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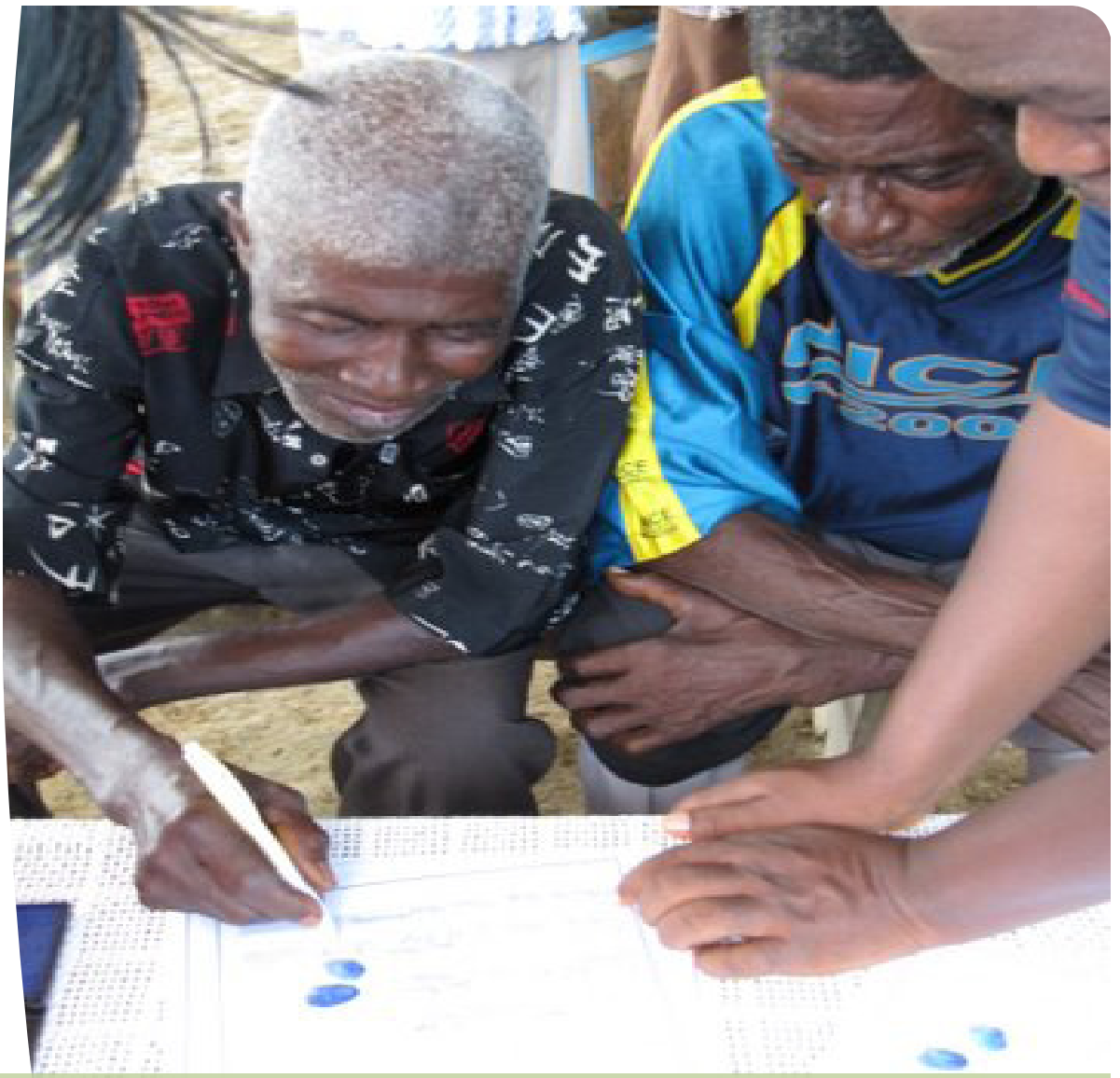

Mandating Recognition

International Law and Native/ Aboriginal Title

Owen J. Lynch

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Cover Photography Credit: Rachael Knight, 2010. Members of the community of Siahn, in Rivercess County, Liberia, sign Memorandums of Understanding with neighboring communities to signal mutual recognition of the harmonization of their shared borders, in a ceremony attended and witnessed by local government officials.

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International Law and Native/Aboriginal Title

OWEN J. LYNCH

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ABSTRACT

This essay identifies, summarizes and analyzes leading international and national laws and judicial cases recognizing or otherwise supportive of native/aboriginal title. Native/aboriginal titles are community-based property rights (CBPRs) typically held by indigenous peoples and some other original, long-term-occupant local communities. The paper evinces widespread and growing evidence that international law is moving towards (and arguably already is) mandating legal recognition of native/aboriginal title to indigenous territories and ancestral domains. It references decisions of the International Court of Justice (ICJ), the Inter-American Court (IAC), and the African Commission on Human and Peoples Rights (N.B. Asia has yet to constitute any juridical entity comparable to the IAC or its European and African counterparts).

This emerging mandate in favor of native/aboriginal title is also apparent in international conventions and declarations, as well as at least fourteen nation states that are already obliged under domestic law, albeit in differing ways, to recognize indigenous peoples' and others' native/aboriginal titles. In addition, since 1968 eleven African nations have recognized customary rights as including property rights in their constitutions and/or land laws, as have major international law conventions, declarations and other instruments that are supportive of native/aboriginal title and are also identified. Finally, the paper summarizes leading cases and instruments in comparative/national (international customary) laws that are likewise supportive of legal recognition.

The essay is not intended to be exhaustive; nor can it be one-hundred percent up to date. Rather, it establishes that the trend in international law -- as conventionally understood, as well as customary international law, as evinced in the domestic law of a growing number of nation-states -- is moving towards mandating the legal recognition of native/aboriginal title.

INTRODUCTION

HUMAN RIGHTS AND ENVIRONMENTAL JUSTICE IN INTERNATIONAL LAW[1]

Over the past 60 plus years there has been growing attention paid to indigenous peoples and other local communities still living in areas originally inhabited by their forebears. This interest is prompted by various concerns, including human rights, economic development, and environmental protection and conservation. Meanwhile, there has been an observable increase in environmental and other types of conflicts throughout the world, many of which are violent and profoundly destructive of human well-being and our natural environment.

The conflicts too often revolve around issues concerning property rights, especially those of indigenous peoples and other local communities who live in rural areas of Africa, the Americas, Asia and the Pacific. A new and emerging early 21st century variant, which borders on the bizarre, involves potential discord over ownership of carbon in trees, including trees planted and protected in long inhabited areas.

The increasing frequency of conflicts over property rights to land, water, forests, trees, carbon and other natural resources is, in large measure, related to ominous global trends concerning human demography, consumption, pollution, violence, inequity, failed states and more. These trends increase and exacerbate already unprecedented demands on the regenerative capacities of remaining ecosystems. In widely varying degrees they jeopardize the precarious well-being of all human beings, especially and most immediately vulnerable groups directly dependent on natural resources for their very survival.

Today, overreliance on environmentally inappropriate, unfair and often ineffective land, forestry, mining, water, agricultural and other natural resource laws – as well as almost exclusively quantitative measures of development – stubbornly endures. This, in turn, exacerbates and reinforces in many areas intranational and international disparities in regards to wealth, poverty, and fairness, as well as environmental resources and threats. Many environmental/conservation initiatives, especially those intended to protect important areas of biological diversity, remain largely indifferent and often even hostile to economic development.[2] Too often these conservation initiatives also ignore human rights and cultural considerations, including the aspirations and interests of indigenous peoples and other local communities.

Legal and other scholars, policy scientists, researchers, community advocates and others are studying and analyzing the multidimensional nature of these seemingly irresolvable challenges. Many increasingly perceive human rights, environmental protection and economic development objectives as complementary, rather than as unrelated or opposing objectives.

Despite an evolving and promising tripartite approach[3] that jointly addresses human rights, environmental and economic concerns, and enduring international economic crises, the prevailing and often single minded pursuit of economic growth and individual private property rights still dominates, overwhelmingly. This pursuit is premised on theoretical and quantitative models that subordinate and too often ignore environmental, labor and human rights concerns, especially when they cannot be easily assessed monetarily.

The growing emphasis on a tripartite approach has contributed to increasing legal support for environmental justice on international, national and local levels. One of the most positive indicators is broadening support for the legal recognition of native/aboriginal title, especially in nations once subject to British colonialism.[4] The trend is readily evident in international law instruments, particularly the United Nations

Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted by the General Assembly on 13 September 2007.[5]

> *The UN Declaration on the Rights of Indigenous Peoples provides a basis for demanding greater and more meaningful participation in international decision making processes. Unlike other legal instruments, the Declaration does not limit the requirement for consultation and cooperation to the national level.*[6]

Many rural peoples are guardians and stewards of forests and other natural resources, including biodiversity reservoirs and carbon sinks, and possess important local knowledge for managing these resources sustainably. Of course, local conditions and cultures vary and not all local people, including indigenous people, respect, protect and sustainably manage their natural environments. But all of them are human beings and have inherent rights simply by virtue of being human. What else gives meaning to the term "human rights"?

The increasing legal support for environmental justice and meaningful participation by vulnerable groups, including indigenous peoples and other original rural long-term-occupant local communities, is not only motivated by concerns about basic fairness. Rather, it is a rational response to a growing body of research that demonstrates the vital role local knowledge and incentives play in the conservation of biological and other resources, including carbon stored in trees.

It has been demonstrated that when forest communities have a right to participate in local governance, including making rules concerning the use and management of forest resources, there is a greater likelihood of more livelihood benefits and higher level of biodiversity.[7] Indeed, a recent report by the World Bank no less concluded that the amount of forest cover and biodiversity within indigenous territories is higher than expected, and much higher than within strict protected zones and areas not inhabited by indigenous peoples.[8]

SELF-DETERMINATION VIS-À-VIS NATIVE/ABORIGINAL TITLE

Although related, there are major differences between concepts of self-determination and native/aboriginal title. In Roman law the concept of *imperium,* or sovereignty, was often referred to as formal legal authority exercised by senior government officialdom over territorially expansive areas, sometimes with virtually absolute power, particularly in the case of some emperors. Originally a military concept, the word was derived from the Latin verb *imperare* (to command): the right was based on the power of the empire, i.e. the state, to enforce its law within its territories.

Dominium, or dominion, on the other hand was understood to be much more limited in scope. It referred to legal authority to manage and otherwise control the use and exploitation of specific areas of land and other natural resources.[9]

Pursuant to the foregoing understanding, this paper deals solely with *dominium*. It does not purport to address issues related to self-determination of indigenous peoples, despite the overlapping aspects of *imperium* and *dominium*.[10] To be more explicit, under international law, issues related to *imperium,* i.e., sovereignty and self-determination, arguably pertain only to rights of indigenous peoples, and not to other local communities including those comprised of original, long term occupants. In the author's opinion, however, international laws concerning native/aboriginal title pertain to both indigenous and some other local communities comprised of original long term occupants whether or not their property rights are yet recognized and documented by the nation state in which they are located.[11]

It merits emphasizing that "The character of international law has evolved with shifts in the ordering of political power and burgeoning of international institutions that constitute themselves on precepts of a peaceful and just world order."[12] Prof. James Anaya, the UN Special Rapporteur on Indigenous Rights,[13] wrote that international law "has been made to include a burgeoning and influential transnational discourse concerned with achieving peace and a minimum of human suffering."

He goes on to aver:

> *This modern discourse of peace and human rights, which tempers positivism in international law, represents in significant measure, the reemergence of classical-era naturalism, in which law was determined on the basis of visions of what ought to be, rather than simply on the basis of what is.*[14]

In Prof. Anaya's words "An array of procedures involving international institutions exist encouraging states to comply with their obligations under international human rights law and bringing pressure to bear on them when they fail."[15]

INTERNATIONAL LAW MANDATES RECOGNITION

Today, it is no longer premature to assert that international law, including international customary (comparative/national) law,[16] mandates legal recognition of native/aboriginal title.[17] In other words, from Canada to Malaysia, South Africa to Australia, Papua New Guinea to Brazil, international customary law, based primarily on a growing number of national laws and cases, as well as international instruments, principles, and court decisions, now prescribes the domestic legal recognition of aboriginal/indigenous property rights. This includes an increasing number of recent and encompassing indicators reflected in international laws that recognize the rights of indigenous peoples and others in long occupied, ancestral areas, including rights to land, forests, trees, waters and other natural resources local peoples invoke and depend on. As stated in October 2007 by the Supreme Court of Belize in *Cal v. Attorney General*[18] there already are an "overwhelming number" of states reflecting "the growing consensus and the general principles of international law on indigenous peoples and their lands and resources."[19]

The trend in support of legal recognition of native/aboriginal titles held by indigenous peoples and other original long-term occupants is clear in international law and international comparative (national) law. This trend reflects broadening acknowledgment, and in some national contexts politically necessary amelioration, of enduring and fundamentally unfair legal arrangements. It builds upon growing awareness that the local knowledge and practices of long-term occupants often contribute to conservation and sustainable management of forests and biodiversity. This development is evident even within the World Bank,[20] and in some instances has resulted in local communities receiving monetary encouragement for continuing to provide environmental services that promote conservation and sustainable development.[21]

The emerging norm of free prior and informed consent (FPIC) manifests another aspect of the trend towards the development of international law supportive of native/aboriginal title, including legal standards that protect the rights, interests and well-being of local rural communities regarding the natural resources they depend on for their lives and livelihoods.[22] Similar to community-based property rights (CBPRs),[23] the right to prior informed consent of indigenous and other local communities can be viewed as a human right that derives its authority from and is recognized not only by international law, but also natural law concepts; the existence of a right to FPIC is not necessarily dependent on governments or any creation, grant or recognition by a particular nation state.[24]

Another significant development involves ongoing efforts to identify and articulate more clearly the responsibilities of non-state actors under international law. More specifically, the UN High Commissioner for Human Rights in 2005 requested the appointment of a Special Representative to, among other things, "identify and clarify standards of corporate responsibility and accountability."[25] The Special Representative noted that international instruments clearly impose at least an indirect responsibility on corporations. "The duty requires states to play a role in regulating and adjudicating abuse by business enterprises or risk breaching international obligations."[26]

A consortium of leading international environmental NGOs, including the World Conservation Union (IUCN), the World Commission on Protected Areas (WCPA) and the World Wide Fund for Nature/World Wildlife Fund (WWF), promulgated a Joint Policy Statement on Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas. In it they agreed that "rights should be respected in relation to the lands, territories, waters, coastal seas and other resources which they traditionally owned or otherwise occupy or use, and which fall within protected areas."[27]

The broadening concept of international environmental justice and conservation and duties to promote and protect it reflects an ever more globally acknowledged basic moral principle: human beings, including those belonging to indigenous and other local communities, have a basic human right to participate effectively in official decision-making processes that directly impact the natural resources they depend on for life and livelihoods. The section that follows presents the international legal basis for this conclusion.

1 Environmental Justice in International Law

1.1 CONVENTIONS AND DECLARATIONS

As recognized in a growing number of international law instruments and judicial decisions, human rights exist and should be respected.[28] By now it is likewise evident that sustainable development and environmental justice are symbiotically related, compatible, and need be jointly pursued.[29] These legally cognizable and often complementary rights constitute a progressive and impressive array of 20th Century advances in legal norms within and among our human community.

The UN Universal Declaration of Human Rights best expresses the right to human existence and dignity.[30] Other human rights relevant to processes for securing legal recognition of local property rights include the right to development,[31] the right to participate,[32] the right to assemble,[33] the right to information,[34] the right to fair adjudication and equitable redress of grievances,[35] the right to share the benefits of genetic resources located within indigenous territories,[36] the right to the conservation and protection of the environment,[37] the right to free and prior informed consent,[38] the right to freedom of religion, [39] and the right to cultural integrity.[40] Some of these rights, and others, are expanded upon in Agenda 21.

The first major international law instrument to link human rights and environmental-protection objectives is the Stockholm Declaration on the United Nations Conference on the Human Environment of 1972.[41] Following Stockholm, a major shift in thinking and in development programs took hold and spread.[42] Since then the realm of international law and environmental concerns has begun to address an expanding number of environmental justice issues.

Examples of growing interest in support for environmental justice are found in various legal instruments promulgated by the international community. Foremost, in regard to this paper's topic, is the historic 2007 United Nations Declaration on Indigenous Peoples (UNDRIP).

It affirms the righteousness of indigenous peoples' struggles, including their resistance to centuries of injustice.

Evidence of the favorable trend supporting recognition of native/aboriginal titles held by indigenous and some other original-long-term-occupant local communities in international law is readily apparent and widespread in UNDRIP and elsewhere. At minimum the prevailing trend is to ensure that local communities are not involuntarily and forcibly removed from their ancestral domains and are able to participate meaningfully in official decisions that directly impact the natural resources they depend on for their lives and livelihoods. This trend is evident in Europe, Africa, the Americas, Asia and the Pacific.[43]

The UNDRIP recognizes:

> *the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.*[44]

It likewise acknowledges:

> *that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment*

Perhaps most significant, the UNDRIP specifically provides in Article 26 that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned."[45] Article 10 of the Declaration explicitly provides that

> *Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.*[46]

Buttressing UNDRIP is the International Labor Organization (ILO) Conventions No. 107 and 169 on the Rights of Indigenous and Tribal Peoples in Developing Countries.[47] Enacted in 1957 and 1989, ILO Conventions 107 and 169 had for decades been the leading international law instruments on native/aboriginal title.[48]

Various other supportive declarations and conventions helped lay the foundation for the UNDRIP. These include the 1992 Rio Declaration from the United Nations Conference on Environment and Sustainable Development, which also adopted Agenda 21.[49] Both documents address an array of important issues related to environmental justice.

The 1995 Copenhagen Declaration by the World Summit on Social Development was a watershed in its emphasis on the economic dimensions of environmental justice. Paragraph Six declares:

> *Equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice.*[50]

Two years later, in 1997, the UN General Assembly reiterated the premise enunciated in Copenhagen as it adopted a program for further implementation of Agenda 21. It stressed anew that "Economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. Sustained economic growth is essential to the economic and social development."[51] The Rio plus ten gathering in Johannesburg in 2002 again reiterated support for a tripartite approach in its Declaration on Sustainable Development.[52]

The concept of environmental justice embraces a special concern for precariously situated local communities, more commonly referred to as "vulnerable populations." The second United Nations Conference on Human Settlements (Habitat II) in an internationally negotiated agreement reemphasized the importance of vulnerability,[53] as have more recent studies examining the linkages between vulnerable populations and climate change.[54] These definitions, as well as increased success by advocates for indigenous peoples and other local communities, and environmental justice are evident in many international instruments such as the Convention on Biodiversity,[55] the Desertification Convention,[56] and the Aarhus Convention.[57] These instruments reaffirm the vital role of local communities in promoting sustainable development and environmental justice.[58]

This emerging new norm is likewise evident within international environmental organizations and their affiliates. For example, the World Wildlife Fund (WWF), citing UNDRIP, has proposed principles for environmental program management that include a mandate "to recognize and respect … customary rights to lands, territories and resources" of indigenous and other local communities. The Conservation Initiative on Human Rights includes WWF and seven other major international environmental organizations. The conservation principles agreed to include respect for human rights. Member organizations are committed to make "special efforts to avoid harm to those who are vulnerable to infringements of their rights and to support the protection and fulfillment of their rights within the scope of our conservation programmes."[59]

In many local situations the most desirable and appropriate outcome is for nation-states to provide for the legal recognition and demarcation of areas covered by native/aboriginal title. Legal recognition should typically not be limited to individual plots, but encompass an array of different and often overlapping community-based property rights (CBPRs), including individual, family and group rights. Especially in regards to original, long-term occupants, i.e., indigenous peoples and some other local communities, their legal rights to land and other natural resources should be considered as private group rights. These CBPRs encompass rights acquired pursuant to local customs and traditions. The existence of these rights is not contingent on any state grant, although state recognition is often desirable and increasingly mandated by international and national law.[60]

International law is also increasingly cognizant and supportive of non-State actors, including local communities, non-government organizations, indigenous and other local peoples' organizations, church groups and other civil society institutions. These institutions likewise enjoy protections under international law and are key to building just, vibrant, sustainable and democratic nation-states, and crafting just norms and processes for local community-state interaction.

1.2 INTERNATIONAL COURT AND TRIBUNAL DECISIONS

The appropriate role of international and regional courts in shaping and defining international law continues to develop and be debated. Regardless of one's position, it should be evident that the architecture for international government in the 21st Century is inexorably being defined by, among others, courts and other international institutions. Essential players in the process of articulation and definition include the International Court of Justice, and other regional international courts.

INTERNATIONAL COURT OF JUSTICE (ICJ)

Western Sahara: Advisory Opinion of 16 October 1975

The foremost adjudicator of international law is the International Court of Justice, based in The Hague, Netherlands. The ICJ Opinion on Western Sahara is an authoritative rejection of the notion that land occupied by indigenous peoples at the time European powers asserted sovereignty could be considered legally unoccupied, or *terra nullius*.

In this advisory and precedent setting opinion, the ICJ held that the indigenous nomadic peoples in the Western (Spanish) Sahara had social institutions at the time of colonization and were entitled to exercise their right to self-determination based on their social coherence as a people. In addition, the ICJ determined that ancestral territories inhabited by nomadic peoples are not *terra nullius* and are not open to arbitrary state acquisition. This case brought an end to the legitimacy of the colonial concept of *terra nullius*. It rejected the

invocation of *terra nullius* to usurp native titles through occupation of territories already inhabited by indigenous peoples, such as the peoples of the Western Sahara.[61] The majority stated that:

> *Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of terra nullius by original title but through agreements concluded with local rulers.*

INTER-AMERICAN COURT OF HUMAN RIGHTS[62]

Awas Tingni v. Nicaragua[63]

This was the first case brought to the Inter-American Court concerning indigenous peoples' property rights. An indigenous group in Nicaragua, the *Awas Tingni,* cited the Inter-American Convention on Human Rights,[64] which includes the right to property, and claimed their rights had been violated by the arbitrary issuance of timber concessions to foreign corporations which overlapped their ancestral domain. The court held that Nicaragua must delimit, demarcate and title the lands belonging to the Tingni community. It also recognized the tradition of communal land ownership among indigenous peoples and the connection between indigenous groups and the land they occupy.

Awas Tingni v. Nicaragua is a landmark case decided by an international tribunal with legally binding authority. It found a national government in violation of the collective land rights of an indigenous group. It is an important precedent for the rights of indigenous peoples in international law, and a precedent-setting decision within the Inter-American human rights system. On December 15, 2008, Nicaragua's Attorney General and other officials traveled to Awas Tingni to formally hand over title for some 73,000 hectares of their traditional homelands.[65]

Moiwana Village v. Suriname[66]

On November 29, 1986, soldiers of the National Army of Suriname surrounded the Maroon village of Moiwana and killed at least 30 people. The many wounded fled with other survivors, some forced to walk three of four days to safety in French Guiana. Efforts to investigate the massacre commenced in 1989 by the civilian police but soon floundered. In August 1990, the police inspector was shot dead and his body dumped near the office of the then-deputy commander of the military police. Other police officers assisting the inspector fled the country and were granted political asylum in the Netherlands.

Until 1997, the survivors and their allies continued pressing for an investigation. A private prosecution procedure was initiated in 1996 and submitted to the Attorney General of Suriname who failed to respond, even to two requests from the Suriname's judiciary. Concluding it was not possible to secure justice, the survivors filed a complaint with the Inter-American Commission on Human Rights. The Commission found Suriname in violation of the American Declaration and recommended that Suriname investigate the event, prosecute those responsible and compensate the survivors. It likewise opined that the massacre was a crime against humanity and violated international law.

On June 15, 2005 the Inter-American Court ruled unanimously that Suriname had violated the human rights of over 100 members of the village of Moiwana, including Article 21 on the right to property of the American Convention on Human Rights[67] and ordered Suriname to redress the violations. Article 21 of the Convention is of special relevance to a paper in international law and native/aboriginal title. It provides that:

- Everyone has the right to use land and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; and,

■ 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.

Citing Article 21 the Court observed that "the Moiwana community members may be considered as the legitimate owners of their traditional land; as a consequence, they have the right to use and enjoyment of that territory." It therefore, ordered the Government of Suriname to:

> *adopt such … measures are necessary to ensure the property rights of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for the members' use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories."*

On June 15, 2005 the Court ruled unanimously that Suriname had violated the human rights of 130 named members of the village of Moiwana and ordered to Suriname to make things right.

Saramaka v. Suriname[68]

The Inter-American Court went further in *Samarka v. Suriname*. Suriname's Maroons are descendents of African slaves who rebelled against French and Dutch colonial regimes in the Americas. They are not identified as indigenous but are considered to be tribal, and fall under international law protections offered by the International Labor Organization (ILO) in Conventions Nos. 107 and 169.[69]

One of the largest groups of Maroons is the Saramaka who number around 55,000. About half of the Samaraka live in ancestral areas of Suriname as did their forebears for over two hundred years. Their society is organized into twelve *Los*, also referred to as clans or groups. Each member of the Samaraka community belongs exclusively to one *Lo*. The matrilineal *Los* are the basic unit of group ownership of land and other natural resources, in which individual and extended family units have subsidiary rights of use and occupation.

Since the mid 20th century the Samaraka have been threatened by outside interests, including the Government of Suriname. In the 1960s the Dutch colonial government teamed up with Alcoa to construct a huge hydroelectric dam to provide energy for the nearby capitol city of Paramaribo and an Alcoa smelter. Soon after a new artificial lake covered almost half of the Samaraka's ancestral domain and displaced an estimated 6000 inhabitants.[70]

In 1996 logging operations commenced and the Samaraka were prevented by soldiers from the Suriname army from even accessing their gardens. They were told that the land now belonged to Chinese loggers who had received official concessions, including areas granted to the Samaraka by the Dutch in the Treaty of 1762. During the ensuing years the local communities began to organize and in 2000 filed a petition with the Inter-American Commission on Human Rights, which in turn requested in 2002 and 2004 that Suriname suspend all logging concessions and mineral exploration. The *de facto* injunctions slowed some logging activities but Suriname failed to comply with substantive remedial measures recommended by the Commission in March 2006,[71] and the Commission referred the case to the Inter-American Court of Human Rights.

The Court ruled in favor of the Samaraka. It concluded that Suriname violated the rights of the Samaraka under Article 21 of the American Convention[72] "by not adopting effective measures to recognize its communal property right to the lands it has traditionally occupied and used.[73] It ordered Suriname to:

> *remove legal provisions that impede protection of the right to property of the Samaraka people and adopt, in its domestic legislation, and through effective and fully informed consultations with the Samaraka people, legislative, administrative and other measures needed to protected, through special mechanisms, the territory*

in which the Samaraka people exercises its right to communal property.

The Court also recommended that Suriname repair the environmental damage caused by the logging concessions and make reparation and due compensation to the Samaraka people for the damage done by the violations established in this report.[74]

INTER-AMERICAN COMMISSION OF HUMAN RIGHTS (IACHR)

Pehuenche and the "Friendly Settlement" with Chile

A petition was filed before the Inter-American Commission in December 2002 on behalf of indigenous Pehuenche families in Chile. It sought reparations because the human rights of the Pehuenche people were being violated by the construction of several dams along the Bio-Bio River. The largest of these dams, the Ralco dam, would displace 700 Indians, the last group of Mapuche/Pehuenche Indians who continue their traditional lifestyle on ancestral lands. The IACHR obliged the Chilean government to negotiate a precedent-setting settlement that will be monitored by the Commission and involves: 1) a promise to attempt to reform Chile's constitution to secure the protection of indigenous rights; 2) compensation directly to the displaced families, including land, educational scholarships, and US$350,000 per extended family; and, 3) the creation of a Municipality whereby the Mapuche/Pehuenche will have local control over their ancestral domain.[75]

The Chilean government also committed to implementing several measures of more general application. The most important commitments were to:

- Strengthen national laws that guarantee respect for indigenous rights, including constitutional reform that would culminate in legal recognition of Chile's indigenous peoples;
- Ratify the International Labour Organisation (ILO) Convention 169 on indigenous peoples' rights; and
- Improve and strengthen legal processes for delineating the territory of the *Mapuche/Pehuenche* people and ensuring their meaningful participation in official development processes, including the creation of a municipality in the *Upper BíoBío*

The "friendly settlement" provides for *Pehuenche* families to receive reparations for relinquishing their legal rights to natural resources that will be flooded by the dams. For the Pehuenche, reparations symbolize the responsibility of the Chilean government under international law for human rights violations they have suffered. The families gained recognition of their rights over lands, technical support to promote agricultural productivity, educational scholarships, and monetary compensation in the order of US$300,000 per family. In turn, they agreed to transfer their rights to ancestral lands and to discontinue legal action.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS[76]

The African Commission on Human and Peoples' Rights is tasked to formulate and lay down principles and rules aimed at solving legal problems. [77] On February 4, 2010 the Commission ruled that the eviction of the Endorois people for tourism development violated their human rights. The violation of indigenous land rights over generations, including illegal displacement in Kenya and beyond, was not totally resolved in the decision.

The African Commission found that the Kenyan government continues to rely on colonial laws that prevent some local communities from gaining legal recognition of their customary property rights, but allowed others, such as local authorities to obtain legally recognized rights over indigenous areas, ostensibly in trust for the local communities. The Endorois trust, however, had been arbitrarily ended by local officials who then seized the ancestral property.[78] The Commission condemned the expulsion of the Endorois people from their ancestral domains near Lake Bogoria National Reserve, Kenya. It is a precedential victory for indigenous and some other local communities in Africa and beyond.

2 International Customary (Comparative/National) Law and Property Rights

2.1 TWENTY-FIRST CENTURY COLONIAL LEGACIES OF GOVERNMENT OWNERSHIP

An often overlooked factor behind enduring laws in regards to modern land and natural resource ownership concerns the ongoing impact of tenacious colonial legal legacies. These legacies within national contexts typically commenced with the usurpation by colonial regimes of indigenous peoples and other local CBPRs.

Beginning in the early 16th century, Hernando Cortez and his minions and successors had profound effect on indigenous communities in what is now Mexico and eventually throughout Latin America and as far as the Philippines. Vast areas of indigenous territory in the Americas and beyond were arbitrarily usurped, in legal theory if not always fact.[79] Ironically, many colonial laws decreed by the Spanish and Portuguese Crowns were ostensibly on behalf of native populations, and eventually covered all Latin America. Meanwhile, throughout North America and Africa the ancestral domains of indigenous peoples and First Nations were also "legally" usurped by the colonial laws and practice of European soldiers and their compatriots.

In Asia during the 1860s, beginning in Ceylon (Sri Lanka today), an extraordinary wave of similar arbitrary and ostensibly legal usurpations inspired by British forestry laws were enacted. This development moved steadily eastward through India, Burma, Thailand, Cambodia, Vietnam, Malaysia, Indonesia and the Philippines.[80] By the dawn of the 20th century almost all territory in European colonies was "legally" owned by the colonial powers. Similar so-called "legal" usurpations subsequently swept through East, West and southern Africa, and lastly the island nations of the Pacific.[81]

Until the mid-20th century, there was little pretext of notice or legal process. Millions of human beings, many whose ancestors for generations had maintained and protected forests, including the carbon within trees, were arbitrarily deemed per the ICJ decision in *Western Sahara* to inhabit empty space, i.e. *terra nullius*. They were considered to be squatters on colonial government land, regardless of length of occupancy. In many now politically independent nations these colonial legacies endure; all too often there is still no legal due process, let alone formal recognition of ancestral-domain rights, but the trend is hopeful.

Nascent, albeit restrictive, on-the-ground indicators of more participatory legal approaches to forest management were evident in southern Africa and Asia by the late 1970s; they include India's Joint

Forest Management, the Philippines Integrated Social Forestry and Zimbabwe's CAMPFIRE programs. Although providing for a greater degree of local participation and benefit sharing than was previously allowed, these programs purport to retain state (public) ownership and control.

2.2 NEW STANDARDS IN INTERNATIONAL CUSTOMARY LAW (LISTED ALPHABETICALLY AND BY GLOBAL REGIONS)

The following national examples from fourteen nations[82] are not intended to be exhaustive, or completely up to date as the trend is dynamic. Rather, they provide proof that a growing number of international institutions as well as nation states are moving toward legal recognition of indigenous peoples' and some other local communities' CBPRs, and in particular native/aboriginal title.

For example, since 1968 eleven African nations have recognized customary rights as including property rights in their constitutions and/or land laws, all but one since 1986.[83] A research report in 2008 concluded that "The overall trend in law and policy has been toward an increased recognition of the role that communities play in forest management and their historical rights to territories." It identified policy and law developments that "Strengthen community tenure rights" in eighteen nations, including Cameroon, China, Brazil, Kenya, Mali and Tanzania.[84] A tropical forest tenure assessment in 2009 reported that 18% of forest land in 30 tropical forest countries is now privately owned by indigenous peoples and some other local communities, an increase from 15% in 2002.[85]

Taken together, these facts, the previously discussed trends in international law and principles, and the following summaries of national-level legal developments, provide further proof that international customary law now effectively mandates legal recognition of native/aboriginal title and other private community-based property rights (CBPRs). They are multi-facetted examples of the evolution of international law in favor of environmental justice, including recognition of native/aboriginal title.[86]

AFRICA

BOTSWANA

The Botswana High Court on December 13, 2006 ruled that more than 1,000 Kalahari Bushmen had been unconstitutionally evicted from their ancestral hunting grounds and had the right to return. The court ruled that they were wrongly evicted by the Botswanan government several years earlier. Supporters of the Bushmen - traditional hunter-gatherers whose proper name is the San - accused the government of evicting them to exploit diamond and mineral wealth on their reserve.

A panel of judges ruled that the San were illegally moved from their ancestral domain in the Central Kalahari Game Reserve. After a 2-1 ruling, Judge Mpaphi Phumaphi, who delivered the swing vote, said the government had forced them out of the reserve by depriving them of their livelihood. "In my view, the simultaneous stoppage of the supply of food rations and the stoppage of hunting licenses is tantamount to condemning the remaining residents to death by starvation," he said.

The case marks the first time a modern, post-colonial national African court recognized the ancestral domain rights of indigenous people. It is also a precedent setting case linking land rights to cultural sustainability and the right to life. Implementation of the decision, however, has been problematic.[87]

On July 21, 2010 the High Court crippled its previous decision and held that the Bushman did

not have a right to use an already established well on their traditional land, or excavate a new one. The African Commission on Human and Peoples' Rights was quick to respond on August 10. The Commission urged the Government of Botswana "to embrace the spirit of the December 13, 2006 ruling of the High Court … by allowing Bushmen to access their own water using the pre-existing borehole."[88] Most heartening, on January 23, 2011, the Botswana Court of Appeal heeded the Commission's admonition and unanimously overruled the High Court holding that that the San have "an inherent right" to drill for water.[89]

SOUTH AFRICA

Richtersveld Community v. Alexor Limited v. the Richtersveld Community[90]

The Richtersveld community is part of a larger group, the Nama people, who are descended from Khoikhoi- and San-speaking people. Their ancestral area was inhabited long before the first colonists, the Dutch, arrived at the Cape in 1652. In 1847, the British Crown annexed the area including land which would become the subject of the Richtersveld claim.

Following annexation, the Richtersveld people continued to live on their land until 1925, when diamonds were discovered. Beginning that year, the Government issued licenses to dig for diamonds to third parties, and as more licenses were awarded, the Richtersveld people were gradually denied access to more and more of their ancestral domain. In 1957, a fence was erected around the entire area, denying the Richtersveld natives any access. Between 1989 and 1994 all legal control of the enclosed area was vested in Alexkor Limited, a Government-owned company which continued to mine for diamonds.

The Richtersveld community argued that when their dispossession began in the 1920s, they possessed a property right to the land based on aboriginal title. They argued that this title survived annexation and existed as a burden on the Crown's title. Their dispossession, founded upon a notion that the Richtersveld people were too uncivilized to possess recognizable legal rights (see *Western Sahara* above), was ethnically and culturally discriminatory.

The Land Claims Court rejected these arguments, and the Richtersveld community appealed to the Supreme Court of Appeal (SCA).[91] The SCA unanimously overturned all of the critical findings made by the land court. It found that at the time of annexation, the Richtersveld people had a communal 'customary law interest' whose source was "the traditional laws and customs of the Richtersveld people." The Court noted the similarity between this 'customary law interest' and aboriginal title.

The Court then cited passages from Australia's *Mabo v. Queensland* decision (see below), which among other things emphasized two important principles. First, a change in sovereignty alone does not destroy pre-existing property rights. Second, the principle expressed in *In re Southern Rhodesia* that some Indigenous people are not sufficiently civilized to have recognizable property rights was rejected ala *Western Sahara*. The Court adopted these principles and found that the Richtersveld people's customary law land rights survived annexation. Finally, the Court held that the Government's failure to recognize the Richtersveld people's rights in land (on the ground of 'insufficient civilization') after diamonds were discovered was discriminatory. As such, the Richtersveld people were entitled under the Restitution Act to both restitution and legal recognition of their ancestral domain rights.

THE AMERICAS

BELIZE

On 18 October 2007, the Supreme Court of Belize ruled in *Cal v. Attorney General*[92] that the national government must recognize indigenous Mayans' customary tenure to land and refrain from any act that might prejudice their use or enjoyment of their ancestral domain. The landmark ruling was a victory for indigenous Mayan communities throughout Belize.

The High Court ordered the government of Belize to "determine, demarcate and provide official documentation of Santa Cruz's and Conejo's [two Mayan villages] title and rights in accordance with Maya customary law and practices." It also ordered the government to desist from any logging, mining or other resource exploitation projects on Mayan land. The decision was the first national judgment rendered with reference to the 2007 UN Declaration on the Rights of Indigenous Peoples.

In 2001, the Belize government began giving rights to logging, oil, and hydro-electric interests on traditional Mayan lands, denying Mayan farmers access to their ancestral domains. In the decision, the Chief Justice of Belize stated that British colonial and subsequent acquisition of land in Belize did not abrogate the Mayan people's primordial rights to their land.

As such, the Court upheld that "the Maya people live, farm, hunt and fish; collect medicinal plants, construction materials and other forest resources; and engage in ceremonies and other activities on land within and around their communities; and that these practices have evolved over centuries from patterns of land use and occupancy of the Maya people." The Supreme Court found that the Mayans had a "complex traditional set of land tenure regulations." Furthermore, "all attempts to divide up the customary village land into arbitrary-sized parcels are doomed to fail to establish a stable land-tenure regime" because the Mayan lifestyle "requires access to a variety of land types in order to grow and gather all the crops and resources they need to survive in any given year."

The Court also held that Mayan rights to occupy their lands, farm, hunt and fish pre-date European colonization and remain in force today. The decision noted:

> *A mere change in sovereignty does not extinguish native title to land. … Extinguishment or rights to or interests in land is not to be lightly inferred.*

Referring to *Delgamuukw v British Columbia* (see below), the High Court observed that "Indigenous title is now correctly regarded as *sui generis*." In other words, the very fact of "Original Peoples" having inhabited a land over time confers land title rights to them. It cited the Belizean Constitution and several international legal precedents that affirmed the existence of indigenous peoples' collective rights to their land and other natural resources.

While stating that the UNDRIP is considered to be non-binding, the Court averred that principles of general international law contained in the declaration should be respected. Moreover, it noted that the UNDRIP was adopted by an "overwhelming number" of states thus reflecting "the growing consensus and the general principles of international law on indigenous peoples and their lands and resources."

BRAZIL

The Brazilian Constitution and national legal framework "provides for a unique proprietary regime over the Brazilian Indians land…which reserves to Brazilian Indians the exclusive use and sustainable administration of the demarcated lands as well as the economic benefits that this sustainable use can generate."[93] The 1988 constitution includes a so-called "Indian Chapter" that enumerates the nature and extent of indigenous rights. The constitution for the first time recognized the existence of collective rights and acknowledged the legitimacy of community-based indigenous autonomy and social structures.

The Brazilian Constitution states that "Land traditionally occupied by Brazilian Indians are those that they have occupied and permanently possessed and they shall have the *exclusive usufruct of the riches of the soil, the rivers and the lakes* existing therein (emphasis supplied)[94] A recent study concluded that these rights extend to carbon in trees located on Indian land.[95]

In 2009 Brazil's Supreme Court sided with indigenous peoples in land disputes in Amazonia

that have been called critical for determining the future of an area of rainforest the size of Western Europe. The decision formally puts the 1.7 million hectares Raposa Serra do Sol Indigenous Reserve under legal control of indigenous Amazonians, despite a handful of large-scale farmers who also are expanding in the northernmost reaches of the Amazon Jungle bordering Venezuela. The decision ordered all non-indigenous residents (including industrial rice farmers) to vacate the reserve.[96] It also imposed nineteen conditions on local indigenous peoples' rights to use and manage their lands that could have negative impacts on their rights in the future.[97]

CANADA

Delgamuukw v. British Columbia[98]

In this landmark decision on the nature and scope of aboriginal title, the Supreme Court of Canada held that absent a valid extinguishment, indigenous people have *sui generis* aboriginal title to the land they exclusively occupied prior to the establishment of British colonial sovereignty, and aboriginal title is protected by the Constitution of Canada. The court recognized a special fiduciary duty between the British Crown and aboriginal peoples. For its part, the Canadian government has the duty to consult in good faith, addressing the concerns of the peoples whose ancestral domain rights are at issue.

While aboriginal rights in Canada have also been bolstered by a number of more recent court decisions, the 1997 Delgamuukw ruling is by far the most significant. It represents the culmination of a long process of legal empowerment for First Nations. The decision is significant in that it not only recognizes aboriginal title, it lays out the means by which the existence of aboriginal title could be proven and recognized, even through the use of oral histories. Whereas previous courts had discounted the use of oral history in making claims (essentially crippling the ability of some indigenous groups to raise such claims), the court ruled that "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with."[99]

The Delgamuukw decision's other significant feature is that it provides guidance for the adjudication and recognition of aboriginal title. Previously it had been acceptable practice for commercial resource extraction to continue unhindered throughout ancestral domains while claims were contested in Canadian courts. Pursuant to Delgamuukw, resource extraction can no longer take place without consideration of aboriginal rights and title. "There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation."[100]

Major legislative advances concerning vast areas of aboriginal territories in Canada have also occurred, although there remain many disputes regarding implementation. These include the Nunavik Inuit Land Claims Agreement of 1993[101] and the Labrador Inuit Land Claims Agreement of 2005.[102]

CHILE

As discussed above in the section on International Court and Tribunal Decisions, the Inter-American Commission obliged the Chilean government to negotiate a precedent-setting settlement that will be monitored by the Commission and involves: 1) a promise to attempt to reform Chile's constitution to secure the protection of indigenous rights; 2) compensation directly to the displaced families, including land, educational scholarships, and US$350,000 per extended family; and, 3) the creation of a Municipality whereby the Mapuche/Pehuenche will have local control over their ancestral domain.[103]

NICARAGUA

As also discussed above, *Awas Tingni v. Nicaragua* is a landmark case decided by an international court with legally binding authority. The Inter-American Court of Human Rights found a national government in violation of the collective

land rights of an indigenous group within national boundaries. It is an important precedent for the rights of indigenous peoples in international law, and it remains a precedent-setting decision within the Inter-American human rights system.

SURINAME

Two other landmark and precedent setting decisions by the Inter-American Court involved Suriname and they too have been discussed above: *Moiwana Village v. Suriname* and *Saramaka v. Suriname*. The Saramaka decision recognized aboriginal titled owned by people who were not thought of as being indigenous (despite over 200 years of original occupancy!) but were considered tribal.

UNITED STATES

Johnson v. M'Intosh

For all the atrocities and injustices inflicted on indigenous peoples in what is now the United States of America, the natives, despite the "discovery doctrine" were not deemed to be mere squatters on land owned by the US Government. Although indigenous rights, including aboriginal title were always subject to extinguishment by the US Congress, in many cases that never occurred. Rather, under the auspices of the US Supreme Court native/aboriginal title was always acknowledged to exist. In Johnson vs. M'Intosh the US Supreme Court held in 1823 that Native Americans had, at minimum, rights of occupation to their ancestral domain, although those rights could only be sold to the US Government.[104]

Tribal jurisdiction over native ancestral domains in the USA, however, is defined as all land within the limits of Indian reservations. Since the 1970s the US Supreme Court has been engaged in apparent efforts to limit the scope of property rights held by Native Americans. The US Government is deemed to be the trustee — regrettably a not always faithful one — or guardian of Native Americans. Perhaps of most importance to this paper, Native Americans are not legally deemed to be squatters within their recognized ancestral domains (reservations).[105]

ASIA AND THE PACIFIC[106]

AUSTRALIA

Mabo v. Queensland[107]

This ground-breaking and globally influential decision was based on findings of fact made by the Supreme Court of Queensland: that the Murray Islanders had a strong connection to the islands and regarded the land as theirs. All of the judges, except one, agreed that:

- there was a concept of native title within British common law;
- the source of native title was the traditional connection to or original, long-term occupation of land;
- the nature and content of native title is determined by the character of the connection or occupation under traditional laws or customs; and
- native title could be extinguished by the valid exercise of governmental powers provided a clear and plain intention to do so was readily evident.

In an internationally landmark decision by the High Court of Australia on the nature and scope of aboriginal title, the court held like its counterpart in Canada that absent a valid extinguishment, aboriginal peoples have, *sui generis*, native title to land they exclusively occupied prior to the imposition of British colonial crown sovereignty. Furthermore, the government has a special fiduciary duty to legally respect and protect native/aboriginal title.

The decision was another blow to the long-standing colonial notion of *terra nullius*[108] It recognized that the indigenous peoples of Australia have pre-existing systems of law and rights. According to the High Court, these customary norms remained in force under the new sovereign, except where specifically modified or extinguished by legislative or executive action.

The Court purported to achieve all this without altering the traditional assumption that the Austra-

lian land mass was "settled". Instead, the rules for a "settled" colony were said to be assimilated the rules for a "conquered" colony.

The majority in Mabo decided that upon acquisition of sovereignty the Crown did not acquire an absolute title but a "radical title," and radical title is subject to native title rights where those rights had not been validly extinguished. (Advocates of native title, especially in Africa, are well advised to take note!) In other words, the court accepted that a modified doctrine of tenure operated in Australia, and that the law of tenure (as a product of the common law) could co-exist with the law of native title (as a product of customary laws and traditions).

The Mabo decision presented many legal and political problems for the Federal Government and the states, including:

- a requirement to make provision for permitted future development of land affected by native title;
- establishing a process for speedy and efficient determination of issues concerning native title.

In response to the Mabo judgment and to potential and subsequent reactions, the Australian Federal Parliament enacted the Native Title Act of 1993.[109] The law was amended in 1998 following the 1996 Wik decision.[110] The Act established a statutory definition of native title and provided a means for establishing a Native Title Tribunal to determine native title, validate acts of recognition and provide for compensation.

MALAYSIA

Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor

In 1997 *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor*[111] established the concept of native title in Malaysian law. The decision was quickly followed by two others: *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*[112], a case involving the logging of *Iban* forest land in Bintulu, Sarawak, and *Sagong bin Tasi & Ors v. Kerajaan Negeri Selangor & Ors,*[113] a case involving the taking of *Temuan* land in Sepang in conjunction with the building of the Kuala Lumpur International Airport. All three cases embraced the doctrine of native title and took significant steps to extend its boundaries.

In *Nor Anak Nyawai*, the High Court recognized the indigenous community's legal control over its communal forest land and enjoined further logging by a timber company, the defendant. In *Sagong bin Tasi*, the High Court recognized native title owned by the *Temuans*, an indigenous people of peninsular Malaysia. It determined that native title included not only usufructory rights described in *Adong*, but also ownership of at least a portion of the plaintiffs' ancestral domain.

The cases illustrate the markedly different legal obstacles facing the *Orang Asli* of the Malay Peninsula and the indigenous peoples of Sarawak and Sabah. In *Nor Anak Nyawai,* the decision rested on the High Court's assessment of Sarawak's extensive history of regulations on land use and whether they served to extinguish the plaintiffs' claim to native title, which they did not.[114]

NEW ZEALAND

On June 28, 2008, seven Maori tribes signed New Zealand's largest ever settlement on grievances over the loss of land and fishery rights during European settlement in the 19th century. The US$319 million agreement is being recognized as a breakthrough in reconciliation. It will "transfer ownership" of 435,000 acres (176,000 ha) of plantation forest and associated rents from the central government to seven North Island tribes, which include more than 100,000 people.

Maori lands and forests were once legally protected by the founding Treaty of Waitangi, signed with European settlers in 1840, but huge tracts of land were later taken for settlement. The Maori have been pursuing grievance claims since the early 1840s. The Central North Island Forests Land Collective Settlement Act of 2008,[115] known informally as the Treelords Deal, restores land rights to the Central North Island Forest Iwi Collective, an organization made up of Maori *iwi,* or social units.

Under the settlement, negotiated by the Office of Treaty Settlements, all rentals and other income from the land will be held in a newly established trust holding company, whose shareholders are the Maori *iwis*.[116]

The Marlborough Sounds case has recognized the 'native title' aspects of the New Zealand settlement. The Chief Justice of the New Zealand Court of Appeal found that Maori rights to the foreshore and seabed had never been clearly extinguished, and thus may still exist. These rights predate colonization and are not dependant on rights accrued under the treaty.[117]

PAPUA NEW GUINEA (PNG)

Approximately 97 percent of Papua New Guinea's total land area is covered by undocumented, customary aboriginal rights that are legally recognized by the national government. (Similar situations exist in most Pacific Island nations.) This area encompasses the largest remaining rainforest/wilderness in the Asia/Pacific region, and is third largest in the world. It is also home to approximately 70% of the nation's traditional communities.

The PNG government has attempted over the past decades to register, and in some instances subordinate, customary rights to lands, forests and other natural resources.[118] In 1998, for example, the government through a legislative act ostensibly acquired title to land belonging to the Maisin people without their knowledge or consent. It then leased 38,000 hectares (94,000 acres) in the Collingwood Bay area to two companies. These companies entered into an agreement with a Malaysian logging company to clear-cut the forests for the purpose of developing a palm oil plantation. The Maisin did not learn of these dealings until barges arrived in Collingwood Bay carrying bulldozers and other logging equipment in June of 1999.

For the Maisin, this all-too-often surreptitious effort in PNG to illegally land grab customary property rights was stymied in May 2002 when a Judge of the National Court of PNG ruled that the government had illegally sold to private development and logging companies property rights to commercially exploit the customary land of the Maisin people. The court cancelled the Government's leases and issued an order enjoining the companies from entering the land without the written consent of the local communities. This decision legally empowered the Maisin to continue protecting their forests as they have for generations. They own over 200,000 hectares (500,000 acres) and have rejected the use of their ancestral domain for large-scale industrial logging or agricultural development.[119]

PHILIPPINES

Cruz vs. Secretary of DENR

The struggle in the Philippines to gain respect for the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) goes back many decades. The greatest legal accomplishment, supported by a broad-based civil-society movement, was enactment of the 1987 Constitution of the Philippine Republic, its first ever promulgated without colonial or military manipulation. Building on several sections within the constitution, the Philippine Congress responded in 1997 by enacting the Indigenous Peoples Rights Act (IPRA).[120]

IPRA is another legal milestone in the global struggle to gain recognition of indigenous and other CBPRs. IPRA provides that rights of ownership and possession held by ICCs/IPs (aka tribal groups) to their ancestral domains shall be recognized and protected. This includes the inherent right to self-governance and self-determination, and respect for indigenous values, practices, institutions and CBPRs. Consequently, the state must guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development.

The Republic of the Philippines is likewise obliged to prevent by law any form or coercion against ICCs/IPs. It shall also respect, recognize and protect the right of ICCs/IPs to preserve and protect their culture, traditions and institutions. All rights recognized under the IPRA shall be considered in the formulation and application of national plans and policies.

The Philippine Supreme Court upheld the constitutionality of the IPRA in a landmark decision in December 2000.[121] The National Commission on Indigenous Peoples (NCIP) is the government institution responsible for implementation.[122] Huge obstacles remain in terms of legally delineating, documenting and otherwise recognizing ancestral domains, primarily in terms of adequate funding and political will. Nevertheless, as of 2010, 156 Certificate of Ancestral Domain Titles (CADTs) covering over 4,259,616 ha have already been delineated and covered by CADTs. The number of beneficiaries exceeds 912,000. [123]

3 Conclusion

Throughout the world the legal rights of indigenous peoples and some other local ancestral communities to native/aboriginal title have steadily been gaining recognition and strength. This important development is highlighted in this paper and many examples and evidence have been presented.

In recent years there have been an extraordinary number of legally supportive developments on international and national levels. As such, it can now be credibly asserted that international law, including international customary law, mandates legal recognition of native/aboriginal title. Whether policy makers, political leaders and economic elites respect and implement this emerging and hopeful new international legal norm remains to be seen.

Advocates for legal recognition, meanwhile, have much reason to be hopeful. There also remains much work to do. As this paper demonstrates, international law is more supportive of the legal recognition of native/aboriginal title than ever before. The on-the-ground global significance of this fact has yet to be clearly established.

ENDNOTES

1 In this essay "law" is understood to be a process of decision making by those who are politically relevant, i.e., a process of authoritative decision-making. See W.M. Reisman, et al. *International Law in Contemporary Perspective*. New Haven: Foundation Press (2004); W.M. Reisman and A.M. Schreiber. *Jurisprudence: Understanding and Shaping Law,* New Haven Press (1987). E.A. Hoebel asserted in *The Law of Primitive Man* that laws and legal systems have four basic elements: 1) norms; 2) regularity of enforcement/application; 3) judgment mechanisms; and 4) enforcement. *Cambridge*, MA: Atheneum (1954). Enforcement has long stood out as the weakest aspect of international law. Publicity and social ostracism, however, have emerged as important modes for promoting international law enforcement. N.B. The author has paraphrased some of Hoebel's language. He finds the term "primitive" to be inappropriate and arrogant in the context of 2011. Over a half-century ago Hoebel was using language that other social scientists of the time were also using widely. It merits note that Hoebel's writings reflect fascination and admiration for non-dominant indigenous peoples and cultures.

Conventional international lawyers would no doubt argue in favor of a more structured and hierarchical understanding of international laws. They tend to categorize international laws as being "hard" or "soft," with only certain international law norms, e.g. conventions, International Court of Justice decisions, and arguably covenants, providing standards that are legally binding (despite often being unenforced and sometimes unenforceable). This paper, by contrast emphasizes emerging global trends and commitments by nation-states and international institutions to new and progressive legal norms supportive of human rights and environmental justice, especially recognition of native/aboriginal title. It relies on emerging understandings of international law that are more inclusive and encompassing. These approaches are increasingly freed from historic but now often dated post-WWII theoretical constructions distinguishing hard from soft law. Indeed, in most respects international law remains largely soft. See comments below by the UN Special Rapporteur on Indigenous Issues, footnotes 12 to 15.

2 J. Alcorn and A. Royo, "Conservation's engagement with human rights: "Traction", "slippage", or avoidance? *Policy Matters*, Vol. 15 (2007).

3 The author is indebted to Gregory Maggio for the "tripartite" concept. See footnote 42 below.

4 See Ch. 2.2 below regarding Botswana, South Africa, Australia, Malaysia, New Zealand, Belize, Canada, the USA and the Philippines (a former colony of the USA).

5 See www.un.org/esa/socdev/unpfii/en/drip.html. See also http://www.un.org/News/Press/docs//2007/ ga10612.doc.htm; http://www.iwgia.org/sw248.asp; World Bank Operational Policy 4.10 of 2005.

6 Foundation for International Law and Development (FIELD). Ways for Indigenous Peoples groups to advance adaptation concerns and solutions through international fora (mimeo.). Prepared for the Inuit Circumpolar Council in Alaska (2009).

7 L. Persha, A. Agrawal and A. Chhatre. *Social and Ecological Synergy: Local Rulemaking, Forest Livelihoods, and Biodiversity Conservation*. Ann Arbor: International Forestry Resources and Institutions (2011). http://rightsandresources.org/publication_details.php?publictionID=2233.

8 A. Nelson and K. Chomitz, *Do Protected Areas Reduce Deforestation?: A Global Assessment with Implications for REDD, Washington, DC: World Bank Independent Investment Group* (2009). http://rightsandresources.org/publication_details.php?publicationID=1373. Included in the assessment was proof, using satellite imagery, that biodiversity conservation is higher within indigenous peoples' territories than outside, two times higher than expected. See also World Resources Institute, "The Wealth of the Poor: Managing Ecosystems to Fight Poverty," *World Resources Report 2005*; A. Molnar, S. Scherr and A. Khare. *Who Conserves the World's Forests? Community-Driven Strategies to Protect Forests and Respect Rights*, Washington, DC, Rights and Resources Initiative (2004); Ed Ayres. Mapping the Nature of Diversity: A Landmark Project Reveals a Remarkable Correspondence between Indigenous Land Use and the Survival of Natural Areas (2003) http://www.worldwatch.org/node/533; J. Alcorn, "Indigenous Peoples and Conservation," *Conservation Biology* 424 (1993).

9 The author owes his understanding of the difference between *imperium* and *dominium* to extended conversations during the 1980s with the late professor of Roman law at the University of the Philippines College of Law, Perfecto V. Fernandez.

10 An anonymous reviewer of an earlier draft of this paper observed that "Whereas all peoples (including indigenous peoples) have the right to self-determination, all persons have property rights. The African Charter on Human and Peoples' Rights consciously makes this distinction between the two sets of rights." Native/aboriginal titles are held by peoples and persons.

[11] There are no reliable estimates of the number of original long term occupants who would not be widely considered, or in many instances even self-identify, as indigenous. Based on the author's knowledge and experience over three decades working on legal aspects of land and other property rights issues concerning rural people, the number must be in the tens, if not hundreds, of millions of people in various regions of Africa, the Americas, Asia and Europe. A specific example would be the Maroons of Suriname (see *Moiwana Village and Saramaka* below) and Cebuano vegetable farmers on the southern end of the Philippine island of Cebu, who farm on slopes long considered by the Republic of the Philippines (and its colonial predecessors) to be classified public forest (albeit denuded) land. These Cebuano farmers, and millions of other Filipinos like them, are also indigenous, at least in the same way the Irish are indigenous to Ireland and the Kurds to Kurdistan, and are poor and ostensibly "squatters". Some farm the same land as their great-great grandparents, and there are no overlapping claims by any other indigenous ethnic group, only by the state. To argue they are not indigenous because they share the dominant national Hispanicized (Christian) culture is to overlook their poverty and political and legal disenfranchisement.

[12] S.J. Anaya, *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2nd ed. (2004), p. 49.

[13] The title Special Rapporteur is accorded to individuals who have a specific mandate, typically for three years, from the UN Human Rights Council to investigate, monitor and recommend ways to ameliorate and solve human rights problems. Special Rapporteurs are appointed by the UN Secretary General, are independent of governments, and are not financially compensated but can receive personnel and logistical support. Upon governmental invitation Special Rapporteurs often conduct in-country fact-finding missions to investigate allegations of human rights violations. Special Rapporteurs also regularly assess and verify complaints made by alleged victims of human rights violations. Verified complaints result in the issuance of an urgent letter or appeal to the national government where the violation has occurred.

[14] See note 12 at 50 (emphasis in original).

[15] See note 12 at 290.

[16] The Statute of the International Court of Justice recognizes the existence of customary international law in Article 38(1)(b), incorporated by Article 92 into the United Nations Charter: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply…international custom, as evidence of a general practice accepted as law." See also Articles 34 to 38 of the Vienna Convention on the Law of Treaties (1969) at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf and Part II B below.

[17] Different terms are used, depending on locale, to refer to native/aboriginal/original/indigenous/tribal/First Nations title.

[18] Claims Nos. 171 and 172 (2007). See www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

[19] For background on the case in Belize see Ch. 2.2.

[20] See endnote 8 above.

[21] See, e.g., What is an Environmental Service? http://pib.socioambiental.org/en/terras-indigenas/servicos_ambientais/o-que-e-servico-ambiental; Fair Deals For Watershed Services In Indonesia http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=448:fair-deals-for-watershed-services-in-ind; *Payments for Ecosystem Services Getting Started: A Primer. Washington, DC: Forest Trends et al (2008).*

[22] A. Perrault, K. Herbertson and O. Lynch, "Partnerships for Success in Protected Areas: The Public Interests and Local Community Rights to Prior Informed Consent (PIC)," *The Georgetown International Environmental Law Review* Vol. XIX, No. 3 (2007). See also F. McCay, FPIC in International and Domestic Law, Address at the Briefing for World Bank Executive Directors on Free Prior Informed Consent (2004), available at http://www.bicusa.org/bicusa/issues/FPIC_briefing_documents.pdf.

[23] For definition and description of CBPRs see Chapter One of O. Lynch and E. Harwell, *Whose Natural Resources? Whose Common Good? Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia.* Washington, DC and Jakarta: Center for International Environmental Law (CIEL); Lembaga Studi dan Advokasi Masyarakat - The Institute for Policy Research and Advocacy (ELSAM); International Center for Environmental Law (ICEL) and International Center for Research on Agro-Forestry (ICRAF) (2002). http://www.ciel.org/Publications/Whose_Resources_3-27-02.pdf. See also O. Lynch, Promoting Legal Recognition of Community-Based Property Rights, Including the Commons: Some Theoretical Considerations. Presented at a Symposium of the International Association for the Study of Common Property and the Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, 1999 www.indiana.edu/~iascp/symposium99.html. CBPRs could include customary use, collective rights, usufruct rights that may or may not also include rights to underlying land, easements, and in some cases fee simple title; and may or may not be recognized by national or local authorities, and may or may not overlap or

conflict with other property rights or claims.

24 Lynch, Promoting Legal Recognition of Community-Based Property Rights ibid.

25 Office of the High Commissioner on Human Rights, *Human Rights and Transnational Corporations and other Business Enterprises*, Human Rights Resolution 2005/69, UN Doc. E/CN.4/2005/L.10/Add.17 (April 20, 2005).

26 See A. Perrault et al. at note 22 above.

27 IUCN, WCPA & WWF, Joint Policy Statement on Indigenous and Traditional Peoples and Protected Areas: Principles and Guidelines (1996). http://www.ww.fi/www/uploads/pdf/indigenous_people_people_policy.pdf.

28 The UN Covenant on Civil and Political Rights states unequivocally in Part Three, Article 6 that "Every human being has an inherent right to life." For a list of internationally recognized human rights instruments see http://umn.edu/humanrts/links.

29 The 1993 Vienna Declaration and Program of Action states in Part I, para. 11 that "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.

30 The Preamble of the UN International Convention of Civil and Political Rights affirms that this right to human life "arises from the inherent dignity of the human person."

31 www.un.org/documents/ga/res/41/a41r128.htm. The charter of the UN includes development as among the goals of its agenda for economic and social development. Article 23 of the Declaration on the Rights of Indigenous Peoples elaborates: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions." The African Charter on Human and Peoples' Rights states in its Preamble "it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."

32 Article 25 of the UN Covenant on Civil and Political Rights promotes democratic government based on the consent of people and in conformity with the principles of the Covenant. The Covenant is largely concerned with elections, rights to vote, run for office, assemble, etc. Remarkably, except for UN DRIP and the Aarhus Convention for Europe, as of 2010 there is no widely recognized right in international law ensuring that individuals and local communities can participate in environmental decisions that directly impact on their lives and livelihoods.

33 Article 20, UN Universal Declaration of Human Rights. Article 20 of the UN Covenant on Economic, Social and Cultural Rights contains some of the most significant international legal provisions relevant to this paper, including rights to social protection, to an adequate standard of living, to education and enjoyment of the benefits of cultural freedom and scientific progress. It also provides equal rights for women and men; the right to just and favorable conditions of work; the right to protection and assistance to the family; the right to adequate standard of living; the right to education; the right to take part in cultural life; and the right to enjoy the benefits of scientific progress and its applications. These rights were reaffirmed anew a half century later in the 2007 UN DRIP.

34 Article 19, UN Universal Declaration of Human Rights.

35 Article 6(1), European Convention on Human Rights.

36 Article 8(j), UN Convention on Biodiversity. See also P. Gepts. "Who Owns Biodiversity and How Should the Owners Be Compensated," *Plant Physiology* , Vol. 134, pp. 1295–1307 (April 2004) http://www.plantphysiol.org.

37 UN Declaration on the Right of Indigenous Peoples, Article 29.

38 The right to free and prior informed consent (FPIC) is found in various instruments, including the UNDRIP. An earlier indicator of the right can be found in the Convention on Biological Diversity in regards to indigenous peoples access and benefit sharing of genetic resources. FPIC ensures a formal role for local people —and some form of veto power—in consultations and decisions regarding local development and conservation projects. It is intended to secure the rights of indigenous peoples and local communities: their rights to self-determination, to control access to their land and natural resources, and to share in the benefits when these resources are utilized by others. See A. Perrault et al. at note 22.

39 Article 18, UN Universal Declaration of Human Rights.

40 See D. Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity*, United Nations Background Note (1995) http://www.un.org/rights/dpi1627e.htm.

41 http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503.

42 O. Lynch and G. Maggio. Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society. Paper prepared for the Earth Council, Costa Rica and the World Resources Institute (1996) www.ciel.org/Publications/publac.html.

43 See Ch. 2..

44 http://www.un.org/esa/socdev/unpfii/en/drip/html.

45 UNDRIP had the support of 143 member states; only four voted no, including the USA, and all four have now changed their votes to the affirmative. On April 23, 2010, within a week after New Zealand (and previously Australia) reversed its position and supported the Declaration, the U.S. ambassador to the UN announced that the United States was undertaking a review of its opposition. See http://www.blogs/alternet.org/speakeasy/2010/04/24/united-states-re-examines-opposition-to-un-declaration/. Canada and the USA have since switched their votes to the affirmative. www.survivalinternational.org/news/. Eleven states, including Kenya, Nigeria, the Russian Federation, Ukraine and Columbia abstained, or were not present. i.e., absent, during the vote, such as Ethiopia, Cote d'Ivoire, Chad, Somalia, Uganda, Papua New Guinea and several other Pacific Island nations. www.un.org/News/Press/docs//2007/ga10612.doc.htm.

46 http://www.un.org/esa/socdev/unpfii/en/drip.html. Previously International Labor Organization Convention No. 169 was the leading and most explicit international law instrument specifically focused on the rights of indigenous and tribal peoples. http://www.ilo.org/ilolex/convde.pl?169.The Convention for the Elimination of All Forms of Racial Discrimination has also been interpreted in some instances as, among other things, benefiting indigenous peoples and some other local communities. http://www2.ohchr.org/english/law/cerd.htm.

47 http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm. Convention No. 107 has been ratified by 27 countries; Convention No. 169 has been ratified by 20 countries.

48 The two conventions, especially the provisions on land, territories and resources, have a wide coverage and are similar. ILO Convention No. 107 assumed the eventual "integration" of indigenous and tribal peoples. Convention No. 169 does not.

49 http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml.

50 U.N. Doc A/CON.166/7/Annex, available at http://www.sd-commission.gov.uk/events/apr01/unpack.

51 http://www.un.org/documents/ga/res/spec/aress19-2.htm. Section III, A, para. 23.

52 http://www.un.org/events/wssd.

53 U.N. Doc A/CONF 165/15 Annex, available at http://www.agora21.org?habitat2/a01a.html.

54 See, e.g. R. Mearns and A. Norton (eds.), *Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World*. Washington, DC: The World Bank (2010).

55 Article 8(j) of the Convention provides that "Each Contracting Party shall, as far as possible and as appropriate … subject to its national legislation, *respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity* and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and *encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practice* (emphasis supplied)." http://www.cbd.int/convention/.

56 http://unccd.int/convention/text/convention.php. Part III, Article 10, (f) obligates state signatories to "*provide for effective participation* at the local, national and regional levels of non- governmental organizations and *local populations, both women and men, particularly resource users, including farmers and pastoralists and their representative organizations*, in policy planning, decision-making, and implementation and review of national action programmes (emphasis supplied)."

57 The Aarhus Convention mandates wide access within Europe to environmental information, participation and justice. http://www.unece.org/env/pp/documents/cep43e.pdf.

58 Adopted at the 17th plenary meeting of the World Summit on Sustainable Development, on 4 September 2002; for the discussion, see chap. VIII of the Summit Report. http://www.un.org/events/wssd.

59 Jenny Springer, WWF Director, Rights and Livelihoods, Rights Principles and Safeguards in REDD+ - NGO approaches. Paper presented at a RRI Workshop, May 12, 2010, Washington, DC. See also footnote 27 above.

60 See footnote 23 above. See also O. Lynch "Concepts and Strategies for Promoting Legal Recognition of Community-Based

Property Rights: Insights from the Philippines and Other Nations," in *Communities and Conservation: Histories and Politics of Community-Based Natural Resource Management*, J.P. Brosious, A. Tsing and C. Zerner, eds. Rowman Altamira (2005); A. White and A. Martin, *Who Owns the World's Forests? Forest Tenure and Public Forests in Transition.* Washington, DC: Forest Trends and Center for International Environmental Law (2002)

61 975 ICJ 12, 37039 (1975). http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=69&PHPSESSID9f70fad1881d531ae&case=61&code=sa&p3=5. More recently in 2010 the ICJ issued an advisory opinion on Kosovo concluding that local indigenous groups have a right in international law to declare their independence from subjugating neo-colonial states. See http://www.icj-cij.org/docket/index.php?pl=3&p2=4&k=21&case=141&code=kos&p3=0.

62 http://cidh.oas.org. See also http://www.corteidh.or.cr/bus_temas_result.cfm.

63 Caso de la Comunidad Mayagna (Sumo) Awas Tingni. Fondo, Reparaciones y Costas. Sentencia de 31 de Agosto de 2001. http://hrlibrary.ngo.ru/iachr/E/tingni9-6-02.html. See also http://www.cedha.org.ar/curiae1.html.

64 www.hrcr.org/docs/American_Convention/oashr.html.

65 See http://www.rightsandresources.org/blog.php?id=380.

66 2005 Inter-Am Ct. H.R. No. 145 (June 15). See http://www.corteidh.or.cr/docs/casos/articulos/ seriec_145_ing.pdf. See also http://www.forestpeoples.org/documents/law_hr/ suriname_iahcr_moiwana_summ_aug05_eng.shtml.

67 http://www.hrcr.org/docs/American_Convention/oashr.html.

68 2007 Inter-Am Ct. H.R. No. 172 (November 28). http://www.corteidh.or.cr/docs/casos/articulos/ seriec_172_ing.pdf.

69 See footnotes 47 and 48 above.

70 R. Price. "Contested Territory: The Victory of the Saramaka Peoples vs. Suriname." http://www.richandsally.net/files/Victory_of_Samarakas_vs_Suriname.pdf.

71 http://www.forestpeoples.org/documents/s_c_america/suriname_iachr_12_saramaka_clans_mar06_eng.pdf.

72 See footnote 67 above.

73 Paragraph 257.

74 Paragraph 260.1 and 3.

75 See http://www.ciel.org/Hre/hrecomponent2.html. See also M.Orellana, Indigenous Peoples, Energy and Environmental Justice: The Pangue/Ralco Hydroelectric Project in Chile's AltoBioBio, mimeo. (2004).

76 On May 27, 2009 the Commission declared Southern Cameroonians "a people," the culmination of a six year struggle against the Republic of Cameroon, See http://www.hbrief.org/2010/01/collective-rights-but-no-independence-for-sothern-cameroon-2/.

77 Communication 276/03 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya. See also "Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's work on indigenous peoples in Africa" (2006) http://www.achpr.org.

78 See Minority Rights Group International ‹http://www.minorityrights.org/7407/trouble-in-paradise/meet-the-endorois.html.

79 See, e.g., K. Hite, "Back to the Basics: Improved Property Rights Can Help Save Ecuador's Rainforests," *Georgetown International Environmental Law Review*, Vol. 16, p. 763 (2004).

80 O.J. Lynch and K. Talbott, *Balancing Acts: National Law and Community Based Forest Management in Asia and the Pacific,* Washington, DC: World Resources Institute (1995).

81 Lynch and Talbott (1995), footnote 52.

82 A decision on the constitutionality of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act of 2006, which would change the legal environment in India, was pending as of March 2011.

83 L. Wiley "Can the continent find solutions to its colonial land ownership legacy?" *ITTO Tropical Forest Update,* Vol. 19, No. 2, Table 1, p. 10 (2009).

84 W. Sunderlin, J. Hatcher and M. Liddle. *From Exclusion to Ownership? Challenges and Opportunities in Advancing Forest Tenure Reform*, Washington, DC: Rights and Resources Initiative (2008), pp. 26-28.

85 See Tropical Forest Tenure Assessment: Trends, Challenges and Opportunities, Rights and Resources Initiative, Washington, DC, USA and International Tropical Timber Organization, Yokohama, Japan (2009), pp. 12-13.

[86] The following discussion of domestic/national law is solely arranged alphabetically by region, and not by strength of reasoning or potential importance to international law.

[87] See February 2010 Advance Report of the UN Special Rapporteur on Indigenous Rights calling on the Botwana Government to do more for Botswana's non-dominant indigenous tribes. http://www.un.org/apps/news/ story.asp?NewsID=33889&Cr+indigenous&Cr1. See also http://survivalinternational.org/tribes/bushmen.

[88] http://www.achpr.org/english/Press%20Release/press%20release_bushman_botswana.htm.

[89] http://www.afrol.com/articles/37150.

[90] http://www.lrc.org.za/judgments/149-2004-04-29-richtersveld-judgment-cc.

[91] http://www.lrc.org.za/Docs/Judgments/Richtersveld_v_Alexor.pdf. See generally, www.supremecourtofappeal.gov.za.

[92] Claims Nos. 171 and 172 (2007). See www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

[93] Memorandum to the Katoomba Group by R. Sales. V. Otsubo and P. Frederrighi, Trench, Rossi e Watanbe Advogados associated with Baker and Mackenzie International (mimeo.), November 13, 2008.

[94] Chapter VIII, Article 231, para. 2. Article 24 of the Indians Statute states that results of natural resource exploitation shall belong to the Indians. *Ibid*.

[95] See footnote 92 above.

[96] See http://www.survivalinternational.org/news/4354; http://rightsandresources.org/blog.php?id=404.

[97] Citing a report by the Insituto Socioambiental http://www.socioambiental.org at http://www. internationalrivers.org/blog/glenn-switkes/raposa-serra-do-sol-pyrrhic-victory-indigenous=peoples-brazil.

[98] 3 S.C.R. 1010 (1997) http://www.csc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.html.

[99] Delgamuukw p. 76

[100] Delgamuukw p. 36. See G. Pechlaner and D. Tindall, "Changing Contexts: Environmentalism, Aboriginal Community and Forest Company Joint Ventures, and The Case Of Iisaak." http://courses.forestry.ubc.ca/Portals/35/docs/cons%20503%202006/tindalll/Pechlaner%20and%20Tindall%20Drafto7.doc.

[101] http://www.nucj.ca/library/bar_ads_mat/Nunavut_Land_Claims_Agreement.pdf.

[102] http://www.laa.gov.nl.ca/laa/liaclaims/default.htm. For background, analysis and updates of these and other agreements with Canadian First Nations see Land Claims Agreement Coalition, http://www.landclaimscoalition.ca.

[103] See Pehuenche and the "Friendly Settlement" with Chile in Ch. 1.2.

[104] 21 US Reports 543 (1823).

[105] See e.g., N.J. Newton, "Federal Power over Indians: Its Sources, Scope and Limitations," *University of Pennsylvania Law Review*, Vol. 132 (1984).

[106] The Uttar Pradesh state government invoked the 2006 Indian Forest Rights Act and recognized ownership rights over 3258 acres held by tribal peoples. A. Tripathi, "UP tribals get forest land ownership," *The Times of India*, December 22, 2009. A decision on the constitutionality of the act is pending as of October 2010 in the Supreme Court of India. See also Cambodia – Indigenous People NGO Networrk (IPNN) "The Rights of Indigenous Peoples in Cambodia" (2010) http://www.elaw.org/node/5349.

[107] (No. 2) (1992) 175 CLR 1. http://austlii.law.uts.edu.au/au/cases/cth/high_ct/175clr1.html. See generally www.mabonativetitle.com.

[108] A Latin expression derived from Roman Law and translated by European colonialists as "empty land" and "land belonging to no one". See Lindley, M. F., *The Acquisition and Government of Backward Territory*, Longmans, Green & Co. Ltd., London, 1926.

[109] See www.weblaw.edu.au/display_resource.phtml?WebLaw_Page=Native+Title.

[110] Wik Peoples v. Queensland, 187 CLR 1 (1996). http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1996/40.html?query=wik%20and%20peoples. Statutory pastoral leases under consideration by the court did not confer rights of exclusive possession on the leaseholders. As such, native title rights can co-exist depending on the terms and nature of a particular pastoral lease.

[111] *Malaysia Law Journal* (*MLJ*), Vol. 1 at 418 (1997).

[112] *MLJ, Vol. 6at* 241 (2001).

[113] *MLJ, Vol. 2 at* 591 (2002).

[114] See Peter Crook, "After Adong: The Emerging Doctrine of Native Title in Malaysia," *Journal of Malaysian and Comparative Law, Vol. 32* (2005). http://www.commonlii.org/my/journals/JMCL/2005/index.html. See also Borneo Research Institute http://brimas.www1.50megs.com/.

[115] http://www.legislation.govt.nz/act/public/2008/0099/latest/DLM1378405.html.

[116] http://www.rightsandresources.org/blog.php?id=342.

[117] Ngati Apa, et al v AG & Ors 19 June 2003 New Zealand Court of Appeal.

[118] O. Lynch and A. Marat, "A Review and Analysis of National Laws and Policies Concerning Customary Ownership and the Conservation and Sustainable Development of Forests and other Biological Resources," *Papua New Guinea Conservation Needs Assessment*. Boroko: Government of Papua New Guinea Department of Environment and Conservation (1992).

[119] See http://www.elaw.org/node/897. On May 28, 2010 the PNG Parliament enacted a new law that would protect corporations exploiting natural resources by prohibiting litigation related to environmental degradation and landowner abuse, thereby potentially undermining the indigenous, and typically undocumented, community-based property rights of PNG's local clans. A case is now pending in PNG's Supreme Court. See J. Hance, "Papua New Guinea strips communal land rights protections, opening door to big business" June 30, 2010 http://news.mongaybay.com/2010/0630-hance_png_amendment.html.

[120] Republic Act No. 8371 (1997) www.humanrights.gov.ph/index.php?categoryid=34.

[121] Cruz vs Secretary of Environment and Natural Resources http://www.sc.judiciary.gov.ph/jurisprudence/2000/dec2000/135385.html (2000).

[122] http://www.ncip.gov.ph/.

[123] Certificates of Ancestral Domain Title (CADT) issued from 2002-2010. National Commission on Indigenous Peoples Ancestral Domain Information System. http://www.202.57.46.78/adis/Public/ ApprovedCADTSummary.aspx. "The overall numbers seem high."

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