is distinct from the dominant property paradigm.⁴⁴¹ Thus, in part, recognition of such customary communal land tenure makes sense from

440. See Andy White, *Introduction* to LYNN ELLSWORTH & ANDY WHITE, *DEEPER ROOTS: STRENGTHENING COMMUNITY TENURE SECURITY AND COMMUNITY LIVELIHOODS* 6 (2004).

441. The efficacy of a common property regime "is indicated by the degree to which community rules and resource boundaries are accepted as legitimate, are clear cut and enforced, and by whether communities can practice exclusion, adapt to new situations and deal effectively with external forces, particularly the government." *Id.* at 12-13.

a pragmatic perspective. In fact, imposition of typical “western” land tenure in place of unique, established local land tenure systems may *increase* conflict and make development assistance even more difficult.⁴⁴²

Access to communal property involves a plethora of human rights not usually associated with the more narrow interpretation of the first generation or “negative” right to be free from arbitrary deprivation of property. This “association” of the international human right to communal property with other human rights constitutes the greatest difference between the human right to communal property and the typical “negative” right to property. The myriad human rights potentially gathered under the umbrella of a human right to communal property even gives rise to an analogy with a western image of property as a bundle of rights. Just as traditional western notions of the bundle of property rights includes “sticks,” such as the right to exclude, the right to use, and the right to sell, the international human right to property includes other human rights that may often only be exercised under the protection of the right to property. For instance, where places and land are sacred the right to free exercise of religion may be involved. When the culture revolves around agriculture or hunting and gathering, a right to culture may only be fulfilled by protecting the right to communal property.

Examination of the communal right to property results in the rather surprising conclusion that, from a legally formalistic viewpoint, it matters little whether indigenous groups that enjoy the right have a legal title or live under a reservation system. While one may think that title would grant greater rights and protections, the many limitations on titles as well as the common practice in Latin America of the state maintaining subsurface — and sometimes even surface resource — rights actually means that even titled communal lands have few of the same legal protections offered to individual private property. Communally titled lands, like reservation lands, are primarily protected by the political process: what price will the government pay for the effects it imposes on property occupied or used by virtue of a communal right? If the answer is that the government will pay no political price either domestically or internationally, then communal property, whether held by title or under a reservation system, is at risk.

The communal right to property has primarily been driven by the concerted efforts of indigenous rights groups. Other culturally, ethnically isolated groups have also gained communal tenure rights through domestic legislation in some countries. This expansion of the human right to communal property seems logical in light of the reasoning behind recognition of rights to communal property.

442. *Id.* at 14.

All the developments surrounding the human right to communal property give new insight into the Evolutionary Theory of Property. This theory asserts that communal land represents a “primitive” step in land tenure evolution that is eventually replaced by a turn to individualized private property. Yet communal land tenure has proven surprisingly resilient. Despite neoliberal reforms to property law in Mexico in 1992, the expected rush to individualize communal *ejido* lands has not yet materialized.⁴⁴³ In Colombia, the 1991 constitution and subsequent laws have resulted in approximately a fifth of the surface area of Colombia becoming land held communally by either indigenous groups or black communities.⁴⁴⁴ Some areas in Europe have resisted the change from communal to individualized property for centuries.⁴⁴⁵

In modern Latin America, many indigenous, ethnic, and racial groups have won formal legal recognition of tenure practices that incorporate communal aspects. This recognition does not mean that the amount of land actually managed communally is increasing. It does, however, seem clear that the amount of land *legally recognized as being held and managed communally* is increasing. The question then becomes whether lands so recognized will endure.

443. See MARÍA TERESA VÁZQUEZ CASTILLO, LAND PRIVATIZATION IN MEXICO: URBANIZATION, FORMATION OF REGIONS, AND GLOBALIZATION IN *EJIDOS* 173-76 (2004); Grenville Barnes, *The Evolution and Resilience of Community-Based Land Tenure in Rural Mexico*, 25 LAND USE POL’Y (forthcoming 2008) (Neth.) (“Even though PROCEDE has certified more than 90% of the *ejidos* in the country, it has been estimated that only 5.3% of all *ejidos* have acquired *dominio pleno*, most of these being urban *ejidos*.” (citing Fernando Galeana Rodríguez, *Demanda del dominio pleno en el ejido: derechos de propiedad y crédito rural [Demands for Complete Dominion in the Ejido: Property Rights and Rural Credit]*, ESTUDIOS AGRARIOS, May-Aug. 2005, at 19 (Mex.), available at http://www.pa.gob.mx/publica/rev_29/fernando.pdf)).

444. Álvaro Velasco Álvarez, Colombia: Comunidades Indígenas y Negras Raizales Contra la Guerra, 18 (Feb. 23-25, 2006) (unpublished manuscript), available at <http://www.latam.ufl.edu/news/conf-papers/alvarezpaperforconf06.pdf>.

445. BEHAR, *supra* note 38, at 189-264.