Redefining Canadian Aboriginal title:

A critique towards an Inter-American doctrine of Indigenous right to land

by

Carlos Iván Fuentes

Faculty of Law

McGill University

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Table of Contents

Table of Graphics

Abstract

Is it possible to redefine Aboriginal title? This study intends to answer this question through the construction of an integral doctrine of aboriginal title based on a detailed analysis of its criticisms. The author uses international law to show a possible way to redefine this part of Canadian law. After a careful review of the most important aspects of aboriginal land in international law, the author chooses the law of the Inter-American Court of Human Rights as its framework. Using the decisions of this Court he produces an internationalized redefinition of Aboriginal title.

Resume

Est-il possible de redéfinir le titre aborigène? Cette étude tente de répondre à cette question à travers l'élaboration d'une nouvelle théorie du droit à la terre, fondée sur la critique de la doctrine antérieure. L'auteur s'appuie sur le droit international pour redéfinir cette partie du droit canadien. Après une analyse solide des aspects les plus importants de la matière, l'auteur choisit de placer sa réflexion dans le cadre de la jurisprudence de la Cour Interaméricaine des Droits de l'Homme. Partant des décisions de cette Cour, il dégage une nouvelle définition du titre aborigène, à vocation internationale,

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Introduction

Every single time I read *Delgamuukw vs. British Columbia* [*Delgamuukw*], the leading case on Canadian law regarding Aboriginal title[1], I am surprised by its coherence and structure. Independently of whether I agree or not with the results of the decision, I have to recognize that its internal logic is impeccable.

From the moment Chief Justice Antonio Lamer starts discussing the justification and content of Aboriginal title to the moment he explains its limitation, the reader faces a perfectly structured argument that transforms the applicable legal authorities into practical considerations and back to a unifying authority.

I still find it remarkable that the whole decision of the Court and particular negative consequences of it are supported by the fact of prior occupation. As I read many articles and books which criticized this decision, I found that most criticism of the current regulation of Aboriginal title would focus on its consequences from a socio-legal point of view.[2]

I definitively do not agree with the results of *Delgamuukw*, but it is my view that the argument of Lamer C.J.C. is irrebutable on its own terms. No criticism of the law of Aboriginal title can take *Delgamuukw* as it is and do more than dissect it, remove the 'bad growths' and attempt to patch it back together. Experience suggests that patches do not last long. A more thorough-going criticism is desperately needed.

Is it possible to redefine Aboriginal title? This is the essential question that I intend to answer with this study. However, I know that many other countries deal with this issue, and that international organizations have started to worry about it too. So, a second question appears: What law can be used to redefine Aboriginal title? Can it be international law? If so, which part of international law?

In the course of the first chapter, I prepare the terrain to answer those questions. Since *Delgamuukw*'s logic allows little room to maneuver, I divide the law of Aboriginal title and set it out using a structural approach. Probably due to my education in civil law, I found that a structural definition allows me to retrace its internal logic. Justification,

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[1] In the course of this study the words 'aboriginal', 'Indigenous' and 'native' will be used interchangeably, meanwhile the use of the word 'Indian' will be avoided except when it is the official legal term.

[2] Except from the evidentiary rules that put the *onus probandi* on the side of Aboriginal peoples, contrary to the common law rule that give the possessor a presumption of title.

source, nature and content are then clear segments of a branch of law that defines itself as the reconciliation between past and present, between Aboriginals and non-Aboriginals, between traditional knowledge and modern law.

Chapter two is the basis for the answer of the essential question. I look at the criticisms that have been made of Aboriginal title, and trace them back to the structure presented in the first chapter. From there I argue that all the relevant law and all the relevant criticism have the same source: 'prior occupation'. However, prior occupation is not a legal category, condition, or fiction; it is simply a historical fact. Prior occupation cannot interpret itself and produce law; a legal tradition must interpret prior occupation in order to create law. Although the justification is the basis of the structure, little can be done if the tools we use to build upon that base are disloyal to the base. For this reason we dismiss both the justification and its interpretation as sources of Aboriginal title, and look at other law that is available to us.

The third chapter tries to answer the questions raised by Chapter two. Tracing references to Aboriginal peoples and their land to the very beginnings of international law, I show that this is not a novel issue for that branch of the law. However, not all international law is relevant to my inquiry. Looking at a regional system of human rights, I find norms and standards available that permit us to challenge the current construction of Aboriginal title. I finally reconstruct an internationalized law of Aboriginal title that promises to satisfy the demands of Aboriginal peoples in Canada.

The methodology of this study has slight variations from chapter to chapter. The first chapter is strictly doctrinal, using Canadian, British and American legal sources to construct the law of aboriginal title as it is now. The second chapter diverges towards socio-legal and cultural studies, trying to look for the injustices of aboriginal title and the meta-legal foundations of those injustices. The third chapter can be called doctrinal, but since the legal sources are not yet directly applicable to Canadian law, it is in a sense theoretical. I acknowledge the influence of philosophers in the branches of hermeneutics and philosophy of law such as Michel Foucault, Gilles Deleuze, Felix Guatarri and Hans Kelsen.

I believe that the law governing the relationship between Aboriginal peoples and the Canadian State must be reconstructed. I hope that this study will be useful both in its

conclusions and methods toward achieving an internationalized conception of Aboriginal peoples in Canada.

1 - Aboriginal title in Canada

The law of Aboriginal title is a special category within the property law of Canada. It acknowledges the possession and use of land by Aboriginal groups and grants it legal protection.[3] While normally land law deals with the legal relationship between a piece of land and its owner;[4] the law of Aboriginal Title aims to regulate the relationship between Aboriginal peoples, the land they traditionally occupy and the legal framework of the Canadian State. Many aspects of this relationship are covered by the law of Aboriginal title,[5] but its essential part (and the focus of this thesis) is the recognition of Aboriginal title itself. That is, the incorporation of Aboriginal possession or tenure of land as a constitutionally protected common law right.[6]

Canadian Law of Aboriginal title has gone through two distinctive periods. During the first period, the definition and content of Aboriginal title was the result of external influence rather than originality. Indeed, Canadian courts were at first deeply influenced by similar decisions of the Supreme Court of the United States of America [US Supreme Court], but the approach taken by Canadian Courts regarding Aboriginal title was then changed by the Privy Council of England [Privy Council]. The definition given by the Privy Council would be the reference point during this whole period. During the second period, the Canadian courts started to diverge from these conceptions, constructing a completely different body of jurisprudence.

The first period can be called the classical law of Aboriginal Title, and it is different from later conceptions in that its original purpose was to support the dispossession of what is today North America. During this period, the law of Aboriginal Title was hardly focused on the Aboriginal person or community as a subject. It was a *mélange* of international doctrine[7] and administrative regulations on jurisdictional claims

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[3] Patrick Macklem, "What's Law got to do with it? The protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L. J. 125 at 133-134.

[4] Nigel P. Gravells, *Land Law: Text and Materials* (London: Sweet and Maxwell, 2004) at 1.

[5] See specially Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: Toronto University Press, 2002) at 86 [Macklem, *Indigenous Difference*].

[6] Kent McNeil, *Common Law Aboriginal Title* (Oxford: Claredon Press, 1989) at 207-208 [McNeil, *Common Law*].

[7] International Law concepts were extensively used in the decisions of the US Supreme Court. Hardy Meyers & Clay Smith, eds., *American Indian Law Deskbook: Conference of Western Attorneys General*, 3rd ed. (Boulder: University Press of Colorado, 2004) at 60-61.

of the non-Aboriginal political entities in America[8] over the lands occupied or formerly occupied by Indigenous peoples. The rights of Aboriginals were secondary and residual to the essential prerogatives of the conqueror.

Although the final purpose of this study is to show that the second period is merely a transitional point towards an internationalized conception of Aboriginal title[9] or Aboriginal territoriality,[10] I will refer to it as the modern law of Aboriginal title. As a transitional period, it starts with a certain understanding of the inadequacy of the former period[11] and the attempts to diverge from it while using the same legal sources and authorities. Two hundred years have not passed in vain; the modern law of Aboriginal Title is less concerned about justifying the dispossession of Indigenous lands because this is already an acknowledged and undisputed fact.[12] Instead, Aboriginal title becomes the vehicle that reconciles Aboriginals and non-Aboriginals in their competing claims over to land and territory. During this period the Aboriginals have been active parties in the courts, and this activity has brought with it the idea of accommodation of interests between Aboriginals and non-Aboriginals.

The following pages are devoted to studying both periods, but using different methods. The first period will be briefly analyzed using a strictly doctrinal and historical approach, in order to pinpoint the parts of its internal discourse that influenced the next period. The philosophical theories that supported the rights of the conquerors in North America will be excluded from general discussion, except when these theories were actually used by judges to support their decisions. The second period will be discussed

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[8] Among the different European conquerors, among the conquerors and its succeeding States, or among the internal authorities of those States.

[9] In International Law, Aboriginal Title "is understood as a right to land given to a community that occupied the land at the time of colonization", Joshua Castellano & Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (Aldershot: Ashgate, 2003) at 201.

[10] Territoriality implies the right to manage the land, the permanent sovereignty over natural resources and some degree of autonomy, *Ibid.* at 201-202; Douglas Harris, "Indigenous Territoriality in Canadian Courts" in Ardith Walkem & Halie Bruce eds., *Box of treasures or empty box? : twenty years of Section 35* (Penticton, BC: Theytus Books, 2003) at 176.

[11] See, Boaventura de Sousa Santos, *Towards a New Legal Common Sense*, 2nd ed. (London: Butterworths, 2002) at 11.

[12] See Robert J. Epstein, "The Role of Extinguishment in the Cosmology of Dispossession" in Gudmundur Alfredsson and Maria Stavropoulou, eds., *Justice Pending: Indigenous Peoples and Other Good Causes. Essays in honor of Erica-Irene A. Daes* (The Hague: Martinus Nijoff Publishers, 2002) at 45.

with the aim of clarifying the doctrine of the modern law of Aboriginal Title by giving it structure.

1.1 - The classical law of Aboriginal Title

Since the arrival of British colonizers in North America, many legal arguments have been used to support the dispossession of Aboriginal peoples from the lands that they have been occupying for centuries.[13] The core of all those arguments is the affirmation that Aboriginals had no proprietary rights over the lands.[14] Nevertheless, since the Aboriginal peoples were in fact living on those lands, and the British had an interest in securing Aboriginal allies until the removal of France as a major power in North America (1760-61), the British Crown had to recognize that their occupation had some legal status.

1.1.1 - The Royal Proclamation

Although many treaties were conducted between the colonizers and certain Aboriginal groups of North America, it was understood for quite a long time that the first source of Aboriginal Title was the Royal Proclamation of 1763.[15] At least it was the first time that the term 'Indian country' was used.[16]

The war between England and France in the colonies had ended with the capitulation of the latter in the Treaty of Paris. Through the Royal Proclamation, King George divided his newly gained colonies in four governments. Moreover, the King saw the importance of regulating not only the lands that the Crown already had purchased or obtained, but also the ones that had yet to be settled, acquired or otherwise claimed by the British Crown. He proclaimed that the Aboriginal Peoples which had any connection to the Empire "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us."[17]

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[13] See generally Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991) at 130-135 [*Report of the Aboriginal Justice Inquiry of Manitoba*].

[14] Eric Kades, "The Dark Side of Efficiency: Johnson v. M'intosh and the Expropriation of American Indian Lands" (1999-2000) 148 U. Pa. L. Rev. 1065 at 1076.

[15] *St. Catharine's Milling and Lumber Co. V. The Queen, 13 S.C.R. 577 at 593* [*St. Catharine's SCC*]; *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46, [1888] J.C.J. No. 1 (P.C.) at 54 [*St. Catherine's PC* cited to App. Cas.].

[16] Charles F. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven: Yale University Press, 1987) at 89.

[17] *Royal Proclamation of 7 October, 1763*, R.S.C. 1985, App. II, No. 1 at 5 [*Royal Proclamation*].

The words of the Royal Proclamation portray the possession of lands by Aboriginal peoples as a mere occupation; bizarrely affirming that those lands were part of the British dominion, even though they were not yet ceded to or purchased by the Crown. The King forbid settlers to buy lands from First Nations in the territory 'not ceded to or purchased by' the British Crown, but clearly established that those lands were within his 'Sovereignty, Protection, and Dominion'.[18] Aboriginal occupation was portrayed as a temporal concession for the sake, security and peace of the colonies.

From then on, the government of the United States of America [USA] and the British Crown would interpret in slightly different ways the Royal Proclamation. Nevertheless, both defined Aboriginal Title from their own standpoint, with the intention of defending their own allegedly paramount right to the land.

1.1.2 - Aboriginal Title in United States' Law

I find it interesting to start by analyzing US Law on Aboriginal title because of the influence that it had in the first Canadian decision on this issue.[19] As I will demonstrate, the jurisprudence of the US Supreme Court, which was rather conciliatory, was ignored by the Privy Council. But as Canadian courts started to create their own jurisprudence diverging from the Privy Council, the jurisprudence of the US Supreme Court was quoted again by Canadian courts.[20]

Before studying the decisions of the US Supreme Court on Indian title,[21] it is important to note that those decisions are far from being logical accounts of the legal dispositions and factual circumstances.[22] There are many inconsistencies from case to

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[18] *Ibid.*

[19] *St. Catharine's SCC*, *supra* note 15.

[20] *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 at 320-321 [*Calder* cited to S.C.R.].

[21] In the U.S. the legal term for Aboriginal title is 'original Indian title'.

[22] McNeil, *Common Law*, *supra* note 6 at 264; See also Jo Carrillo, "Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in Law" (2000-2001) 12 U. Fla. J.L. & Pub. Pol'y 13 at 22 (Johnson v. McIntosh is part legal text, part historical narrative, part creation story, and part symbolic text with a political function. It does indeed have a strange, strangely logical, puzzling sentiment wafting through it, beginning with its explicit admonition against questioning); Philip P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993-1994) 107 Harv. L. Rev. 381 at 386 (In Johnson, Chief Justice Marshall did not engage in a full legal, much less normative, defense of the theory of discovery and conquest. Instead, he asserted that the Court was compelled to embrace the theory for institutional reasons).

case, and within the cases itself,[23] which makes of little use a detailed account of each case. A general description of the doctrine will be more useful for the purposes of this study.

It must be clarified that these variations are important; any judicial opinion regarding the legal status of the lands of Aboriginals in the US would have severe repercussions on the political status (sovereignty) of the tribes. The decisions that form the bases of American native title were crafted by the Chief Justice John Marshall and maintained by succeeding Justices towards a particular goal: give the overarching power of lands and resources to the federal government of the USA,[24] even for future cases.[25] As Churchill puts it: "the Chief Justice engaged in a calculated exercise in juridical cynicism, quite deliberately confusing and deforming accepted legal principles as an expedient to 'justifying' his country's pursuit of a thoroughly illegitimate course of territorial acquisition."[26]

The first cases on Indian title that reached the US Supreme Court were essentially about the acquisition of land reserved for Aboriginals by individuals[27] or states,[28] and about the exercise of jurisdiction by states on Aboriginal lands[29]. The issue under discussion was not 'what is Aboriginal Title to land' but rather 'who can sell this land' and 'who has authority over these lands'. Nonetheless, in order to answer those issues the justices had to decide who actually owned the lands.

Marshall had to acknowledge the Royal Proclamation, the British conquest and the doctrine of discovery in order to assert the power of the US over its territory at that

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[23] See David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997) at 35; Mauro Mazza, *La Protezione dei popoli indigeni nei paesi di Common Law* (Padova: CEDAM, 2004) at 145.

[24] See Wilkins, *supra* note 23 at 34.

[25] Ward Churchill, *Perversions of Justice: Indigenous Peoples and Angloamerican Law* (San Francisco: City Lights, 2003) at 9.

[26] *Ibid.* at 10.

[27] *Johnson v. M'Intosh*, 21 U.S. 543 (1823) at 571-572 [*Johnson*].

[28] *Fletcher v. Peck*, 10 U.S. 87 (1810) [*Fletcher*].

[29] *Worcester v. Georgia*, 31 US 515 (1832) [*Worcester*]; *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) [*Cherokee*].

moment.[30] But the Royal Proclamation banned non-Aboriginals from buying Aboriginal lands[31], not the other way around.[32] By doing this, the Crown did not extend its powers over aboriginals and left open the question about the powers of Aboriginals to sell.[33] Here the issues of title and sovereignty merge. For Marshall, recognizing that Aboriginals could sell would have amounted to accepting their absolute power over their lands, thus excluding the authority of the USA.

Since it was politically impossible for the Court to deny the overarching authority of the USA, it rejected the claim that Aboriginals could transfer title.[34] The conclusion is simple: competing claims of full title are incompatible,[35] so the doctrine of discovery gives absolute title to the federal government of the USA.[36] Nevertheless, Marshall had to recognize that the Aboriginal occupation of lands is fair and legal,[37] making the absolute

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[30] *Johnson*, *supra* note 27 at 573, 587-588 and 597; *Worcester*, *supra* note 29 at 544; *New Orleans v. United States*, 35 U.S. 662 (1836) at 681; Wilkins, *supra* note 23 at 31; Bryan H. Wildenthal, *Native American Sovereignty on trial* (Santa Barbara: ABC-CLIO, 2003) at 6.

[31] *Royal Proclamation*, *supra* note 17 at 5.

[32] Although there were statutes in many states of the U.S. prohibiting Indians from selling, Marshal found that those statutes were inapplicable because of the special relationship between the U.S, and Indians. Meyers & Smith, *supra* note 7 at 5 and 60.

[33] Brian Donovan, "The evolution and present status of common law Aboriginal title in Canada: The law's crooked path and the hollow promise of *Delgamuukw*" (2001-2002) 35 U.B.C. L. Rev. 43 at 49 [Donovan, "The evolution"].

[34] *Johnson*, *supra* note 27 at 591 and 603 (Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others (...)It is obvious, that this transaction can amount to no acknowledgment, that the Indian grant could convey a title paramount to that of the crown, or could, in itself, constitute a complete title); See also Kades, *supra* note 14 at 1078; Wilkins, *supra* note 23 at 30; David Wilkins & K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001) at 54.

[35] *Johnson*, *supra* note 27 at 588-589 (An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it (...) It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it).

[36] *Johnson*, *supra* note 27 at 588 and 603; *Holden v. Joy*, 84 U.S. 211 at 243 (1872); see also Anthony Peirson Xavier Bothwell, "We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property" (2000) 6 Ann. Surv. Int'l & Comp. L. 175 at 186.

[37] *Johnson*, *supra* note 27 at 574; see also Kades, *supra* note 14 at 1097; Gary P. Gould & Alan J. Semple, *Our Land: The Maritimes: The basis of the Indian claim in the maritime provinces of Canada* (Fredericton: Saint Annes Point Press, 1980) at 115.

title of the discoverer conditional to the surrender of those lands by the nations inhabiting them.[38]

In this light, Indian title is understood as a limitation on the title of the United States and as an Aboriginal right of occupancy.[39] Meaning, a "full right to the lands they occupied, until that right should be extinguished by the United States."[40]

1.1.3 - Aboriginal Title in British common law

In 1887 the Supreme Court of Canada [Supreme Court] had the opportunity to define its posture towards Aboriginal Title in the case of *St. Catharine's Milling and Lumber Co. v. The Queen*. In this decision, the Court had to decide whether surrendered Aboriginal lands belonged to the Dominion of Canada or the Province of Ontario. In the judgment, the Supreme Court adopted the American conception of Aboriginal Title, concluding that it only amounts to occupancy, and that the Crown is the only owner of the land.[41].

The Dominion of Canada appealed the decision of the Supreme Court to the Privy Council arguing, among other things, that Aboriginals had a full title equivalent to fee simple estate[42]. One must be careful not to read too much into this argument. It was simply an attempt of the Dominion to show that the land was surrendered to it and not to the province of Ontario.[43] The First Nations that surrendered the land were not a party to the proceedings.

On 1888 The Judicial Committee of the Privy Council delivered its decision. Although it affirmed the decision of the Supreme Court, it expressed the meaning and nature of 'Indian title' in a slightly different way.[44] For the Privy Council, Aboriginal

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[38] *Johnson*, *supra* note 27 at 585-587, 592; *Worcester*, *supra* note 29 at 548 and 557; *Cherokee*, *supra* note 29 at 7; William C Canby, Jr., *American Indian Law in a nutshell*, 2nd. ed. (St. Paul: West Publishing Co., 1988) at 258; see also Gould & Semple, *supra* note 37 at 115.

[39] *Johnson*, *supra* note 27 at 588 and 603; *Mitchel v. U.S.*, 34 U.S. 711 at 746; *Mayor*, *supra* note 30 at 681; *United States v. Cook*, 86 U.S. 591 (1873) at 592; Wilkins & Lomawaima, *supra* note 34 at 54; Canby, *supra* note 38 at 258.

[40] *Worcester*, *supra* note 29 at 560.

[41] *St. Catharine's SCC*, *supra* note 15 at 599.

[42] *St. Catherine's PC*, *supra* note 15 at 47-49; Peter Kulchyski, ed, Unjust Relations: aboriginal rights in Canadian courts (Toronto: Oxford University Press, 1994) at 21.

[43] Kulchyski, *supra* note 42 at 21.

[44] It is interesting the way in which the Lordships make no reference to the previous American cases, and based the issue of native title exclusively in the text of the Royal Proclamation. The Rights of the Crown to acquire the Indian land are also based in the Proclamation and not in the doctrine of discovery itself.

peoples did not have a proprietary interest on their lands[45] because "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign."[46] The title of the Crown is a paramount estate that becomes *plenum dominium* over the land upon extinguishment of Aboriginal title.[47] The Aboriginal right of occupancy was a burden on the title of the Crown, and as such it must be extinguished before the Crown acquires the property of the land. This decision was the basis of the Privy Council's definition of Indian title. Successive cases would keep the same wording and explain further the opinion of their Lordships.

The British understanding of Aboriginal Title departs from an institution originating in Roman law called the *usufructus*;[48] which gives the rights of use and enjoyment of the fruits of a good to a person, while the property of it remained in another person.[49] Initially English Law understood the usufruct as an interest that did not give rise to a legal entitlement: "when, therefore, a man has the use, it is simply that there is a confidence placed in some person, who has the legal estate, to permit the other person to have a usufructuary interest."[50] In later stages possession started to play an essential role for the establishment of a proprietary legal interest.[51] This caused the development of the law of trusts, which reconciled the proprietary interest of one person and the beneficial interest of another over the same piece of land.[52] Nevertheless the Privy Council rejected

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[45] *St. Catherine's PC, supra* note 15 at 58.

[46] *Ibid.* at 54.

[47] *Ibid.* at 55.

[48] See specially Richard H. Bartlett, *Indian Reserves in Quebec* (Saskatoon: University of Saskatchewan Native Law Centre, 1984) at 24.

[49] Andrew Borkowski & Paul du Plessis, *Textbook on Roman Law* (Oxford, Oxford University Press, 2005) at 172; Jean Gaudemet, *Droit privé romain*, 2d ed. (Paris: Montchrestien, 2000) at 247-248; Paul Frédéric Girard, *Manuel élémentaire de droit romain*, 8th ed. by Félix Senn (Paris: Dalloz, 2003) at 388-389; Aldo Schiavone, ed., *Diritto private romano: Un profilo storico* (Torino: Picola Biblioteca Einaudi, 2003) at 327.

[50] *Egerton v Earl Brownlow and others*, [1843-1860] All ER Rep 970.

[51] Megarry and Wade, when talking about the rights that come from possession, affirm that "it is sometimes possible for an entirely fresh title to be created, conferring a new fee simple state" Robert Megarry & William Wade, *The Law of Real Property*, 6th ed. by Charles Harpum, et al. (London: Sweet and Maxwell, 2000) at para. 3-117; see also Sukhnider Panesar, *General Principles of Property Law* (Harlow: Longman, 2001) at 125.

[52] A.W.B. Simpson, *An Introduction to the History of the Land Law* (Oxford: Oxford University Press, 1961) at 182; Graham, Moffat, *Trusts Law: Text and Materials*, 2d. ed. (London: Butterworths, 1994) at 30-33; Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations*, 3d. ed. (London: Butterworths, 2002) at 6-7; See also David J. Hayton, *Underhill and Hayton Law Relating to Trusts and trustees*, 16th. ed. (London: Butterworths, 2003) at 3-5; Geraint Thomas & Alastair Hudson, *The Law of Trusts* (Oxford: Oxford University Press, 2004) at 13-14 and 47.

the idea that Indian title amounted to an equitable or beneficial interest in the land.[53] Woodward suggests that "the correct meaning of the word 'usufructuary' in the Privy Council case has nothing to do with defining the nature of the rights to be enjoyed, but is only intended to indicate who may enjoy those rights."[54]

Although in Roman law the exercise or enjoyment of the *usufructus* was transferable, the right itself could not be ceded because it was a personal servitude.[55] This coincides with the Privy Council's qualification of native title as a "personal right in the sense that it is in its nature inalienable except by surrender to the crown."[56]

In sum, the Privy Council concluded that Indian title was nothing more than a mere burden on the full title of the Crown,[57] and implied that it only was a personal concession by saying that it was "dependent upon the good will of the Sovereign."[58]

1.1.4 - Canadian law towards the transition

When looking at the results, there is not much difference between the occupation/limitation definition given by the Supreme Court of the U.S. and the usufruct/burden definition adopted by the Privy Council. Nevertheless it must be noted that the American conception remains valid in that country,[59] after minor modifications in later cases.[60]

The success of the classical law of Aboriginal Title in the USA is probably due to the way in which it was defined. Simply a full right to land (although non-proprietary[61]); meanwhile the British definition portrayed it as right that depended on the will of the sovereign. Both conceptions allowed the extinguishment of Aboriginal Title in

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[53] *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401, 56 D.L.R. 373 at 411 [*Attorney-General for Quebec* cited to A.C.].

[54] Jack Woodward, *Native Law* (Toronto: Thomson Carswell, 1994) at 6-230.2.

[55] Borkowski & Plessis, *supra* note 49 at 174; Gaudemet, *supra* note 49 at 247-248; Bruno Schmidlin & Carlo Augusto Cannata, *Droit Privé Romain*, t. 1 (Lausanne: Payot, 1984) at 201; Girard, *supra* note 49 at 391; Silvio Perozi, *Istituzioni di Diritto Romano*, t. 1, 2d ed. by Luigi Capogrossi Colognesi (Roma: Il Cigno Edizioni, 2002) at 787;

[56] *Attorney-General for Quebec*, *supra* note 53 at 408; see also *St. Catherine's PC*, *supra* note 15 at 54.

[57] *St. Catherine's PC*, *supra* note 15 at 58; *Attorney-General for Quebec*, *supra* note 53 at 410; *Amodu Tijani v. The Secretary, Southern Nigeria*, [1921] 2 AC 399 (P.C.) at 403.

[58] *St. Catherine's PC*, *supra* note 15 at 54.

[59] See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

[60] See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

[61] *Ibid.* at 278.

questionable ways,[62] but while one recognizes Aboriginal Title as a right, the other perceives it as a concession.[63]

Although the Privy Council defined the nature of the rights of Aboriginals, it never addressed the content of this right. In any case, Canadian classical law of Aboriginal Title will be deeply affected by the Privy Council reluctance to discuss the matter forthrightly: "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point."[64]

As complex situations started to arise, the poor regulation in the content of the classic law of Aboriginal Title became more evident. The transition towards a modern law of Aboriginal Title in Canada started in 1973, when the Supreme Court in the case of *Calder v. British Columbia* [*Calder*] stated:

> [T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means **and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'**.[65]

The importance of *Calder* for Aboriginal peoples is that it affirmed that Aboriginal title exists independently of its legal recognition by the Canadian State.[66] It survives the assertion of sovereignty of the British Crown and derives from the occupation of Aboriginal peoples.[67] This opened the possibility of land rights beyond the reserves, and made Aboriginal title a matter that can and must be proven by fact.

In *Guerin v. Canada*, the Supreme Court was faced with the dilemma of either maintaining an obsolete definition (personal, usufructuary right), or adopting a new one (beneficial interest). Indeed many dissenting opinions had already contemplated the

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[62] Felix S. Cohen, "Original Indian Title" (1947-1948) 32 Minn. L. Rev. 28 at 36.

[63] See Woodward, *supra* note 54 at 6-230.1.

[64] *St. Catherine's PC*, *supra* note 15 at 55.

[65] *Calder*, *supra* note 20 at 328.

[66] Donovan, "The evolution", *supra* note 33 at 56.

[67] *Ibid.*

possibility of characterizing Aboriginal title as a 'beneficial interest.'[68] The Court answered with a 'neither and both' solution: neither one nor the other is accurate; but both of them together portray the complexity of Aboriginal Title. "Any description of Indian title which goes beyond these two features [usufructuary right and beneficial interest] is both unnecessary and potentially misleading."[69]

The modern law of Aboriginal Title was crystallized in *Delgamuukw.*[70] In this judgment, Chief Justice Antonio Lamer agreed with the previous judgments on the point that the Privy Council's "choice of terminology is not particularly helpful to explain the various dimensions of Aboriginal Title."[71] According to the text of the decision, Lamer C.J.C. did not claim to have come up with a new definition of Aboriginal Title. He considered that he was simply rephrasing the classical definition by calling it a '*sui generis* interest in land.'[72] Moreover, the importance of this judgment is the extensive discussion about the sources, justification, nature and content of Aboriginal Title, which will be further discussed in the following section.

Although *Delgamuukw* is the most important decision in Canadian modern law on Aboriginal Title, it must be read together with previous and subsequent cases in order to develop the best interpretation of modern Aboriginal Title.

1.2 - The modern law of Aboriginal Title

As noted earlier, the law of Aboriginal Title regulates the relationship of Aboriginals, the land they occupy and the legal framework of Canada. The following pages deal with the right to Aboriginal Title. In this sense, a difference must be made between ancestral Aboriginal land and reserved land.[73] Notwithstanding the jurisprudence

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[68] *Canada (Attorney-General) v. Giroux*, 53 S.C.R. 172; *Cardinal v. Attorney General of Alberta,* [1974] S.C.R. 695, 40 D.L.R. (3d) 553; *Western Industrial Contractors Ltd. v. Sarcee Developments Ltd.* (1979), 15 A.R. 309; 98 D.L.R. (3d) 424 (C.A. Div.).

[69] *R. v. Guerin,* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 at 382 [*Guerin* cited to S.C.R.].

[70] David W. Elliott, "Delgamuukw: Back to Court?" (1998) 26 Man. L.J. 97 at 109-110; James (Sakej) Youngblood Henderson, et al., *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000) at 397

[71] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 at para. 112 [*Delgamuukw*].

[72] *Ibid.*

[73] See Woodward, *supra* note 54 at 6-197; see also Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 65 and ss.

that affirms that Aboriginal groups' legal interest on both types of land is the same,[74] reserved land is "land that has become permanently attached to a particular group of native people"[75] because it has been recognized by treaties, statutes and land claim agreements. Meanwhile ancestral Aboriginal lands "are lands which the natives possess for occupation and use at their own discretion,"[76] but without the status of a reserve.

The narrative used in the following section differs in tone from the previous one. This section is intended to express an original understanding of Aboriginal Title in a synthetic manner.[77]

1.2.1 - Justification

In common law systems, it is important for judges to justify their conclusions and the rights that are vindicated by their decisions. In the case of Aboriginal peoples, the justification of their rights is particularly important because their rights entail a differentiated treatment by the government that non-Aboriginals do not enjoy.[78]

Here the word 'justification' must be understood as the theories, facts or philosophical arguments that support the existence of given right, in this case the reason for giving legal protection to Aboriginal claims over certain lands, i.e., the reason for recognizing Aboriginal Title. It must not be mistaken with the 'test of justification', which is the test created by Canadian jurisprudence to determine if an infringement of an Aboriginal right is valid.[79]

The material object of Aboriginal title is the land. Not any type of land, but land that Aboriginal groups have been occupying since before the British Crown's assertion of sovereignty. Since the goal of the right to Aboriginal title is to protect this particular type of land, the essential reason to give a *sui generis* title to land is the fact that occupation

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[74] *Guerin*, *supra* note 69 at 379.

[75] Brian Slaterry, (1987) "Understanding Aboriginal Rights" 66 Can. Bar Rev. 727 at 743.

[76] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at para. 119 [*Van der Peet*].

[77] Regarding the theoretical construction of Aboriginal Title, particularly the geometric analogy, I have been highly influenced by Deleuze and Guatarri. Gilles Deleuze & Felix Guattari, *Anti-Oedipus: capitalism and schizophrenia* (Minneapolis: University of Minnesota Press, 1987); Gilles Deleuze & Felix Guattari, *A thousand plateaus: capitalism and schizophrenia* (Minneapolis: University of Minnesota Press, 1987).

[78] See specially William Jonas & Margaret Donaldson, "The Legitimacy of Special Measures" in Sam Garkawe, et al., eds., *Indigenous Human Rights* (Sydney: Sydney Institute of Criminology, 2001).

[79] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 at 1110 [cited to S.C.R.]; *R. c. Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657 at para. 56 [*Adams*].

started prior to the assertion of sovereignty.[80] In other words, the justification of Aboriginal Title, just as other Aboriginal rights,[81] is derived from the prior occupation of Aboriginal peoples in what today is Canada.[82]

1.2.2 - Nature

The nature of Aboriginal Title within the legal system of Canada refers to the nature of an Aboriginal right.[83] In other words, Aboriginal Title is one of many possible Aboriginal rights.[84] It must not be mistaken with a site-specific Aboriginal right which consists in an activity (for example, hunting) which can only be exercised on a particular track of land.[85] Practices protected by an Aboriginal right are not necessarily linked to the place where they are performed,[86] and Aboriginal Title cannot be understood as a group of Aboriginal rights.[87] In order to understand the nature of Aboriginal Title, it is necessary to briefly review the nature of Aboriginal rights within Canadian law.

1.2.2.1 - The nature of Aboriginal rights

Although Aboriginal rights are based in the culture of Aboriginal peoples and its different manifestations,[88] their recognition must balance the Aboriginal practices and the

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[80] See Kent McNeil, *Defining Aboriginal Title in the 90's: has the Supreme Court finally got it right?* (Toronto: York University Printing Services, 1998) at 11 [McNeil, *Defining*]; Henderson, *supra* note 70 at 238.

[81] *Van der Peet*, *supra* note 76 at para. 30 (the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here...).

[82] *Calder*, *supra* note 20 at 328 (the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means...).

[83] *Van der Peet*, *supra* note 76 at para. 33 (Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights).

[84] *Delgamuukw*, *supra* note 71 at para. 137 ([A]boriginal title is a species of aboriginal right recognized and affirmed by s. 35(1)...); *Van der Peet*, *supra* note 76 at para. 74 (aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land).

[85] *Adams*, *supra* note 79 at para. 30 (Even where an aboriginal right exists on a track of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific track of land).

[86] *Van der Peet*, *supra* note 76 at para. 116.

[87] *Delgamuukw*, *supra* note 71 at para. 137 (this suggests that Aboriginal Title is merely the sum of a set of individual aboriginal rights, and that it therefore has no independent content. However, I rejected this position).

[88] *Van der Peet*, *supra* note 76 at para. 46 (in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right).

perspective of the common law towards such practices.[89] In other words, a particular Aboriginal right will be awarded as long as the tradition or practice can be expressed in a manner that the common law recognizes.[90]

The doctrine of Aboriginal rights implicitly accepts that there is some degree of incommensurability between the common law and Aboriginal legal systems,[91] because it does not accept that Aboriginal customary law is *per se* a source of aboriginal rights. Aboriginal customary law must be 'translated' into common law terms in order to become law.[92] So, the doctrine of Aboriginal rights is the legal mechanism that 'reconciles' Aboriginal practices and the existing legal framework in Canada.

The process of reconciliation can be explained using a geometrical metaphor. In the graphic below there are two flat surfaces or planes facing each other. One represents the system of customary law of a given Aboriginal group[93] and the other represents the common law. The common law plane and the Aboriginal plane are not necessarily conflictive, but they cannot be merged one into the other because of their epistemological differences. An instrument is placed between them in order to perform the conversion from one system of knowledge to the other. This instrument brings the two systems to an agreement, although it belongs to the common law.[94] The action that the instrument performs must be understood as an epistemological amalgamation, that is, the reconciliation of two systems of knowledge in order to produce new (legal) knowledge. It would be a mistake to believe that the mechanism combines two normative systems, since

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[89] *Ibid.* at para. 50 (the only fair and just reconciliation is (...) one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law).

[90] *Ibid.* at para. 49 (the definition of an aboriginal right must (...) take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system).

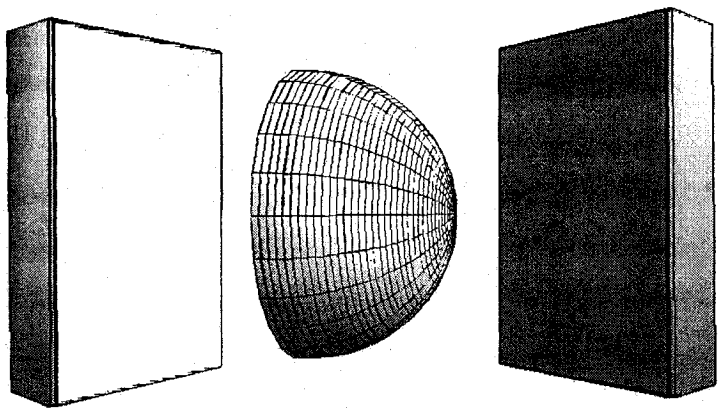
[91] *Contra* John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 5-12 (While Borrows acknowledges that the Supreme Court of Canada looks for the source of *sui generis* aboriginal rights in both Aboriginal legal traditions and the common law, he interprets this as the acceptance of Aboriginal law as part of the laws of Canada); H. Patrick Glenn, *Legal Traditions of the World*, 2nd ed. (Oxford: Oxford University Press, 2004) at 44-48.

[92] *Van der Peet, supra* note 76 at para. 49

[93] Because there is no such thing as an unified aboriginal system of knowledge, it depends on the culture of the group. Henderson, *supra* note 70 at 401-402; *contra* Glenn, *supra* note 91 at 59-68.

[94] *Delgamuukw, supra* note 71 at para. 82 (although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*).

Aboriginal customary law is not understood as law until it is reduced to common law terms.[95]



Graphic 1: Nature of the modern law of Aboriginal title

The claim of an Aboriginal group for a particular right arises as a projection of a portion of the Aboriginal plane towards the common law plane. In its trajectory it passes through the conversion instrument, where it is transformed into a cognizable common law right. Finally, the resulting Aboriginal right is incorporated into the plane of the common law.[96]

In this light, the concept of Aboriginal rights is a means to recognize Aboriginal traditions and practices under the common law by giving those traditions and practice the status of constitutionally protected common law rights. Since there is no similar instrument in the Canadian legal system, Aboriginal rights are *sui generis*.

Similarly, a claim of Aboriginal title is the projection of the Aboriginal immemorial presence on a given track of land into the conversion matrix. The resulting right is a *sui generis* title that is incorporated in the common law plane. The nature of Aboriginal title is of an instrument that recognizes under the Canadian legal system the prior occupation of a given track of land, awarding a title which constitutes a *sui generis* legal right similar to a full property right, but with special characteristics and content.

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[95] *Van der Peet, supra* note 76 at para. 49

[96] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1, 2005 SCC 43 at para. 70 (The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right) [*Marshall 3*].

1.2.3 - Sources

The modern law of Aboriginal Title recognizes that the Royal Proclamation is not the original source of Aboriginal Title.[97] The statutes and jurisprudence of the Canadian legal system have not created this right; rather, the Canadian legal system has recognized its continued existence.[98]

The issue of the sources of Aboriginal Title is deeply related to its justification. The prior occupation of these lands by Aboriginals does not simply demonstrate the reason they deserve title, but also the reason why this title still exists today. Nevertheless, prior occupation must be complemented by a legal system that recognizes and protects those rights that arise from prior occupation. Thus, the sources of Aboriginal Title are two: prior occupation and the relationship between the common law and Aboriginal systems of customary law.[99] The nature of title also shows the two components that form the source of Aboriginal Title. The resulting right in common law arises from the projection of the Aboriginal portion (prior occupation) onto the conversion instrument (relationship between common law and Aboriginal systems of customary law).

On one side, Aboriginal occupation was prior to the introduction of English law, thus giving it predominance over any other interest on land that this system of law can create.[100] On the other side, English law must recognize this occupation as a proof of an interest in land.[101] The *sui generis* nature of Aboriginal law is finally revealed: the common law does not recognize a regular proprietary interest, it recognizes a title that resembles fee simple, but that has special characteristics.[102]

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[97] *Guerin, supra* note 69 at 379 (Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision); see also *Report of the Aboriginal Justice Inquiry of Manitoba, supra* note 13 at 121.

[98] *Guerin, supra* note 69 at 376 (this Court recognized Aboriginal Title as a legal right derived from the Indians' historic occupation and possession of their tribal lands.); *Delgamuukw, supra* note 71 at para. 114 (it is now clear that although Aboriginal Title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples.).

[99] *Delgamuukw, supra* note 71 at para. 114.

[100] *Delgamuukw, supra* note 71 at para. 114 ([Aboriginal Title] arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward).

[101] *Ibid.* at para. 114 (the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law); McNeil, *Common Law, supra* note 6 at 207.

[102] *Delgamuukw, supra* note 71 at para. 113-115.

1.2.4 - Characteristics

Aboriginal title resembles fee simple title, but it is not entirely equal to this common law right. It has two basic differences: Aboriginal Title is held communally and is inalienable.

Both characteristics derive from the fact that for Aboriginal peoples, the land is part of the shared culture of the group.[103] The characteristics are then the internal and external manifestation of that fact.

The first characteristic, its communality, is the internal manifestation and makes Aboriginal Title a communal right.[104] This characteristic has its origins in the classic law of Aboriginal title, when the British Crown forbade settlers from dealing with Aboriginals.[105] Consequently, Aboriginal individuals could not sell land directly to non-Aboriginals, and the Crown would only deal with the group as a whole through its leaders. Today it is understood that the property of the land belongs to the group, not to its individual members. Aboriginal systems of customary law do not allow any member of the group to take unilateral decisions about the fate of the group's land.[106] Thus, Aboriginal Title is defined in common law terms as a communal right.[107]

The second characteristic, its inalienability, is the external manifestation; it makes Aboriginal Title a personal right.[108] Lands that are held under Aboriginal Title cannot be transferred to other individuals under the Canadian legal system without losing its protection as 'Aboriginal'. In order to transfer the piece of land, it must be surrendered

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[103] *Ibid.* at para. 128 (there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture); see also *Report of the Aboriginal Justice Inquiry of Manitoba*, *supra* note 13 at 116; Henderson, *supra* note 70 at 406-412.

[104] *Delgamuukw*, *supra* note 71 at para. 115.

[105] *Royal Proclamation*, *supra* note 17 at 5.

[106] See also *First Nations Land Management Act*, S.C. 1999, C.24 at s. 18(3); Woodward, *supra* note 54 at 9-259.

[107] *Delgamuukw*, *supra* note 71 at para. 115.

[108] *Ibid.* at para. 113 (One dimension is its *inalienability*. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal" in this sense); *Paul v. Canadian Pacific Ltd.*, [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487 at para. 34 (we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its general inalienable nature); see also Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L. Rev. 301 at 314.

first to the Crown. As a result the land is no longer the property of the Aboriginal group, and becomes the property of the Crown.

All of the above explains why Aboriginal Title is a *sui generis* proprietary right different from land held as fee simple. However the *sui generis* nature of the right also influences the content of Aboriginal title.[109]

1.2.5 - Content

Finally, Aboriginal Title, as any other right, is not an absolute right; it has boundaries and limitations. The content of a right is found between what can and what cannot be done with it. In the case of Aboriginal title, the content is defined in positive and negative terms.

The positive aspect (what can be done) is not linked to Aboriginal traditions. In other words, Aboriginal title gives the right-holder freedom to use the land for indeterminate purposes.[110] Once Aboriginal title is granted, the group can use the land for whatever activities they want so long as those activities do not transgress the limitation set out below, even if those activities have nothing to do with Aboriginal traditions or customs.

The negative aspect or limitation (what cannot be done) is linked to the traditional relationship between Aboriginal peoples and the land. The aforementioned freedom finds its limits in the activities that might destroy the connection of the group with the land.[111] Anything that would destroy the use of the land for traditional purposes by future generations is incompatible with Aboriginal title.[112]

1.2.6 - Definition

Having in view now the structure of Aboriginal title, it is possible to define it.

The right to Aboriginal Title is defined as the right of Aboriginal peoples to be recognized as the *sui generis* owners of the tracks of lands that they have exclusively and continuously been occupying[113] since before the assertion of sovereignty by the British

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[109] See Henderson, *supra* note 70 at 238.

[110] *Delgamuukw*, *supra* note 71 at para. 124; See also Henderson, *supra* note 70 at 362.

[111] *Delgamuukw*, *supra* note 71 at para. 125.

[112] *Ibid.* at para. 154.

[113] *Ibid.* at 143; McNeil, *Common Law*, *supra* note 6 at 207-208; Macklem, *Indigenous Difference*, *supra* note 5 at 76.

Crown.[114] This title is a *sui generis* interest in land that consists in the right to exclusive occupancy and possession.[115]

It must be kept in mind that since 1982, this right has received constitutional protection.[116] Aboriginal title, as an aboriginal right, enjoys the protection given by section 35 of the Constitution. Although section 35 is not included in the *Canadian Charter of Rights and Freedoms*, it elevates to constitutional level all the Aboriginal rights that exist at common law; i.e., those rights recognized by the courts.

1.3 - Final remarks

The discussion above demonstrates the essential role that the concept of 'prior occupation' plays in the Canadian law of Aboriginal Title. The jurisprudence recognizing the right to Aboriginal title flows from that undisputed fact.

Having understood the historical evolution of Aboriginal Title and its current formulation, it is necessary now to review important criticism of the manner in which this right has been conceptualized, always keeping in mind the role of 'prior occupation' as its source and justification.

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[114] Kent McNeil "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1997-1998) 5 Tulsa J. Comp. & Int'l L. 253 at 274; Macklem, *Indigenous Difference*, *supra* note 5 at 76.

[115] *Delgamuukw*, *supra* note 71 at 185; Macklem, *Indigenous Difference*, *supra* note 5 at 76; see also Henderson, *supra* note 70 at 362; Woodward, *supra* note 54 at 6-197; *First Nations Land Management Act*, *supra* note 106 s. 18(1).

[116] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35(1) (The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed) [*Constitution Act, 1982*].

2 - Present and future of Aboriginal title

So far I have shown the evolution and general structure of the law of Aboriginal title, paying particular attention to the right of recognition of such title. My intention in the first section was to present a doctrinal framework that would allow the reader to observe how the justification, source, nature and content of Aboriginal title can be reduced to a single statement: Aboriginal title derives from prior occupation.

Since my intention here is to show some of the socio-legal deficiencies of the modern law of Aboriginal title and the possible tools that can be used to redefine Aboriginal title, this section will be less doctrinal than the previous one. Aboriginal title has always been an object of criticism.[117] Many authors have already denounced the deficiencies that will be studied in this section. My contribution to the literature on the subject will be initially to systematize all of those deficiencies and eventually find the thread that links them together.

Beyond every single criticized feature of Aboriginal title, there is an argument that attempts to make it reasonable to an impartial observer. As I will eventually show, all these arguments can be easily located within the framework of Aboriginal title already presented in section 1.2 - and traced back to the concept of prior occupation. The importance of this exercise is not only to recognize the shortcomings of the decisions of the Supreme Court of Canada, but also to acknowledge that prior occupation is used to limit the enjoyment of Aboriginal title.

Towards the end of this section I will try to present alternative interpretations of the notion of prior occupation, in an attempt to find an appropriate justification for Aboriginal title.

2.1 - The Injustices of the Modern Law of Aboriginal Title

Before 1997, there was no legal definition of Aboriginal title in the Canadian legal system.[118] With the arrival of the modern law of Aboriginal title, the situation of Indigenous lands was clarified and some of the basic demands of First Nations in Canada were vindicated. For example, it was accepted that Aboriginal peoples have a just claim

[117] Before Aboriginal title existed as a legal concept, Victoria criticized the way in which the European Powers were dealing with Aboriginal peoples, their lands and their sovereignty over those lands. Francisci de Victoria, *De Indis et de Ivre Belli Relectiones,* by Ernest Nys (Washington D.C.: Carnegie Institution of Washington, 1917) at 218.

[118] McNeil, *Defining*, *supra* note 80 at 7.

for the land on which they have been living since the assertion of British or Canadian sovereignty. It has also been established that Aboriginal title is a right 'in land' and not a group of Aboriginal rights.[119] But the answers found in Delgamuukw and successive cases do not fully satisfy all the necessities and legitimate demands of First Nations, and there is no certainty that those answers would apply to Métis' lands.[120] I will devote the following pages to systematize the existing criticisms to the modern law of Aboriginal title and I will explain the source of each criticism.

Until this moment I have called those criticisms 'inadequacies' or 'deficiencies', but from now on I want to go a step further by calling them 'injustices'. The choice of terminology cannot be taken lightly. I strongly believe that Canadian law of Aboriginal title should be quite different from what it is now, and an embryonic idea of how Aboriginal title should be conceptualized is quite plausibly already in our thoughts, language and social aims.[121]

As tempted as I am to identify myself with a particular theory of justice, this would be of little help to the purposes of this study. First, I cannot claim that all the writers quoted or cited herein share the same opinion. Secondly, no theory of justice that I

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[119] Delgamuukw, clarified that Aboriginal title is a right in land, and not the right to perform a group of Aboriginal rights in a given piece of land. Consequently, the uses of the land are not limited to Aboriginal traditions.

[120] *Van der Peet*, *supra* note 76 at 67 (the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis). In *R. v. Powley*, the Court did respond to the situation of their aboriginal rights giving them a different time frame than the one given to First Nations; but the timeframe for First Nations lands and rights are different, which makes us think that the Court can establish a different time frame for Métis lands. *R. v. Powley*, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1, 2003 SCC 43 at para. 38 [*Powley*]; Nevertheless, Métis Peoples have engaged in comprehensive land claims procedures, which so far has concluded in one land claim agreement. Ministry of Indian Affairs and Northern Development, *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (Ottawa: Ministry of Indian Affairs and Northern Development, 1993) online: Ministry of Indian Affairs and Northern Development <http://www.ainc-inac.gc.ca/pr/agr/sahtu/sahmet_e.html>; *Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c. 27. By the time this thesis was completed, the case *Manitoba Métis Federation Inc. v. Canada* was in the last stages before the Manitoba Court of Queen's Bench; in this case the Métis Nations of Manitoba argue that unconstitutional measures of the provincial government have prevented them from enjoying 1.4 million acres of land that they rightfully own.

[121] L.H.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv. L. Rev. 593 at 614-615.

know of can support all of the statements that I wish to make. I prefer to work with each injustice separately and then draw some principles that would inform a special idea of justice on the issue of Aboriginal title.

2.1.1 - The proof of title

The modern law of Aboriginal title has set a test for the recognition of Aboriginal title which takes into account the oral history of an Aboriginal group, its previous presence and present occupation of a given track of land in order to award title[122]. The test is described in the *Delgamuukw* decision:

> In order to make out a claim for Aboriginal title, the Aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[123]

The first level, which requires the occupation to have started prior to sovereignty, neglects to recognize land rights of groups that were displaced (often forcibly) to new territory after the assertion of sovereignty.[124] At the second level, the claimants must prove continuity in their occupation since time immemorial, which puts the *onus probandi* on the occupants of the land, contrary to the common law's rules of evidence.[125]

2.1.1.1 - The temporal limit

Regarding the temporal aspect, the test of Aboriginal title differentiates from the test of specific Aboriginal rights over land in the sense that the latter "aim[s] at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans."[126] In other words, while

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[122] See Peter H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask. L. Rev. 247 at 272.

[123] *Delgamuukw*, *supra* note 71 at para. 143.

[124] Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's The Connection?" (1997-1998) 36 Alberta L. Rev. 117 at 132-133 [McNeil, *Title and Rights*].

[125] Brian Donovan, "Common Law Origins of Aboriginal Entitlements to Land" (2003) 29 Man. L.J. 289 at 340 [Aboriginal peoples have generally been unsuccessful in asserting proprietary claims to their ancestral lands because of a persistent but unexpressed double standard in the application of common law principles by Canadian governments and courts]; Kent McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?" (1990) 16 Monash U.L. Rev. 91 at 104 [McNeil, A question].

[126] *Van der Peet*, *supra* note 76 at para. 44.

the law generally protects Aboriginal practices that existed prior to contact, it protects Aboriginal lands that were occupied at the moment of assertion of sovereignty of the British Crown. In this light, the Aboriginal title test appears more protective than the Aboriginal rights test. But when compared to the Métis rights test, which uses the moment of 'effective European control' as the time limit for protection,[127] it appears less generous.

Hence, the Supreme Court took into account the dynamism of cultural practices,[128] but in a fairly negative manner. In order to protect Aboriginal traditions, customs and practices,[129] the Supreme Court had to draw a line to determine when exactly this protection must end.[130] That is, the Court had to determine from which moment on new Aboriginal practices will not be considered 'central to the Aboriginal societies.'[131] Thus, modern variations of Aboriginal practices that lack continuity with ancient practices are not protected by the doctrine of Aboriginal rights[132]. As Borrows says: "With this test [the test in *Van der Peet*], as promised, Chief Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, 'once upon a time,' central to the survival of a community".[133] In a similar manner, Aboriginal title has

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[127] *R. v. Powley*, *supra* note 120 at para. 18.

[128] See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002) at 2-4 [Benhabib, *Claims*]; Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizen* (Cambridge: Cambridge University Press, 2004) at 120; Jeff Spinner, *The boundaries of citizenship: Race, Ethnicity and Nationality in the Liberal State* (Baltimore: The John Hopkins University Press, 1994) at 64-66; See also Esther Sánchez Botero "Reflexiones antropológicas en torno a la justicia y la jurisdicción especial indígenas en una nación multicultural y multiétnica" in Fernando García, ed., *Las sociedades interculturales: un desafío para el siglo XXI* (Quito: FLACSO, 2000) at 66 online: <http://www.flacso.org.ec/docs/sasocintercul.pdf>; Eva Brems, "Reconciling Universality and Diversity" in András Sajó, ed, *human rights with Modesty: The Problem of Universalism* (Leiden: Martines Nijhoff, 2004) at 58.

[129] Paraphrasing the *Constitution Act, 1982*, *supra* note 116 at s. 35.

[130] Justice L'Heureux-Dubé, dissenting in *Van der Peet*, called it the "cut-off date". *Van der Peet*, *supra* note 76 at 169.

[131] *Ibid.* at para. 44 and 63 (Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1)).

[132] *Ibid.* at para. 64 (The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights).

[133] Borrows, *Recovering*, *supra* note 91 at 60.

a temporal limit: Aboriginal groups cannot claim title over land that they started occupying after the assertion of sovereignty by the Crown.

In the case of Aboriginal rights, this time limit produces an effect of 'controlled Aboriginality'. That is, there is a range of legally accepted Aboriginal practices that exist since time immemorial and that can be performed in modern ways, for example, hunting with modern rifles.[134] Outside that range, there are variations of those practices that do not have legal protection because they did not exist or have dramatically changed since contact with Europeans.[135] I do not want to analyze here the injustices of this controlled Aboriginality, but it is important to note that the doctrine of Aboriginal rights permeates the whole doctrinal construction of Aboriginal title.

When it comes to Aboriginal Title, the time limit does not seek to directly control Aboriginality, but to sustain non-Aboriginal territorial control of the Canadian State.[136] In *Delgamuukw*, the Chief Justice justified the time limit by affirming that "it does not make sense to speak of a burden on the underlying title before that title existed, Aboriginal title crystallized at the time sovereignty was asserted".[137] In other words, Aboriginal title exists as the recognition of a pre-existing control over land that ceased to exist once the British Crown asserted its control over the same land. But this recognition does not give the same control to Aboriginal groups today, it simply grants a 'right in land'.[138]

The weight of this injustice falls on the sources of Aboriginal title. Since Aboriginal title arises from indigenous previous occupation of the land coupled with the relationship between the common law and Aboriginal systems of knowledge, the right can only be recognized if it existed at the moment the common law became the sovereign legal system in Canada. The land that was not occupied by an Aboriginal group entered into the land system of the common law. The land possessed by Aboriginal groups

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[134] *R v. Simon*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390 at paras. 29 & 31 (Although this case refers to treaty rights) [*Simon*].

[135] See Borrows, *Recovering*, *supra* note 91 at 63-64.

[136] *Ibid.* at 94 and 98 (Sovereignty is pretty powerful stuff. Its mere assertion by one nation is said to bring another's land rights to a 'definite and permanent form' [...] What alchemy transmutes the base of Aboriginal possession into the golden bedrock of Crown title? [...] Conjuring Crown assertions of sovereignty validates the appropriation of Aboriginal land for non-Aboriginals people. It sanctions the colonization of British Columbia and directs Aboriginal peoples to reconcile their perspectives with the diminution of their rights).

[137] *Delgamuukw*, *supra* note 71 at para. 145.

[138] *Ibid.* at para. 111.

remained in their possession, and the common law had to acknowledge the existing legal framework of the group.

The problem is that upon the arrival of Europeans to their lands and their proximities, many aboriginal groups moved to other locations.[139] In this case, the group might not have established a connection with the land until after the assertion of sovereignty.[140] All those groups cannot claim any right on land since they cannot prove their immemorial presence and spiritual connection with the land.[141]

2.1.1.2 - The *onus probandi*

According to common law rules of evidence regarding real property, the occupation of land raises a prima facie presumption of ownership that can only be defeated by the proof of prior superior title.[142]

Delgamuukw has particular importance for evidentiary issues. The Supreme Court accepted in this case that oral histories are essential to prove pre-sovereignty occupation.[143] In order to be awarded Aboriginal title over a track of land, Aboriginal groups must provide evidence of pre-sovereignty occupation. But since conclusive evidence of such occupation might be difficult to provide, the Aboriginal group can prove title by showing current occupation coupled with evidence of continuity since pre-sovereignty[144].

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[139] See McNeil, *Title and Rights*, *supra* note 124 at 132.

[140] *Ibid.* at 132-133.

[141] *Delgamuukw*, *supra* note 71 at para. 154 (I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained).

[142] *Roe dem. Haldane and Urry v. Harvey* (1769), 4 Burr. 2484, 98 E.R. 302 at 304-305 (In a ejectment, the party who wouls chahge the possession, must take out a title. [...] The plaintiff must recover upon the strength of his own title.); *Peaceable dem. Uncle v. Watson* (1811), 4 Taunt. 16, 128 E.R. 232 at 232-233 (Possession is prima facie evidence of seisin in fee simple); *Asher v. Whitlock* (1865) L.R. 1 Q.B. 1 at 5 ([P]ossession is good against all the world except the person who can shew a good title. [...] The fact of possession is prima facie evidence of seisin in fee. The law gives credit to possession unless explained; and Mr. Merewether, in order to succeed, ought to have gone on and shewn the testator's title to be bad...); *Perry v. Clissold*, [1907] A.C. 73 (P.C.) at 79 (It cannot be disputed that a person in possession of land in the assumed character or owner and excersing peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner); See also *R. c. Bagshaw*, [1972] S.C.R. 2, 21 D.L.R. (3d) 202 at para. 18; *R v. Gombosh Estate*; *R. v. Fleming*, [1986] 1 S.C.R. 415, 26 D.L.R. (4th) 641 at para. 42; Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 Osgoode Hall L. J. 780 at 316-324 [McNeil, The Onus].

[143] *Delgamuukw*, *supra* note 71 at para. 84.

[144] *Ibid.* at para. 152.

Notwithstanding the difficulties in proving both pre-sovereignty possession and continuity, even using oral histories, the injustice lies in the *onus probandi* of Aboriginal title. Somehow the Court has concluded that the special claim to Aboriginal Title must be proven by the party that actually has possession over the land. Certainly the issue of Aboriginal title has come to the Courts upon direct request to recognize title,[145] upon issues related to the fiduciary duty of the Crown,[146] or as a defense to the exercise of Aboriginal practices.[147] But in any case, it should be up to the Crown or any other person challenging Aboriginal title to provide proof of prior and better title.[148]

It is still not clear why it is up to Aboriginal peoples to prove an undisputed fact such as its previous occupation.[149] Of course the evidence that a Court would expect is that an Aboriginal group had possession of a given track of land since before sovereignty.[150] In this light it is obvious that the Supreme Court has interpreted previous occupation in the most restrictive way possible: specific previous occupation, which must also be reasonably maintained until today.[151]

If one of the principal concerns of the government when negotiating comprehensive land claims[152] is "the needs and the interests of the Aboriginal group",[153] why does the test for title award only the land that an Aboriginal group can prove they had in a particular moment in time? I have no answer for this question.

> Aboriginal claimants who are currently in possession should not have to prove continuity with occupation pre-dating the Crown's

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[145] *Calder*, *supra* note 20; *Delgamuukw*, *supra* note 71.

[146] *Guerin*, *supra* note 69; *Haida Nation v. British Columbia, (Minister of Forests)*, [2002] 6 W.W.R. 243 164 B.C.A.C. 217, 2002 BCCA 147 (C.A.); *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 245 D.L.R. (4th) 193, 2004 SCC 74.

[147] *Adams*, *supra* note 79; *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385 [*Côté* cited to S.C.R.]; *Marshall 3*, *supra* note 96.

[148] McNeil, A question, *supra* note 125 at 104; see also *supra* fn. 142.

[149] McNeil, The Onus, *supra* note 142 at 779.

[150] *Ibid.* at 780-781.

[151] *Delgamuukw*, *supra* note 71 at 153.

[152] Comprehensive land claims is the name given by the Ministry of Indian Affairs and Northern Development to the land claims that are based on un-extinguished Aboriginal title. There are also the specific land claims which are based on treaties.

[153] Canada, Minister of Indian Affairs and Northern Development, *Resolving Aboriginal Claims. A practical guide to Canadian experiences* (Ottawa: Ministry of Public Works and Government Services Canada, 2003) at 30 online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/rul/rul1_e.pdf>.

> assertion of sovereignty. Their possession should be sufficient in and of itself to establish a presumption of Aboriginal title. But if continuity is required, it should also be presumed from present possession, just like occupation of the lands at the time that the Crown asserted sovereignty should be presumed.[154]

2.1.2 - The uses of the land and the inherent limit

According to the modern law of Aboriginal title, the legal title awarded to Aboriginal peoples "confers the right to use land for a variety of activities,"[155] but "that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's Aboriginal title."[156] This is the negative aspect of the content of Aboriginal title, and it is called the 'inherent limit'. This limit did not exist nor had a precedent in the classic law of Aboriginal title; it is a feature that appeared in the modern law.[157]

The Court explained that the inherent limit is an extension of the justification of Aboriginal title so that such title can benefit future generations. In other words, if Aboriginal title seeks to preserve today the linkage between Aboriginal peoples and their traditional lands, the limit seeks to preserve this linkage for future generations.[158] In the doctrine, this linkage has been called "indigenous peoples' special relationship with the land", and it has been broadly explored as a justification for Aboriginal title and other Aboriginal rights in the international context.[159]

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[154] McNeil, The Onus, *supra* note 142 at 793.

[155] *Delgamuukw*, *supra* note 71 at para. 111.

[156] *Ibid.*

[157] Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Center – University of Saskatchewan, 2001) at 116 [McNeil, *Emerging*].

[158] *Delgamuukw*, *supra* note 71 at paras. 127, 154 and 166.

[159] *Study on indigenous land rights*, CHR Res. 1997/114, UN CHROR, 58th Sess., UN Doc. E/CN.4/RES/1997/114 [*Study on indigenous land rights*]; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Indigenous people and their relationship to land. Preliminary working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 49th Sess. UN Doc. E/CN.4/Sub.2/1997/17; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Indigenous people and their relationship to land. Progress report on the working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 50th Sess. UN Doc. E/CN.4/Sub.2/1998/15; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Indigenous people and their relationship to land. Second progress report on the working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 51th Sess. UN Doc. E/CN.4/Sub.2/1999/18 [*Second progress report prepared by Mrs. Erica-Irene Daes*]; Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 52th Sess. UN Doc. E/CN.4/Sub.2/2000/25; Sub-Commission on the

Although this limitation finds its explanation in the Aboriginal worldview and ecological tradition,[160] its effect is to ban many possible modern uses of land. According to McNeil, "[w]hat this really appears to mean is that Aboriginal title, while not limited *to* Aboriginal uses of land at the time of Crown sovereignty, is still limited *by* those uses."[161]

The inherent limitation is unjust for two reasons. First, it restricts the uses of land by Aboriginal groups to an external conception of their relationship to land,[162] one which does not take into account the evolving possibilities of group.[163] Second, it perpetuates the paternalistic approach to Aboriginal rights by forcing Aboriginal groups to surrender land to the Crown if they want to use the land in an 'incompatible manner'.[164]

According to the words of *Delgamuukw*, an Aboriginal group cannot claim title to land if they have used the land in a way that is not compatible with the nature of their claim, which must be based on the nature of their attachment. What this shows is that Aboriginal title does not protect the lands used by Aboriginals because of their previous occupation; it only protects the lands of groups which have maintained a cultural pattern with reasonable variations, because this cultural condition still exists.

If an Aboriginal group has the title over a piece of land and wishes to use it in a manner that is not compatible with their traditions, it must first surrender its land to the Crown in order to use it in such manner. The message sent here is that Aboriginal groups that change their conception of land can no longer own land as Aboriginals, they must renounce that part of their Aboriginality. "While the court was anxious not to restrict Aboriginal land rights 'to those activities which have been traditionally carried out on it', it is difficult to read its inherent limit in any other way".[165]

Promotion and Protection of Human Rights, *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 53th Sess. UN Doc. E/CN.4/Sub.2/2001/21 [*Final working paper (2001) by Mrs. Erica-Irene Daes*].

[160] Henderson, *supra* note 70 at 419; McNeil, *Emerging*, *supra* note 157 at 117; Glenn, *supra* note 91 at 74-77.

[161] McNeil, *Emerging*, *supra* note 157 at 119; McNeil, *Defining*, *supra* note 80 at 11-13.

[162] McNeil, *Emerging*, *supra* note 157 at 119.

[163] Borrows, *Recovering*, *supra* note 91 at 99-100.

[164] Will Kymlicka, *Multicultural Citizenship: A liberal theory of Minority Rights* (Oxford: Claredon Press, 1995) at 218 n.30 [Kymlicka, *Multicultural*].

[165] Borrows, *Recovering*, *supra* note 91 at 100.

Who is to judge if a use of the land is incompatible to the particular attachment of an Aboriginal group? In my view, Aboriginal groups are fully capable of knowing what is best for them in a particular moment and for their future generations. Nevertheless it seems as if it is up to an external entity to decide if a particular use "is irreconcilable with the nature of the claimants' attachment to those lands".[166] It must be noticed that the Chief Justice used the word 'claimant'. This paternalistic view enforces the 'trinkets for gold'[167] prejudice against Aboriginal knowledge.[168] But this limitation has a larger consequence: if Aboriginal peoples want to make any substantial change in the way they use their land, they must surrender those lands and accept that they are on Canadian territory and subject to Canadian (non-Aboriginal) sovereignty. Here the issues of land and sovereignty merge and produce a confrontation between the federal government of Canada and Aboriginal Peoples, one that revolves around territoriality and resources. As peoples, Aboriginal groups should be entitled to freely decide the fate of their natural resources[169] without having to renounce their title to land.

On a sociological level, the choice between nothing and surrendering fails to appreciate the dynamic nature of cultural practices. The doctrine of Aboriginal rights of First Nations[170] already produces an effect of 'controlled Aboriginality' by not granting protection to the practices, customs or traditions that arose as a response to European influences.[171] The inherit limit further controls the evolution of Aboriginal traditions discouraging modern uses of land under the threat of losing legal protection.

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[166] *Delgamuukw*, *supra* note 71 at para. 125.

[167] In reference to the popular story which says that upon the arrival of Spaniards to the Caribbean, Aboriginal peoples would easily trade their gold for trinkets. Nicholas J. Saunders, "Biographies of Brilliance: Pearls, Transformations of Matter and being, c. AD 1492" (1999) 31:2 World Archaeology 243 at 247.

[168] Constable shows an example of the prejudice against Indigenous peoples in the case of silence, when this is interpreted as laziness, hostility, stupidity and others. Marianne Constable, *Just Silences. The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2005) at 86.

[169] Sub-Commission on the Promotion and Protection of Human Rights, Indigenous peoples' permanent sovereignty over natural resources. Final report of the Special Rapporteur, Mrs. Erica-Irene Daes, UN CHROR, 56th Sess. UN Doc. E/CN.4/Sub.2/2004/30; see also Nico Schrijver, *Sovereignty Over Natural Resources* (Cambridge: Cambridge University Press, 1997) at 311-319.

[170] In the cases of Métis Nations, the Supreme Court had to take account of the interaction between aboriginal and Europeans because of the particular formation of the Métis people. See *R. v. Powley*, *supra* note 120.

[171] *Van der Peet*, *supra* note 76 at para. 73. This effect can also be seen in treaty rights. *Simon*, *supra* note 134 at paras. 29 & 31; *R. v. Sundown*, [1999] 1 S.C.R. 393, 170 D.L.R. (4th) 385 at paras. 26-33; *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513 at paras. 56 & 61; *R. v. Marshall*, [1999] 3 S.C.R. 533,

If the Supreme Court accepted that Aboriginal lands have an inescapable economic aspect,[172] is it fair to impose any restriction on the uses of the land? Precisely the economic aspect of land (hence the natural resources on it) is the factor that makes the inherent limit unreasonable and unjust. This limitation only produces political and economical inequity between Aboriginal peoples and other inhabitants of Canada. Eventually the limitation will either freeze Aboriginal cultures in time or will liberate all Canadian territory from the 'burden of Aboriginal title'.

2.1.3 - Site-specific Aboriginal rights

When talking about Aboriginal rights and their relationship to land, the Supreme Court has differentiated three levels of rights: (1) those that have no linkage with the land (for example, generic hunting), (2) those rights which have been exercised on a particular piece of land (for example, hunting in a particular ground), and (3) the right to the land itself.[173] The second level on the spectrum is called 'site-specific Aboriginal rights'.

The doctrine of the site-specific Aboriginal rights seeks to provide special protection for those Aboriginal rights that have been exercised in a particular place. This constitutes an extra protection in the sense that the protection of a custom is coupled with partial control of the environment where that custom is practiced.

From the standpoint of a claim of title, the doctrine of site-specific Aboriginal rights constitutes the next best thing when evidence of exclusive use of the land is not available.[174] Chief Justice Lamer says: "I should also reiterate that if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title."[175] In other words, when the nature of the occupation of a track of land is not sufficient to support a claim of aboriginal title, the aboriginal group would have to settle for one or more site-specific aboriginal rights.[176]

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179 D.L.R. (4th) 193 at paras. 36-39; *Marshall 3*, *supra* note 96 at paras. 16-18; *R. v. Morris*, 2006 SCC 59 at paras. 37-40.

[172] *Delgamuukw*, *supra* note 71 at para. 166.

[173] *Adams*, *supra* note 79 at para. 29; *Côté*, *supra* note 147 at para. 39; *Delgamuukw*, *supra* note 71 at para. 138; *Marshall 3*, *supra* note 96 at para. 126; see also Douglas Lambert, "Van Der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32 U.B.C. L. Rev. 249 at 256-257.

[174] See McNeil, *Title and Rights*, *supra* note 124 at 122.

[175] *Delgamuukw*, *supra* note 71 at para. 159.

[176] William F. Flanagan, "Piercing the Veil of Real Property Law: Delgamuukw v. British Columbia" (1998-1999) 24 Queen's L.J. 279 at 294.

It seems that the Supreme Court has understood that exclusion of others from a piece of land is the only way to demonstrate an interest on land that is worthy of protection.[177] This rationale derives from the definition of aboriginal title.[178] Since title confers an exclusive right, the occupation that gives rise to this right must have been exclusive. Here the interpretation of prior occupation is based solely on the European idea of occupation,[179] and although nomadic groups are not excluded from title, *Delgamuukw* and *R. v. Marshall; R. v. Bernard* recognize that those groups might have problems proving exclusive occupation.[180]

This injustice is manifested through the presence of a residual category for groups that cannot prove the right to title under the existing test. One might think that a site-specific aboriginal right is better than nothing. But the necessities of an Aboriginal group are not confined to the space where they inhabit. Protecting their right to hunt in a particular place does not protect the place in itself, and it only gives them the right to hunt in that place. Recent cases have established that "[l]ess intensive uses may give rise to different rights [to title]"[181] making the threshold an issue of "intention and capacity to control."[182] This is an appreciation of land rights that flows from an European perspective.

It seems to me that in this aspect of Aboriginal title the Supreme Court does not do enough to permit aboriginal knowledge to be received into the common Law. According to the test of Aboriginal title, the pattern of occupation that must be shown as evidence (i.e., exclusive occupation) is found in the common law and in the practice of some Aboriginal groups. The characteristics of exclusive and permanent (even the 'reasonably permanent' idea presented by the Supreme Court[183]) occupation of the land are not found in every single Aboriginal group of Canada. This is one of the risks of

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[177] Brian J. Burke, "Left Out in the Cold: The Problem with Aboriginal Title under Section 35(1) of the Constitution Act, 1982 for Historically Nomadic Aboriginal Peoples" (2000) 38 Osgoode Hall L.J. 1 at 24-25.

[178] *Delgamuukw*, *supra* note 71 at para. 155.

[179] Macklem, *Indigenous Difference*, *supra* note 5 at 81-82 (The fact that Aboriginal people occupied ancestral territory in ways and for purposes unfamiliar to European standards should not disentitle them from claiming rights of ownership in relation to that territory).

[180] *Delgamuukw*, *supra* note 71 at para. 139; *Marshall 3*, *supra* note 96 at para. 66.

[181] *Marshall 3*, *supra* note 96 at para. 70.

[182] *Ibid.*

[183] *Delgamuukw*, *supra* note 71 at 153-154.

making a global judgment about the relationship of Aboriginal peoples with the land.[184] Many views are neglected when only some are taken to be intelligible to the common law. Instead of making a general rule based on selective reception of some aboriginal practices relating to land use and occupation, aboriginal title must function as a flexible and open-textured framework that allows every single Aboriginal group with a just claim to obtain legal protection for their land, protection that reflects the way they interact with the land.

2.2 - 'Aboriginal peoples were already here'[185]

In the previous sub-section, I commented about some of the many criticisms that have been brought to bear on the modern law of Aboriginal title. All of them were easily traced to one part of the doctrine constructed in section 1.2 -, and then traced back to the initial justification of the structure of Aboriginal title: prior occupation.

Although the idea of prior occupation has been crafted in many cases, I prefer the choice of words of the Supreme Court in *Van der Peet*:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.[186]

The argument is presented here in simple words because it is simple in its essence. Aboriginal customs and practices deserve protection because they existed long before Europeans arrived and tried to impose their lifestyle on Aboriginal peoples. "[A] prior occupant of land has a stronger claim to that land than subsequent arrivals".[187]

However, the argument also allows a restrictive rhetoric. If aboriginal rights are directed to honor the prior occupation of Aboriginal peoples, the Canadian State is only obligated to award legal protection to the practices existing at the moment it started to exist as a political entity. When applying the general doctrine of Aboriginal rights to Aboriginal title, the result is awarding only the lands that were 'Aboriginal' when the

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[184] Henderson, *supra* note 70 at 401-405; *contra* Glenn, *supra* note 91 at 59-61.

[185] *Van der Peet*, *supra* note 76 at para. 30.

[186] *Ibid.* 30.

[187] Macklem, *Indigenous Difference*, *supra* note 5 at 78.

British Crown asserted sovereignty over Canada. The rest of the land was for the colonizers to take.[188] This is the logic behind statements such as: "it does not make sense to speak of a burden on the underlying title before that title existed".[189]

The concept of prior occupancy, as it has been used in *Delgamuukw* and other cases, belies an inconsistent approach to the object of protection of Aboriginal rights in general. By referring to Aboriginal title as deserving particular protection because it is necessary to compensate for historical wrongs, Canadian law engages in a paternalist discourse that does not address the necessities of First Nation's cultures.[190] Such discourse freezes in time the particularities of many cultures by stating that Aboriginal peoples stopped acquiring land rights at the moment sovereignty was asserted. "Most indigenous groups focus, not on reclaiming all of what they had before European settlement, but on what they need now to sustain themselves as distinctive societies".[191]

Should we look elsewhere for the justification of this right? Significant research in this regard has already been undertaken.

Many authors have raised the possibility of justifying aboriginal rights and land rights using the concepts of 'special connection with the land'[192] and 'unequal circumstances and substantive equality'.[193] But neither of these concepts escapes from criticism, as both of them sustain a differentiated treatment based on the preservation of

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[188] This conclusion was supported by classic international law scholars like Vattel, who affirmed that since Aboriginal peoples rather roamed than inhabited their lands, they "can not take to themselves more land than they have need of or can inhabit and cultivate". E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Washington D.C.: Carnegie Institution of Washington, 1917) at 38 and 85.

[189] *Delgamuukw*, *supra* note 71 at para.145.

[190] Kymlicka, *Multicultural*, *supra* note 164 at 220.

[191] *Ibid.* at 221.

[192] See particularly *Second progress report prepared by Mrs. Erica-Irene Daes*, *supra* note 159 at para. 10 (Indigenous peoples have explained that, because of the profound relationship that indigenous peoples have to their lands, territories and resources, there is a need for a different conceptual framework to understand this relationship and a need for recognition of the cultural differences that exist. Indigenous peoples have urged the world community to attach positive value to this distinct relationship).

[193] See specially Will Kymlicka, Liberalism, community and culture (Oxford: Oxford University Press, 1989) [Kymlicka, *Liberalism*]; Kymlicka, *Multicultural*, *supra* note 164; see also Macklem, *Indigenous Difference*, *supra* note 5 at 71-75 and 84.

the cultural aspects of Aboriginal groups[194] rather than producing justification for Aboriginal title that does not allow restrictive interpretations.

I will briefly analyze them.

2.2.1 - Special connection with the land

The concept of the 'special connection with the land' has been extensively used by Aboriginal peoples themselves, particularly at the international level.[195] The idea of a special relationship is presented through the existence of four elements which are unique to Aboriginal peoples:

> (i) [A] profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.[196]

Because the aforementioned elements of Aboriginal culture are not seen in non-Aboriginal societies, the lands where Aboriginal peoples inhabit deserve legal protection.[197] "Aboriginal systems of knowledge are the only foundation for knowing a *sui generis* Aboriginal law and its tenure. They define the nature of a group's attachment to the land".[198]

The recently approved *United Nations Declaration on the Rights of Indigenous Peoples* also contemplates the special relationship with the land as a particular right that must be preserved:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal

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[194] Benhabib makes an important point about pre-justification which might lead our methodological search for the *ratio juris* of Aboriginal title: "intercultural justice between human groups should be defended in the name of justice and freedom and not of an elusive preservation of cultures". Benhabib, *Claims*, *supra* note 128 at 8. See also Hannah Arendt, *Responsibility and Judgment* (New York: Schocken Books, 2003) at 202-203 and 205.

[195] *Final working paper (2001) by Mrs. Erica-Irene Daes*, *supra* note 159 at para. 12.

[196] *Ibid.* at para. 20.

[197] See specially *Ibid.* at para. 145-148.

[198] Henderson, *supra* note 70 at 401-402.

> seas and other resources and to uphold their responsibilities to future generations in this regard.[199]

Even the Catholic Church has used this argument to support the right to existence of minorities and aboriginal groups:

> Certain peoples, especially those identified as native or indigenous, have always maintained a special relationship to their land, a relationship connected with the group's very identity as a people having their own tribal, cultural and religious traditions. When such indigenous peoples are deprived of their land they loose a vital element of their way of life and actually run the risk of disappearing as a people.[200]

But despite the attempts of the former United Nations' Special Rapporteur Ms. Erica-Irene Daes[201] to detach the idea of the 'special connection with the land' from a frozen interpretation of Aboriginal rights,[202] similar arguments have been used in Canadian law to impose unjust limitations to the uses of aboriginal land.[203]

Theoretically speaking, there is nothing wrong with using Aboriginal peoples' special relationship with the land as the justification for aboriginal title. The problem is that it might allow restrictive interpretations based on the scope of protection. In other words, it might be used to limit any evolution on the uses of the land, thus restricting the cultural variations of Aboriginal peoples' relationship with the land.

2.2.2 - Unequal circumstances and substantive equality

According to Kymlicka, Aboriginal rights have always been outside the realm of liberal political theory because liberals wrongly believe that group rights are incompatible

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[199] *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, HRC Res. 2006/2 UN HRCOR, 1st Sess., UN Doc. A/HRC/RES/2006/2 at art 25 [*Declaration on the Rights of Indigenous Peoples*].

[200] Pope John Paul II, "To Build Peace, Respect Minorities" (Message of His Holiness for the celebration of the World Day of Peace, 1 January 1989) at para. 6 online: The Holy See <http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_19881208_xxii-world-day-for-peace_en.html>.

[201] Former United Nations' Special Rapporteur with the mission "to prepare, from within existing resources, a working paper on indigenous people and their relationship to land with a view to suggesting practical measures to address ongoing problems in this regard", *Study on indigenous land rights*, *supra* note 159.

[202] *Final working paper (2001) by Mrs. Erica-Irene Daes*, *supra* note 159 at para. 118.

[203] *Supra* subsection 2.1.2 -.

with individual rights.[204] But using liberal theory, he argues that Aboriginal necessities can be understood as unequal circumstances that are external to the realm of individual choice:

> The very existence of aboriginal cultural communities is vulnerable to the decisions of the non-aboriginal majority around them. They could be outbid or outvoted on resources crucial to the survival of their communities, a possibility that members of the majority cultures simply do not face. As a result, they have to spend their resources on securing the cultural membership which makes sense of their life.[205]

Since those unequal circumstances put Aboriginal peoples at a disadvantage compared to the rest of the population and since those unequal circumstances are not the result of personal choice but of cultural affiliation, special measures must be taken in order to "correct an advantage that non-aboriginals people have before anyone makes a choice"[206]. In this light, Aboriginal title must seek to secure the survival of Aboriginal culture, rather than to rectify the injustices that were committed in the past.[207]

> Group-differentiated rights –such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims and language rights– can help rectify this disadvantage, by alleviating the vulnerability of minority cultures to majority decisions.[208]

Kymlicka successfully uses liberal theory to sustain the existence of group-rights (i.e. Aboriginal title) as a means to achieve egalitarian justice. In his view the rectification of inequalities "is the basis for a liberal defense of aboriginal rights, and of minority rights in general".[209]

The validity of this justification has been criticized precisely because it perpetuates social and political bias against minority groups.[210] Indeed, Kymlicka's rationale is not directed at Aboriginal peoples themselves but to non-aboriginals. While

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[204] Kymlicka, *Multicultural, supra* note 164 at 44.

[205] Kymlicka, *Liberalism, supra* note 193 at 187.

[206] *Ibid.* at 189.

[207] Kymlicka, *Multicultural, supra* note 164 at 43.

[208] *Ibid.* at 109.

[209] Kymlicka, *Liberalism, supra* note 193 at 189.

[210] Andrea Cassatella, "Multicultural Justice: Will Kymlicka and Cultural Recognition" (2006) 19:1 Ratio Juris 80 at 92-98.

showing liberal society that true liberalism would accept differentiated rights, he does not abandon the liberal model that has caused many of the inequalities that Aboriginal peoples suffer.[211] On a more elemental level, it is possible to say that a justification like the one proposed by Kymlicka pays little attention to the history of Aboriginal peoples,[212] which is an essential part of their cultural identity.[213]

Nevertheless, none of the aforementioned objections are directed to the source of the issue. This justification is feasible as long as the collective memory and capacity of self government of Aboriginal peoples is protected. The problem would arise if the use of the liberal tools are interpreted beyond the external justification and are used to construct the structure of Aboriginal title. It is true that differentiated rights are to be different from the rights applied to non-Aboriginal society, but there is already some imposition of common law conceptions of property in the current construction of Aboriginal title. Arguably, the extent to which Aboriginal title can use a liberal justification without becoming westernized in the processes will depend on the amount of legal independence and recognition given to Aboriginal systems of customary law, and in their capacity to determine by themselves the scope and nature of Aboriginal self-determination.

2.2.3 - Justification and interpretation

As I have shown, all of the possible justifications of Aboriginal title, including the one used by the Supreme Court of Canada, would reasonably support the existence of Aboriginal title. Nevertheless, all of them can be used in a restrictive manner which would set limitations on the recognition, extension or enjoyment of this right.

In other words, there is no justification currently in play that, in virtue of its nature, can protect Aboriginal interests from less than generous interpretations that result in restrictive understandings of Aboriginal title. However, interpretation is merely an action performed on a certain object using a particular method. According to Foucault, techniques of interpretation are above all personal concerns of the operator, thus there is no such thing as an objective interpretation. The outcome of an interpretative procedure

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[211] *Ibid.* at 95-96.

[212] Macklem, *Indigenous Difference*, *supra* note 5 at 84.

[213] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, UN CERDOR, 51st Sess., Annex, Agenda Item V, Report on the Fifty First Session, UN GAOR, 1997, Supp. No. 18, UN Doc. A/52/18 (1997) at 4.a.

will depend on the object of interpretation and the purposes and perspective of the interpreter. "[I]nterpretation will henceforth always be interpretation by 'whom?' One does not interpret what is in the signified, but one interprets after all: *who* posed the interpretation. The basis of interpretation is nothing but the interpreter." [214] Beulac agrees: "an interpretation consists in a process in which the interpreter understands the object in a way that corresponds to the original creative activity of the author."[215]

This takes us back to the doctrine of aboriginal title and aboriginal rights. The concept of prior occupation is not only the justification; it is also one of the sources of Aboriginal title. The other source is the nature of aboriginal title, which manifests itself as the conversion instrument that translates aboriginal customary law into cognizable common law rights.

This demonstrates that prior occupation is interpreted by the common law in order to produce the content of Aboriginal title. Nevertheless, the conflictive part of this interpretation process is the fact that the result of this interpretation must be expressed in terms that the common law can understand and accept.[216] The limitations that are attributed to the nature of Aboriginal title are not part of Aboriginal customs themselves. Those limitations are always raised after the common law (i.e., judges) interprets the significance of Aboriginal prior occupation.

What I want to say is that prior occupation itself is a historical fact that can have many legal consequences, depending on the legal tools used to interpret it. "It might well be that the legal significance of prior occupancy ought to be tempered by competing normative commitments".[217]

The process of thought that gives birth to Aboriginal title is fatally biased, not in its justification, but in its nature, because ultimately it consists in a unilateral and external imposition of non-Aboriginal legal standards on Aboriginal peoples. In this sense, regardless of the particular justification of Aboriginal rights, the results of the interpretative endeavor performed by the common law may always fail to satisfy

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[214] Michel Foucault, *Essential works of Foucault. Aesthetics, method and epistemology*, vol. 2 (New York: The New York Press, 1994) 269-278.

[215] Stéphane Beaulac, *The Power of Language in the Making of International Law* (Leiden: Martinus Nijhoff Publishers, 2004) at 61.

[216] *Van der Peet, supra* note 76 at para. 49.

[217] Macklem, *Indigenous Difference, supra* note 5 at 85.

Aboriginal expectations, for the interpretation comes from outside Aboriginal legal systems rather than from within them. In that sense the nature and justification of Aboriginal title must emerge from within the nature of Aboriginal culture.

2.2.4 - Beyond the common law

Up to this point I have shown how prior occupation is used to build the whole structure of Aboriginal title while at the same time it is used to create unjust restrictions on the acquisition and enjoyment of such title. But I have also shown that this is probably due to the use of the common law as an interpretative tool.

Thus, it is necessary to look for an interpretative tool that is used to contextualize the contents of Aboriginal title in a manner that would bring due protection to Aboriginal peoples. The question raised here is: is there any hope for the common law? In search of that hope, my attention was drawn to Australia, and particularly the landmark case of Native title in this country: *Mabo and Others v. State of Queensland* [*Mabo*]. But before arriving at the theoretical solution proposed in *Mabo*, it is necessary to understand the nature of the doctrinal changes that this case brought.

The Australian legal system was based on the presumption that the lands that today form the country were *terra nullius*, that is, lands owned by no one. Theoretically speaking, *terra nullius* was a notion of Roman law that explained the acquisition of original property of vacant goods by its discoverer (such as a hidden treasure). Nevertheless in Australia they adopted what is called an 'enlarged concept of terra nullius'. Indeed, they used Vattel's theory, which affirmed that aboriginal peoples "can not [sic] take to themselves more land than they have need of or can inhabit and cultivate" to support the acquisition of unused land.[218] Additionally they used the Privy Council's jurisprudence from other colonies which sustained that since Aboriginal societies were not civilized societies, aboriginal peoples could not be granted property rights.[219] Putting these concepts together, the Australian legal system based its sovereignty and property over land by affirming that vacant land, land not put into use, and land occupied by societies of lower social development were *terra nullius*, thus it could be acquired by discovery.

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[218] Vattel, *supra* note 188 at 85.

[219] In re Southern Rhodesia [1919] A.C. 211 (P.C.) at 233-234.

Mabo has been highly celebrated because it rejected the assumption that the whole Australian continent was *terra nullius* when colonizers arrived.[220] The Justices of the High Court of Australia affirmed: "[t]he common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius".[221] From that moment on, the Australian legal system recognized and granted legal protection to land rights that preceded the introduction of the common law.[222]

Nevertheless, few authors have pointed to the authorities and arguments that the High Court of Australia used to destroy the assumption of *terra nullius*.[223] Initially, Chief Justice Brennan recognized that the factual premise of the doctrine of *terra nullius* was invalid[224] by accepting that aboriginal peoples had a proprietary interest that arose from their occupation.[225] This acceptance resembles the concept of prior occupancy in Canadian law,[226] since both entail the recognition of aboriginal legal systems which are not nullified by the introduction of the common law.[227]

The High Court proceeded to weigh the fact of occupancy with the common law. Here Canadian and Australian positions diverge: while Canada still accepts that the

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[220] Adrian Bradbrook, et al., *Australian Real Property Law*, 3rd. ed. (Sydney: Lawbook Co., 2002) at 270; Melissa Perry & Stephen Lloyd, *Australian Native Title Law* (Sydney: Lawbook Co., 2003) at 10-11; Sean Brennan, et al., *Treaty* (Sydney, The Federation Press, 2005) at 102-105; Hannah McGlade, "Native title, 'Tides of History' and Our Continuing Claims for Justice-Sovereignty, Self Determination and Treaty" in Aboriginal and Torres Strait Islander Service & Australian Institute of Aboriginal and Torres Strait Islander Studies, *Treaty... let's get it right* (Canberra: Aboriginal Studies Press, 2003) at 118-119.

[221] *Mabo and Others v. State of Queensland [NO. 2]*, 175 CLR 1, 107 ALR 1 at 58 [*Mabo*].

[222] Christopher J F Boge, "A Fatal Collision at the Intersection? The Australian Common Law and Traditional Aboriginal Land Rights" in Christopher J F Boge, *Justice For All? Native Title in the Australian Legal System* (Brisbane: Lawyers Books Publications Pty Ltd, 2001) at 9-11; Perry & Lloyd, *supra* note 220 at 10-11.

[223] Brennan, *supra* note 220 at 104; Mark Brabazon, "Mabo, The Constitution and The Republic" (1994) 11 Austl. Bar Rev. 1 at 12.

[224] *Mabo*, *supra* note 221 at 39 and 58.

[225] *Ibid.* at 39-40.

[226] *Delgamuukw*, *supra* note 71 at para. 114; although prior occupation is not part of the test for native title in Australia, Christos Mantziaris & David Martin, *Native Title Corporations: A legal and anthropological analysis* (Leichhardt: The Federation Press, 2000) at 27.

[227] *Mabo, supra* note 221 at 39 (The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England); Brabazon, *supra* note 223 at 16-17 (The common law of Australia now recognizes that, prior to 1788, our continent and its islands were owned by the peoples who inhabited them, in accordance with the laws and customs of their civilizations. The basis of that title is occupation,); *Calder*, *supra* note 20 at 328 ("the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries").

common law has a role to play in the construction of aboriginal title,[228] the Australian Justices found themselves incapable of applying the existing common law rules:

> As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organization" than the Australian Aborigines whose claims were "utterly disregarded" by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.[229]

The Justices in *Mabo* already faced the interpretative dilemma that was explained in section 2.2.3 -. Unable to apply such discriminatory rules, and hearing the appeal of the most basic principles of justice, they went beyond the then-existing rules of the common law to find answers. In that process they quoted the International Court of Justice's Advisory Opinion on *Western Sahara*, and paid special attention to the "expectations of the international community"[230] and the "opening up of international remedies to [Australian] individuals."[231] They concluded that there was another set of authorities that can inform the common law on this issue:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[232]

I will go further in this argument and sustain that international law should be considered an authoritative influence on the issue of Aboriginal title. This means that

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[228] *Delgamuukw*, *supra* note 71 at para. 114 (What this suggests is a second source for aboriginal title -- the relationship between common law and pre-existing systems of aboriginal law).

[229] *Mabo*, *supra* note 221 at 40.

[230] *Ibid.* at 41.

[231] *Ibid.*

[232] *Ibid.* at 42.

there is hope for the common law, but this hope is not within the common law, at least not as it exists in Canada today. The Canadian legal system must accept that in the issue of Aboriginal title, international law has set minimum standards that must inform the common law. In that sense, the common law must incorporate international law due to its authoritative influence.

The theories of Hans Kelsen on the "superiorité morale de l'objetivisme juridique"[233] shed some light on our discussion. A positivist vision of the relationship between national and international law gives primacy and superiority to national law. However, by eliminating the dogma of sovereignty and separation "on établira qu'il existe un ordre juridique universel, indépendant de toute reconnaissance aux États, une *civitas maxima.*"[234] In this light, Kelsen distinguishes between norms that are possibly norms of international law (those that can be regulated by national law), and norms that are necessarily of international law (those that do not admit regulation by national law). There are no issues of purely national regulation, just issues that international law has not *yet* regulated.[235] National law cannot contradict norms of a necessarily international nature.[236] There is a penetration of international law in subjects that were considered purely internal, limiting the competence of national authorities.[237] The parallel regulation by both bodies of law is possible; in this case international law will dictate the general principles while national law will regulate the details.[238]

> The fact that a subject matter is regulated by a norm of international law stipulating an obligation with respect to this matter has the effect that this matter can no longer be regulated arbitrarily by national law. There are subject matters which, according to general international law, and subject matters which,

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[233] Hans Kelsen, "Les rapports de système entre le droit interne et le droit international public" in *Recueil des Cours de la Académie de Droit International 1926*, tome 14 (Paris: Hachette, 1927) at 325-326.

[234] *Ibid.* at 326.

[235] Hans Kelsen, "Théorie Générale du droit international public. Problèmes choisis" in *Recueil des Cours de la Académie de Droit International 1932*, tome 42 (Paris: Sirey, 1933) at 303 [Kelsen, Théorie Générale].

[236] Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge: Harvard University Press, 1945) at 349-350 [Kelsen, *General Theory*].

[237] Kelsen, Théorie Générale, supra note 235 at 181.

[238] *Ibid.* at 300.

> according to particular international law, especially treaties, must be regulated in a certain way by national law.[239]

In this light, although a hard positivism would consider that issues of Aboriginal lands in Canada are subject to national regulation only, the existence of an international law regulating this issue should inform the national law. If Canada had ratified an international treaty concerning Aboriginal lands, this international instrument could inform interpretations of domestic law, and if such a ratified treaty were incorporated into domestic law via legislation, then as a legal matter it would have direct effect. But since this is not the case, I must rely on the moral and juridical authority of the international order as such, and on this basis try to establish that this order can and should influence Canada's approach to Aboriginal title.

But with which part of national law can we further regulate the general principles established in international law? Given the inadequacies of the common law (inadequacies that have as much to do with its non-Aboriginal and imperial nature as with its particular contents), it would be at least problematic to seek a basis for specific regulations in the common law. Arguably, aboriginal customary law is the best place to look for that regulation. I wish to propose a symbiotic relation where aboriginal law would supply detailed and substantive rules and regulations while international law would accommodate such legal regimes within the structure provided by its general principles. In this sense, international law operates as an empty container that needs to be filled with the particular knowledge of an Aboriginal group in order to define the obligations of the Canadian state towards that group. This approach could bring the authoritative influence of both types of normative regimes to transform the common law into an internationalized regulation of Aboriginal title.

This can be expressed using a geometrical metaphor based on Hans Kelsen's theory of norms,[240] and the pyramidal representation that is usually given to his account of the hierarchy of norms (although he did not include international law in his hierarchy theory). The pyramid is divided in two segments, the upper one represents international law and the lower one represents Canadian law. While the Canadian law segment is

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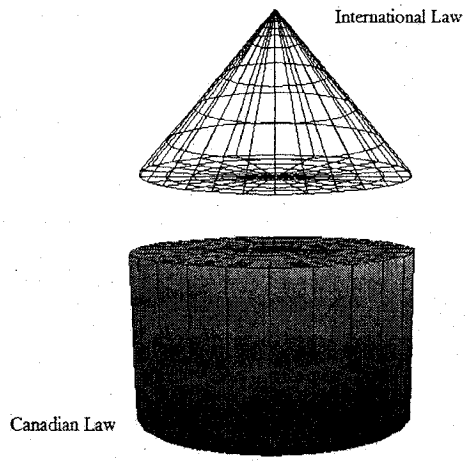
[239] Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952) at 242 [Kelsen, *Principles*].

[240] Kelsen, *General Theory*, *supra* note 236 at 123-162.

concrete, the international law segment is just a hollow structure. Aboriginal knowledge related to title will occupy the hollow space of the structure. The pyramid is segmented because international law does not form part of the same body of the Canadian law, and because its authority over Canadian law is merely influential. In this sense, Canadian law does not play a subordinate role in the structure, but it must inform itself using international law. At the moment Canada ratifies international treaties regulating Aboriginal lands, the pyramid would stop being segmented and international law would have paramount authority over Canadian law.



Graphic 2: Nature of the internationalized law of Aboriginal title

One of the influences from international law that will inform the common law is the right to property in international human rights law[241], which means that the State must protect, guarantee and promote all property rights first acquired. This protection must be given to all the persons under the jurisdiction of the Canadian State regardless of the type of property or the system of law under which it was acquired.

In this sense, the rights to land acquired by Aboriginal peoples under their system of customary law are to be respected and recognized today. Nobody denies that modern systems of land law reflect the relationship between non-aboriginals and the land. But the

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[241] *Universal Declaration of Human Rights,* G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), at art. 17. OAS, *American Declaration of the Rights and Duties of Man,* O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) at art. XXIII. Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms,* 213 U.N.T.S. 262, entered into force May 18, 1954, at art. 1; OAS, *American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123* at art. 21 [*American Convention*]; African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 at art. 14.

Canadian land rights system has adopted a particular conception of the land that is not shared by Aboriginal groups. "Aboriginal legal perspectives have been evaluated by stories that are alien to this land. It is now time for the common law's treatment of Aboriginal peoples to be judged by stories indigenous to this continent."[242] The importance of Aboriginal customary law flows from the necessity to regulate land in a manner that reflects the reality of the relationship between Aboriginal peoples and the land.[243] Both systems of law are legitimate to their own people. The role of international law is to be the mediator among peoples and their legal traditions.

> L'étrangère apparait comme un ennemi hors la loi, -sa communauté n'est pas considérée comme une communauté de droit, mais comme une horde de barbares, et par conséquent comme un troupeau de bêtes. Reconnaitre en l'étranger un homme, c'est-à-dire un être de même nature, reconnaître également l'ordre qui régit sa communauté, comme un ordre juridique, bien que différent par son contenu et par son domaine d'application, ce sont la des tendances que vont de pair avec la possibilité et le besoin de rentrer en rapports pacifiques avec les hommes d'autres communautés, en vue d'échanges matériels et spirituels; elles supposent donc qu'on ait déjà pris conscience de la possibilité et de la nécessité de réglementer juridiquement ces rapports. Et ce procès d'élargissement de la conscience sociale au delà de l'Etat où l'on vit trouve son expression dans la formation costumière d'un droit interétatique.
> C'est le droit qu'on appelle le droit international.[244]

Further construction of an internationalized concept of aboriginal title requires a deeper review of the available international law. For this reason I will leave the rest of the structure of aboriginal title to the next section.

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[242] Borrows, *Recovering*, *supra* note 91 at xii.

[243] Henderson, *supra* note 70 at 401-402.

[244] Kelsen, Théorie Générale, supra note 235 at 127-128.

3 - Towards a internationalized law of Aboriginal title

In the last section I proposed a change in the doctrinal framework of Aboriginal title, namely influencing its legal basis through the use of international law in order to structure and empower aboriginal customary law as the fundamental legal source of particular aboriginal claims.

Nevertheless, this proposition was not entirely based on the merits of international law, but mostly in the inadequacies of the common law. For this reason it is necessary to explore the capabilities of international law, as a normative system, to satisfy the necessities of Indigenous peoples.[245] Of course those necessities are already considered by the normative systems of Aboriginal peoples. The attachment of Aboriginal groups to their land is best portrayed by the customs of the groups.[246] In this sense Aboriginal systems or customary law reveal themselves as the natural source of Aboriginal title.[247] The legitimacy of international law as an influence for Aboriginal title comes from the fact that it empowers the normative systems of Aboriginal peoples, which are the best suited to regulate Aboriginal land.

A word of caution is necessary, from now on the sources and authorities to sustain our argument will be the international instruments, resolutions, judgments and decisions that have dealt with Indigenous lands rights and Indigenous rights in general. Sadly, Canada has not signed or ratified any of the international conventions that deal with this issue. In a similar way, the Canadian government has systematically opposed any resolution of the United Nations that has contemplated the possibility of granting the right of self-determination to Aboriginal peoples. It can be said that I am constructing castles in the sand, however these norms can become binding in the Canadian legal system if the government decides to ratify and implement them. In that sense, this study can be seen both as the search for just solutions and the demand for those solutions to be embraced by Canada.

In this section I will look at the international law applicable to the issues of aboriginal land, in the search for an internationalized concept of Aboriginal title. I will

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[245] International law prefers the term 'Indigenous' over 'Aboriginal'. From now on I will only use 'Aboriginal' when referring to Canadian law.

[246] Henderson, *supra* note 70 at 401-402.

[247] Ibid. at 406-412.

start by looking at how this issue was present in the classical theory of international law, its virtual disappearance during the post-Westphalia era, and its reappearance by virtue of non-discrimination norms in modern international law, particularly international human rights law.

After this historical account of theories and doctrines, I will show how a regional regime of protection, the Inter-American System of Human Rights [IASHR], has generated a significant number of decisions that can give us the tools to reconstruct Aboriginal title. This will take me to a direct comparison between the law of Aboriginal title in Canada and the Inter-American doctrine, in order to find which approach works better. I will conclude by reconstructing and redefining Aboriginal title towards an internationalized concept, which will be entirely based on the Inter-American doctrine of the right to communal Indigenous property.

3.1 - Indigenous lands in international law

The issue of Indigenous lands is not foreign to international law. From the classic scholarship, to the contemporary doctrine, it is possible to find references to Indigenous lands. Nevertheless, the manner in which this issue has been dealt with is not consistent. Different periods present different approaches to Indigenous peoples and their lands, and some periods do not speak about the subject at all. I do not intend to give a detailed historical account of the international doctrines and theories regarding Indigenous peoples in this section.[248] I only want to present the most relevant cases in which international law dealt with Indigenous lands, particularly the lands belonging to Aboriginals of the Americas.

3.1.1 - International law in the pre-westphalia era

On October 12th, 1492, Christopher Columbus and his crew arrived in what is today the Dominican Republic. This was the first time that an European crossed the Atlantic Ocean and reached what today is the American continent. This posed many challenges to European systems of laws, because they did not expect to find the kind of social organization that indigenous peoples had in those times.

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[248] For such a detailed account, see S. James Anaya, *Indigenous Peoples and International Law* (Oxford: Oxford University Press, 2004) at 15-34; P.G. McHugh, *Aboriginal Societies and the Common Law* (Oxford: Oxford University Press, 2004) at 290-302.

For the pre-westphalia Europe this was an issue that transcended the particular laws of the kingdoms. Francisco de Victoria, a theology professor at the University of Salamanca, was among the first scholars to deal with the status of the Indigenous in America.[249] In his *Relectio de Indis Recent Inventis*, he argued that "the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners".[250]

Victoria was, of course, writing about *ius gentium* from a catholic point of view.[251] His conclusions were directed to establish that the Pope had no jurisdiction over Aboriginal lands.[252] The Spanish practice of those days, expressed in the *Requerimiento*[253] and based on the *Tordesillas treaty*,[254] was to inform Aboriginal peoples how the Pope has given the King and Queen of Spain the dominion over their lands, and to warn them of the consequences of not accepting their authority.[255] In this sense, Victoria denounced the illegitimacy of Spanish title over those lands[256].

The importance of Victoria's writings comes from the fact that he gave some kind of international legal personality to Aboriginal peoples of the Americas.[257] Brown Scott affirms that Victoria saw Aboriginal peoples as 'barbarian principalities', and as such he tried to include them on the legal framework of the *ius gentium*.[258] Koskenniemi thinks that Victoria's conception of *ius gentium* was not based on States but on peoples, and as

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[249] G. C. Marks, "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas" (1992) 13 Austl. Y. Int'l. L. 1 at 7-9.

[250] Victoria, *supra* note 117 at 128.

[251] Martti Koskenniemi, *From Apoloogy to Utopia. The Structure of International Legal Argument. Reissue with new epilogue* (Cambridge: Cambridge University Press, 2005) at 95.

[252] *Ibid.* at 135 (The Pope is not civil or temporal lord of the whole World in the proper sense of the words 'lordship' and 'civil power'); Ayala had already deal with the jurisdiction of the pope over infidels, finding that he did not had it. Balthazar Ayala, *Three Books on the law of War and on the Duties Connected with War and on Military Discipline*, by John Pawley Bate, vol. 2 (Washington D.C.: Carnegie Institution of Washington, 1912) at para. 29; see also Francisco Suarez, *Selections from Three Works of Francisco Suarez* by Gladys William et al., vol. 2 (Oxford: Claredon Press, 1944) at 808.

[253] Wilhelm G. Grewe, *Fontes Historiae Iuris Gentium*, vol 2. (Berlin: Walter de Gruyter, 1988) at 68.

[254] *Ibid.* at 110.

[255] *Ibid.* at 68.

[256] Victoria, *supra* note 117 at 128.

[257] J.H.W. Verzijl, *International Law in Historical Perspective*, vol. 2 (Leyden: A. W. Sijthoff, 1969) at 2.

[258] James Brown Scott, "Súarez and the International community" (Address in commemoration of the contribution of Francisco Suárez to International Law and Politics, Catholic University, 30 April 1933) (published as a pamphlet, Washington, D.C., 1933).

peoples Aboriginals could have territorial rights.[259] Regardless of the approach taken, it is evident that Victoria understood that the concept of the European State is not a prior requirement for the existence of territorial rights of Aboriginal peoples. Nevertheless Victoria did acknowledge the importance of a lawful State for the organization of social life.[260]

Sadly, Victoria's approach to *ius gentium* would not last even a century.[261] With the conceptual formation of the modern nation-State and a system of international law based on that State, Indigenous peoples passed from possible members of an "all embracing system of international law",[262] to mere subjects with diminished rights.

3.1.2 - International law post-westphalia

The Peace of Westphalia played an essential role in the development of modern international law. It was the historical moment in which the international legal regime became a regime of States for States[263]. Since the Indigenous social communities did not resemble European nations, Aboriginal peoples were not recognized as States or nations. This eliminated the possibility, posed by Victoria, of giving a role to aboriginal peoples in the international legal order.

There is an important contradiction in the history of relations between Aboriginals and colonizers. The British Crown signed several treaties –an instrument of international law– with Indigenous groups of North America. Without knowing, many Aboriginal groups surrendered their lands and authority to the British Crown through those treaties. Nevertheless, the official position of the Crown (and other European States) was that these groups could hardly be regarded as members of the international community.[264] As

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[259] Koskenniemi, *supra* note 251 at 101.

[260] Victoria, *supra* note 117 at 161.

[261] Brown Scott, *supra* note 258 at 45.

[262] *Ibid.*

[263] Thomas Alfred Walker, *A History of the Law of Nations*, vol 1 (Cambridge: Cambridge University Press, 1899) at 148; Antonio Cassese, *International Law in a Divided World* (Oxford: Claredon Press, 1986) at 36-37; Richard Falk, *Law in an Emerging Global Village: A post-Westphalian Perspective* (Ardsley: Transnational Publishers, 1998) 1t 4; Christopher Harding & C.L. Lim, "The Significance of Westphalia: an Archeology of the International Legal Order" in Christopher Harding & C.L. Lim, eds., *Renegotiating Westphalia* (The Hague: Martinus Nijhoff Publishers, 1999) at 5-6; Beaulac, *supra* note 215 at 67-68.

[264] William Eduard Hall, *A Treatise on International Law*, 4th ed. (Oxford: Claredon Press, 1895) at 43; L. Oppenheim, *International Law: A Treatise* (London: Longmans, Green and Co., 1905) at 139-140; according to Westlake, aboriginal peoples could not even cede land and sovereignty through treaties, because they did not understand those rights, John Westlake, *The Collected Papers of John Westlake on*

a consequence, the treatment that each colonial power would give to the Aboriginal inhabiting its newly acquired lands was an issue of internal law.[265] All this can be reduced to two statements: (1) Indigenous peoples, as groups, were not seen as equal to European States, so they could not have territorial rights; and (2) Indigenous peoples, as individual men, were not seen as equal to the European man, so they could not have real property rights.

Emmerich de Vattel, one of the most important scholars in international law of this era, reconsidered the issue of the land inhabited by American Aboriginals. Almost two centuries after Victoria, Vattel wrote:

> There is another celebrated question which has arisen principally in connection with the discovery of the New World. It is asked weather a nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country. We have already pointed out, in speaking of the obligation of cultivating the earth, that these tribes can not [sic] take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not [sic]be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.[266]

Vattel considered that hunting and gathering activities did not amount to lawful use of land. In this sense, he affirmed that Aboriginal peoples had no territorial rights whatsoever, and that their right to occupy land was limited to the pieces where they inhabited and cultivated.

From that point on, the issue of Indigenous lands disappeared from international law. A few scholars and commentators still talked about the status of Aboriginal peoples

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Public International Law, ed. by L. Oppenheim (Cambridge: Cambridge University Press, 1914) at 146 & 151; this opinion was later adopted by Max Hubert in his famous arbitral award about the sovereignty over the island of Palmas, *Island of Palmas (Miangas) Case (Netherlands v. United States)* (1928), 2 U.N. Rep. Int'l Arbitral Awards 829 (Permanent Court of Arbitration), (Sole Arbitrator: Max Hubert).Charles de Visscher considers that sovereignty over territory must be recognized by all States, if such recognition is not given, the territory is *terra nullius*, Legal Status of Estern Greenland, "Exposé de M. le Professeur De Visscher" (28 November 1932), P.C.I.J. (Ser. C) No. 66, 2793 at 2794.

[265] Westlake, *supra* note 264 at 142.

[266] Vattel, *supra* note 188 at 85.

in the law of nations,[267] particularly after the decisions of the US Supreme Court which granted the Cherokees the status of domestic dependent nations.[268] The westphalian idea of an international law created by States to regulate States did not allow further inclusion of Aboriginal peoples as groups worthy of study and protection by this body of law.

3.1.3 - The era of the international organizations

Since the end of World War I, the Nations of the world started to change the vision of an international law driven by States and maintained through temporal alliances towards a more institutionalized concept. Although the League of Nations was already a very important attempt to achieve the institutionalization of international law, it was not until the United Nations (UN) that we see an international organization capable of organizing international law and achieving (with mixed results) the goals of peace and security.

This institutionalized approach to international law brought the idea of a world order, that is, the rule of law at a supranational level which is maintained by institutions of universal and regional membership.[269]

Initially, the issue of indigenous lands was hardly on the agenda of any international organization. However, since one of the pillars of this era is the promotion of human rights and the elimination of any kind of discrimination,[270] these organizations had to eventually deal with these issues. In the following pages I will present the most relevant attempts to deal with Indigenous lands in this era.

3.1.3.1 - The International Labor Organization

Although the International Labor Organization [ILO] is part of the United Nations framework, it will be treated separately of the United Nations' Human Rights bodies. This is due to the fact that its methods to produce standards and norms, and its compliance mechanisms are substantially different from the aforementioned bodies.

The ILO is undoubtedly the first international organization to work extensively on issues related to Indigenous peoples. Although it is sometimes argued that this

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[267] Westlake, *supra* note 264 at 146 and 151.

[268] Henry Wheaton, *Elements of International Law*, 6th ed. by William Beach Lawrence (Boston: Little, Brown and Company, 1855) at 53-54.

[269] See e.g. Wallace McClure, *World Legal Order: Possible Contributions by the People of the United States* (Chapel Hill: University of North Carolina Press, 1960) at 28-29 & 211.

[270] *Charter of the United Nations* at Preamble.

organization had a dark past, and that its approach to Indigenous peoples adopted a colonial perspective,[271] it must also be acknowledged that the ILO was the first organization to recognize Indigenous land rights.[272]

One of the most important precedents in modern international law regarding Indigenous rights was ILO *Convention 107*.[273] On the subject of Indigenous land rights, this Convention established that "[t]he right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized".[274] However, Rodríguez-Piñero warns us not to see a "genuine affirmation of indigenous peoples' right to the land",[275] taking into account the historical context of its drafting.

Eventually the ILO would move away from an ideology of integration and assimilation of Indigenous peoples, and this movement led to the revision of *Convention 107* and the preparation of *Convention 169*. On the subject of Aboriginal lands, Convention 169 heightened the concept of lands including the right to natural resources,[276] and established certain obligations of the State in order to protect this right.[277]

3.1.3.2 - The United Nations

The participation of the UN in the evolution of Indigenous rights' standards has been very important over the last 25 years. However, not all of the mandated bodies of the United Nations have contributed to the protection of Indigenous lands.

The human rights bodies of the UN have, of course, a central role on this issue. Nevertheless it is important to notice the role of other bodies in the production of norms that have affected the way we see Indigenous lands.

3.1.3.2.1 The International Court of Justice

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[271] Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford: Oxford University Press, 2005) at 17-18.

[272] *Ibid.* at 206.

[273] *Ibid.* at 199.

[274] *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 U.N.T.S. 247, at art. 11.

[275] Rodríguez-Piñero, *supra* note 271 at 210; see also Anaya, *supra* note 248 at 55.

[276] *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 72 ILO Official Bull. 59, at arts. 12.2 & 15.1.

[277] *Ibid.* at arts. 16-19.

It is important to mention that even though the International Court of Justice has not dealt with Aboriginal peoples *per se*, it has adopted some decisions regarding territorial disputes that have affected the way international law sees Indigenous land and various non-Indigenous intrusions into Indigenous territory. In *Western Sahara*, the ICJ established that according to the practice of the States, the "territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*".[278] As a consequence, sovereignty over those territories could not be acquired upon simple occupation.[279] This view had already been advanced by Judge Ammoun in the separate opinion of the *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1970-1971)* [*Namibia*]. Judge Ammoun considered that:

> It was a monstrous blunder and a flagrant injustice to consider Africa south of the Sahara as *terrae nullius*, to be shared out among the Powers for occupation and colonization, when even in the sixteenth century Vitoria had written that Europeans could not obtain sovereignty over the Indies by occupation, for they were not terra nullius.[280]

3.1.3.2.2 The Human Rights bodies

Within the framework of the UN's human rights bodies, the issue of Aboriginal lands has been extensively discussed. From the outset we must note a difference between the treaty bodies and the charter bodies. The treaty bodies are the seven monitoring bodies established by the seven most important conventions[281] of the UN Human Rights' System. The mission of the treaty bodies is to monitor the fulfillment of treaty obligations by signatory States. The charter bodies are the bodies created by organs of the Charter of

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[278] *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12 at para. 80.

[279] *Ibid.*

[280] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1970-1971), Separate Opinion of Vice-President Ammoun*, Advisory Opinion, [1971] I.C.J. Rep. 55 at para. 10.

[281] The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Soon another convention will be added to this list: the International Convention for the Protection of All Persons from Enforced Disappearance

the UN, they work under the Universal Declaration of Human Rights and the special procedures created by superior charter bodies. The charter bodies are conceived as a group of experts whose mission is to codify the international human rights law and to investigate the most serious and systematic violations of human rights.

Although the right to Indigenous land is not contemplated in any of the treaties of the United Nations, some treaty bodies have studied the issue under the scope of the rights to non-discrimination and protection of minorities. Namely, the Committee on the Elimination of Racial Discrimination [CERD] has dealt with the issue of Indigenous land rights using the non-discrimination principles of the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD]. Similarly, the Human Rights Committee [HRC] has applied the minority rights provision of the International Covenant on Civil and Political Rights [ICCPR].

In their interpretative role, which consists in the production of general comments and recommendations[282] that complement the articles of the treaties, these bodies have recognized the right of aboriginal peoples to their communal property. The CERD, in its general recommendation 23, called:

> [U]pon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[283]

Meanwhile, the HRC in its general comment 23 established that the cultural rights protected under the article 27 of the ICCPR (rights of minorities), does not entail the right to self-determination.[284] However, the Committee found that the regime of article 27 might provide protection to cultural practices deeply related to territory and use of resources.[285]

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[282] While most of the bodies that have this function call their comments 'general comments' the CERD calls them 'general recommendations'.

[283] *General Recommendation No. 23*, *supra* note 213 at para. 5.

[284] Human Rights Committee, *General comment under article 40, paragraph 4, of the International Covenant on Civil and Political Rights*, UN CCPROR, 21st Sess., UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) at para 3.1.

[285] *Ibid.* at para. 3.2

State parties to the seven basic UN Human Rights' conventions have the obligation to submit reports to the respective committee of each treaty, which will then evaluate the report and give recommendations regarding the fulfillment of the obligations of the State. In the evaluations of the CERD and the HRC about States with Indigenous populations, it is common to find recommendations that stress the importance of land for aboriginal peoples and that encourage the State to follow international standards on this issue.[286]

The charter bodies of the UN have also contributed to the recognition of the right to Indigenous property. The former Commission on Human Rights, its successor the Human Rights Council, and its Sub-Commission for the Promotion and Protection of Human Rights [the Sub-Commission][287] have played an essential role in the definition of international standards regarding Indigenous lands.

The issue of Indigenous lands started being a concern of the charter bodies in the beginning of the 1980's, when a working group was created within the Sub-Commission "in order to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations".[288] Eventually this working group started drafting a declaration on the right of Indigenous peoples. Later on, a special working group within the Commission on Human Rights would be created with the particular objective of drafting this declaration, leaving the Working group of the Sub-Commission with its initial mandate. Recently, the Human Rights Council accepted the

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[286] For some of the most recent decisions of the CERD regarding Indigenous lands, see *Concluding observations of the Committee on the Elimination of Racial Discrimination: Mexico*, UN CERDOR, 2006, UN Doc. CERD/C/MEX/CO/15 at para. 15; *Concluding observations of the Committee on the Elimination of Racial Discrimination: El Salvador*, UN CERDOR, 2006, UN Doc. CERD/C/SLV/CO/13 at para. 11; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala*, UN CERDOR, 2006, UN Doc. CERD/C/GTM/CO/11 at para. 17; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Colombia*, UN CERDOR, 2006, UN Doc. CERD/C/GUY/CO/14 at paras. 15-18; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana*, UN CERDOR, 2006, UN Doc. CERD/C/BWA/CO/16 at para. 12; for some of the most recent decisions of the HRC regarding Indigenous lands, see *Concluding observations of the Human Rights Committee: Paraguay*, UN HRCOR, 2006, UN Doc. CCPR/C/PRY/CO/2 at para. 23; *Concluding observations of the Human Rights Committee: Brazil*, UN HRCOR, 2006, UN Doc. CCPR/C/BRA/CO/2 at para. 6; *Concluding observations of the Human Rights Committee: Canada*, UN HRCOR, 2006, UN Doc. CCPR/C/CAN/CO/5 at paras. 8, 9 & 22.

[287] Formerly called the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[288] *Study of the problem of discrimination against indigenous populations*, ESC Res. 1982/34, UN ESCOR, 1982, UN Doc. E/Res/1982/34 at para. 1.

text of the Draft declaration and sent it to the General Assembly for adoption,[289] which should take place before September, 2007.[290] In the subject of the right to land, the declaration establishes:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[291]

The Sub-Commission also had an important role in the evolution of the right to indigenous land. In 1996, this body requested the appointment of a special rapporteur to study the issues of lands and territories of Indigenous peoples. The Human Rights Commission responded positively to the request of the Sub-Commission and named Ms. Erica-Irene Daes special rapporteur to prepare a working paper on indigenous people and their relationship to land.[292] The working papers that Ms. Daes produced on the issues of the special relationship of Indigenous peoples with their land, and the permanent sovereignty of Indigenous peoples over their natural resources, are important tools in the struggle for the recognition of Indigenous lands around the world.

3.1.3.3 - The Organization of American States

The Organization of American States [OAS] is the regional organization that brings together all the countries of the Americas. Given the fact that most of the countries of the Americas have Indigenous populations, the OAS has had an important role to play with respect to Aboriginal issues. Evidence of this is the attempt of this organization to produce an American declaration on the rights of Indigenous peoples. This declaration is

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[289] *Declaration on the Rights of Indigenous Peoples*, *supra* note 199.

[290] *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994*, GA Res. 178, UNGAOR, 61st Sess., UN Doc. A/RES/61/178 (2006); see also Social, Humanitarian and Cultural Committee (Third Committee) of the General Assembly, *Report of the Human Rights Council*, UN C3OR, 61st Sess., UN Doc. A/61/448 (2006) draft res II.

[291] *Declaration on the Rights of Indigenous Peoples*, *supra* note 199 at art. 26.

[292] *Study on indigenous land rights*, *supra* note 159.

being drafted by a special working group within the Committee on Juridical and Political Affairs, based on a previous draft created by the Inter-American Commission on Human Rights [Inter-American Commission or the Commission]. At this time, there is no consensus on the article provisionally called 'right to land, territories and resources'.

The bodies of the OAS that have played the most important role on the issue of Indigenous lands are the Inter-American Commission and the Inter-American Court on Human Rights [Inter-American Court or the Court]. The first of them, the Inter-American Commission, has two functions: political and quasi-judicial. In the exercise of its political functions, the Commission is in charge of the elaboration of an annual report on the situation of the human rights in the Americas, and special thematic or country reports when those are considered necessary. Although the issue of Indigenous lands is to be found in many annual and country reports, to date no particular report on the issue of aboriginal lands has been produced.[293]

The quasi-judicial function of the Inter-American Commission consists in the study of individual petitions of alleged violations of the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights* [*American Convention*]. After a procedure that includes the phases of admissibility, friendly settlement, recommendations and evaluation, the Commission will decide if the State has violated the aforementioned treaties. In the event of a violation, if the relevant state has ratified the *American Convention* and accepted the jurisdiction of the Inter-American Court, the State or the Commission can present the case before the Court.

To date, the Commission has received a dozen communications related to the indigenous right to land;[294] nevertheless, only four of them have passed to the Inter-

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[293] Although there are several reports on the rights of aboriginal peoples in general: OAS, Inter-American Commission on Human Rights, *Report on the situation of Human Rights of a segment of yhe Nicaraguan population of Miskito origin*, OR OEA/Ser.L./V.II.62/doc. 10 rev. 3 (1983); OAS, Inter-American Commission on Human Rights, *The Human Rights Situation of Indigenous People in the Americas*, OR OEA/Ser.L/V/II.108/Doc. 62 (2000); OAS, Inter-American Commission on Human Rights, *Proposed American Declaration on the Rights of Indigenous People Authorities and Precedents in International and Domestic law*, OR OEA/Ser.L/V/II.110/Doc. 22 (2001); OAS, Inter-American Commission on Human Rights, *Marandu Mbohapyha Derecho Humano Kuéra Rehegua Paraguáipe*, OEA/Ser.L/V/II.110/Doc. 52 (2001); OAS, Inter-American Commission on Human Rights, *Jurisprudencia sobre derechos de los pueblos Indígenas en el Sistema Interamericano de Derechos Humanos*, OR OEA/Ser.L/V/II.120/Doc. 1 (2004).

[294] *Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities v. Paraguay* (1999), Inter-Am. Comm. H.R. No. 90/99, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106 Doc. 6 rev; *Village of Moiwana v. Suriname* (2000), Inter-Am. Comm. H.R. No.

American Court: *The Case of the Mayagna (Sumo) Awas Tingni Community* [*Mayagna*], *The Case of Moiwana Village* [*Moiwana*], *The Case of the Yakye Axa Indigenous Community* [*Yakye Axa*] and *The Case of the Sawhoyamaxa Indigenous Community* [*Sawhoyamaxa*].

Both the practice of the Commission and the jurisprudence of the Court have found that the right to property of the *American Convention* includes the right to communal Indigenous property.

3.1.4 - Towards a new era: the humanization of international law

The road that has taken us from Victoria to the latest decisions of the Inter-American Court is anything but a casual path. The inclusion of such a delicate subject (one often left to national law alone) in international law is due to a process that started with the adoption of the Universal Declaration of Human Rights.[295] The increasing importance of human rights discourse in public international law is undeniable today.[296]

26/00, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106 Doc. 6 rev; *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay* (2002), Inter-Am. Comm. H.R. No. 2/02, Annual Report of the Inter-American Commission on Human Rights: 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1; *Marie and Carrie Dann v. United Stastes* (2002), Inter-Am. Comm. H.R. No. 75/02, Annual Report of the Inter-American Commission on Human Rights: 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1; *Xakmok Kásek Indigenous Community v. Paraguay* (2003), Inter-Am. Comm. H.R. No. 11/03, Annual Report of the Inter-American Commission on Human Rights: 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2; *Sawhoyamaxa Indigenous Community v. Paraguay* (2003), Inter-Am. Comm. H.R. No. 12/03, Annual Report of the Inter-American Commission on Human Rights: 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2; *Community of San Vicente Los Cimientos v. Guatemala* (2003), Inter-Am. Comm. H.R. No. 68/03, Annual Report of the Inter-American Commission on Human Rights: 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2; *Mercedes Julia Huenteao Beroiza et al. v. Chile* (2004), Inter-Am. Comm. H.R. No. 30/04, Annual Report of the Inter-American Commission on Human Rights: 2005, OEA/Ser.L/V/II.122 Doc. 5 rev. 1; *Maya Indigenous Communities of the Toledo District v. Belice* (2004), Inter-Am. Comm. H.R. No. 40/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1; *The Kichwa Peoples of the Sarayaku Community and its Members v. Ecuador* (2004), Inter-Am. Comm. H.R. No. 64/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1; *Community of San Mateo de Huanchor and its Members v. Peru* (2004), Inter-Am. Comm. H.R. No. 69/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1; pursuant to article 50 & 51 of the American Convention, the Commission did not publish its Report No. 27/98 regarding the case 11,577: *Awas Tingni Indigenous Community v. Nicaragua*; a discussion of some of these cases can be found in Derek de Bakker, "The Court of Last Resort: American Indians in the Inter-American Human Rights System. Why American Indians Should Utilize Supranational Courts" (2004) 11 Cardozo J. Int'l & Comp. L. 939.

[295] Pierre-Marie Dupuy, "Cours Général de Droit International Public: L'Unité de l'Ordre Juridique International" in Hague Academy of International Law, *Collected Courses of the Hague 2000*, tome 297 (Leiden: Martinus Nijhoff, 2003) at 414.

[296] Theodor Meron, "General Course on Public International Law: International Law in the Age of Human Rights" in Hague Academy of International Law, *Collected Courses of the Hague 2003*, tome 301 (The

Scholars affiliated to The Hague Academy of International Law, such as Cançado Trindade, P.M. Dupuy, R.-J. Dupuy, Meron and Rosenne have studied this process and developed a theory that shows how today international law is evolving towards humanization,[297] towards an *ius gentium* for humanity.[298]

The actual protection of Indigenous peoples in international law and the emerging interest in protecting their land is yet further evidence of this transitional moment.[299] It is evident that the individual is starting to play more than a passive role in international law, as its interest has become an essential part of the system.[300] Indigenous peoples, as groups of individuals that deserve communal differentiated rights,[301] are also part of this process of humanization and start to face the possibility of being recognized as peoples in the full term of the word.[302] In international law that means that aboriginal peoples can acquire the right to self-determination.[303]

This phenomenon is not exclusive to the protection regimes in international law; it is evolving and transforming the whole body of public international law.[304]

The idea of the humanization of international law requires us to embrace this momentum and promote broader standards of protection for the individual and particular collectivities within international human rights law and public international law. In this sense, one must not settle for merely the current standards and developments of

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Hague: Martinus Nijhoff, 2004) at 21 [Meron, "General Course"]; Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at XV [Meron, *Humanization*].

[297] Meron, "General Course", supra note 296 at 22; Meron, *Humanization*, *supra* note 296 at XV.

[298] René-Jean Dupuy, "Conclusions of the Workshop" in René-Jean Dupuy, ed., *L'Avenir du Droit International Dans un Monde Multiculturel: Colloque de la Académie de Droit International de la Haye, 17-19 Novembre 1983* (The Hague : Martinus Nijhoff, 1983) at 478-487; René-Jean Dupuy, *La Communauté internationale entre le mythe et l'histoire* (Paris: UNESCO, 1986) at 171-173; Antônio Augusto Cançado Trindade, "Hacia el nuevo *Jus Gentium* del siglo XXI: El derecho universal de la humanidad" in Secretaria General de la OEA, *Jornadas de Derecho Internacional 2003* (Washington: OEA, 2005) at 235-242; Antônio Augusto Cançado Trindade, *A Humanização do Dereito Internacional* (Belo Horizonte: Del Rey, 2006) at 138.

[299] Meron, "General Course", supra note 296 at 366-368.

[300] Shabtai Rosenne, "General Course on Public International Law: The perplexities of Modern International Law" in Hague Academy of International Law, *Collected Courses of the Hague 2001*, tome 291 (The Hague: Martinus Nijhoff, 2002) at 38, 46 & 225; Meron, "General Course", supra note 296 at 22; Shabtai Rosenne, *The Perplexities of Modern International Law* (Leiden: Martinus Nijhoff, 2004) at 15 & 265-268; Meron, *Humanization*, *supra* note 296 at 354.

[301] *Declaration on the Rights of Indigenous Peoples*, *supra* note 199 at art. 1.

[302] *Ibid.* at art 2.

[303] *Ibid.* at art 3.

[304] Meron, "General Course", supra note 296 at 22.

international law; the evolution must occur both in national law and in international law. When talking specifically of Indigenous peoples, the humanization must move beyond norms of non-discrimination, and must advance issues of territoriality, land and resources, the ultimate point of which is the recognition of Aboriginal peoples as true nations. This does not necessarily have to lead to secession, but to true politics of inclusion and pluralism within the existing States.

3.2 - Application of international law to Aboriginal title: the inter-American doctrine

I turn now to the practical use of international law in the case of Aboriginal title.

The problem with most of the norms described above is that they are either not available to Canadian Aboriginal peoples or they are "soft-law." This will not be an impediment to discuss further internationalization of the concept of Aboriginal title, but it will inform the norms that I will choose to construct this concept.

This study is intended to present feasible options for Aboriginal peoples. For this reason, I focus on international norms that can potentially apply to the Canadian State, ones that are binding and that have an effective supervision mechanism.

All of the abovementioned norms[305] either apply or can apply to the Canadian State, however not all of them are binding, because some are 'soft law'. Focusing on those international instruments that Canada has ratified or can ratify, and which contain hard norms, we are left with the ICCPR, the ICERD and the *American Convention.*

As I will now argue, the stronger guarantees of the *American Convention* (and the greater likelihood of obtaining an effective remedy) suggests that, of the three legal regimes, the regime secured by the *American Convention* offers the greatest promise regarding the protection of Aboriginal land rights. First, regarding the ICCPR, it must be remembered that this Covenant touches Indigenous rights through the rights of minorities provision and that this treaty does not contain the right to property. As a matter of fact, the HRC already dealt with a case where Canadian First Nations alleged a violation of its land rights.[306] Although the *Lubicon Lake Band* case was essentially based on the title to

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[305] The American Declaration, the ICCPR, the American Convention, the ICERD, the Convention 169 and the Declaration on the Rights of Indigenous Peoples.

[306] *Lubicon Lake Band v. Canada*, Communication No. 167/1984, UN HRCOR, 1990, Supp. No. 40, U.N. Doc. A/45/40 at 1.

land of the band, the decision of the HRC was more directed at protecting the cultural identity of the group: "Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue".[307] Second, the ICERD also does not include the right to property. Its potential to protect Aboriginal land is confined to the principle of non-discrimination. It also has the disadvantage that its protection mechanism has never been used in cases related to aboriginal title. Third, the *American Convention* does contain the right to property, and the organs of the IASHR have found that this right also protects the right of communal Indigenous property to land.

Based on these considerations, the best place to look for norms that would help in the construction of an internationalized concept of Aboriginal title relevant to Canadian Aboriginal peoples is the IASHR. However, I do not consider that the whole law of the IASHR is required for this project. I prefer to concentrate on the jurisprudence of the Inter-American Court because this is indeed the final interpreter of the *American Convention.* Although the practice of the Inter-American Commission has played an important role in the development of the communal Indigenous right to property, its value is always measured in terms of the judgments of the Court. For example, in the *Mayagna* case, one of the central arguments of the Commission was that the communal Indigenous right to property is part of customary international law,[308] but since the Court did not agree on this point, it has not been used in later cases.

Now I will proceed to describe the most important features of the jurisprudence of the Inter-American Court.

3.2.1 - The Jurisprudence of the Inter-American Court on Human Rights

The foundation of the protection of aboriginal lands in the IASHR comes from the right to property of the *American Convention*, which states:

Right to Property

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[307] *Ibid.* at para. 33.

[308] *Case of the Mayagna (Sumo) Awas Tingni Community (Nicaragua)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 79, [*Mayagna*] at para. 140.d; see also Arizona Journal of International and Comparative Law, "Final Written Arguments of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights: In the Case of the Mayagna (Sumo) Indigenous Community of Awas Tigni Against the Republic of Nicaragua (Unofficial Translation)" 19 Ariz. J. Int'l & Comp. Law 325 at 349-350.

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law.[309]

Nothing in this article indicates that the existence of an Indigenous right to land is a differentiated right. Indeed, none of the conventions or declarations adopted under the Inter-American system explicitly states that Indigenous peoples have a communal right to their traditional land.[310] Nevertheless, as the cases started to arrive to the Inter-American Commission and the Court, these bodies faced the possibility of interpreting the right to property in a manner that would also protect Aboriginal title.

Although the Inter-American Court has only dealt with this issue in four cases, the Court's interpretative approach – one that invites the possible development of an Indigenous right to land – has dramatically changed over the course of these four cases. I will analyze each case separately in order to see the progressive development of the jurisprudence regarding this right.

3.2.1.1 - The Case of the Mayagna (Sumo) Awas Tingni Community

The Case of the Mayagna (Sumo) Awas Tingni Community V. Nicaragua [*Mayagna*] was decided by the Inter-American Court on August 31, 2001. *Mayagna* was not the first case where the Court had to deal with Aboriginal customs,[311] but it was the first time it had to decide if the non-recognition of those customs was a violation to the *American Convention*. More importantly, the Court had to decide this in the context of a land claim.

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[309] *American Convention*, *supra* note 241 at art. 21.

[310] Ludovic Hennebel, "La protection de l'«intégrité spirituel» des indigènes : Réflexions sur l'arrête de la Cour interaméricaine des droits de l'home dans l'affaire *Comunidad Moiwana c. Suriname* du 15 juin 2005" (2006) 66 Rev. Trim. Dr. H. 253 at 254-254.

[311] In the reparations phase of the Aloeboetoe case, the Court had to consider weather all of the wives of the victims had the right to receive compensation. Since the customary law of the group allowed multiple partners, the Court awarded compensation to each wife of each victim; *Case of Aloeboetoe et al. (Suriname)* (1993), Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 15, at paras. 17 and 62.

Although *Mayagna* is a landmark case in the international recognition of the indigenous right to land, the terms by which this judgment recognizes this right are rather vague. The Inter-American Court based its logic on the doctrine of the 'living instrument' which states that "human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions".[312] Nevertheless, the Inter-American Court never explained the present-day conditions that would justify the extension of the property right guaranteed in the Convention to an indigenous right to land; the judges simply stated that:

> Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.[313]

The Inter-American Court concluded that article 21 (right to land) must take into account the fact that the national legislation of Nicaragua accepts Indigenous communal property as a type of property.[314] This is based on the interpretative rules of the *American Convention*, which state that whenever a State has adopted by national or international law a higher standard of protection than the *American Convention*, then the *American Convention* must be interpreted as containing that higher standard.[315]

It is important to notice that although the decision of the Court does not try to ground the existence of this right to a formal justification, it explains the nature of the

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[312] *The Right to Information on Consular Assistance in the framework of the guarantees of the Due Process of Law* (1999), Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A), No. 16, at para. 114; *Villagran Morales et al. Case (The "Street Children" Case) (Guatemala)* (1999), Inter-Am. Ct. H.R. (Ser. C) No. 63, at para. 193; *Mayagna, supra* note 308 at para. 148; *Juan Humberto Sánchez Case (Honduras)* (2003), Interpretation of the Judgment on Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 102, at para. 56; *The Gómez Paquiyauri Brothers Case (Peru)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 110, at para. 165; *Case of the Yakye Axa Community (Paraguay)* (2005), Inter-Am. Ct. H.R. (ser. C) No. 125, at para. 125 [*Yakye Axa I*]; this doctrine was first formulated in 1978 by the European Court of Human Rights, for detailed history of this doctrine in that Court see Alastair Mowbray, "The Creativity of the European Court of Human Rights" (2005) 5:1 Hum. Rts. L. Rev. 57.

[313] *Mayagna, supra* note 308 at para. 148.

[314] *Ibid.* at para. 153.

[315] *American Convention, supra* note 241 at art. 29.

relationship of aboriginal peoples with the land they inhabit.[316] In this sense, it seems as if the Court takes the concept of a special relationship with the land as the justification of the right to communal indigenous property of land.

Once the Inter-American Court vaguely established the existence of a 'communal property right to the land', it proceeded to define how the Court should decide if the claiming community had that right or not. The criterion is based strictly in the traditions of the group, which the Court considers customary law:

> Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.[317]

The Court did not develop their concept of possession or the evidentiary standard to prove that possession, because the State did not deny that the Mayagna Awas Tingini Community had such a right.[318] Nicaragua recognized through its legislation that Indigenous peoples have a right over the land they occupy, and the agents of the State in this case did not argue that the Mayagnas did not have this right. The decision of the Inter-American Court suggests that it is not within its competence to decide the extent and location of the lands that belong to the group. Moreover, the Court decided that the State should delimitate, demarcate and title the lands that belong to the Mayagna Awas Tingini Community, according to the customary law of the group.[319]

Finally, the *Mayagna* case develops the obligations of the State regarding the communal property right to the land according to the *American Convention*. These obligations are two: (1) award legal protection to the territory belonging to the community and (2) abstain from actions that might compromise the use and enjoyment of the land by the community.[320]

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[316] *Mayagna, supra* note 308 at para. 149.

[317] *Ibid,* at para. 151.

[318] *Ibid.* at para. 152.

[319] *Ibid.* at para. 173.3 & 173.4.

[320] *Ibid.* at para. 153.

3.2.1.2 - The Case of Moiwana Village

The *Case of Moiwana Village* [*Moiwana*] was not directly related to the Indigenous right to land. In fact, the Inter-American Commission accused the State of Suriname of violating the rights to judicial protection and fair trial. The Commission alleged that in 1986 unidentified members of the military forces of the State massacred 40 members of the N'djuka group and destroyed the Moiwana Village. Since the massacre, nobody has inhabited the lands where the village was.

There were two procedural problems with the case: (1) the massacre occurred almost a year before Suriname ratified the *American Convention* and recognized the jurisdiction of the Inter-American Court, and (2) the victims presented their petition almost 10 years after the occurrence of the massacre. For this reason the Inter-American Commission only alleged the violation of rights that admit the doctrine of continued violation, that is, a violation that extends in time until the State takes positive and effective measures to repair the victims.[321] The Commission did not include in the application to the Court the rights to life, humane treatment, freedom of movement and residence, or property.

However, since the representation of the victims raised the issue of lands during trial, the Court admitted it as an additional accusation.[322]

Regarding the right to property and its concept, the Inter-American Court did not advance further arguments for its application to indigenous lands, it simply pointed back to its jurisprudence in *Mayagna*.[323] Nevertheless, the decision of the Court has two important components: (1) it recognized that the right to property admits continued

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[321] Hennebel, *supra* note 310 at 257-258.

[322] The Court allows the introduction of new accusations (not facts) by the victims in the parts of the process where they can intervene; *Case of "Five Pensioners" (Peru)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 98, at para. 155; *Case of Maritza Urrutia (Guatemala)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 103, at para. 134; *Case of Herrera-Ulloa (Costa Rica)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 107, at para. 142; (2004); *Case of the Gómez Paquiyauri brothers*, *supra* note 312 at para. 179; *Case of Children's Rehabilitation (Paraguay)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 112, at para. 125; *Case of De La Cruz-Flores (Peru)* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 115, at para. 122; *Case of the Mapiripán Massacre (Colombia)* (2005), Preliminary Objections and Acknowledgment of State Responsibility, Inter-Am. Ct. H.R. (Ser. C) No. 122, at para. 28.

[323] *Case of Moiwana Village (Suriname)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 124. [*Moiwana I*] at para. 129.

violation, and (2) it further developed the doctrine of the Court on the type of possession that the group must prove.

Although the issue of 'continued violation' seems to only have consequences for the jurisdiction of the Court in future cases, it might have extensive philosophical and legal consequences. It admits that the usurpation of Indigenous lands is more than a past wrong. The displacement is in fact the action that triggers the violation, and as long as this displacement exists, the State is liable.[324]

Before deciding the type of possession that proves title, the Inter-American Court had to make a decision on the justification of the right to Indigenous land. The concept of prior occupancy as justification of this right would not have given positive results in this case because the N'djuka group is not aboriginal to the region where the village was located. The evidence of the case shows that the N'djukas settled in the Moiwana Village around the 19th century.[325] In fact, the N'djukas are "members of an ethnic community that descends from the so-called 'Bush Negroes' or 'Maroons', namely former slaves who managed to escape enslavement and established new autonomous communities in the eastern part of Suriname."[326] Instead, the Court formally adopted the criterion that had already been suggested in *Mayagna*; i.e., justifying this right through the concept of a special relationship with the land:

> That conclusion was reached upon considering the unique and enduring ties that bind indigenous communities to their ancestral territory. The relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations.[327]

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[324] *Ibid.* at 108 & 126.

[325] *Ibid.* at 131-132.

[326] Claudia Martin, "The Moiwana Village Case: A New Trend in Approaching the Rights of Ethnic Groups in the Inter-American System" (2006) 19 Leiden J. Int'l. L. 491 at 491.

[327] *Ibid.* at para. 131.

Using the concept of a special connection with the land, the Court clarified the doctrine set in *Mayagna* regarding possession, and explained that "mere possession of the land should suffice to obtain official recognition of their communal ownership".[328]

After verifying that the Moiwana group had an 'all-encompassing relationship' with the land, and that it had possession of this land before agents of the State displaced them, the Court decided that the State of Suriname must recognize the ownership of the land by the group.[329]

Finally, the Court "left the designation of the territorial boundaries in question to 'an effective mechanism' of the State's design"[330] which will acknowledge the opinion of the neighboring communities.[331]

3.2.1.3 - The Case of the Yakye Axa Indigenous Community

The Case of the Yakye Axa Indigenous Community [*Yakye Axa*] is based on a land claim that this community started in the year 1993 before Paraguayan authorities. After a long procedure the authorities were not able to recognize the property rights of the Yakye Axa community because the land was occupied by non-aboriginals.[332] Then it was up to the National Congress to expropriate the lands in order to give them to the Indigenous community, but the adjudication offer made by the Congress did not include the requested lands.[333] The community raised a petition to the IASHR which concluded with the decision of the Inter-American Court. In this sense, *Yakye Axa* represents the best example of the internationalization of a land claim.

This case has several particularities that make it an interesting case both in the facts and the decision.

Regarding the factual particularities, the Yakye Axa Community comes from the Paraguayan Chaco and its ancestor was the Chanawatsan group, which was a nomadic group of the zone before the arrival of Anglican colonizers.[334] The piece of land that the

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[328] *Ibid.*

[329] *Ibid.* at para. 133.

[330] *Case of Moiwana Village (Suriname)* (2006), Interpretation of the June 15, 2005 Judgment on the preliminary objections, merits and reparations, Inter-Am. Ct. H.R. (Ser. C) No. 145, at para. 19.

[331] *Moiwana 1*, *supra* note 323 at 133.

[332] *Yakye Axa 1*, *supra* note 312 at para. 50.23-50.53.

[333] *Ibid.* at para. 50.54-50.61.

[334] *Ibid.* at para. 50.2.

Yakye Axa claimed was abandoned voluntarily by them in 1986 because of the awful life conditions in the zone.[335]

The decision of the Inter-American Court in this case is extremely important for the rights of Aboriginal peoples of the continent. Prior to analysis of the articles alleged to have been violated, the decision has a section called Prior Considerations, which reads as follows:

> Due to the fact that the present case deals with the rights of the members of an Indigenous community, the Court considers it important to remember that in conformity with the articles 24 (equality before the law) and 1.1 (obligation to respect rights) of the American Convention, the States must guarantee, in conditions of equality, the full exercise and enjoyment of the rights of these persons within their jurisdictions. However, in order to guarantee effectively these rights, when States interpret and apply their national legislation, they must take in consideration the special characteristics that differentiate Indigenous peoples from the general population, which form their cultural identity. The same idea must be applied by the Court, in the case under study, in order to asses the content of the articles of the American Convention.[336]

In my view, the Court has established here an interpretative criterion which allows for the expansion of the *American Convention* based on cultural difference.[337] In other words, even if a given State does not recognize Indigenous rights, the Court can ground the extension of the *American Convention* to Indigenous rights and protect such rights through reference to the traditions and customs of the Indigenous group. The Court clearly states that this interpretative criterion must be applied by the States within their national legislation.

Regarding the alleged violation of the right to communal Indigenous property, the Court started by discussing the sources that can be used to interpret the *American Convention*. The Court used:

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[335] *Ibid.* at para. 50.13.

[336] *Ibid.* at para. 51 [translated by author].

[337] For the arguments that led me to that conclusion see Carlos Iván Fuentes, "Universalidad y diversidad cultural en la interpretación de la Convención Americana sobre Derechos Humanos: Innovaciones en el caso de la Comunidad Indígena Yakye Axa" (2006) 1:2 Debates Hum. Rits. & Inter-Am. Syst. 69 online: CEJIL <http://www.cejil.org/revista/revista_2.pdf>.

1. "[T]he special signification of the communal property of ancestral land for Aboriginal groups", according to paragraph 51 of the same judgment (Prior Considerations).[338]
2. The evaluative interpretation of human rights treaties based on the doctrine of the living instrument.[339]
3. *ILO Convention 169*, according to the norms of interpretation of the *American Convention*.[340]
4. The Paraguayan constitution and laws.[341]

In *Yakye Axa*, the Inter-American Court reaffirmed the importance of the special relationship of Aboriginal peoples with their land,[342] underlining that the right to Indigenous property is a means to protect the cultural aspects of the group:

> The guarantee of the right of communal property of Indigenous peoples must take into account that the land is deeply related with its traditions and oral histories, their customs and languages, their arts and rituals, their knowledge and uses related to nature, their culinary arts, their customs, their clothing, philosophy and values. In virtue of their environment, integration with nature and history, the members of the Indigenous communities transmit from generation to generation this immaterial cultural patrimony, which is constantly recreated by the members of Indigenous communities and groups.[343]

The Court also suggested that the violation of the right to communal Indigenous property might entail the violation of other rights such as the right to cultural identity and the right to existence of Indigenous groups.[344]

Ultimately, *Yakye Axa*'s central issue is the treatment of competing claims between Indigenous and non-Indigenous peoples over a track of land. In this issue the Court established first that the protection of Indigenous culture and the existence of an Aboriginal group are legitimate objectives of a democratic and pluralistic society in the

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[338] *Yakye Axa 1*, *supra* note 312 at para. 124 [translated by author].

[339] *Ibid.* at para. 125.

[340] *Ibid.* at para. 126-127, 130 & 136.

[341] *Ibid.* at para. 138 & 139.

[342] *Ibid.* at para. 131, 135 & 137.

[343] *Ibid.* at para. 154 [translated by author].

[344] *Ibid.* at para. 147.

sense intended by the *American Convention*, which itself sustains the legitimate restriction of the property rights of non-indigenous peoples.[345] Secondly, the Court established that the rights of aboriginals do not necessarily prevail in all cases.[346] If the State has concrete and justified reasons that make it impossible to award the requested land, it must compensate the group, taking into account their needs and opinions.[347]

Finally, the Court reaffirmed its jurisprudence regarding the obligation of the State to identify, delimitate, demarcate the lands of the Indigenous group and then award them title,[348] clearly establishing that it is not the duty of the Inter-American Court to engage in such operation.[349]

3.2.1.4 - The Case of the Sawhoyamaxa Indigenous Community

The Case of the Sawhoyamaxa Indigenous Community [*Sawhoyamaxa*] is also a case against the State of Paraguay. It is called the 'sister case' of the *Yakye Axa*, because the factual aspects of the cases are similar and the nature of their claims is practically the same. Moreover, both the Yakye Axas and the Sawhoyamaxas have the same ancestors.

The importance of *Sawhoyamaxa* comes from the fact that it unifies the jurisprudence of the Inter-American Court about the right of communal Indigenous property by drawing general principles from *Mayagna*, *Moiwana* and *Yakye Axa*. And although the decision of the Court in *Sawhoyamaxa* is very similar to *Yakye Axa*, the language of the former is clearer.

Initially, the Court finally explains why the *American Convention* must be interpreted using the cultural aspects of the alleged victims:

> Moreover, this Tribunal considers that the concepts of property and possession can have a collective meaning for the Indigenous communities, in the sense that the ownership of the land 'is not centered on an individual but rather on the group and its community'. This notion of ownership and possession over the lands does not necessarily correspond to the classical conception of property, but it deserves the same protection under article 21 of the American Convention. The failure to recognize specific

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[345] *Ibid.* at para. 146 & 148; *Case of the Yakye Axa Community (Paraguay)* (2006), Interpretación de la sentencia sobre fondo, reparaciones y costas, Inter-Am. Ct. H.R. (ser. C) No. 142, at para. 24 [*Yakye Axa 2*].

[346] *Yakye Axa 1*, *supra* note 312 at para. 149; *Yakye Axa 2*, *supra* note 345 at para. 25.

[347] *Yakye Axa 1*, *supra* note 312 at para. 151; *Yakye Axa 2*, *supra* note 345 at para. 25.

[348] *Yakye Axa 2*, *supra* note 345 at para. 23.

[349] *Ibid.* at para. 26.

> versions of the right to use and enjoyment of property, established by culture, uses customs and beliefs of each peoples, would amount to sustaining that there is only one manner to use and dispose of property, which would make the protection of article 21 of the Convention useless for millions of persons.[350]

Regarding the possession of the land as evidence of title, the Court draws four principles from the preceding cases: (1) the traditional possession of land has the same value as the highest title awarded by the State, (2) this possession entails the right to request recognition and title (3) the groups that have involuntarily lost possession over their lands retain their proprietary rights over the land, unless it is legitimately transferred to others, and (4) if the lands of an Indigenous group has been transferred to a third party, the group still has the right to reclaim the lands or receive compensation for them.[351] However, *Sawhoyamaxa* is important because it finally defines the manners to prove the Indigenous right to land and discusses the defenses that the State can raise in order to not award title over a particular piece of land.

Indeed, *Sawhoyamaxa* discusses whether there is any time limitation to request title. Since the Inter-American Court has based the right to communal Indigenous land on the special relationship with the land,[352] the right to request title will not disappear until this special relationship of the Indigenous group with the land disappears.[353] However, the Court also established that the limitation will only operate if the relationship with the land is possible; that is, if there is a real obstacle for the group to maintain the relationship, the temporal limitation will not operate to block a claim.[354]

Finally, the Inter-American Court dealt with the arguments of the State that sustained that it was not in a position to return lands that were owned by third parties or that were rightfully exploited. Using the arguments advanced on *Yakye Axa*,[355] the Court considered that the fact that the land was in private hands was not a concrete and justified

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[350] *The Case of the Sawhoyamaxa Indigenous Community (Paraguay)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 146, at para. 120 [translated by author] [*Sawhoyamaxa*].

[351] *Ibid.* at para. 128.

[352] *Mayagna, supra* note 308 at para. 149; *Moiwana 1, supra* note 323 at 131; *Yakye Axa 1, supra* note 312 at para. 131, 135 & 137.

[353] *Sawhoyamaxa, supra* note 350 at para. 131.

[354] Ibid at para. 132.

[355] *Yakye Axa 1, supra* note 312 at para. 151; *Yakye Axa 2, supra* note 345 at para. 25.

reason for not awarding title to the Indigenous group.[356] According to the Court, if that would be a justified reason "the right to devolution of the land would lose sense and would not offer any real possibility of recuperating traditional lands".[357] Meanwhile, the argument based on the exploitation looks at the land exclusively from the point of view of its productivity, thus denying the particular ties of Indigenous peoples with their land.[358]

3.2.2 - A postscript about the Inter-American doctrine

The Inter-American doctrine has sufficient richness and complexity to demonstrate the possibility of conceiving Aboriginal title in a manner that is different than the manner Canadian courts conceive it. The approach used by the Inter-American Court denotes the importance of regional systems of human rights in the development of standards that respond to the necessities of particular groups. This is not to say that the Universal System of Human Rights is disconnected from the realities of the Americas. However, its norms tend to present more global solutions, and these might fail to appreciate the particularities that make possible the localized interpretation of rights.

At the same time, we must not fool ourselves: the treaty law of the Inter-American system does not by itself supply the right to communal Indigenous property. Judicial interpretation of the *American Convention* is the sole origin of this right.[359] It is debatable whether cultural adaptation of norms is a valid interpretation of the obligations agreed to by States through treaties. However, the right to communal Indigenous property has apparently become settled doctrine in the Inter-American system. This shows the potential of international law to create and influence positive changes in the way we talk about rights. But this is only a step in the struggle for the inclusion of differentiated Indigenous rights as universal human rights standards.

3.3 - Internationalizing Aboriginal title

After having seen the most important features of the jurisprudence of the Inter-American system of human rights, I will proceed to apply those standards in the construction of an internationalized law of Aboriginal title. Initially I will show how Canadian standards can be transformed through the application of the Inter-American

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[356] *Sawhoyamaxa, supra* note 350 at para. 138.

[357] *Ibid.* [translated by author].

[358] *Ibid.* at para. 139.

[359] Hennebel, *supra* note 310 at 253-254.

doctrine. Then I will present the internationalized law of Aboriginal title in the same fashion I presented the construction of the modern law of Aboriginal title.

3.3.1 - Aboriginal title versus the Indigenous communal right to land

Although the Inter-American doctrine on the Indigenous communal right to land does not handle detailed issues such as negotiation and distribution of the land, there are significant improvements that can be made in Canadian law using these international standards. In this subsection I will compare the Canadian and Inter-American approaches of title to land. The comparison will focus on particular issues that I have already revealed as problematic in subsection 2.1 - of this study.

3.3.1.1 - Proof of title

According to Canadian law on Aboriginal title the test to prove such title, requires that: "(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive."[360] Those requirements give little weight to present occupation and uses of land, while the most important aspects are of an historical nature (prior occupation or continuity).

Meanwhile, Inter-American law's test is based on the present occupation of the land by the Indigenous group.[361] In other words, if an Indigenous group is occupying a track of land pacifically, the Court considers that the State has an obligation to award title to this land. Historical considerations will only take place if the group has been dispossessed of the land. In that case, the group has to prove that it has historical connections with this land in order to prove title.[362]

The simplicity of this test comes from the Aboriginal traditions and uses of land. The communal nature of Aboriginal uses of land means that the Aboriginal individual does not own land; he or she inhabits it, uses it and cares for it.[363] Thus, international law

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[360] *Delgamuukw*, *supra* note 71 at para. 143.

[361] *Mayagna*, *supra* note 308 at para. 151; *Sawhoyamaxa*, *supra* note 350 at para. 128.

[362] *Sawhoyamaxa*, *supra* note 350 at para. 128.

[363] John Borrows & Leonard Rotman, Aboriginal Legal Issues: Cases, Materials and Commentaries, rev. ed. (Toronto: Butterworths, 2003) at 1.

recognizes that occupation is *per se* the evidence of a proprietary interest, but that the right is not extinguished if the occupation has stopped.[364]

The current test of Aboriginal title in Canada is not only difficult to satisfy but also extremely complicated to assess. Aboriginal groups have to use histories and traditions to prove their customary law,[365] which must be assessed by a judge that most of the times would not comprehend the significance of those traditions.[366] The Inter-American test is based on an objective and verifiable fact (occupancy) that does not need further support, unless dispossession is a factor.[367] And even in cases of dispossession, the occupation of the land does not have to be traced to centuries ago, but to the time when the dispossession actually occurred.[368] And since the object of protection is the special connection between Aboriginal peoples and their land, it would be irrelevant to measure the time that Aboriginals occupied the land.

The adoption of the Inter-American test would facilitate the presentation and analysis of evidence, while allowing First Nations, Inuit and Métis peoples to acquire title over land which would be impossible to acquire under the previous test.

3.3.1.2 - The temporal limit

The jurisprudence of the Supreme Court of Canada has set a temporal limit or 'cut off' date in which Aboriginal peoples stopped acquiring land rights. Aboriginal title would only be awarded over lands that were occupied by a given group since before the assertion of sovereignty of the British Crown.[369]

Inter-American law does not contemplate a 'cut off' date. In fact, the Inter-American Court has awarded title to land to groups that were not aboriginal to the region they occupy, but that had a communal conception of the property over land.[370] While occidental society has a linear conception of time, Aboriginal peoples' conception is

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[364] *Sawhoyamaxa*, *supra* note 350 at para. 128.

[365] Borrows, *Recovering*, *supra* note 91 at 88-89.

[366] *Ibid.* at 90.

[367] *Moiwana 1*, *supra* note 323 at 131; *Sawhoyamaxa*, *supra* note 350 at paras. 128 and 131.

[368] *Ibid.*

[369] *Delgamuukw*, *supra* note 71 at para. 145.

[370] *Moiwana 1*, *supra* note 323 at 132.

circular.[371] In this sense, their attachment with the land is not conceived in terms of time, but in terms of meaning.[372] And that meaning does not have a start or end date.[373] Inter-American law takes into account that fact to establish that the object of protection is not the land itself, but the unique bond that an Aboriginal group has with a particular piece of land.[374]

Maintaining the temporal limit is difficult to justify except from the point of view of lending security to the land rights acquired by non-aboriginals some time after the Crown's assertion of sovereignty. Eliminating the temporal limit would bring more protection to those groups that were displaced from their lands due to the influence of Europeans. This elimination would allow groups to claim title over the lands that they occupy today and not those that are inhabited by non-aboriginals. In this sense, in at least some cases, neither non-Aboriginals nor Aboriginals are sacrificed by the elimination of the cut off date.

Inter-American law has understood that, independently of the moment when a group settled on a piece of land, the law must protect the meaning that the land has for the group and the activities that are performed there. Canadian law must embrace this approach in order to respect the bond of aboriginal peoples with their land.[375]

3.3.1.3 - The content of Aboriginal title

The Supreme Court of Canada established in *Delgamuukw* that the content of Aboriginal title was explained by two propositions:

> [F]irst, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive

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[371] Rupert Ross, *Dancing with a ghost: Exploring Indian reality* (Markham: Octopus Publishing Group, 1992) at 89-91.

[372] *Moiwana 1*, *supra* note 323 at 131.

[373] Brent Olthuis, "Defrosting Delgamuukw (or 'How to Reject a Frozen Rights Interpretation of Aboriginal Title in Canada')" (2001) 12 N.J.C.L. 385 at 398 ([T]he occupancy criterion itself tends to freeze aboriginal land rights at a conspicuously random historical date [...]. The fact of which people happened to occupy the land at the moment of asserted British sovereignty would provide a desultory, if not completely arbitrary, method for allocating land rights and resolving these complex issues).

[374] *Mayagna*, *supra* note 308 at para. 151; *Moiwana 1*, *supra* note 323 at 131. *Yakye Axa 1*, *supra* note 312 at para. 154; *Sawhoyamaxa*, *supra* note 350 at para. 131.

[375] Olthuis, *supra* note 373 at 398 ([T]he test effectively obviates a truly meaningful analysis of the aboriginal relationship to land. Arguably, the physical fact of occupation at a given moment can provide no more than an approximation of the aboriginal perspective.).

> aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.[376]

While giving freedom to Aboriginal groups to engage in "non-Aboriginal" activities within their lands, the Court also created a limitation on the use of the land. As explained above, this limitation affects the uses in which Aboriginal peoples can put their land and natural resources.

The Inter-American law has not directly discussed the content of the title that is awarded by the Indigenous communal right to property. However, in the *Sawhoyamaxa* the Court explained that: "the traditional possession of land by aboriginals has the same value as the title to full dominion awarded by the State."[377] In this sense, an Aboriginal group must have the same rights over their land that non-Aboriginals have over their real property. A limitation over the land of Aboriginal peoples that is not applied to non-Aboriginals is a discriminatory measure that prejudices Aboriginals. Of course, since both Aboriginal title and the Indigenous right to property are communal, the communal aspect of the land will still be part of an internationalized law of Aboriginal title; thus the decisions over the fate of the land must be taken by the group as a whole.

By not specifying the content of the right, Inter-American law respects the possibility of different conceptions of the land. Different Aboriginal groups have different ways to use the land and natural resources they have.[378] In this light, setting a defined parameter of possible uses or definitive limitations might disregard the differences among Aboriginal peoples.

In a case discussing political rights, the Inter-American Court established that the fact that Indigenous peoples do not have the custom to postulate through political parties obligates the State to accept independent postulations from Indigenous candidates.[379] This is an example of how international law shapes national law through the use of Indigenous customary law.

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[376] *Delgamuukw*, *supra* note 71 at para. 117.

[377] *Sawhoyamaxa*, *supra* note 350 at para. 128.

[378] Australian law has followed a similar path: "The determination of the features of the title are determinations of fact, ascertained by evidence. The content of the title will vary because the underlying indigenous systems of traditional law and customs will vary", Mantziaris & Martin, *supra* note 226 at 45.

[379] *Case of Yatama (Nicaragua)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 127, at para. 218.

An internationalized law of Aboriginal title must adapt to the uses that the group considers important for their relationship with the land, together with possible evolutions that this relationship with the land might undergo.

This equivalence between full dominion and Aboriginal title would eliminate the distinction of a *sui generis* proprietary interest in Canadian law, while maintaining the communal character of Aboriginal title. Canadian law must apply the international standard in order to avoid an illegitimate preference of non-Aboriginal conceptions of land (e.g., fee simple holders having greater rights than possessors of Aboriginal title) and to guarantee equality between all Aboriginal conceptions of land.

3.3.1.4 - Competing claims

In Canadian Law, a piece of land that has been occupied and used by non-Aboriginal peoples loses its character of Aboriginal land and cannot be subject to Aboriginal title.[380] Meanwhile, in Inter-American law, Aboriginal peoples still have the right to raise a claim over land that has been occupied by non-Aboriginals, according to a special test.[381]

Inter-American law allows this sort of claim because the Aboriginal group might have been forcibly dispossessed by the State (which can occur by action or omissions of public agents). In this sense, the right to Indigenous communal property would lose all meaning if land claims were not possible due to actions or omissions of the State that would encourage or allow private parties to use Aboriginal lands.

According to Inter-American law, if a particular group has been dispossessed of a piece of land to which they still maintain a certain attachment, they can raise a claim for that land.[382] If for some reason maintaining the attachment would have been impossible, then the group can raise a land claim anyways.[383] This is compatible with Aboriginal conceptions of land because their relationship with the land is not affected by the uses of the land or the presence of others. Since land is not a commodity, many hunting grounds

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[380] Because the Aboriginal group would not be able to prove continuity of its occupation since sovereignty, *Delgamuukw*, *supra* note 71 at para. 152; also, in defense of the good faith purchaser the doctrine protects the person that buys Aboriginal land under the appearance of good title, *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135 (C.A.) at para. 305.

[381] *Sawhoyamaxa*, *supra* note 350 at paras. 128, 131 and 132.

[382] *Ibid.* at 128.

[383] *Ibid.* at 132.

were shared by Aboriginal peoples. External manifestations do not affect their way to see the land and the way they depend on it.

Canadian law would perpetuate an injustice if Aboriginal peoples cannot claim the land to which they still maintain certain bonds. This does not mean that Aboriginal peoples can claim Aboriginal title and ensuing rights of possession over downtown Toronto, for instance. But if a group can give evidence of the presence of cultural attachments (such as sacred sites or ritual places) to a piece of land that is today owned by non-aboriginals, then the group has the right to a fair compensation.[384]

In some cases, this fair compensation will not consist in awarding Aboriginal title. If the Canadian State gives evidence of concrete and justified reasons that do not allow awarding title, then the group can be compensated otherwise. The Inter-American law recognizes that land is a necessary part of Aboriginal peoples' necessities, thus a fair compensation will always take the form of land. In other words, if it is impossible for the State to return the ancestral lands of the group, then the State must award title over other pieces of land that would allow the subsistence of the group.[385]

The land to which the group has attachments will always be the priority. But if such land is unavailable for justified reasons, the State must compensate with lands that would allow the group to subsist in their traditional ways.[386] This is not desirable because the group would not have attachments with this land, but the necessities of the group would make it reasonable to award some piece of land of similar conditions. Of course, the State must be in a real impossibility to award the requested territory in order to look for alternate lands.

The internationalization of Aboriginal title requires that Canadian law accepts land claims over pieces of territory that once were Aboriginal, and that due to actions or omissions of the State have been occupied by non-Aboriginals. In the same manner, Canadian law must acknowledge that Aboriginal title is about satisfying the needs of Aboriginal peoples and not about conciliating Aboriginal systems of knowledge with non-Aboriginal legal systems.

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[384] *Ibid.* at 135.

[385] *Ibid.*

[386] Hélène Tigroudja, "Chronique des décision rendues par la Cour Interaméricaine des Droits de l'Home (2005)" (2006) 66 Rev. Trim. Dr. H. 277 at 314.

3.3.1.5 - Justification revisited

As I have shown, Inter-American law justifies the Indigenous communal right to property through the argument of the 'special connection with the land'. Moreover, Inter-American law does not allow the restrictive interpretation of this justification in the construction of limitations to the right itself. Inter-American law does this by acknowledging that Aboriginal legal norms are the source of this right,[387] and that non-aboriginal systems of law must understand Aboriginal title as full dominion property.[388]

Both Inter-American law and United Nations Human Rights norms have adopted the special bond between aboriginal peoples and their land as justification. This is so because international human rights' protection to land is extremely recent, while the occupation of Aboriginal peoples occurred centuries ago, before any international human right treaty was written. Its focus of protection cannot be to repair a situation that precedes their existence.[389] International human rights are focused on providing justice considering contemporary necessities using an inter-temporal interpretation of its norms.[390] Human rights cannot go back into the past and read its norms using the criteria of the sixteenth century; the interpretation of the norms must be consistent with an ethos that views all individuals and peoples as enjoying moral equality.[391] If the international community is talking about land rights of Aboriginal peoples based on their bond with the land, it is because today we consider this bond as an object to be protected.

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[387] *Mayagna, supra* note 308 at para. 151; *Moiwana 1, supra* note 323 at 131. *Yakye Axa 1, supra* note 312 at paras. 147 and 154; *Sawhoyamaxa, supra* note 350 at para. 131.

[388] *Sawhoyamaxa, supra* note 350 at para. 128.

[389] It must be noted that there is a trend in International Criminal Law to repair situations that precede the existence of *treaty law* by arguing that certain international crimes exist in *customary international law*. The International Military Tribunal at Nuremberg decided that the crime against peace (today called crime of aggression) already existed in customary law, while The International Criminal for the former Yugoslavia decided that violations of common article 3 of the Geneva Conventions during internal armed conflicts entail criminal responsibility according to international customary law. *France et al. v. Goering et al.*, (1946) 22 IMT 411; 41 A.J.I.L. 172 at 464-467 [219-222 in A.J.I.L.]; *The Prosecutor v. Dusko Tadic*, IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at para. 134 and 137. In any case, it is doubtful that human rights in general, or the Indigenous communal right to property in particular are part of customary international law.

[390] See specially *Island of Palmas (Miangas) Case (Netherlands v. United States), supra* note 264.

[391] *The Right to Information on Consular Assistance in the framework of the guarantees of the Due Process of Law, supra* note 312 at para. 114; *Villagran Morales et al. Case (The "Street Children" Case) (Guatemala), supra* note 312 at para. 148; *Juan Humberto Sánchez Case (Honduras), supra* note 312 at para. 56; *The Gómez Paquiyauri Brothers Case (Peru), supra* note 312 at para. 165; *Yakye Axa 1, supra* note 312 at para. 125.

In order to adopt a fully internationalized concept of Aboriginal title, it is necessary to adopt the justification that international bodies have been giving to the Indigenous communal right to property.

However, this is just the foundation of the right; as such it must be interpreted in a non-restrictive manner and taking into account Aboriginal legal traditions. This justification also calls for justice based on current needs instead of focusing on amending past wrongs. This choice must not be seen as the only possible option, but due to the novelty of human rights law it is the necessary choice for an internationalized concept.

3.3.2 - The internationalized law of Aboriginal title

After taking into account the proposed changes in the way Canadian modern law of Aboriginal title is perceived, the structure of this branch of law must evidently change. In order to achieve its clear redefinition, I will present a new construction using the method proposed on subsection 1.2 -. Of course, some parts of the structure have either changed or are not necessary for this redefinition.

3.3.2.1 - Justification

The internationalized law of Aboriginal title is based on a broader understanding of land and law.[392] Just as it cannot be said that there is just one vision of the relationship between a person and their belongings, the internationalized law of Aboriginal title accepts the existence of different ways to regulate the relationship between a human collectivity and the land they occupy.[393]

In this sense, the justification of Aboriginal title will be the fact that particular human collectivities, namely Aboriginal peoples, do not see land as a commodity.[394] Their special way to understand land will require a particular type of protection which is not found in formal state systems of real property.

Aboriginal peoples have a particular relationship with the land they occupy that is conceptually distinct from the commercial interest of the land or the emotional links that a person can develop for his house.[395] In that sense removing a non-Aboriginal from a track

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[392] *Mayagna, supra* note 308 at para. 151; *Moiwana 1, supra* note 323 at 131; *Yakye Axa 1, supra* note 312 at paras. 147 and 154; *Sawhoyamaxa, supra* note 350 at para. 131.

[393] *Sawhoyamaxa, supra* note 350 at para. 120.

[394] *Mayagna, supra* note 308 at para. 149.

[395] *Ibid.*

of land would raise the right to reparations that will rectify the caused damage.[396] Meanwhile, for Aboriginal peoples, there is no other way to correct the damage than protecting their linkage to the land.[397]

3.3.2.2 - Nature

The nature of the internationalized law of Aboriginal title is understood as a reference to international protected human rights, but without looking for its essence in international law. In this sense, there is no fixed concept of Aboriginal title in this body of law.

As stated above, the internationalized law of Aboriginal title recognizes the existence of Aboriginal legal orders that understand the law in a different way.[398] By taking this particular conception of the land and giving it the protection of an international human right, the internationalized law of Aboriginal title simply puts the law of Aboriginal peoples on a supra-national level.

This does not mean that non-aboriginals have fewer rights than aboriginals.[399] The human right to property has the same level of protection as the human right to Aboriginal title. However in competing claims, the Aboriginal title will prevail as long as the Aboriginal group still has cultural attachments to the land.[400] The reason for this general preference comes from the justification of title. The dispossession of non-aboriginals is, other things being equal, reparable by other means than restitution of the land; such is not generally the case with Aboriginal groups, or at least the cost to them is relatively higher given the cultural and not just economic significance of land.[401] Since the object of protection is the special relationship among aboriginal peoples and their ancestral land, the essence of an internationalized concept of aboriginal title would be to protect the title of the land that belongs to the group.[402] I have already shown that there are alternative methods of reparation, such as awarding other pieces of land. But the preferable

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[396] *American Convention*, *supra* note 241 at art. 21.

[397] *Sawhoyamaxa*, *supra* note 350 at para. 135.

[398] *Ibid.* at para. 120.

[399] *Ibid.* at paras. 131, 132 and 136.

[400] *Ibid.*

[401] *Ibid.* at 135.

[402] *General Recommendation No. 23*, *supra* note 213 at para. 5.

reparation will always be to award the title to the requested lands, regardless of present occupation by non-aboriginals.[403]

3.3.2.3 - Sources

The source of the internationalized law of aboriginal title is a complex issue. Three normative bodies, in two different normative aspects, play a role in the formulation of this right.

In the substantial aspect, the sole source of Aboriginal title is Aboriginal law itself. The customary law of the group will dictate the substantive content of the right, under this light, no other legal order can dictate the way in which the land is used.[404] For instance, if present occupation by the group suffices to prove title, international law will adapt this lower threshold of evidence to award title.[405]

In the structural aspect, the sources of Aboriginal title are international law and the particular system of national law. Theoretically, the material competence of national public law is always dependent on the material competence of international law, to the extent that is not valid for a State to legislate in contravention of norms formulated by the international community.[406] Since the internationalized law of Aboriginal title rests on international law, Canadian law can regulate the aspects that are not established in international law,[407] but without diminishing the *effet utile* of the international standard.[408]

In this light, the substantial content of Aboriginal law is encapsulated by international law and it must be received by Canadian law as it is in principle, but adjusted for local conditions.

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[403] *Ibid.*

[404] *Mayagna, supra* note 308 at para. 149; *Moiwana 1, supra* note 323 at 131.

[405] *Mayagna, supra* note 308 at para. 149 (As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration); see also Isabel Madariaga Cuneo, "The Rights of Indigenous Peoples and The Inter-American Human Rights System" 22 Ariz. J. Int'l & Comp. L. 53 at 57.

[406] Kelsen, *Principles, supra* note 239 at 242.

[407] Kelsen, Théorie Générale, supra note 235 at 300.

[408] *Bámaca Velásquez Case (Guatemala)* (2003) Resolution on the fullfilment of the Judgement, Inter-Am. Ct. H.R. 27 Nov. 2003 at para. 7.d (considerando); Héctor Faúndez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos institucionales y procesales*, 3rd ed. (San José: Instituto Interamericano de Derechos Humanos, 2004) at 57-60.

3.3.2.4 - Recognition

Under the internationalized law of Aboriginal title, an Aboriginal group's property rights over a specific piece of land will be recognized if the group has a special connection to the land and/or is in possession of the land.

The aspect of special connection is of central importance, because it's the reason that justifies title. This special connection is a material and spiritual linkage of a communal nature, different from the personal approach of non-aboriginal societies directed at individual possession and production.[409] The aspect of possession is important because it is evidence of the group's special relationship with a particular piece of land.[410]

It is important to notice that if an Aboriginal group has been evicted or otherwise expelled from the land, it maintains its proprietary rights as long as they keep their special relationship with the land, even if the land has been transferred to non-aboriginals.[411]

If for any reason external to the group the possession of the land and the maintenance of the special relationship with it has not been possible, the group only needs to show its special conception of the land and past possession in order to assert its proprietary rights.[412]

3.3.2.5 - Redefinition

According to the internationalized law of Aboriginal title, the right to Aboriginal title is defined as the right of Aboriginal peoples to be recognized as the communal owners of the tracks of lands they occupy, and with which they have a special relationship. This right gives them the legal power to use the land in the way the group as a whole decides, according to their customary law.

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[409] *Mayagna, supra* note 308 at para. 149; *Sawhoyamaxa, supra* note 350 at para. 128.

[410] *Moiwana 1, supra* note 323 at para.131.

[411] *Sawhoyamaxa, supra* note 350 at paras. 131-132.

[412] *Ibid.*

Conclusions

Through the course of this study I have demonstrated the most important features of Canadian law of Aboriginal title, its philosophical foundations, its legal formulations and many of its shortcomings. The intention was to discover if it was possible to reconceive the law of Aboriginal title in a different way.

Indeed, a reconceptualization of Aboriginal title is not only possible; it is desirable too. The premises on which Aboriginal title in Canada is founded restrict the rights of Aboriginal peoples and favor inequality at the expense of Canada's First Nations.

Although the intention of this study was to reconceive and redefine Aboriginal title from the stand point of international law (particularly Inter-American law), this is only one of many possible means to redefine it. In this sense, I do not mean to say that this is the best approach to remedy the current inequities. It is my wish that this approach, one that seeks a reconceptualization of Aboriginal title using the resources of international law, would be used in other contexts and with other tools in the future.

Most of the current criticism of Aboriginal title can be overcome by the use of international law, without proposing impractical options. In my view, the adoption of the proposed solution will contribute to the well-being of Aboriginal peoples. And its feasibility is just a couple of steps away: ratification and implementation of the *American Convention* by Parliament. It is my opinion that the legal community of this country, the assemblies of Aboriginal peoples and civil society in general should start more campaigns towards the ratification of this treaty.[413]

Undoubtedly, this will improve the situation of many Canadians, Aboriginal and non-Aboriginal alike.

[413] Other scholars have proposed this, see specially Woodward, *supra* note 54.

Bibliography

Legislation

Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11

First Nations Land Management Act, S.C. 1999, c. 24.

Indian Act, R.S.C. 2000, c. 12, ss. 148-152.

Royal Proclamation of 7 October, 1763, R.S.C. 1985, App. II, No. 1.

Sahtu Dene and Metis Land Claim Settlement Act, S.C. 1994, c. 27.

Specific Claims Resolution Act, S.C. 2003, c. 23.

Jurisprudence

Attorney-General for Quebec v. Attorney-General for Canada, [1921] 1 A.C. 401, 56 D.L.R. 373.

Calder v. British Columbia (A.G.), [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

Canada (Attorney-General) v. Giroux, 53 S.C.R. 172.

Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695, 40 D.L.R. (3d) 553.

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135 (C.A.).

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193.

Haida Nation v. British Columbia, (Minister of Forests), [2002] 6 W.W.R. 243 164 B.C.A.C. 217, 2002 BCCA 147 (C.A.).

Paul v. Canadian Pacific Ltd., [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487.

R. v. Adams, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657.

R. v. Bagshaw, [1972] S.C.R. 2, 21 D.L.R. (3d) 202.

R. v. Côté, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385.

R v. Gombosh Estate; R. v. Fleming, [1986] 1 S.C.R. 415, 26 D.L.R. (4th) 641.

R. v. Guerin, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321.

R. v. Marshall, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513.

R. v. Marshall, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193.

R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220; 255 D.L.R. (4th) 1, 2005 SCC 43.

R. v. Morris, 2006 SCC 59 at paras. 37-40.

R. v. Powley, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1, 2003 SCC 43.

R v. Simon, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390.

R. v. Sparrow, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385.

R. v. Sundown, [1999] 1 S.C.R. 393, 170 D.L.R. (4th) 385.

R. v. Van der Peet, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289.

St. Catharine's Milling and Lumber Co. V. The Queen (1987), 13 S.C.R. 577.

St. Catherine's Milling and Lumber Company v. R. (1888), 14 App. Cas. 46, [1888] J.C.J. No. 1 (P.C.).

Taku River Tlingit First Nation v British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550, 245 D.L.R. (4th) 193, 2004 SCC 74.

Western Industrial Contractors Ltd. v. Sarcee Developments Ltd. (1979), 15 A.R. 309; 98 D.L.R. (3d) 424 (C.A. Div.).

Government documents

Canada, Minister of Indian Affairs and Northern Development, *Resolving Aboriginal Claims. A practical guide to Canadian experiences* (Ottawa: Ministry of Public Works and Government Services Canada, 2003) at 30 online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/rul/rul1_e.pdf>.

Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991).

Ministry of Indian Affairs and Northern Development, *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (Ottawa: Ministry of Indian Affairs and Northern Development, 1993) online: Ministry of Indian Affairs and Northern Development <http://www.ainc-inac.gc.ca/pr/agr/sahtu/sahmet_e.html>.

Foreign Jurisprudence

Amodu Tijani v. The Secretary, Southern Nigeria, [1921] 2 AC 399 (P.C.).

Asher v. Whitlock (1865) L.R. 1 Q.B. 1.

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

Egerton v Earl Brownlow and others, [1843-1860] All ER Rep 970.

Fletcher v. Peck, 10 U.S. 87 (1810).

Holden v. Joy, 84 U.S. 211 (1872).

In re Southern Rhodesia [1919] A.C. 211 (P.C.).

Johnson v. M'Intosh, 21 U.S. 543 (1823).

Mabo and Others v. State of Queensland [NO. 2], 175 CLR 1, 107 ALR 1.

New Orleans v. United States, 35 U.S. 662 (1836).

Peaceable dem. Uncle v. Watson (1811), 4 Taunt. 16, 128 E.R. 232.

Perry v. Clissold, [1907] A.C. 73 (P.C.).

Roe dem. Haldane and Urry v. Harvey (1769), 4 Burr. 2484, 98 E.R. 302

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

United States v. Cook, 86 U.S. 591 (1873).

Worcester v. Georgia, 31 US 515 (1832).

International Materials

Conventions and Declarations

African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

Charter of the United Nations.

Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 U.N.T.S. 247.

Convention concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 72 ILO Official Bull. 59.

Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 262, entered into force May 18, 1954.

OAS, *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

OAS, *American Convention on Human Rights*, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948),

Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994, HRC Dec. 2006/2 UN HCROR, 1st Sess., UN Doc. A/HRC/RES/2006/2.

Cases (Inter-American Commission)

Community of San Mateo de Huanchor and its Members v. Peru (2004), Inter-Am. Comm. H.R. No. 69/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1.

Community of San Vicente Los Cimientos v. Guatemala (2003), Inter-Am. Comm. H.R. No. 68/03, Annual Report of the Inter-American Commission on Human Rights: 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2.

Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities v. Paraguay (1999), Inter-Am. Comm. H.R. No. 90/99, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106 Doc. 6 rev.

The Kichwa Peoples of the Sarayaku Community and its Members v. Ecuador (2004), Inter-Am. Comm. H.R. No. 64/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1.

Marie and Carrie Dann v. United Stastes (2002), Inter-Am. Comm. H.R. No. 75/02, Annual Report of the Inter-American Commission on Human Rights: 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1.

Maya Indigenous Communities of the Toledo District v. Belice (2004), Inter-Am. Comm. H.R. No. 40/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1.

Mercedes Julia Huenteao Beroiza et al. v. Chile (2004), Inter-Am. Comm. H.R. No. 30/04, Annual Report of the Inter-American Commission on Human Rights: 2005, OEA/Ser.L/V/II.122 Doc. 5 rev. 1

Sawhoyamaxa Indigenous Community v. Paraguay (2003), Inter-Am. Comm. H.R. No. 12/03, Annual Report of the Inter-American Commission on Human Rights: 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2.

Village of Moiwana v. Suriname (2000), Inter-Am. Comm. H.R. No. 26/00, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106 Doc. 6 rev.

Xakmok Kásek Indigenous Community v. Paraguay (2003), Inter-Am. Comm. H.R. No. 11/03, Annual Report of the Inter-American Commission on Human Rights: 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2.

Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay (2002), Inter-Am. Comm. H.R. No. 2/02, Annual Report of the Inter-American Commission on Human Rights: 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1.

Cases and Advisory Opinions (Inter-American Court)

Bámaca Velásquez Case (Guatemala) (2003) Resolution on the fullfilment of the Judgement, Inter-Am. Ct. H.R. 27 Nov. 2003.

Case of Aloeboetoe et al. (Suriname) (1993), Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 15.

Case of Children's Rehabilitation (Paraguay) (2004), Inter-Am. Ct. H.R. (Ser. C) No. 112.

Case of De La Cruz-Flores (Peru) (2004), Inter-Am. Ct. H.R. (Ser. C) No. 115.

Case of "Five Pensioners" (Peru) (2003), Inter-Am. Ct. H.R. (Ser. C) No. 98.

Case of Herrera-Ulloa (Costa Rica) (2004), Inter-Am. Ct. H.R. (Ser. C) No. 107.

Case of the Mapiripán Massacre (Colombia) (2005), Preliminary Objections and Acknowledgment of State Responsibility, Inter-Am. Ct. H.R. (Ser. C) No. 122.

Case of Maritza Urrutia (Guatemala) (2003), Inter-Am. Ct. H.R. (Ser. C) No. 103.

Case of the Mayagna (Sumo) Awas Tingni Community (Nicaragua) (2001), Inter-Am. Ct. H.R. (Ser. C) No. 79.

Case of Moiwana Village (Suriname) (2005), Inter-Am. Ct. H.R. (Ser. C) No. 124.

Case of Moiwana Village (Suriname) (2006), Interpretation of the June 15, 2005 Judgment on the Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 145.

Case of the Yakye Axa Community (Paraguay) (2005), Inter-Am. Ct. H.R. (ser. C) No. 125.

Case of the Yakye Axa Community (Paraguay) (2006), Interpretación de la Sentencia sobre Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 142.

Case of Yatama (Nicaragua) (2005), Inter-Am. Ct. H.R. (Ser. C) No. 127.

The Gómez Paquiyauri Brothers Case (Peru) (2004), Inter-Am. Ct. H.R. (Ser. C) No. 110.

Juan Humberto Sánchez Case (Honduras) (2003), Interpretation of the Judgment on Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 102.

The Case of the Sawhoyamaxa Indigenous Community (Paraguay) (2006), Inter-Am. Ct. H.R. (Ser. C) No. 146.

Villagran Morales et al. Case (The "Street Children" Case) (Guatemala) (1999), Inter-Am. Ct. H.R. (Ser. C) No. 63

The Right to Information on Consular Assistance in the framework of the guarantees of the Due Process of Law (1999), Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A), No. 16.

Cases (Others)

France et al. v. Goering et al., (1946) 22 IMT 411; 41 A.J.I.L. 172.

Island of Palmas (Miangas) Case (Netherlands v. United States) (1928), 2 U.N. Rep. Int'l Arbitral Awards 829 (Permanent Court of Arbitration), (Sole Arbitrator: Max Hubert).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1970-1971), Separate Opinion of Vice-President Ammoun, Advisory Opinion, [1971] I.C.J. Rep. 55.

Legal Status of Estern Greenland, "Exposé de M. le Professeur De Visscher" (28 November 1932), P.C.I.J. (Ser. C) No. 66, 2793.

Lubicon Lake Band v. Canada, Communication No. 167/1984, UN HRCOR, 1990, Supp. No. 40, U.N. Doc. A/45/40.

The Prosecutor v. Dusko Tadic, IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

Western Sahara, Advisory Opinion, [1975] I.C.J. Rep. 12 at para. 80.

Concluding Observations

Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana, UN CERDOR, 2006, UN Doc. CERD/C/BWA/CO/16.

Concluding observations of the Committee on the Elimination of Racial Discrimination: Colombia, UN CERDOR, 2006, UN Doc. CERD/C/GUY/CO/14.

Concluding observations of the Committee on the Elimination of Racial Discrimination: El Salvador, UN CERDOR, 2006, UN Doc. CERD/C/SLV/CO/13.

Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala, UN CERDOR, 2006, UN Doc. CERD/C/GTM/CO/11.

Concluding observations of the Committee on the Elimination of Racial Discrimination: Mexico, UN CERDOR, 2006, UN Doc. CERD/C/MEX/CO/15.

Concluding observations of the Human Rights Committee: Canada, UN HRCOR, 2006, UN Doc. CCPR/C/CAN/CO/5.

Concluding observations of the Human Rights Committee: Brazil, UN HRCOR, 2006, UN Doc. CCPR/C/BRA/CO/2.

Concluding observations of the Human Rights Committee: Paraguay, UN HRCOR, 2006, UN Doc. CCPR/C/PRY/CO/2.

Other International Materials

Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*, UN CHROR, 59 Sess., UN Doc. E/CN.4/2003/90.

Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, UN CERDOR, 51st Sess., Annex, Agenda Item V, Report on the Fifty First Session, UN GAOR, 1997, Supp. No. 18, UN Doc. A/52/18 (1997).

Human Rights Committee, *General comment under article 40, paragraph 4, of the International Covenant on Civil and Political Rights*, UN CCPROR, 21st Sess., UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).

OAS, Committee on Juridical and Political Affairs, *Proposed American Declaration on the Rights of Indigenous Populations*, GT/DADIN/doc.1/99 rev. 2 (1999).

OAS, Inter-American Commission on Human Rights, *Jurisprudencia sobre derechos de los pueblos Indígenas en el Sistema Interamericano de Derechos Humanos*, OR OEA/Ser.L/V/II.120/Doc. 1 (2004).

OAS, Inter-American Commission on Human Rights, *Marandu Mbohapyha Derecho Humano Kuéra Rehegua Paraguáipe*, OEA/Ser.L/V/II.110/Doc. 52 (2001).

OAS, Inter-American Commission on Human Rights, *Proposed American Declaration on the Rights of Indigenous People Authorities and Precedents in International and Domestic law*, OR OEA/Ser.L/V/II.110/Doc. 22 (2001).

OAS, Inter-American Commission on Human Rights, *Report on the situation of Human Rights of a segment of yhe Nicaraguan population of Miskito origin*, OR OEA/Ser.L./V.II.62/doc. 10 rev. 3 (1983).

OAS, Inter-American Commission on Human Rights, *The Human Rights Situation of Indigenous People in the Americas*, OR OEA/Ser.L/V/II.108/Doc. 62 (2000).

Social, Humanitarian and Cultural Committee (Third Committee) of the General Assembly, *Report of the Human Rights Council*, UN C3OR, 61st Sess., UN Doc. A/61/448 (2006).

Study on Indigenous land rights, CHR Res. 1997/114, UN CHROR, 58th Sess., UN Doc. E/CN.4/RES/1997/114.

Study of the problem of discrimination against Indigenous populations, ESC Res. 1982/34, UN ESCOR, 1982, UN Doc. E/Res/1982/34.

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Indigenous people and their relationship to land. Preliminary working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 49th Sess., UN Doc. E/CN.4/Sub.2/1997/17.

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Indigenous people and their relationship to land. Progress report on the working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 50th Sess., UN Doc. E/CN.4/Sub.2/1998/15.

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Indigenous people and their relationship to land. Second progress report on the working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 51th Sess., UN Doc. E/CN.4/Sub.2/1999/18.

Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 52th Sess., UN Doc. E/CN.4/Sub.2/2000/25.

Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene Daes, Special Rapporteur*, UN CHROR, 53th Sess., UN Doc. E/CN.4/Sub.2/2001/21.

Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources. Final report of the Special Rapporteur, Mrs. Erica-Irene Daes,* UN CHROR, 56th Sess., UN Doc. E/CN.4/Sub.2/2004/30.

Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994, GA Res. 178, UNGAOR, 61st Sess., UN Doc. A/RES/61/178 (2006).

Secondary Materials

Monographs

Anaya, S. James. *Indigenous peoples in international law*, 2d ed. (New York: Oxford University Press, 2004).

Arendt, Hannah. *Responsibility and Judgment* (New York: Schocken Books, 2003).

Ayala, Balthazar. *Three Books on the law of War and on the Duties Connected with War and on Military Discipline*, by John Pawley Bate, vol. 2 (Washington D.C.: Carnegie Institution of Washington, 1912).

Battiste, Marie & Henderson, James Youngblood. *Protecting indigenous knowledge and heritage : a global challenge* (Saskatoon: Purich, 2000).

Barker, Joanne. *Sovereignty matters: locations of contestation and possibility in indigenous struggles for self-determination* (Lincoln: University of Nebraska Press, 2005).

Bartlett, Richard H. *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990).

___. *Indian Reserves in Quebec* (Saskatoon: University of Saskatchewan Native Law Centre, 1984).

Behrendt, Larissa. *Achieving social justice: indigenous rights and Australia's future* (Annandale, N.S.W.: Federation Press, 2003).

Benhabib, Seyla, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002).

___. *The Rights of Others: Aliens, Residents and Citizen* (Cambridge: Cambridge University Press, 2004).

Beaulac, Stéphane. *The Power of Language in the Making of International Law* (Leiden: Martinus Nijhoff Publishers, 2004).

Borkowski, Andrew & du Plessis, Paul. *Textbook on Roman Law* (Oxford, Oxford University Press, 2005).

Borrows, John. *Recovering Canada: the resurgence of Indigenous law* (Toronto: University of Toronto Press, 2002).

___ & Rotman, Leonard Ian. *Aboriginal legal issues: cases, materials & commentary*, 2nd ed. (Markham: LexisNexis Butterworths, 2003).

Bradbrook, Adrian, et al. *Australian Real Property Law*, 3rd. ed. (Sydney: Lawbook Co., 2002).

Brennan, Sean, et al. *Treaty* (Sydney, The Federation Press, 2005).

Cançado Trindade, Antônio Augusto. *A Humanização do Dereito Internacional* (Belo Horizonte: Del Rey, 2006).

Canby, Jr., William C. *American Indian Law in a nutshell*, 2nd. ed. (St. Paul: West Publishing Co., 1988).

Carmichael, David L. *Sacred sites, sacred places* (London: Routledge, 1994).

Casas, Bartolomé de las. *An account, much abbreviated, of the destruction of the Indies, with related texts* (Indianapolis: Hackett Publishers, 2003).

Castellino, Joshua & Allen, Steve. *Title to Territory in International Law: A Temporal Analysis* (Aldershot: Ashgate, 2003).

Cassese, Antonio. *International Law in a Divided World* (Oxford: Claredon Press, 1986).

Churchill, Ward. *Perversions of Justice: Indigenous Peoples and Angloamerican Law* (San Francisco: City Lights, 2003).

Cohen, Cynthia. *The human rights of indigenous peoples* (Ardsley: Transnational, 1998).

Constable, Marianne. *Just Silences* (New Jersey: Princeton University Press, 2005).

Deleuze, Gilles & Guattari, Félix. *A thousand plateaus: capitalism and schizophrenia* (Minneapolis: University of Minnesota Press, 1987).

___. *Anti-Oedipus: capitalism and schizophrenia* (Minneapolis: University of Minnesota Press, 1987).

Dupuy, René-Jean. *La Communauté internationale entre le mythe et l'histoire* (Paris: UNESCO, 1986).

Falk, Richard. *Law in an Emerging Global Village: A post-Westphalian Perspective* (Ardsley: Transnational Publishers, 1998).

Faúndez Ledesma, Héctor. *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos institucionales y procesales*, 3rd ed. (San José: Instituto Interamericano de Derechos Humanos, 2004).

Flanagan, Thomas. *First nations? Second thoughts* (Montreal: McGill-Queen's University Press, 2000).

Foucault, Michel. *Essential works of Foucault. Aesthetics, method and epistemology*, vol. 2 (New York: The New York Press, 1994).

Gaudemet, Jean. *Droit privé romain*, 2nd ed. (Paris: Montchrestien, 2000).

Girard, Paul Frédéric. *Manuel élémentaire de droit romain*, 8th ed. by Félix Senn (Paris: Dalloz, 2003).

Glenn, H. Patrick. *Legal Traditions of the World*, 2nd ed. (Oxford: Oxford University Press, 2004).

Gould Gary P. & Semple, Alan J. *Our Land: The Maritimes: The basis of the Indian claim in the maritime provinces of Canada* (Fredericton: Saint Annes Point Press, 1980).

Gravells, Nigel P. *Land Law: Text and Materials* (London: Sweet and Maxwell, 2004).

Grewe, Wilhelm G. *Fontes Historiae Iuris Gentium*, vol 2. (Berlin: Walter de Gruyter, 1988).

Hall, William Eduard. *A Treatise on International Law*, 4th ed. (Oxford: Claredon Press, 1895).

Hayton, David J. *Underhill and Hayton Law Relating to Trusts and trustees*, 16th. ed. (London: Butterworths, 2003).

Henderson, James (Sakej) Youngblood, et al. *Aboriginal tenure in the constitution of Canada* (Scarborough: Carswell, 2000).

Issac, Thomas. *Aboriginal Law: Commentary, Cases and Materials*, 3rd ed. (Saskatoon: Purich Publishing, 2003).

Ivison, Duncan. *Postcolonial liberalism* (Cambridge: Cambridge University Press, 2002).

Keal, Paul. *European conquest and the rights of indigenous peoples: the moral backwardness of international society* (Cambridge: Cambridge University Press, 2003).

Kelsen, Hans. *General Theory of Law and State*, trans. Anders Wedberg (Cambridge: Harvard University Press, 1945).

___. *Principles of International Law* (New York: Rinehart & Company, 1952).

Koskenniemi, Martti. *From Apoloogy to Utopia. The Structure of International Legal Argument. Reissue with new epilogue* (Cambridge: Cambridge University Press, 2005).

Kulchyski, Peter. ed. *Unjust Relations: Aboriginal rights in Canadian courts* (Toronto: Oxford University Press, 1994).

Kymlicka, Will. *Liberalism, community and culture* (Oxford: Oxford University Press, 1989).

___. *Multicultural Citizenship: A liberal theory of Minority Rights* (Oxford: Claredon Press, 1995).

McHugh, P.G. *Aboriginal Societies and the Common Law* (Oxford: Oxford University Press, 2004).

Macklem, Patrick. *Indigenous difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

Mainville, Robert. *An overview of Aboriginal and treaty rights and compensation for their breach* (Saskatoon: Purich Publishing, 2001).

Mantziaris, Christos & Martin, David. *Native Title Corporations: A legal and anthropological analysis* (Leichhardt: The Federation Press, 2000)

Mazza, Mauro. *La Protezione dei popoli indigeni nei paesi di Common Law* (Padova: CEDAM, 2004).

Megarry, Robert & Wade, William. *The Law of Real Property*, 6th ed. by Charles Harpum, et al. (London: Sweet and Maxwell, 2000).

Meron, Theodor. *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006).

Meyers. Hardy & Smith, Clay. eds., *American Indian Law Deskbook: Conference of Western Attorneys General*, 3rd ed. (Boulder: University Press of Colorado, 2004).

McClure, Wallace. *World Legal Order: Possible Contributions by the People of the United States* (Chapel Hill: University of North Carolina Press, 1960).

McHugh, Paul G. *Aboriginal societies and the common law: a history of sovereignty, status, and self-determination* (Oxford ; New York: Oxford University Press, 2004).

McNeil, Kent. *Common law Aboriginal title* (Oxford: Oxford University Press, 1989).

___. *Defining Aboriginal title in the 90's: has the Supreme Court finally got it right?* (Toronto: Robarts Centre for Canadian Studies York University, 1998).

___. *Emerging justice? Essays on indigenous rights in Canada and Australia* (Saskatoon: Native Law Centre University of Saskatchewan, 2001).

Moffat, Graham. *Trusts Law: Text and Materials*, 2nd. ed. (London: Butterworths, 1994).

Oppenheim, L. *International Law: A Treatise* (London: Longmans, Green and Co., 1905).

Panesar, Sukhnider. *General Principles of Property Law* (Harlow: Longman, 2001).

Patton, Paul. *Deleuze and the political* (London ; New York: Routledge, 2000).

Pearce, Robert & Stevens, John. *The Law of Trusts and Equitable Obligations* 3rd. ed. (London: Butterworths, 2002)

Perozi, Silvio. *Istituzioni di Diritto Romano*, t. 1, 2nd ed. by Luigi Capogrossi Colognesi (Roma: Il Cigno Edizioni, 2002).

Perry, Melissa & Lloyd, Stephen. *Australian native title law* (Sydney, Australia: Lawbook Co., 2003).

Porter, Robert Odawi. *Sovereignty, colonialism and the indigenous nations: a reader* (Durham, N.C.: Carolina Academic Press, 2005).

Rodríguez-Piñero, Luis. *Indigenous peoples, postcolonialism, and international law: the ILO regime (1919-1989)* (Oxford ; New York: Oxford University Press, 2005).

Rosenne, Shabtai. *The Perplexities of Modern International Law* (Leiden: Martinus Nijhoff, 2004).

Ross, Michael Lee. *First Nations sacred sites in Canada's courts* (Vancouver: UBC Press, 2005).

Ross, Rupert. *Dancing with a ghost: Exploring Indian reality* (Markham: Octopus Publishing Group, 1992).

Russell, Peter H. *Recognizing Aboriginal title: the Mabo case and indigenous resistance to English-settler colonialism* (Toronto: University of Toronto Press, 2005).

Salembier, Paul, et al. 2006 *Modern Annotated First Nations Legislation* (Commerce Valley: LexisNexis Butterworths, 2005)

Santos, Boaventura De Sousa. *Towards a New Legal Common Sense: Law, Globalization and emancipation*, 2d ed. (London: Butterworths, 2002).

___. *Reinventar la Democracia : reinventar el Estado* (Buenos Aires: Consejo Latinoamericano de Ciencias Sociales, 2005).

Schiavone, Aldo. ed. *Diritto privato romano: Un profilo storico* (Torino: Picola Biblioteca Einaudi, 2003).

Schmidlin, Bruno & Cannata, Carlo Augusto. *Droit Privé Romain*, t. 1 (Lausanne: Payot, 1984).

Schrijver, Nico. *Sovereignty Over Natural Resources* (Cambridge: Cambridge University Press, 1997).

Simpson, A.W.B. *An Introduction to the History of the Land Law* (Oxford: Oxford University Press, 1961).

Smith, Rhona K. M. *Textbook on international human rights*, 2d ed. (Oxford: Oxford University Press, 2005).

Spinner, Jeff. *The boundaries of citizenship: Race, Ethnicity and Nationality in the Liberal State* (Baltimore: The John Hopkins University Press, 1994).

Suarez, Francisco. *Selections from Three Works of Francisco Suarez* by Gladys William et al., vol. 2 (Oxford: Claredon Press, 1944).

Sutton, Peter. *Native title in Australia: an ethnographic perspective* (Cambridge: Cambridge University Press, 2003).

Thomas, Geraint & Hudson, Alastair. *The Law of Trusts* (Oxford: Oxford University Press, 2004).

Thornberry, Patrick. *Indigenous peoples and human rights* (Manchester: Manchester University Press, 2002).

Tie, Warwick. *Legal pluralism: toward a multicultural conception of law* (Aldershot: Ashgate, 1999).

Vattel, E. de. *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Washington D.C.: Carnegie Institution of Washington, 1917).

Venne, Sharon Helen. *Our elders understand our rights : evolving international law regarding indigenous peoples* (Penticton, B.C.: Theytus Books, 1998).

Verzijl, J.H.W. *International Law in Historical Perspective*, vol. 2 (Leyden: A. W. Sijthoff, 1969).

Victoria, Francisci de. *De Indis et de Ivre Belli Relectiones,* by Ernest Nys (Washington D.C.: Carnegie Institution of Washington, 1917).

Walker, Thomas Alfred. *A History of the Law of Nations*, vol 1 (Cambridge: Cambridge University Press, 1899)

Weisbrod, Carol. *Emblems of Pluralism: Cultural Differences and the State* (New Jersey: Pinceton University Press, 2002).

Westlake, John. *The Collected Papers of John Westlake on Public International Law*, ed. by L. Oppenheim (Cambridge: Cambridge University Press, 1914).

Wheaton, Henry. *Elements of International Law*, 6th. ed. by William Beach Lawrence (Boston: Little, Brown and Company, 1855).

White, Jerry P, et al. *Permission to Develop: Aboriginal Treaties, Case Law and Regulations* (Toronto: Thompson Educational Publishing, 2004).

Wildenthal, Bryan H. *Native American Sovereignty on trial* (Santa Barbara: ABC-CLIO, 2003).

Wilkins, David E. *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997).

___. & Lomawaima, K. Tsianina. *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).

Wilkinson, Charles F. *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven: Yale University Press, 1987).

Woodward, Jack. *Native Law* (Toronto: Thompson, 1994).

Articles

Anaya, S. James. "The Influence of Indigenous Peoples on the Development of International Law" in Sam Garkawe, Loretta Kelly & Warwick Fisher eds., *Indigenous Human Rights* (Sydney: Sydney Institute of Criminology, 2001).

Arizona Journal of International and Comparative Law, "Final Written Arguments of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights: In the Case of the Mayagna (Sumo) Indigenous Community of Awas Tigni Against the Republic of Nicaragua (Unofficial Translation)" (2002) 19 Ariz. J. Int'l & Comp. Law 325

Asch, Michael. "From Terra Nullius to affirmation: reconciling Aboriginal rights with the Canadian constitution" (2002) 17:2 Can. J.L. & Soc. 23.

___ & Catherine Bell. "The Impact of Precedent in Aboriginal Rights Litigation" in Michael Asch ed., *Aboriginal and treaty rights in Canada : essays on law, equity, and respect for difference* (Vancouver: UBC Press, 1997).

___ & Norman Zlotkin. "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in Diane Elizabeth Kirkby & Catharine Coleborne eds., *Law, history, colonialism: the reach of Empire* (Manchester: Manchester University Press, 2001).

Bakker, Derek de. "The Court of Last Resort: American Indians in the Inter-American Human Rights System. Why American Indians Should Utilize Supranational Courts" (2004) 11 Cardozo J. Int'l & Comp. L. 939.

___. "Content of Aboriginal Title and Equality before th Law" (1998) 61 Sask. L. Rev. 377.

Battiste, Marie. "Decolonising University Research: Ethical Guidelines for Research Involving Indigenous Populations" in Gudmundur Alfredsson & Maria Stavropoulou eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague: Martinus Nijhoff, 2002).

Barume, Albert K. "Indigenous Battling for Land Rights: The Case of the Ogiek of Kenya" in Joshua Castellino & Niamh Walsh eds., *International law and indigenous peoples* (Leiden ; Boston: M. Nijhoff, 2005).

Behrendt, Larissa. "The Relevance of the Rights Agenda in the Age of Practical Reconciliation" in Rosemary Hunter & Mary Keyes eds., *Changing Law. Rights, Regulation and Reconciliation* (Burlington: Ashgate, 2005).

Bern, John & Dodds, Susan. "On the Plurality of Interests: Aboriginal Self-government and Land Rights" in Duncan Ivison, Paul Patton & Will Sanders eds., *Political theory and the rights of indigenous peoples* (Cambridge, U.K. ; New York: Cambridge University Press, 2000) xi.

Biber, Katherine. "Being/Nothing: Native Title and Fantasy Fulfilment" (2004) 3 Indigenous L.J. 1.

Boge, Christopher J F . "A Fatal Collision at the Intersection? The Australian Common Law and Traditional Aboriginal Land Rights" in Christopher J F Boge, *Justice For All? Native Title in the Australian Legal System* (Brisbane: Lawyers Books Publications Pty Ltd, 2001).

Borrows, John. "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37 Osgoode Hall L.J. 537.

Bothwell, Anthony Peirson Xavier. "We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property" (2000) 6 Ann. Surv. Int'l & Comp. L. 175.

Brabazon, Mark. "Mabo, The Constitution and The Republic" (1994) 11 Austl. Bar Rev. 1.

Brems, Eva. "Reconciling Universality and Diversity" in András Sajó, ed, *human rights with Modesty: The Problem of Universalism* (Leiden: Martinus Nijhoff, 2004).

Burke, Brian J. "Left Out in the Cold: The Problem with Aboriginal Title under Section 35(1) of the Constitution Act, 1982 for Historically Nomadic Aboriginal Peoples" (2000) 38 Osgoode Hall L.J. 1.

Cançado Trindade, Antônio Augusto. "Hacia el nuevo Jus Gentium del siglo XXI: El derecho universal de la humanidad" in Secretaria General de la OEA, *Jornadas de Derecho Internacional 2003* (Washington: OEA, 2005).

Carrillo, Jo. "Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in Law" (2000-2001) 12 U. Fla. J.L. & Pub. Pol'y 13.

Cassatella, Andrea. "Multicultural Justice: Will Kymlicka and Cultural Recognition" (2006) 19:1 Ratio Juris 80.

Castellino, Joshua. "The 'Right' to land, International Law & Indigenous Peoples" in Joshua Castellino & Niamh Walsh eds., *International law and indigenous peoples* (Leiden ; Boston: M. Nijhoff, 2005).

Choo, Christin. "Historians and native title: the question of evidence" in Diane Elizabeth Kirkby & Catharine Coleborne eds., *Law, history, colonialism : the reach of Empire* (Manchester: Manchester University Press, 2001).

Christie, Gordon. "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous L.J. 67.

Cohen, Felix S. "Original Indian Title" (1947-1948) 32 Minn. L. Rev. 28.

Donovan, Brian. "Common Law Origins of Aboriginal Entitlements to Land" (2003) 29 Man. L.J. 289.

___. "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of Delgamuukw" (2001) 35 U. Brit. Colum. L. Rev. 43.

Dupuy, Pierre-Marie. "Cours Général de Droit International Public: L'Unité de l'Ordre Juridique International" in Hague Academy of International Law, *Collected Courses of the Hague 2000*, tome 297 (Leiden: Martinus Nijhoff, 2003).

Dupuy, René-Jean. "Conclusions of the Workshop" in René-Jean Dupuy, ed., *L'Avenir du Droit International Dans un Monde Multiculturel: Colloque de la Académie de Droit International de la Haye, 17-19 Novembre 1983* (The Hague : Martinus Nijhoff, 1983).

Elliott, David W. "Delgamuukw: Back to Court?" (1998) 26 Man. L.J. 97.

Epstein, Robert J. "The Role of Extinguishment in the Cosmology of Dispossesion" in Gudmundur Alfredsson & Maria Stavropoulou eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague: Martinus Nijhoff, 2002).

Flanagan, William F. "Piercing the Veil of Real Property Law: Delgamuukw v. British Columbia" (1998-1999) 24 Queen's L.J. 279.

Frickey, Philip P. "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993-1994) 107 Harv. L. Rev. 381.

Carlos Iván Fuentes, "Universalidad y diversidad cultural en la interpretación de la Convención Americana sobre Derechos Humanos: Innovaciones en el caso de la Comunidad Indígena Yakye Axa" (2006) 1:2 Debates Hum. Rits. & Inter-Am. Syst. 69 online: CEJIL <http://www.cejil.org/revista/revista_2.pdf>.

Gilbert, Jérémine. "The Blur of Distonction: Adivasis Experience with Land Rights, Self-Rule and Autonomy" in Joshua Castellino & Niamh Walsh eds., *International law and indigenous peoples* (Leiden ; Boston: M. Nijhoff, 2005).

Harding, Christopher & Lim, C.L. "The Significance of Westphalia: an Archeology of the International Legal Order" in Christopher Harding & C.L. Lim, eds., *Renegotiating Westphalia* (The Hague: Martinus Nijhoff Publishers, 1999).

Harris, Douglas. "Indigenous Territoriality in Canadian Courts" in Ardith Walkem & Halie Bruce eds., *Box of treasures or empty box? : twenty years of Section 35* (Penticton, BC: Theytus Books, 2003).

Hart, L.H.A. "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv. L. Rev. 593.

Henderson, James (Sakej) Youngblood. "Taking Equality into the 21st Century: An Aboriginal Commentary" (2000-2001) 12 N.J.C.L. 31.

___. "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous L.J. 1.

Hennebel, Ludovic. "La protection de l'«intégrité spirituel» des indigènes : Réflexions sur l'arrête de la Cour interaméricaine des droits de l'home dans l'affaire *Comunidad Moiwana c. Suriname* du 15 juin 2005" (2006) 66 Rev. Trim. Dr. H. 253.

Jonas, William & Donaldson, Margaret. "The Legitimacy of Special Measures" in Sam Garkawe, et al., eds., *Indigenous Human Rights* (Sydney: Sydney Institute of Criminology, 2001).

Joffe, Paul. "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec" (2000) 45 McGill L.J. 155.

Kades, Eric. "The Dark Side of Efficiency: Johnson v. M'intosh and the Expropriation of American Indian Lands" (1999-2000) 148 U. Pa. L. Rev. 1065.

Kelsen, Hans. "Les rapports de système entre le droit interne et le droit international public" in *Recueil des Cours de la Académie de Droit International 1926*, tome 14 (Paris: Hachette, 1927).

___. "Théorie générale du droit international public. Problèmes choisis" in *Recueil des Cours de la Académie de Droit International 1932*, tome 42 (Paris: Sirey, 1933).

Kymlicka, Will. "Theorizing Indigenous Rights" (1999) 49 U.T.L.J. 281.

Lambert, Douglas. "Van Der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32 U.B.C. L. Rev. 249.

Macklem, Patrick. "What's Law Got to Do with It: The Protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L.J. 125.

___ & Morgan, Ed. "Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in Awas Tingni v. Republic of Nicaragua" (2000) 22 Hum. Rts. Q. 569.

Madariaga Cuneo, Isabel. "The Rights of Indigenous Peoples and The Inter-American Human Rights System" (2005) 22 Ariz. J. Int'l & Comp. L. 53.

Marks, G. C. "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas" (1992) 13 Austl. Y. Int'l. L. 1.

Martin, Claudia. "The Moiwana Village Case: A New Trend in Approaching the Rights of Ethnic Groups in the Inter-American System" (2006) 19 Leiden J. Int'l. L. 491.

McGlade, Hannah. "Native title, 'Tides of History' and Our Continuing Claims for Justice-Sovereignty, Self Determination and Treaty" in Aboriginal and Torres Strait Islander Service & Australian Institute of Aboriginal and Torres Strait Islander Studies, *Treaty... let's get it right* (Canberra: Aboriginal Studies Press, 2003)

McNeil, Kent. Kent McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?" (1990) 16 Monash U.L. Rev. 91.

___. "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1997-1998) 5 Tulsa J. Comp. & Int'l L. 253.

___. "Aboriginal Title and Aboriginal Rights: What's the Connection" (1997-1998) 36 Alta. L. Rev. 117.

___. "Aboriginal Title and Section 88 of the Indian Act" (2000-2001) 34 U.B.C. L. Rev. 159.

___. "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61:2 Sask. L. Rev. 431.

___. "Aboriginal Title as a Constitutionally Protected Property Right" in Owen Lippert ed., *Beyond the Nass Valley: National implications of the Supreme Court's Delgamuukw decision* (Vancouver: Fraser Institute, 2000).

___. "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L. Rev. 301.

___. "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous L.J. 1.

___. "Self-Government and the Inalienability of Aboriginal Title" (2001-2002) 47 McGill L.J. 473.

___. "The Onus of Proof of Aboriginal Title" (1999) 37 Osgoode Hall L.J. 775.

___. "The Meaning of Aboriginal Title" in Michael Asch ed., *Aboriginal and treaty rights in Canada : essays on law, equity, and respect for difference* (Vancouver: UBC Press, 1997).

___. "The Vulnerability of Indigenous Land Rights in Australia and Canada" (2004) 42 Osgoode Hall L.J. 271.

Meron, Theodor. "General Course on Public International Law: International Law in the Age of Human Rights" in Hague Academy of International Law, *Collected Courses of the Hague 2003*, tome 301 (The Hague: Martinus Nijhoff, 2004)

Moreton-Robinson, Aileen. "Terra Nullius and the Possesive Logic of Patriarchal Whiteness: Race and Law Matters" in Rosemary Hunter & Mary Keyes eds., *Changing Law. Rights, Regulation and Reconciliation* (Burlington: Ashgate, 2005).

Moses, Ted. "Renewal of the Nation" in Gudmundur Alfredsson & Maria Stavropoulou eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague: Martinus Nijhoff, 2002).

Mowbray, Alastair. "The Creativity of the European Court of Human Rights" (2005) 5:1 Hum. Rts. L. Rev. 57.

Nettheim, Garth. "Mabo and legal pluralism: The Australian Aboriginal justice experience" in Kayleen M. Hazlehurst ed., *Legal pluralism and the colonial legacy : indigenous experiences of justice in Canada, Australia, and New Zealand* (Aldershot ; Brookfield, Vt.: Avebury, 1995).

Olthuis, Brent. "Defrosting Delgamuukw (or "How to reject a frozen rights interpretation of Aboriginal title in Canada")" (2000-2001) 12 N.J.C.L. 385.

Parsonson, Ann. "The fate of Maori land rights in early colonial New Zealand: the limits of the Treaty of Waitangu and the doctrine of Aboriginal title" " in Diane Elizabeth Kirkby & Catharine Coleborne eds., *Law, history, colonialism : the reach of Empire* (Manchester: Manchester University Press, 2001).

Pratt, Angela. "Treaties vs. Terra Nullius: Reconciliation, Treaty-Making and Indigenous Sovereignty in Australia and Canada" (2004) 3 Indigenous L.J. 43.

Pruner, Jacqueline F. "Comment: Aboriginal Title and Extinguishment Not So "Clear And Plain": A Comparison of the Current Maori and Haida Experiences" (2005) 14 Pac. Rim L. & Pol'y J. 253.

Reilly, Alex & Genovese, Ann. "Claiming the Past: Historical Understanding in Australian Native Title Jurisprudence" (2004) 3 Indigenous L.J. 19.

Riley, Mary. "The Amerindian Rights Movement in Guyana and its Influence" in Mary Riley ed., *Indigenous Intellectual Property Rights. Legal Obstacles and Innovative Solutions* (Walnut Creek: AltaMira Press, 2004).

Rosenne, Shabtai. "General Course on Public International Law: The perplexities of Modern International Law" in Hague Academy of International Law, *Collected Courses of the Hague 2001*, tome 291 (The Hague: Martinus Nijhoff, 2002).

Russell, Peter H. "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask. L. Rev. 247.

Sánchez Botero, Esther. "Reflexiones antropológicas en torno a la justicia y la jurisdicción especial indígenas en una nación multicultural y multiétnica" in Fernando García, ed., *Las sociedades interculturales: un desafío para el siglo XXI* (Quito: FLACSO, 2000) online: <http://www.flacso.org.ec/docs/sasocintercul.pdf>.

Saunders, Nicholas J. "Biographies of Brilliance: Pearls, Transformations of Matter and being, c. AD 1492" (1999) 31:2 World Archaeology 243.

Slaterry, Brian. "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

Spaulding, Richard. "Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective" (1989) 47 U.T.L.J. 35.

Thornberry, Patrick. "Treatment of Minority and Indigenous Issues in the European Convention on Human Rights" in Gudmundur Alfredsson & Maria Stavropoulou eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague: Martinus Nijhoff, 2002).

Tigroudja, Hélène. "Chronique des décision rendues par la Cour Interaméricaine des Droits de l'Home (2005)" (2006) 66 Rev. Trim. Dr. H. 277.

Trahan, Yvette. "The Richtersveld Community & Others v. Alexkor Ltd.: Declaration of a "Right in Land" through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System" (2004) 12 Tul. J. Int'l. & Comp. L. 565.

Tucker, Catherine M. "Land, Tenure Systems, and Indigenous Intellectual Property Rights" in Mary Riley ed., *Indigenous Intellectual Property Rights. Legal Obstacles and Innovative Solutions* (Walnut Creek: AltaMira Press, 2004).

Walters, Mark D. "Towards a 'taxonomy' for the common law: legal history and the recognition of Aboriginal customary law" in Diane Elizabeth Kirkby & Catharine Coleborne eds., *Law, history, colonialism : the reach of Empire* (Manchester: Manchester University Press, 2001).

Wilkins, Kerry. "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous L.J. 57.

Woodward, Jack. "Converting the Communal Aboriginal Interest into Private Property: Sarnia, Osoyoos, the Nisga'a Treaty and Other Recent Developments" in Owen Lippert ed., *Beyond the Nass Valley : national implications of the Supreme Court's Delgamuukw decision* (Vancouver: Fraser Institute, 2000).

Addresses

Brown Scott, James. "Súarez and the International community" (Address in commemoration of the contribution of Francisco Suárez to International Law and Politics, Catholic University, 30 April 1933) (published as a pamphlet, Washington, D.C., 1933).

Pope John Paul II. "To Build Peace, Respect Minorities" (Message of His Holiness for the celebration of the World Day of Peace, 1 January 1989) at para. 6 online: The Holy See <http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_19881208_xxii-world-day-for-peace_en.html>.