

# Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level

Katja Göcke\*

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\* Ass. Jur., LL.M. (University of Sydney), Senior Research Fellow at the Institute for International Law and European Law, Faculty of Law, Georg-August University of Goettingen, Germany.

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## Abstract

Today, it is generally recognized that the relationship to land forms the basis of an indigenous people's identity, and that indigenous peoples' cultures cannot be preserved without a certain degree of control over land and natural resources. In the course of colonization, however, indigenous peoples lost ownership and control over most of their ancestral lands, and from the end of the 19th century onwards the existence of inherent indigenous land rights, i.e. rights not derived from the colonial powers but rooted solely in the use and ownership of the land by indigenous peoples since time immemorial, had been completely denied. This began to change in the 1960s. Due to increased pressure by national courts and international institutions, state governments started to recognize the continued existence of inherent indigenous land rights and to develop different policies to protect them. This paper looks at how indigenous peoples' land rights are nowadays recognized and protected in the United States of America, Canada, Australia, and New Zealand, and whether the different national approaches are in accordance with international legal standards. It will be shown that none of the States subject to this study acts completely in accordance with its obligations under international law, but that nevertheless all States have some strong points regarding the realization and protection of indigenous land rights and can learn from each other's experiences.

## A. Introduction

It is estimated that worldwide there are between 300-500 million people of indigenous origin, living in approximately 3,000-5,000 indigenous communities in more than 70 States.<sup>1</sup> Their traditional habitats range from Arctic

<sup>1</sup> M. D. Cole, *Das Selbstbestimmungsrecht indigener Völker: Eine völkerrechtliche Bestandsaufnahme am Beispiel der Native Americans in den USA* (2009), 194; T. Koivurova, 'From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)Gain Their Right to Self-Determination', 15 *International Journal on Minority and Group Rights* (2008) 1, 1, 21; European Parliament, *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, 9 February 1994, OJ C61/69, A; European Commission, *Working Document on Support for Indigenous Peoples in the Development Co-operation of the Community and the Member States*, 11 May 1998, SEC(1998) 773, 1. However, the numbers vary significantly. For example, G. Alfredsson, 'Indigenous Populations, Protection', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. II, (1995), 946, 946 estimates the number of indigenous persons at 100-200 million, whereas B. Broms, 'The Rights of Indigenous Peoples: Recognition of Collective Rights', 3 *The Finnish Yearbook of*

permafrost zones to deserts and tropical rainforests. Since indigenous peoples have adapted to these diverse living conditions, their cultures, societies, ways of life, and forms of land use differ significantly. Yet, despite these differences, all indigenous peoples worldwide have one thing in common: they all share a deeply felt spiritual attachment to their ancestral territories, as well as the idea of collective stewardship over land and its resources. This special relationship lies at the core of an indigenous peoples' identity. Since indigenous peoples define themselves as peoples through their common genealogical descent from their ancestral lands and its continued collective use by the group, indigenous peoples' cultures cannot survive in the long term without access to, and a certain degree of control over, their traditionally used lands and resources.<sup>2</sup>

Yet in the course of colonization, indigenous peoples lost most of their ancestral lands – by conquest, cession, or occupation of their lands as *terrae nullius*. This loss of land has led to loss of identity, marginalization, and poverty. As a result, indigenous peoples all over the world have become disadvantaged by almost every standard compared to the dominant society, including income, education, housing, standard of health, and life expectancy,<sup>3</sup> and thus are often referred to as “Fourth World”.<sup>4</sup> Despite this desperate situation, the interests and demands of indigenous peoples have for a long time been completely disregarded on the national and international level. Instead, indigenous peoples were regarded as backward peoples who – for their own benefit – had to be assimilated into mainstream society to overcome their social disadvantages. This began to change in the 1960s. In the course of decolonization, the civil rights movement in the US and the increased importance of human rights, indigenous peoples began to organize themselves nationally and internationally and to draw the attention of the national public and the world community to their desperate situation.<sup>5</sup> Because of the importance of land for an indigenous people's culture

*International Law* (1992), 298, 304 estimates their number at 250 million.

<sup>2</sup> See e.g. E. Dannenmaier, 'Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine', 86 *Washington University Law Review* (2008) 1, 53, 84-88 with references to statements of indigenous groups and advocates.

<sup>3</sup> See e.g. UN Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (2009).

<sup>4</sup> The term “Fourth World” was coined by George Manuel in G. Manuel & M. Posluns, *The Fourth World: An Indian Reality* (1974) and has since been used to describe the situation of indigenous peoples. See also C. J. Iorns, 'Indigenous Peoples and Self Determination: Challenging State Sovereignty', 24 *Case Western Reserve Journal of International Law* (1992) 2, 199, 201-202.

<sup>5</sup> See e.g. S. J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (2004), 56 [Anaya, *Indigenous Peoples in International Law*]; P. Thornberry, *Indigenous Peoples and*

and identity, the realization of the right to own, use, and live on their ancestral lands has been at the center of their struggle for recognition and enforcement of their rights.

This paper will look at the question of how indigenous land rights are realized in different national jurisdictions, and whether the level of protection and enforcement awarded to indigenous land rights is in accordance with minimum standards under international law. For the sake of clarity and brevity, the comparison of national legal frameworks will be limited to Australia, New Zealand, Canada, and the USA. The selection of these States as subjects of this study was, on the one hand, made for reasons of comparability: Australia, New Zealand, Canada, and the USA were all – at least predominantly – colonized by Great Britain. All of these States are typical settler States, and thus share the same historical path. On the other hand, the respective States have in the past led the way in the development of rights of indigenous peoples, and thus developments in these States can indicate future trends regarding rights of indigenous peoples worldwide.

The paper will be structured as follows: first, a historical overview of the indigenous peoples' loss of their ancestral lands during colonization will be given (B.). In a next step, the recognition, protection, and enforcement of indigenous peoples' land rights under the current national legal systems of the respective States will be surveyed and compared (C.). Subsequently, it will be analyzed whether the several national instruments for the protection and enforcement of indigenous land rights are in accordance with minimum standards under international law (D.). Ultimately, an appraisal will be given (E.).

## B. The Loss of Indigenous Lands During Colonization

In the course of colonization, indigenous peoples lost ownership and control over most of their ancestral lands. Yet the ways in which indigenous peoples lost these lands differ significantly in the different States and regions. Three methods of land acquisition by the colonial powers are to be distinguished: conquest, cession/purchase, and occupation. In addition, some States implemented land reforms to render tribal ownership of land impossible.

As a general principle, the acquisition of title to land by mere occupation is only possible if the land had previously belonged to no one, i.e. if it constituted

*Human Rights* (2002), 21; D. Sanders, 'The Legacy of Deskaheh: Indigenous Peoples as International Actors', in C. Price Cohen (ed.), *The Human Rights of Indigenous Peoples* (1998), 73, 75-76.

*terra nullius*. In some regions, however, the colonial powers applied a legal fiction to extend the *terra nullius* doctrine to regions inhabited by indigenous peoples. Indigenous peoples were classified as “savages”, who were to be treated as legally non-existent. Consequently, indigenous peoples were entirely denied the legal capacity to claim rights over their traditional territories. The best-known example for indigenous territories being treated as *terrae nullius* is Australia. The Australian Aboriginal peoples were regarded as “so entirely destitute [...] even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded”,<sup>6</sup> and it was assumed that “[t]he right to the soil, and of all lands in the Colony, became vested immediately upon its settlement, in His Majesty, in the right of his crown, and as representative of the British Nation”.<sup>7</sup>

The *terra nullius* concept was also systematically pursued in the Canadian Provinces of British Columbia<sup>8</sup> and Quebec,<sup>9</sup> in the Canadian Maritime Provinces,<sup>10</sup> and in the US State of California.<sup>11</sup> In addition, land rights of indigenous peoples were also disregarded in the northern regions, namely in the US State of Alaska,<sup>12</sup> and in Canada north of the 60th parallel<sup>13</sup> due to indifference and neglect by the colonial powers, which initially did not envisage

<sup>6</sup> British Parliamentary Papers, (1837) Vol. VII (425), 82. The text can also be found in M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1926), 41.

<sup>7</sup> *R v. Steel*, Supreme Court of Van Diemen’s Land, (1834) 1 Legge 65, 68-69.

<sup>8</sup> See S. Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People From Australia to Alaska* (2007), 195-230 [Banner, *Possessing the Pacific*].

<sup>9</sup> Algonquin Nation, ‘Presentation to the Members of the Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty’ (4 February 1992), available at <http://cwis.org/fwdp/Americas/algonqin.txt> (last visited 15 June 2013), para. 2; R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (1990), 14-15. This assumption was, however, flawed. See Algonquin Nation, *supra* note 9, para. 2; T. Morantz, ‘Aboriginal Land Claims in Quebec’, in K. Coates (ed.), *Aboriginal Land Claims in Canada: A Regional Perspective* (1992) [Coates, *Aboriginal Land Claims in Canada*], 101, 103.

<sup>10</sup> See N. E. Ayers, ‘Aboriginal Rights in the Maritimes’, 2 *Canadian Native Law Reporter* (1984) 1, 1; R. H. Bartlett, *Indian Reserves in the Atlantic Provinces of Canada* (1986).

<sup>11</sup> Banner, *Possessing the Pacific*, *supra* note 8, 161-194.

<sup>12</sup> *Ibid.*, 287-314.

<sup>13</sup> K. Coates, ‘Best Left As Indians: The Federal Government and the Indians of the Yukon, 1894-1950’, 4 *The Canadian Journal of Native Studies* (1984) 2, 179, 181; W. R. Morrison, ‘Aboriginal Land Claims in the Canadian North’, in Coates, *Aboriginal Land Claims in Canada*, *supra* note 9, 167, 168.

settlement of these hostile and barren regions, and thus did not find it necessary to deal with indigenous ownership rights.

In most parts of North America and in New Zealand, however, the colonial powers recognized the rights of indigenous peoples to their ancestral lands. With regard to North America, this is evidenced, *inter alia*, by the *Royal Proclamation* issued by the British Crown in 1763, which explicitly confirmed the Indians' right to their lands.<sup>14</sup> Likewise, with regard to New Zealand, the *Treaty of Waitangi* of 1840, signed by the British Crown and several Maori chiefs and applicable to the whole of New Zealand, guaranteed to the Maori "the full exclusive and undisturbed possession of their Lands".<sup>15</sup>

Occasionally, it was argued that indigenous peoples had subsequently lost these rights as a result of conquest. For example, after the American War of Independence in 1783, several members of the US Congress were of the opinion that the Indians – most of whom had sided with the British – had altogether to be regarded as a defeated people and thus all their lands could be confiscated without compensation.<sup>16</sup> Although such confiscations occurred to some extent,<sup>17</sup> they remained an exception. The same was true with regard to New Zealand. For example, in 1863, the New Zealand Parliament enacted the *New Zealand Settlements Act*<sup>18</sup> in response to the First Waikato War, allowing for the confiscation of Maori lands. Yet, although the New Zealand government subsequently confiscated more than 12,000 km<sup>2</sup>, it later handed back 6,500 km<sup>2</sup> to the Maori owners and paid compensation for another 3,200 km<sup>2</sup>.<sup>19</sup> Since at the time of colonization, the principle of acquired rights or *droits acquis* – i.e. the principle that conquest leaves the property of individuals untouched – was

<sup>14</sup> The text of the *Royal Proclamation* of 7 October 1763 can be found in B. Slattery, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Territories* (1979), 363-369.

<sup>15</sup> *Treaty of Waitangi*, Art 2. The text of the *Treaty of Waitangi* can be found in Schedule 1 of the *Treaty of Waitangi Act 1975* (No. 114).

<sup>16</sup> C. Goldberg, 'Federal Policy and Treaty Making: A Federal View', in D. L. Fixico (ed.), *Treaties With American Indians: An Encyclopedia of Rights, Conflicts, and Sovereignty*, Vol. I (2008) [Fixico, *Treaties with American Indians*], 13, 14.

<sup>17</sup> S. Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (2005), 112-113, 121-124 & 127-129 [Banner, *How the Indians Lost Their Land*].

<sup>18</sup> *An Act to Enable the Governor to Establish Settlements for Colonization in the Northern Island of New Zealand* (3 December 1863).

<sup>19</sup> G. W. Rice, *The Oxford History of New Zealand*, 2nd ed. (1992), 63-67.

already widely recognized as a rule of international law,<sup>20</sup> the amount of land lost by indigenous peoples as a result of conquest is altogether negligible.

Instead, if indigenous peoples' rights to their ancestral lands were recognized by the colonial powers, land was generally acquired through cession treaties and agreements, not through conquest. Both in North America and New Zealand, the Crown reserved for itself the exclusive right to purchase land from indigenous peoples.<sup>21</sup>

Consequently, vast parts of Canada, including the Prairie Provinces and considerable parts of Ontario and the Northwest Territories, were acquired through treaties between the British or – since the founding of the Dominion of Canada in 1867 – the Canadian government respectively and several Indian tribes.<sup>22</sup> The US government also maintained the British strategy of buying land from the Indian tribes after the country had gained its independence, and between 1789 and 1871, 229 treaties concerning cession of land were ratified by the US Congress.<sup>23</sup> Likewise, in New Zealand, the Crown had until the 1850s acquired virtually the entire South Islands and several thousand square

<sup>20</sup> E. d. Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Vol. III (1758) [1916], Book III, Ch. XIII, 177, para. 200. See also *Treaty of Paris*, 3 September 1783, Arts V & VI, 8 Stat. 80; *Wilcox v. Henry*, Supreme Court of Pennsylvania, (1782) 1 US (1 Dall.) 69, 71; *Johnson v. M'Intosh*, US Supreme Court, (1823) 21 US (8 Wheat) 543, 589; *United States v. Percheman*, US Supreme Court, (1832) 32 US (7 Pet.) 51.

<sup>21</sup> *Royal Proclamation 1763*, *supra* note 14: "We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose". *Treaty of Waitangi*, Art. 2, *supra* note 15: "[T]he Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf".

<sup>22</sup> See map in R. A. Reiter, *The Law of Canadian Indian Treaties*, 2nd ed. (1996), 54.

<sup>23</sup> D. L. Fixico, 'Introduction', in Fixico, *Treaties with American Indians*, *supra* note 16, xxi, xxi.

kilometers of land on the North Island – in total approximately half of the country – through purchases from the Maori.<sup>24</sup>

But although these transactions were based on treaties and agreements, the loss of land can by no means be qualified as voluntary. It can be assumed that many of the early land purchases were based on cultural misunderstandings regarding the meaning of these transactions. Since indigenous peoples had not traded in land prior to the arrival of Europeans, they would not have understood their consent as a permanent relinquishment of their rights to the land but rather as permission for the Europeans to henceforth use the land together with the tribe.<sup>25</sup> But also the treaties and agreements concluded later, at a time when most indigenous peoples would have realized the true meaning of land transactions, cannot be classified as voluntary surrenders of land. The government negotiators often resorted to fraud and other dishonest conduct to buy as much land as possible at the lowest possible price. For example, the negotiators took advantage of the fact that indigenous peoples were not familiar with British terms and units of measurement so that they often ended up selling more land than they wanted to. In addition, in the written documents, the government negotiators often unilaterally diverted from the previous oral agreements capitalizing on the fact that most indigenous negotiators were not able to read. Furthermore, indigenous negotiators were bribed or agreements were concluded with individual tribal members who had no authority to sell the land on behalf of the tribe.<sup>26</sup> Some indigenous peoples were also coerced to sell their lands by threat of the use of military force or by threat of withholding the delivery of essential food supplies, leaving many tribes only with the choice to either sign or to starve.<sup>27</sup>

Yet despite the unequal power of the parties and the governments' resort to dishonest negotiation methods, some indigenous peoples were able to hold on to considerable amounts of their ancestral lands. Through efficient organization of their tribal structures, internal unity, and cooperation with other tribes, several

<sup>24</sup> Banner, *Possessing the Pacific*, *supra* note 8, 68.

<sup>25</sup> See Banner, *How the Indians Lost Their Land*, *supra* note 17, 57-59 with further references; Banner, *Possessing the Pacific*, *supra* note 8, 70-72 with further references; M. Craufurd-Lewis, 'Treaties with Aboriginal Minorities', 15 *Canadian Journal of Native Studies* (1995) 1, 1, 43; J. R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, 3rd ed. (2000), 218-220; B. W. Morse, 'Canadian Indian Treaties', in Fixico, *Treaties with American Indians*, *supra* note 16, 209, 214; A. Ward, *National Overview*, Vol. I (1997), 58-59.

<sup>26</sup> Banner, *How the Indians Lost Their Land*, *supra* note 17, 62-74 with further references.

<sup>27</sup> G. Friesen, *The Canadian Prairies: A History* (1987), 150-151.

indigenous peoples – in particular in the western States of the USA and on the North Island of New Zealand – initially resisted attempts by the governments to acquire their lands. This put the governments under pressure. Since there was a steady influx of settlers to these regions and consequently a high demand for more and more land, the New Zealand and the US government decided to choose a new path to overcome this resistance: by way of comprehensive land reforms, the traditional tribal rights to the land were to be exchanged for individual fee simple titles.

These reforms ultimately caused indigenous peoples to lose most of their remaining land. In 1887, the US government enacted the *General Allotment Act* (Dawes Act),<sup>28</sup> which – contrary to previous treaty promises by the US government – allowed for the breaking up of all tribally held Indian reservations and their allotment to individual Indians. After a trust period of 25 years, these allotments were to be converted into fee simple titles and be freely alienable. As a result of the *Dawes Act*, Indians lost ownership over 364,000 km<sup>2</sup> – two thirds of their 1887 land base.<sup>29</sup> To the same end, the New Zealand government enacted the *Native Lands Act* in 1865.<sup>30</sup> Contrary to Article 2 of the *Treaty of Waitangi*, which guaranteed the Maori collective ownership of their lands, their tribally held titles were to be converted into individual and freely alienable ownership titles derived from the Crown. As a result of this land reform, the Maori lost almost two thirds of their remaining land base, in total almost 58,000 km<sup>2</sup>.<sup>31</sup>

Hence, regardless of whether the indigenous peoples' rights to their traditional territories were initially recognized by the colonial powers or whether their lands were treated as *terrae nullius*, indigenous peoples could ultimately not prevent the loss of vast amounts of their ancestral lands in the course of colonization. Eventually, from the end of the 19th century onwards, the existence of inherent indigenous land rights rooted solely in traditional use and ownership was generally denied. Consequently, previous treaties concluded with indigenous peoples were regarded as abrogable or simple nullities.<sup>32</sup>

<sup>28</sup> *Dawes General Allotment Act*, 8 February 1887, 24 Stat. 388; 25 USC 331, ch. 119.

<sup>29</sup> *Cobell v. Babbitt*, United States District Court for the District of Columbia, (1999) 91 F.Supp.2d 1, 8; N. J. Newton *et al.* (eds), *Cohen's Handbook of Federal Indian Law*, 3rd ed. (2005), 1042.

<sup>30</sup> *An Act to Amend and Consolidate the Laws Relating to Lands in the Colony in Which the Maori Proprietary Customs Still Exist, and to Provide for the Ascertainment of the Titles to Such Lands, and for Regulating the Descent Thereof, and for Other Purposes* (30 October 1865) (No. 71).

<sup>31</sup> A. Ward, *National Overview*, Vol. II (1997), 248.

<sup>32</sup> See *Wi Parata v. The Bishop of Wellington*, Supreme Court of New Zealand, (1877) 3 NZ

### C. Today's Recognition and Implementation of Indigenous Land Rights in Comparison

Whereas up until the mid-20th century States completely ignored demands by indigenous peoples to have their inherent rights to their ancestral lands recognized and protected, this began to change after the Second World War. Under the impression of the unprecedented scale of atrocities committed against parts of the own population in National Socialist Germany, there was a general agreement among States that never again shall a State become an instrument to suppress and marginalize certain minorities. In the wake of the decolonization process, the US civil rights movements and the growing importance of human rights, governments and societies began to realize that in the past great injustices had been committed against indigenous peoples, and the keyword of “reconciliation” took center stage in the relationship between national governments and indigenous peoples. In the course of this development, States moved further away from the view that indigenous peoples were primitive and backward societies which for their own good had to be assimilated into mainstream society. Instead, it became increasingly accepted that indigenous cultures had an intrinsic value and were to be preserved for their own sake. States recognized that ownership and control over their traditional land and resources could not only help to solve the massive social and economic problems indigenous peoples are faced with, but also that a certain degree of self-administration and control over land and resources was essential to ensure the survival of indigenous peoples as peoples. Initially, however, States only recognized a moral, not a legal, obligation to realize and protect indigenous land rights. Consequently, governments were hesitant in addressing indigenous peoples' claims. This changed with the emergence of the modern aboriginal title doctrine.

The decision of the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia* is generally regarded as the starting point of the modern aboriginal title doctrine. In its decision, the Canadian Supreme Court stated that at the time of colonization the indigenous peoples of British Columbia held aboriginal rights to their lands – i.e. rights based solely on the use and occupation of the land by indigenous peoples since time immemorial irrespective of the recognition of these rights by the Crown. It further declared

Jur. (NS) 72, 77-78; *St. Catherine's Milling and Lumber Co. v. The Queen*, Privy Council, (1888) 14 App. Cas. 46 (JCPC), 54.

that these rights were not automatically extinguished with the acquisition of British sovereignty.<sup>33</sup> This decision is regarded as a landmark decision since for the first time a supreme court implied that an aboriginal title could still exist over all lands not ceded. In 1986, the New Zealand High Court followed suit in its decision *Te Weehi v. Regional Fisheries Officer* by declaring that “the local laws and property rights of [indigenous] peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty”.<sup>34</sup> In 1992, the High Court of Australia in its famous decision *Mabo v. Queensland (No. 2)* also accepted the existence of inherent indigenous land rights by declaring that the concept of *terra nullius* was “false in fact and unacceptable in [Australian] society”.<sup>35</sup> Instead, it assumed that aboriginal title to land has survived as a “burden on the radical title of the Crown”.<sup>36</sup>

By way of this development the courts provided indigenous peoples with leverage against the governments. Governments were forced to take the land claims of indigenous peoples seriously and to enter into negotiations in order to settle all open land claims. Hence, the recognition of legally enforceable claims on behalf of indigenous peoples and the resulting pressure on governments to negotiate turned indigenous peoples from passive recipients of state benefits to actors with enforceable rights.<sup>37</sup>

## I. Inherent Land Rights

The aboriginal title doctrine was mainly shaped by the Supreme Court of Canada and the High Court of Australia with some decisions also issued by courts in New Zealand and the USA. Yet, although the developments in the several common law States have influenced one another, there is no uniform concept of aboriginal title. Instead, the legal nature and protection of aboriginal title rights, as well as the burden of proof to establish such rights differ significantly among these States.

<sup>33</sup> *Calder v. Attorney-General of British Columbia*, Supreme Court of Canada, [1973] SCR 313, 328, 375 & 390.

<sup>34</sup> *Te Weehi v. Regional Fisheries Officer*, High Court of New Zealand, [1986] 1 NZLR 682, 687. See also *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General*, New Zealand Court of Appeal, [1994] 2 NZLR 20 (CA), 23-24. See also the remarks by M. B. Schroder, ‘On the Crest of a Wave: Indigenous Title and Claims to the Water Resource’, 8 *New Zealand Journal of Environmental Law* (2004), 1, 16.

<sup>35</sup> *Mabo v. Queensland (No. 2)*, High Court of Australia, (1992) 175 CLR 1, para. 39.

<sup>36</sup> *Ibid.*, para. 62.

<sup>37</sup> P. G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (2011), 5.

## 1. Legal Nature

In Canada, New Zealand, and the USA, an aboriginal title is regarded as an exclusive right to the land itself, i.e. the right to the land is not limited to traditional activities.<sup>38</sup> Yet, according to the Supreme Court of Canada, the use of land by aboriginal title holders “must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title”.<sup>39</sup> Hence, the Supreme Court of Canada places restrictions on aboriginal title holders as to the range of permissible uses of the land, which do not apply to fee simple title holders. The US Supreme Court also classifies an aboriginal title as less comprehensive than a fee simple title by holding that an aboriginal title does not constitute “full proprietary ownership” or at least “right to unrestricted possession, occupation and use”,<sup>40</sup> but merely “permissive occupation”.<sup>41</sup> However, as a right to the land itself, an aboriginal title in the Canadian, New Zealand, and US legal systems also includes a right to sub-surface resources.<sup>42</sup>

In contrast, in Australia, an aboriginal – or native – title is merely seen as a bundle of rights which generally gives indigenous peoples only the right to pursue certain activities, which themselves constitute traditional aboriginal rights – e.g. the right to hunt, to fish, to gather, or to perform cultural activities

<sup>38</sup> With regard to Canada, see *Delgamuukw v. British Columbia*, Supreme Court of Canada, [1997] 3 SCR 1010, 1094-1096, paras 138 & 140 [Delgamuukw Case]; regarding the USA, see e.g. *United States v. Shoshone Tribe of Indians*, US Supreme Court, (1938) 304 US 111, 117-118 [Shoshone Tribe of Indians Case]; *United States v. Klamath and Moadoc Tribes*, US Supreme Court, (1938) 304 US 119. See also F. S. Cohen, ‘Original Indian Title’, 32 *Minnesota Law Review* (1947) 1, 28, 55; Newton *et al.*, *supra* note 29, 20-21. With respect to New Zealand, see R. H. Bartlett, *Native Title in Australia*, 2nd ed. (2004), 230-231 [Bartlett, Native Title in Australia]; Schroder, *supra* note 34, 21-22.

<sup>39</sup> *Delgamuukw Case*, *supra* note 38, 1080-1081, para. 111.

<sup>40</sup> *Tee-Hit-Ton Indians v. United States*, US Supreme Court, (1955) 348 US 272, 277 [Tee-Hit-Ton Indians Case].

<sup>41</sup> *Ibid.*, 279.

<sup>42</sup> With regard to Canada, see *Delgamuukw Case*, *supra* note 38, 1086-1087, para. 122; M. A. Stephenson, ‘Resource Development on Aboriginal Lands in Canada and Australia’, 9 *James Cook University Law Review* (2002/2003), 21, 37 & 41-42; Schroder, *supra* note 34, 19. Regarding the US, see S. D. Green, ‘Specific Relief for Ancient Deprivations of Property’, 36 *Akron Law Review* (2003) 2, 245; Newton *et al.*, *supra* note 29, 974, with reference to *Shoshone Tribe of Indians Case*, *supra* note 38, 117-118. With respect to New Zealand, see Bartlett, *Native Title in Australia*, *supra* note 38, 230-231; Schroder, *supra* note 34, 21-22.

– without conferring a right to the land itself.<sup>43</sup> Hence, although an aboriginal title has since the *Mabo* decision in 1992 been recognized in 141 cases over a total area of 20.5% of Australia, this has in most cases only led to the recognition of minimal rights.<sup>44</sup>

## 2. Protection

Under the legal systems of all States subject to this study an aboriginal title is regarded as inalienable.<sup>45</sup> Yet, the overall level of protection afforded to original land rights differs significantly among the States. In Canada, aboriginal title rights are constitutionally protected and therefore can only be extinguished with the consent of the indigenous peoples concerned.<sup>46</sup> This constitutional protection is, however, not regarded as absolute. Whereas aboriginal titles may not be unilaterally extinguished, they may nevertheless be infringed upon by the federal or provincial government if the infringement is “in furtherance of a legislative objective that is compelling and substantial”<sup>47</sup> and “consistent with the special fiduciary relationship between the Crown and aboriginal peoples”.<sup>48</sup> Yet, even before the existence of an aboriginal title has been established, the government has a legal duty to consult with all potential aboriginal title holders and, if appropriate, accommodate their interests before projects potentially affecting these rights might commence.<sup>49</sup>

<sup>43</sup> *Western Australia v. Ward*, High Court of Australia, (2002) 213 CLR 1, 94-95 [Western Australia Case].

<sup>44</sup> Australian Government - National Native Title Tribunal, ‘Information About Native Title: Facts and Figures’ (31 May 2012), available at <http://www.nntt.gov.au/Information-about-native-title/Pages/Factsandfigures.aspx> (last visited 15 June 2013); Australian Government - National Native Title Tribunal, ‘Determinations of Native Title’ (11 January 2013), available at [http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/Determinations\\_map.pdf](http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/Determinations_map.pdf) (last visited 15 June 2013).

<sup>45</sup> See *Delgamuukw Case*, *supra* note 38, 1081-1082, para. 113; *Mabo v. Queensland (No. 2)*, *supra* note 35, paras 53, 63 & 83; *Johnson v. M'Intosh*, *supra* note 20, 574; *Attorney-General v. Ngati Apa*, New Zealand Court of Appeal, [2003] 3 NZLR 643 (CA), paras 16 & 29 [Ngati Apa Case].

<sup>46</sup> *Constitution Act, 1982*, Art. 35 (1) (Schedule B to the *Canada Act 1982* (UK), 1982, ch. 11): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.

<sup>47</sup> See *Delgamuukw Case*, *supra* note 38, 1107-1108, para. 161.

<sup>48</sup> See *ibid.*, 1108-1109, para. 162.

<sup>49</sup> *Haida Nation v. British Columbia (Minister of Forests)*, Supreme Court of Canada, 2004 SCC 73, [2004] 3 SCR 511, 520, para. 10 [Haida Case]; see also *Taku River Tlingit First*

In the USA, on the other hand, an aboriginal title – or original Indian title – is not regarded as a *Fifth Amendment* right.<sup>50</sup> That means it is not protected at all against seizure and extinguishment by the federal government, and such acts are also not compensable.<sup>51</sup> An aboriginal title is to a certain degree protected by the fact that only the federal government and not the individual States or private individuals can infringe or extinguish aboriginal title rights.<sup>52</sup>

Under the Australian legal system, the federal government does not have exclusive competencies regarding indigenous peoples and their land.<sup>53</sup> However, since Section 109 *Commonwealth Constitution* stipulates that federal law takes precedence over state law, the federal *Racial Discrimination Act 1975* (Cth) (RDA), which prohibits discrimination based on racial and ethnic origin and lays down the right to equality before the law,<sup>54</sup> and the federal *Native Title Act 1993* (Cth) (NTA), which regulates that a native title can only be extinguished in accordance with the NTA,<sup>55</sup> prevent States to a certain degree from infringing or extinguishing aboriginal titles.<sup>56</sup> The federal government, on the other hand, can infringe or extinguish aboriginal title rights at any time since the RDA and NTA are not constitutionally

*Nation v. British Columbia (Project Assessment Director)*, Supreme Court of Canada, 2004 SCC 74, [2004] 3 SCR 550, 562, para. 21 [Taku River Case].

<sup>50</sup> Under the *Fifth Amendment*, “[n]o person shall [...] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”.

<sup>51</sup> *Tee-Hit-Ton Indians Case*, *supra* note 40, 285.

<sup>52</sup> See e.g. *Worcester v. Georgia*, US Supreme Court, (1832) 31 US (6 Pet.) 515, 519; *United States v. Santa Fe Pacific Railroad*, US Supreme Court, (1941) 314 US 339, 347; *Oneida Indian Nation v. County of Oneida (Oneida I)*, US Supreme Court, (1974) 414 US 661, 667-668; *County of Oneida v. Oneida Indian Nation (Oneida II)*, US Supreme Court, (1985) 470 US 226, 240; see also Newton *et al.*, *supra* note 29, 971-972.

<sup>53</sup> *Commonwealth Constitution*, Section 51 (63 & 64 Victoria, c. 12 (UK)) in its current version says: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: [...] (xxvi) the people of any race for whom it is deemed necessary to make special laws”. Until a constitutional amendment in 1967, the federal government had no competencies concerning indigenous peoples. See also Bartlett, *Native Title in Australia*, *supra* note 38, 276-277; Stephenson, *supra* note 42, 46-47.

<sup>54</sup> See *Racial Discrimination Act 1975* (Cth) (No. 52), Sections 9 & 10.

<sup>55</sup> See *Native Title Act 1993* (No. 110), Section 11 [NTA].

<sup>56</sup> See also Bartlett, *Native Title in Australia*, *supra* note 38, 274; Stephenson, *supra* note 42, 46.

entrenched, and it has done so on several occasions in the past.<sup>57</sup> Under the current legal system, indigenous peoples in Australia neither have a right to veto, nor a comprehensive right to be consulted prior to activities on their lands.<sup>58</sup> Native title holders are accorded a right to negotiate. Under this right, native title holders are to be notified of proposed projects on their lands, and the government as well as the operator must enter into good faith negotiations with the intention of reaching an agreement.<sup>59</sup> If no agreement is reached within a six-month period, each of the negotiation parties may apply to the National Native Title Tribunal, which determines whether the proposed project may be carried out.<sup>60</sup> This determination can, however, be overridden by the Commonwealth minister in the national interest or the interest of the respective State or Territory.<sup>61</sup> Hence, ultimately, the right to negotiate is not very strong but instead largely accommodates the economic interests of the States and private enterprises.<sup>62</sup> Furthermore, in its decision *Western Australia v. Ward*, the High Court held that a clear and plain intention was not necessary to extinguish aboriginal titles. Instead, every inconsistency between an aboriginal title and a non-indigenous land right is sufficient to extinguish a native title bit by bit.<sup>63</sup>

A special situation exists in New Zealand. New Zealand is one of only three States worldwide without a written constitution or a constitutionally entrenched bill of rights. Since parliamentary acts can therefore not be declared *ultra vires* by courts, the New Zealand legislature has an exceptional

<sup>57</sup> For example, the NTA validated all past acts that were irreconcilable with the inherent indigenous land rights and as a result extinguished all native titles. Another example is the *Native Title Amendment Act 1998* (Cth) (No. 97) [NTAA], which was enacted in response to the decision in *Wik Peoples v. Queensland*, in which the High Court held that the granting of pastoral leases had not necessarily extinguished aboriginal title rights. The NTAA unilaterally extinguished all native titles to lands, to which contrary to the NTA new lease rights had been granted after 1993.

<sup>58</sup> See G. Nettheim, 'The Search for Certainty and the Native Title Amendment Act 1998 (Cth)', 22 *University of New South Wales Law Journal* (1999) 2, 564, 570-571; Stephenson, *supra* note 42, 56-59; G. Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)', 23 *Melbourne University Law Review* (1999) 2, 372, 405-409.

<sup>59</sup> NTA, Sections 29-31, *supra* note 55.

<sup>60</sup> *Ibid.*, Sections 35 & 38.

<sup>61</sup> *Ibid.*, Section 42. Regarding the negotiation process, see also Stephenson, *supra* note 42, 57-59.

<sup>62</sup> See McHugh, *supra* note 37, 166.

<sup>63</sup> *Western Australia Case*, *supra* note 43, 89.

power unique for a liberal democracy, which can be classified as parliamentary supremacy.<sup>64</sup> This became evident in the foreshore and seabed controversy. In reaction to the decision by the New Zealand Court of Appeal in *Attorney-General v. Ngati Apa*, in which the Court held that an aboriginal – or Maori customary – title could potentially still apply to the foreshore and seabed, the New Zealand parliament enacted the *Foreshore and Seabed Act 2004*. This act regulated that henceforth “the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property”.<sup>65</sup> Consequently, all potential inherent rights of the Maori to the foreshore and seabed were without prior consultation unilaterally extinguished whereas non-indigenous private rights to these regions remained untouched.<sup>66</sup> The act was repealed after much political controversy in April 2011 with the enactment of the *Marine and Coastal Area (Takutai Moana) Act 2011*, which reversed the vesting of title to the foreshore and seabed in the Crown.<sup>67</sup> Yet, the foreshore and seabed controversy shows that aboriginal titles in New Zealand can be extinguished unilaterally and without compensation at any time.

### 3. Burden of Proof and Limitations

Another issue of relevance is the burden of proof on indigenous peoples asserting an aboriginal title and the overall possibility to claim an aboriginal title in the respective State. Under the aboriginal title doctrine, only *existing* rights are protected. The doctrine is not a means of reparation. Consequently, large parts of Canada, the USA, and New Zealand are *a priori* not subject to a potential aboriginal title. As regards Canada, aboriginal titles cannot be claimed to the Prairie Provinces and considerable parts of Ontario since these regions were ceded to the Crown in the 19th and 20th centuries.<sup>68</sup> In the USA, the continued

<sup>64</sup> See G. W. G. Leane, ‘Fighting Them on the Beaches: The Struggle for Native Title Recognition in New Zealand’, 8 *Newcastle Law Review* (2004) 1, 65, 79-82; G. W. G. Leane, ‘Indigenous Rights Wronged: Extinguishing Native Title in New Zealand’, 29 *Dalhousie Law Journal* (2006) 1, 41, 61-64 & 74-77; C. N. Siewers Jr., ‘Balancing a Colonial Past With a Multicultural Future: Maori Customary Title in the Foreshore and Seabed After Ngati Apa’, 30 *North Carolina Journal of International Law and Commercial Regulation* (2004) 1, 253, 256-257.

<sup>65</sup> *Foreshore and Seabed Act 2004* (No. 93), Section 13 (1).

<sup>66</sup> *Ibid.*, Sections 5 & 18.

<sup>67</sup> *Marine and Coastal Area (Takutai Moana) Act 2011* (No. 3), Section 11.

<sup>68</sup> Regarding the areas in the Northwest Territories claimed by the Dene and Métis, which are covered by numbered *Treaty No. 8* (21 June 1899) and *Treaty No. 11* (27 June 1921)

existence of aboriginal titles is even less likely. Not only has the US government concluded numerous cession treaties with Indian tribes all over the USA but in addition, comprehensive land reforms were carried out to convert traditional tribal rights into individual fee simple titles. The land reforms in New Zealand during the 19th and 20th century were carried out to the same end. In the course of the New Zealand land reforms, practically all lands in New Zealand were reviewed by the Maori Land Court and subsequently the aboriginal titles were converted into freehold titles.<sup>69</sup> As a result, in New Zealand, aboriginal title rights are only discussed with regard to bodies of water and submerged lands.<sup>70</sup> In Australia, on the other hand, where according to the *terra nullius* doctrine indigenous land rights have for a very long time been completely ignored and therefore neither cession treaties were concluded nor land reforms carried out, the area, in which aboriginal titles could potentially still exist, covers practically the entire Australian landmass.

As regards the burden of proof on indigenous peoples to establish an aboriginal title, there are also major differences among the different States subject to this study. Concerning the burden of proof in Canada, the Supreme Court of Canada has stated in *Delgamuukw* that an indigenous group claiming an aboriginal title has to prove that (1) it has occupied the land prior to sovereignty, (2) there is continuity between present and pre-sovereignty occupation, and (3) at sovereignty occupation was exclusive.<sup>71</sup> The Supreme Court elaborated on these criteria in greater detail in its decision *R. v. Marshall; R. v. Bernard* and placed the burden of proof so high that hardly any indigenous group can meet the test. The Supreme Court held that the required criteria of occupation would only be fulfilled if the respective activity on the land had been “sufficiently

(printed in Reiter, *supra* note 22, 42-59 & 68-71) the Canadian federal government has acknowledged the potential existence of aboriginal title rights based on the fact that these treaties have never been implemented; see also T. Isaac, *Aboriginal Law: Commentary, Cases and Materials* (2004), 94.

<sup>69</sup> R. Boast, ‘Maori Proprietary Claims to the Foreshore and Seabed After Ngati Apa’, 21 *New Zealand Universities Law Review* (2004) 1, 1, 3; Land Information New Zealand, ‘What Is Maori Land’, available at <http://www.linz.govt.nz/survey-titles/maori-records/what-is-maori-land> (last visited 15 June 2013). See also *Ngati Apa Case*, *supra* note 45, para. 4.

<sup>70</sup> J. F. Pruner, ‘Aboriginal Title and Extinguishment Not So ‘Clear and Plain’: A Comparison of the Current Maori and Haida Experiences’, 14 *Pacific Rim Law and Policy Journal* (2005) 1, 253, 279.

<sup>71</sup> *Delgamuukw Case*, *supra* note 38, 1097-1107, paras 143-159.

regular and exclusive”.<sup>72</sup> Seasonal hunting, fishing, or gathering activities in a particular area were not regarded as sufficient to establish such a regular and exclusive occupation and therefore can never give rise to an aboriginal title. Instead, such activities can only establish non-territorial aboriginal rights to carry out these specific activities, not, however, a right to the land itself.<sup>73</sup> Since almost all indigenous groups in North America were nomadic or semi-nomadic, this amounts *de facto* to a denial of aboriginal title rights in Canada. Instead, through the back door a bundle of rights approach like in Australia is introduced.<sup>74</sup> Consequently, so far no indigenous group has managed to have an aboriginal title recognized by the courts. Courts have only hinted that such a right may exist under certain circumstances without having recognized its existence in any particular case. The burden for proving non-territorial aboriginal rights is also very high. Indigenous peoples are not only required to prove that an activity has been carried out or that a resource has been used since time immemorial, but also that a particular practice or custom is “integral to the distinctive culture”<sup>75</sup> and “has continuity with the practices, customs and traditions of pre-contact times”.<sup>76</sup> These requirements as regards aboriginal rights *de facto* amount to a frozen rights approach, forcing indigenous peoples to either live in the past to maintain their aboriginal rights or to adapt to modern times and lose these rights.<sup>77</sup>

The burden of proof is much lower in the USA. In *Mitchel v. United States*, the US Supreme Court held that

<sup>72</sup> *R. v. Marshall; R. v. Bernard* (2005), Supreme Court of Canada, 2005 SCC 43, [2005] 2 SCR 220, 247, para. 58 [Marshall Case].

<sup>73</sup> *Ibid.*, 247, 251-252, 523, paras 58, 70 & 77.

<sup>74</sup> See also the critical Dissenting Opinion of Judge LeBel, in *Delgamuukw Case*, *supra* note 38, 265, 271-279, paras 110, 126-140. See also T. Isaac, *Aboriginal Title* (2006), 17-19.

<sup>75</sup> *R. v. Van der Peet*, Supreme Court of Canada, [1996] 2 SCR 507, 549, para. 46 [Van der Peet Case].

<sup>76</sup> *Ibid.*, 556, para. 63.

<sup>77</sup> K. McNeil, ‘Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty’, 5 *Tulsa Journal of Comparative and International Law* (1998) 2, 253, 265. See also R. L. Barsh & J. Youngblood Henderson, ‘The Supreme Court’s Van der Peet Trilogy: Naive Imperialism and Ropes of Sand’, 42 *McGill Law Journal* (1997) 4, 993; J. Borrows, ‘The Trickster: Integral to a Distinctive Culture’, 8 *Constitutional Forum* (1997) 2, 27, 28-29; L. I. Rotman, ‘Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van der Peet’, 8 *Constitutional Forum* (1997) 2, 40, 43-45.

“Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected until they abandoned them, made a cession to the government or an authorized sale to individuals”.<sup>78</sup>

Hence, indigenous peoples can also claim aboriginal titles to lands which they have traditionally used for seasonal hunting, fishing, and gathering activities. The task of proving traditional possession is further facilitated by the fact that the indigenous peoples do not have to prove possession since the establishment of sovereignty by a European colonial power but only “continuous use and occupancy ‘for a long time’ prior to the loss of the property”.<sup>79</sup>

In Australia, the burden of proof is considerably higher than in the USA. In *Members of the Yorta Yorta Aboriginal Community v. Victoria*, the High Court of Australia held that continued use and occupation of the land is not sufficient to establish an aboriginal title. Instead, in addition, the indigenous group has to prove that “the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty”.<sup>80</sup> Hence, in order to prove their aboriginal titles, indigenous peoples not only have to specify the individual laws and customs under which they hold rights to the land but also the uninterrupted adherence to these rules and customs since the acquisition of sovereignty by the British Crown. There is no presumption of a continued connection to the land based on its permanent occupation and use.<sup>81</sup> The burden of proof is hard to meet for most indigenous groups, in particular since the High Court deemed the lower court’s approach permissible according to which historical written colonial documents are given preference over oral histories and traditions of indigenous peoples.<sup>82</sup>

<sup>78</sup> *Mitchel v. United States*, US Supreme Court, (1835) 34 US (9 Pet.) 711, 746.

<sup>79</sup> *Newton et al.*, *supra* note 29, 970 with reference to *Sac & Fox Tribe of Indians of Oklahoma v. United States*, United States Court of Claims, (1967) 383 F.2d 991, para. 45.

<sup>80</sup> *Members of the Yorta Yorta Aboriginal Community v. Victoria*, High Court of Australia, (2002) 194 ALR 538, para. 47 [Yorta Yorta Aboriginal Community Case].

<sup>81</sup> R. H. Bartlett, ‘An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta’, 31 *University of Western Australia Law Review* (2003) 1, 35, 44.

<sup>82</sup> *Ibid.* with reference to *Yorta Yorta Aboriginal Community Case*, *supra* note 80, paras 163 & 190.

The relevant New Zealand act, the *Tē Ture Whenua Maori Act 1993/Maori Land Act 1993* (TTWMA) also contains a provision according to which Maori customary land is only land held in accordance with *tikanga Maori*,<sup>83</sup> i.e. “Maori customary values and practices”.<sup>84</sup> Unlike in Australia, however, values and practices are not frozen at the time of acquisition of sovereignty by the Crown. Instead, Maori customary values and practices refer to the values and practices that are relevant at the time the land claim is being made.<sup>85</sup> This significantly lowers the burden of proof. Yet, like in Canada, the ownership structures are frozen at the time of acquisition of sovereignty by the Crown. Hence, the Maori also have to prove that their ancestors had already used the land at the time of colonization.<sup>86</sup>

#### 4. Conclusion

All in all, the aboriginal title doctrine has not lived up to the expectations the indigenous peoples originally had for it. The bold and innovative approaches initially applied by the courts were not only not repeated in later judgments but, moreover, mitigated or even completely abandoned in later decisions. In addition, unwelcome judgments were often scrapped by legislation and innovative judicial approaches were thus destroyed. As a result, the aboriginal title doctrine has, since its modern recognition in 1973, continuously been undermined and diminished, and aboriginal title rights have increasingly been subordinated to land rights derived from the government. Since aboriginal title therefore only confers a “defective, vulnerable and inferior legal status for indigenous land and resource ownership”,<sup>87</sup> indigenous peoples have more and more resorted to applying to the governments for derivative, state-defined land rights – and thus a secure legal position – as a means to implement and enforce their rights to their ancestral lands.

<sup>83</sup> *Tē Ture Whenua Maori Act 1993* (No. 4), Section 129 (2) (a) [TTWMA].

<sup>84</sup> *Ibid.*, Section 4.

<sup>85</sup> J. I. Reynolds, ‘Recent Developments in Aboriginal Law in the United States, Australia and New Zealand: Lessons for Canada? Part II’, 62 *The Advocate* (2004), 177, 184.

<sup>86</sup> *Oakura* (June 1866), Compensation Court, printed in: *Important Judgments: Delivered in the Compensation Court and Native Land Court: 1866-1879* (1879), 9, 10.

<sup>87</sup> Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Human Rights on Indigenous Peoples: Indigenous People and Their Relationship to Land: Second Progress Report on the Working Paper*, UN Doc E/CN.4/Sub.2/1999/18, 3 June 1999, 13, para. 38.

## II. Derivative Land Rights

Although derivative ownership and use rights are created, defined, and conferred by the State, such rights must not be regarded as a gift from the States to indigenous peoples. Instead, in most areas, to which States confer land rights to indigenous peoples, the latter hold a potential aboriginal title or – in case the aboriginal title has unambiguously been extinguished through a previous legislative or executive act – they often have a claim for reparation for illegal, unfair, and discriminatory land seizures. This must be borne in mind when talking about derivative land rights.

Derivative land rights of indigenous peoples have to be subdivided into two main categories: rights to the land itself, and rights to use and co-manage the land and its natural resources.

### 1. Rights to the Land Itself

Needless to say, nowadays indigenous peoples – like all other citizens – may acquire fee simple title to land by purchase from the government or third parties. In addition, all States covered in this study provide for special legal regimes under which land rights can be transferred to indigenous groups. These particular forms of indigenous land rights, which deviate from land titles held by non-indigenous owners, are justified with the special historical relationship between the government and indigenous peoples and the need for reconciliation for historical injustices.

On the one hand, indigenous peoples focus on the protection and preservation of those state-defined land rights already guaranteed to them by the governments in historical treaties or previous legislation or executive acts. On the other hand, they aim at the better protection of their aboriginal title rights by obtaining additional state-defined rights to the respective area. Furthermore, the transfer of state-defined rights can also serve as a means of reparation for the illegal and unfair taking of their lands during colonization.

The amount of derivative land rights conferred to indigenous peoples differs significantly among the several States subject to this study. The indigenous peoples of the USA, who make up 1.4% of the population, hold derivative land rights to approximately 4% of the total US landmass or around 400,000 km<sup>2</sup>, of which 184,000 km<sup>2</sup> lie in Alaska.<sup>88</sup> In Canada, where indigenous peoples account

<sup>88</sup> J. Mitchell, *Forest Service National Resource Guide to American Indian and Alaska Native Relations* (1997), available at <http://www.fs.fed.us/people/tribal/> (last visited 15 June 2013), Appendix D; J. Utter, *Americans Indians: Answer to Today's Question* (2001), 217.

for 3.8% of the total population, indigenous groups hold around 626,000 km<sup>2</sup> or 6.3% of the total landmass, yet most of it lies north of the 60th parallel. In the southern Provinces, which are home to approximately 95% of all indigenous people within Canada, only 37,000 km<sup>2</sup> are held by indigenous groups.<sup>89</sup> In Australia, indigenous groups, accounting for 2.5% of the total population, hold land rights to 16% of the country, i.e. 1.2 million km<sup>2</sup>. Yet, almost half of all land held by indigenous groups lies in the Northern Territory and a further 47% in Western Australia and South Australia.<sup>90</sup> In New South Wales, Victoria, Queensland, and Tasmania – home to approximately two thirds of all indigenous Australians – indigenous groups hold hardly any land.<sup>91</sup> The total amount of land held by Maori groups, who constitute 14.6% of the total New Zealand population, is hard to specify. According to official data, Maori hold derivative rights to 15,000 km<sup>2</sup> or 5.6% of New Zealand with approximately 14,500 km<sup>2</sup> being situated on the North Island and 500 km<sup>2</sup> on the South Island.<sup>92</sup> This number, however, only comprises lands held in form of Maori Freehold Title.<sup>93</sup>

<sup>89</sup> Indian and Northern Affairs Canada, 'General Briefing Note on Canada's Self-Government and Land Claims Policies and the Status of Negotiations' (January 2012), available at [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al\\_ldc\\_ccl\\_gbnjan2012\\_1324327698586\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_gbnjan2012_1324327698586_eng.pdf) (last visited 15 June 2013).

<sup>90</sup> H. McRae *et al.*, *Indigenous Legal Issues: Commentary and Materials*, 4th ed. (2009), 208-209; D. P. Pollack, 'Indigenous Land in Australia: A Quantitative Assessment of Indigenous Landholdings in 2000' (2001), available at [http://caepr.anu.edu.au/sites/default/files/Publications/DP/2001\\_DP221.pdf](http://caepr.anu.edu.au/sites/default/files/Publications/DP/2001_DP221.pdf) (last visited 15 June 2013), 29-30.

<sup>91</sup> Australian Bureau of Statistics, '3238.0 - Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 1991 to 2009' (27 September 2004), available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3238.0Main+Features11991%20to%202009> (last visited 15 June 2013); McRae *et al.*, *supra* note 90, 209.

<sup>92</sup> Controller and Auditor-General, 'Māori Land Administration: Client Service Performance of the Maori Land Court Unit and the Maori Trustee' (2004), available at <http://www.oag.govt.nz/2004/maori-land-court/docs/maori-land-court.pdf> (last visited 15 June 2013), 8. See also the overview in G. Harmsworth, 'Māori Perspectives on Kyoto Policy: Interim Results: Reducing Greenhouse Gas Emissions from the Terrestrial Biosphere (C09X0212)' (February 2003), available at [http://www.landcareresearch.co.nz/\\_\\_data/assets/pdf\\_file/0004/43834/maori\\_perspectives\\_kyoto\\_interim.pdf](http://www.landcareresearch.co.nz/__data/assets/pdf_file/0004/43834/maori_perspectives_kyoto_interim.pdf) (last visited 15 June 2013), 27. These official numbers are, however, disputed. Instead, some estimate the total area of land held by Maori in form of Maori Freehold Title at only 8,200 km<sup>2</sup> or 3% of the total New Zealand landmass. See *ibid.*, 9.

<sup>93</sup> According to TTWMA, *supra* note 83, Section 129 (2) (b), Maori Freehold Land is land whose "beneficial ownership [...] has been determined by the Maori Land Court by freehold order". Maori Freehold Land can be held by Maori tribes or by Maori individuals. Yet, since most of it was created in the course of the land reforms of the 19th and early 20th century with the intention to individualize land rights, the majority of Maori Freehold

In addition, Maori tribes collectively hold several thousand square kilometers in other forms, yet there are no official records regarding the exact number.

When looking at the total amount of land held by or for indigenous peoples, it has to be kept in mind that the actual amount does not say anything about the legal nature, content, scope, and degree of protection of the rights. Comprehensive and exclusive rights over a small area of land may be worth more than weak and non-exclusive rights over vast territories. Therefore, in the following, the different national strategies regarding the conveyance and protection of derivative indigenous land rights will be presented and analyzed. In this context, two forms of derivative collective land rights will be looked at: the reservation or tribal trust land system, and the concept of conveying collective fee simple title to indigenous groups.<sup>94</sup>

#### a. Reservations and the Tribal Trust Land System

Reservations are areas which have been demarcated by the respective government for the use and occupation of a certain indigenous group. The legal title to a reservation is vested in the government, which holds the land in trust for the indigenous group – the beneficial owner. Historically the establishment of reservations and the practice of “rounding up” indigenous peoples were intended to prevent violent and costly conflicts through the separation of indigenous peoples from the encroaching Europeans, and – at the same time – open the indigenous peoples’ traditional territories to settlement. Thus reservations were only created in regions intended for settlement. Consequently, during the colonization period, the reservation system was extensively applied in the southern Canadian Provinces, the contiguous States of the USA, and in Australia. In contrast, in the northern regions of North America, where due to the hostile climate no considerable degree of settlement was expected, hardly any reservations were established. Neither were reservations in a considerable number established in New Zealand, although it had always been intended for settlement.

Land is held by individuals.

<sup>94</sup> There are other forms of derivative land rights, e.g. individual trust lands (allotments or Maori freehold lands) as remnants of the 19th and 20th century land reforms, permanent leasehold lands, or so-called Deeds-of-Grant-in-Trust, a community-level land trust established in Queensland to administer former reserves. Yet, these forms of derivative land rights only play a minor role and are therefore, for reasons of brevity, not expanded on in this paper.

Since reservations were in the past often used to control and oppress indigenous peoples, and due to their paternalistic nature, their *raison d'être* is challenged. Accordingly, within Canada no further reservations are being established, and the Australian States have even converted most of their existing reservations into collective fee simple title.<sup>95</sup> Only the USA still sticks to the reservation system for future conveyances of land. When talking about the reservation system in the USA, one has to bear in mind, however, that since enactment of the *Dawes Act* a distinction needs to be made between reservations and tribal trust lands. Whereas initially the term "reservation" was synonymous with "tribal trust land", the breaking up of reservations in the course of the allotment policy of the 19th and early 20th centuries has led to the fragmentation of reservations, and some reservations are nowadays predominantly owned by non-Indian individuals, whereas others are still exclusively or predominantly held as trust land on behalf of the tribes.<sup>96</sup> In total, there are about 180,000 km<sup>2</sup> of tribal trust lands; this is about 2.3% of the total US landmass.<sup>97</sup>

The tribal trust land system in the USA is maintained with the express support of the indigenous peoples. This is due to the fact that the rights accorded to indigenous peoples with regard to their tribal trust lands are more

<sup>95</sup> The only State within Australia in which the reservation system is still prevalent is Western Australia, where reservations still cover an area of over 202,350 km<sup>2</sup>. The only other State with reservations is Queensland. Yet, in Queensland, reservations cover an area of only 177.8 km<sup>2</sup> and therefore less than 0.1% of all reservations within Australia. See McRae *et al.*, *supra* note 90, 209. See also Queensland Government - Queensland Studies Authority, 'The History of Aboriginal Land Rights in Australia (1800s-1980s)' (December 2007), available at [http://www.qsa.qld.edu.au/downloads/approach/indigenous\\_res006\\_0712.pdf](http://www.qsa.qld.edu.au/downloads/approach/indigenous_res006_0712.pdf) (last visited 15 June 2013), 4 & 8; E. A. Young, 'Aboriginal Land Rights in Australia: Expectations, Achievements and Implications', 12 *Applied Geography* (1992) 2, 146, 152.

<sup>96</sup> Cole, *supra* note 1, 420. Since not all reservations were allotted but often only those lands wanted by settlers or the government for agricultural purposes or resource extraction, some reservations are still exclusively or predominantly owned by Indian tribes. See D. R. Nash & C. E. Burke, 'The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act', 5 *Seattle Journal for Social Justice* (2006) 1, 121, 125. For example, about 95% of the largest Indian reservation, the Navajo Reservation covering more than 60,000 km<sup>2</sup> in the States Arizona, Utah, and New Mexico, are still collectively held as Indian trust land. In total, about 45% of all Indian reservations are still exclusively held for the tribes. See J. Utter, *supra* note 88, 207-208.

<sup>97</sup> An additional 184,000 km<sup>2</sup> of land is held in the form of Alaska Native Corporation Lands. This form of land rights will not be examined in greater detail in this paper since it is based on an experimental model, which has not been repeated in any of the contiguous States.

comprehensive than in Canada and Australia and, in fact, in some respect more comprehensive than rights accorded by fee simple title.

Like in Canada<sup>98</sup> and Australia,<sup>99</sup> indigenous peoples in the USA may not alienate or mortgage land held in trust without the government's consent.<sup>100</sup> This limitation restricts their economic freedom and makes it harder for them to receive loans for the development of their lands. Yet, aside from these restrictions, indigenous peoples in the USA hold quasi-property rights to their reservations protected under the *Fifth Amendment*.<sup>101</sup> These rights include the right to sub-surface resources.<sup>102</sup> The federal government has exclusive jurisdiction with regard to lands held in trust for Indians<sup>103</sup> and is under the obligation to protect Indian trust land against all interferences by States, local authorities, or other third parties.<sup>104</sup> Consequently, unauthorized hunting, trapping, and fishing,<sup>105</sup> the grazing of livestock without the tribe's consent,<sup>106</sup> and settling on Indian trust land<sup>107</sup> are prohibited by federal laws. In addition, Indian trust land is not subject to state codes or state or local taxation.<sup>108</sup> Furthermore, only on trust land there is a presumption of inherent governmental powers of the tribes, including civil and criminal jurisdiction and the power to tax.<sup>109</sup> In addition, in the USA, gaming is also only possible on tribal trust land, not on tribally held fee simple land.<sup>110</sup> Since income from gaming is nowadays for many Indian tribes a very important economic factor providing Indian tribes with the opportunity to generate money to provide social services to their members and to buy back

<sup>98</sup> *Indian Act*, Section 90 (2) (RSC, 1985, ch. I-6).

<sup>99</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA) (No. 24), Section 20 (3) (c).

<sup>100</sup> 25 USC 177; 25 CFR 152.22 (b) as well as 25 USC 348 & 415 (a). See also Newton *et al.*, *supra* note 29, 998-1003.

<sup>101</sup> See *United States v. Sioux Nation*, US Supreme Court, (1980) 448 U.S. 371, 408; Newton *et al.*, *supra* note 29, 1026-1030 with further references.

<sup>102</sup> Newton *et al.*, *supra* note 29, 1086-1088 with further references. See also J. Mitchell, *supra* note 88, Appendix D; Utter, *supra* note 88, 218-221.

<sup>103</sup> *Indian Act*, *supra* note 98, Section 2, Ch. I-5. See also *United States v. Kagama*, US Supreme Court, (1886) 118 U.S. 375; *Donnelly v. United States*, US Supreme Court, (1913) 228 U.S. 243.

<sup>104</sup> Newton *et al.*, *supra* note 29, 1015-1016.

<sup>105</sup> 18 USC 1165. See also Newton *et al.*, *supra* note 29, 1153-1154.

<sup>106</sup> 25 USC 179.

<sup>107</sup> 25 USC 180.

<sup>108</sup> 25 USC 465.

<sup>109</sup> Newton *et al.*, *supra* note 29, 214-219.

<sup>110</sup> See *Indian Gaming Regulatory Act 1988* (25 USC 2701).

their ancestral lands, and thus to increase their land base, indigenous peoples have a substantial interest to have their lands held in trust.<sup>111</sup>

Many of these incentives do not apply with respect to reservations in Canada or Australia. On reservations in Canada and Australia, indigenous peoples neither enjoy tribal self-government nor is gaming permissible.

Like in the USA, the indigenous peoples in Canada hold quasi-property rights to their reservations, and their reservations are exempted from property and estate taxes.<sup>112</sup> Furthermore, since the federal government has exclusive jurisdiction with regard to lands held in trust for Indians, the indigenous peoples' rights to reservations may not be infringed by provincial or territorial governments.<sup>113</sup> Reservations may also not be unilaterally diminished or taken away by the federal government since they are constitutionally protected under Section 35 *Constitution Act, 1982*. Unlike in the USA, the rights to the land do not, however, extend to sub-surface resources, which are generally owned and administered by the respective Province.<sup>114</sup>

Even more restricted are the rights of indigenous peoples on reservation lands in Australia. Unlike in the USA and Canada, indigenous peoples in Western Australia – the only Australian State which still sticks to the reservation system – do not have quasi-property rights to reservation lands. Instead, reservations can at any time unilaterally be diminished, altered, or taken away by proclamation of the governor.<sup>115</sup> Furthermore, indigenous peoples cannot prevent non-indigenous peoples from accessing and using their lands. Not only do the rights of indigenous peoples to their reservations not include rights to sub-surface resources,<sup>116</sup> but unlike in the USA and Canada the aboriginal peoples also do not have the right to veto resource exploration and exploitation on their reservations.<sup>117</sup>

<sup>111</sup> See e.g. K. K. Washburn, 'Federal Law, State Policy, and Indian Gaming', 4 *Nevada Law Journal* (2004) 2, 285.

<sup>112</sup> *Indian Act*, Section 87, *supra* note 98.

<sup>113</sup> *Constitution Act, 1867*, Section 91 (24) (30 & 31 Victoria, ch. 3 (UK)).

<sup>114</sup> See *ibid.*, Section 109. Regarding Manitoba, Alberta, Saskatchewan, and British Columbia see the *Constitution Act, 1930* (20-21 Geo. V, ch. 26 (UK)). Regarding Newfoundland, see the *Newfoundland Act* (12-13 Geo. V, ch. 22 (UK)). Regarding Prince Edward Island, see the Schedule to the *Prince Edward Island Terms of Union* (1873).

<sup>115</sup> *Aboriginal Affairs Planning Authority Act 1972* (WA), Section 25. But see also *Land Administration Act 1997* (WA) (No. 30), Sections 42-44.

<sup>116</sup> *Land Administration Act 1997*, Section 24, *supra* note 115.

<sup>117</sup> *Mining Act 1978* (WA) (No. 107), Section 24 (1) (f) & (7) (a). See M. Tehan, 'Practising Land Rights: The Pitjantjatjara in the Northern Territory, South Australia and Western Australia', 65 *The Australian Quarterly* (1993) 4, 34, 38 & 41-43.

For these reasons, indigenous peoples in Australia and Canada are less favorable towards the reservation system than indigenous peoples in the USA. In addition, it needs to be kept in mind that in the course of the *Dawes Act* the indigenous peoples in the USA have experienced a massive loss of land as a result of the conversion of reservations into fee simple land. Therefore, they still associate fee simple title with loss of land, and consequently reject it as a means of realizing indigenous land rights.

#### b. Collective Fee Simple Title

Whereas in the USA indigenous peoples' land rights are still virtually synonymous with the tribal trust land system, indigenous peoples in Canada, Australia, and New Zealand nowadays hold most of their lands in the form of collective fee simple title.

The conveyance of collective fee simple title in Canada is based on the Comprehensive Land Claims (CLC) Policy. The CLC Policy was introduced in 1973 in response to the *Calder* decision. The CLC Policy addresses the assumption that aboriginal titles may have survived in all areas not subject to historical land cession treaties. Based on negotiations, all claims by indigenous groups shall be comprehensively and finally settled by extinguishing or rendering permanently unenforceable all potential but vague aboriginal titles and rights to an indigenous group's entire traditional territory in return for the conveyance of precise and secure collective fee simple title to a certain part of the traditionally used land. Accordingly, all agreements concluded in the course of the CLC Policy contain a clause which shall make it impossible for indigenous groups to claim aboriginal title or rights in the future.<sup>118</sup> Under the CLC Policy, 24 agreements have been concluded so far between the federal government and indigenous groups, and about 613,000 km<sup>2</sup> of land – that is 6.1% of the total

<sup>118</sup> See C. Alcantara, 'Old Wine in New Bottles?: Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements', 35 *Canadian Public Policy* (2009) 3, 325, 335-336 with further references; J. E. Dalton, 'Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?', 22 *Windsor Review of Legal and Social Issues* (2006), 29, 52-53, 70; P. Rynard, "'Welcome In, But Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada', 33 *Canadian Journal of Political Science* (2000) 2, 211, 218. See also CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/CAN/CO/5, 22 May 2006, 4, para. 16.

area of Canada – has been transferred to indigenous groups in the form of fee simple title, with most of the land conveyed lying north of the 60th parallel.<sup>119</sup>

In New Zealand, the exchange relationship is not at the center of the land policy. An exchange of “aboriginal title for fee simple title” is practically impossible since almost all original indigenous land rights in New Zealand were extinguished in the course of the land reforms of the 19th and 20th centuries. Instead, in New Zealand the focus is on the question whether in the course of previous land transactions the principles of the *Treaty of Waitangi* have been violated, which in its English version guarantees to the Maori “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession”.<sup>120</sup> Two procedures are open to Maori claimants: proceedings before the Waitangi Tribunal – a specialist body established by the *Treaty of Waitangi Act 1975* as a combination of an arbitral tribunal and an independent commission of inquiry – or direct negotiations with the government.<sup>121</sup> As redress for illegal takings of land, the *Treaty of Waitangi Act 1975* provides, on the one hand, for the return of the respective land to the Maori as immediate remedy (cultural redress) or, on the

<sup>119</sup> *James Bay and Northern Quebec Agreement 1975* (Quebec); *Northeastern Quebec Agreement 1978* (Quebec); *Inuvialuit Final Agreement 1984* (Northwest Territories) [Inuvialuit Final Agreement]; *Gwich'in Comprehensive Land Claim Agreement 1992* (Yukon, Northwest Territories) [Gwich'in Agreement]; eleven *Yukon First Nations Final Agreements* under the *Council for Yukon Indians Umbrella Final Agreement 1993* (Yukon) [Council for Yukon Indians Umbrella Final Agreement]; *Sahtu Dene and Métis Comprehensive Land Claim Agreement 1993* (Northwest Territories) [Sahtu Dene and Métis Agreement]; *Nunavut Land Claims Agreement 1993* (Nunavut) [Nunavut Land Claims Agreement]; *Nisga'a Final Agreement 1998* (British Columbia) [Nisga'a Final Agreement]; *Tlicho Land Claims and Self-Government Agreement 2003* (Northwest Territories) [Tlicho Land Claims and Self-Government Agreement]; *Labrador Inuit Land Claims Agreement 2005* (Newfoundland and Labrador) [Labrador Inuit Land Claims Agreement]; *Nunavik Inuit Land Claims Agreement 2006* (Quebec, Nunavut, Newfoundland and Labrador) [Nunavik Inuit Land Claims Agreement]; *Tsawwassen First Nation Final Agreement 2007* (British Columbia) [Tsawwassen First Nation Final Agreement]; *Maa-Nulth First Nations Final Agreement 2009* (British Columbia) [Maa-nulth First Nation Final Agreement]; and *Eeyou Marine Region Land Claims Agreement 2010* (Nunavut). For an overview of the CLC Agreements, see e.g. Indian and Northern Affairs Canada, *supra* note 89.

<sup>120</sup> *Treaty of Waitangi*, Art. 2, *supra* note 15.

<sup>121</sup> See Office of Treaty Settlements, ‘Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown’ (2010), available at <http://nz01.terabyte.co.nz/ots/fb.asp?url=LiveArticle.asp?ArtID=1715811693> (last visited 15 June 2013), 38.

other hand, for damages in money or in form of alternative land (financial redress).<sup>122</sup> As financial redress, only those tracts of land can be conveyed to indigenous peoples, which have been placed in the regional land bank system of the Office of Treaty Settlements for this purpose at the request of claimant groups after the lands have been declared surplus land. Furthermore, the land must be situated in the area of interest of the respective indigenous group. Land as financial redress is only transferred at fair market value, i.e. the value of the land conveyed is set off against the total amount of the financial redress awarded to the indigenous claimant group.<sup>123</sup> As cultural redress, land is handed back to its previous indigenous owners without such an offset if the land is of particular cultural or spiritual importance to the indigenous group.

Unlike in Canada and New Zealand, there is no uniform national procedure in Australia for the conveyance of fee simple title. Since the federation only has concurrent legislative powers with regard to indigenous peoples and their land, every Australian State and Territory – with the exception of Western Australia which still clings to the reservation system – has its own procedures to convey fee simple title to indigenous peoples. Yet collective fee simple title is unevenly spread across Australia. About 74% (579,000 km<sup>2</sup>) are situated in the Northern Territory, 24% (189,000 km<sup>2</sup>) in South Australia, and 2% (14,600 km<sup>2</sup>) in Queensland.<sup>124</sup> In New South Wales, Victoria, Tasmania, the Australian Capital Territory, the Jervis Bay Territory, and Western Australia, where 55% of the indigenous population of Australia lives, indigenous peoples hold hardly any title to land.<sup>125</sup> For a long time, the main purpose of the conveyance of collective freehold title to indigenous groups has been the dissolution of the reservation system and therefore the mere conversion of existing reservations into fee simple lands. In particular in the Northern Territory further purposes were pursued, like creating a land base sufficient to allow economic development or conveying land to which the group has close traditional ties in order to ensure its cultural survival. The settlement of indigenous land claims, which is at the center of the Canadian land policy, was for a very long time not a relevant factor in Australia since, until 1992, the official governmental position was that such rights had never existed in Australia.

<sup>122</sup> *Treaty of Waitangi Act 1975*, Section 6 (3), *supra* note 15.

<sup>123</sup> Office of Treaty Settlements, *supra* note 121, 90.

<sup>124</sup> Australian Government - Geoscience Australia, 'Land Tenure' (1993), available at <http://www.ga.gov.au/education/geoscience-basics/land-tenure.html> (last visited 15 June 2013).

<sup>125</sup> McRae *et al.*, *supra* note 90, 209.

But not only do the motives for conveying collective fee simple title to indigenous peoples differ across the States subject to this study. There are also considerable differences regarding content, scope, and protection of these rights.

As a general rule, a fee simple title holder is free to alienate, lease, or mortgage his or her title. With regard to collective fee simple titles of indigenous peoples, this right is sometimes limited. Whereas such restrictions limit indigenous peoples in their ability to raise money in order to develop the land, they make sure that there will be no future landless generations. As regards the legal situation in Canada, several CLC agreements contain provisions restricting the alienability of fee simple title. The furthest reaching restrictions were imposed on indigenous groups in the Gwich'in, the Sahtu Dene, and Métis CLC agreements which stipulate that collective fee simple title can only be transferred to organizations controlled by the respective indigenous group or to the federal or the territorial government – as regards the latter two, however, only in exchange for other lands.<sup>126</sup> Mortgaging the land is also prohibited.<sup>127</sup> Several other CLC agreements also restrict the alienability of collective fee simple land.<sup>128</sup> All CLC agreements concluded within British Columbia, however, stipulate that the indigenous groups can without prior approval by the government, alienate or mortgage their lands to any third person.<sup>129</sup>

In Australia, as a general rule, the collective fee simple title transferred to indigenous groups is inalienable and cannot be mortgaged.<sup>130</sup> Collective fee

<sup>126</sup> *Gwich'in Agreement*, Section 18.1.5, *supra* note 119; *Sahtu Dene and Métis Agreement*, Section 19.1.5, *supra* note 119.

<sup>127</sup> *Gwich'in Agreement*, Section 18.1.8, *supra* note 119; *Sahtu Dene and Métis Agreement*, Section 19.1.8, *supra* note 119.

<sup>128</sup> For example, according to *Nunavut Land Claims Agreement*, Section 19.7.1, *supra* note 119, fee simple lands can only be transferred to indigenous organizations or the federal government, according to *Labrador Inuit Land Claims Agreement*, Section 4.4.5, *supra* note 119, it can only be conveyed to the federal and provincial government (yet it can generally be mortgaged. See *ibid.*, Section 4.8.1 (d); and according to *Inuvialuit Final Agreement*, Section 7.44, *supra* note 119, the land can only be conveyed to corporations controlled by the indigenous group, the federal government or individual members of the respective group.

<sup>129</sup> See *Nisga'a Final Agreement*, Sections 3.4 (a) & 3.8, *supra* note 119; *Tsawwassen First Nation Final Agreement*, Sections 4.3 (a) & 6.1 (b) (ii), *supra* note 119. The *Maa-nulth First Nation Final Agreement* also provides for the option to transfer fee simple title to third persons without the government's consent, but it makes such a transfer dependent on the prior registration of the parcel if the parcel is to be transferred to a non-indigenous person. See *Maa-nulth First Nation Final Agreement*, Sections 2.3.2, 2.3.5 & 3.3.1, *supra* note 119. As regards mortgages, see *ibid.*, Section 2.3.13 (a) (ii).

<sup>130</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (No. 91), Section 19

simple land can, however, in principle be leased to third persons, yet the term of lease may not exceed a certain amount of years without the government's prior approval.<sup>131</sup>

In New Zealand, indigenous fee simple land generally constitutes ordinary fee simple land, hence the Maori can use their land as economic good without restrictions, i.e. they may sell or lease their land to anyone and mortgage it, unless the land was transferred to them as cultural redress under certain obligations and restrictions.

In none of the States subject to this study does the conveyance of title to land automatically convey title to sub-surface resources. According to the Canadian CLC Policy, indigenous peoples only hold sub-surface rights to lands transferred to them if the conferral of such rights was expressly included in the respective agreement. Currently, they hold sub-surface rights to approximately one fifth of the total land area conveyed to them in the course of the CLC Policy. In Australia, most of the States and Territories do not confer rights to sub-surface resources when transferring land to indigenous peoples in form of collective fee simple title.<sup>132</sup> Since in particular the Northern Territory and South Australia – where approximately 98% of the total amount of collective fee simple land is situated – do not confer sub-surface rights when conveying land

[Aboriginal Land Rights (Northern Territory) Act]; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) (No. 20), Section 17 [Anangu Pitjantjatjara Yankunytjatjara Land Rights Act]; *Maralinga Tjarutja Land Rights Act 1984* (SA) (No. 3), Section 15 [Maralinga Tjarutja Land Rights Act]; *Aboriginal Land Act 1991* (Qld) (No. 32), Sections 40C & 77C [Aboriginal Land Act 1991]; *Torres Strait Islander Act 1991*, Sections 37C & 73-75 (Qld) (No. 33) [Torres Strait Islander Act]. See also *Aboriginal Lands Act 1995* (Tas) (No. 98), Section 30 [Aboriginal Lands Act 1995]; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) (No. 34), Sections 13 & 21 [Aboriginal Land (Lake Condah and Framlingham Forest)]; *Aboriginal Land Grants (Jervis Bay Territory) Act 1986* (Cth) (No. 164), Section 38 (1) [Aboriginal Land Grants (Jervis Bay Territory) Act 1986].

<sup>131</sup> *Aboriginal Land Rights (Northern Territory) Act*, Section 19, *supra* note 130; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act*, Section 6 (2) (b) (iii), *supra* note 130; *Maralinga Tjarutja Land Rights Act*, Section 5 (2) (b) (iii), *supra* note 130; *Aboriginal Land Act 1991* (Qld), Sections 39-40B & 76-77B; *Torres Strait Islander Act*, *supra* note 130, Sections 36-37B & 73; *Aboriginal Lands Act 1995*, Section 28A, *supra* note 130; *Aboriginal Land Act 1970* (Vic), Section 11 (4); *Aboriginal Land (Lake Condah and Framlingham Forest) Act*, Section 13 & 21, *supra* note 130; *Aboriginal Land Grants (Jervis Bay Territory) Act 1986*, Section 38, *supra* note 130.

<sup>132</sup> See *Aboriginal Land Act 1991*, Sections 42 & 80, *supra* note 130; *Torres Strait Islander Act 1991*, Sections 39 & 77, *supra* note 130; *Aboriginal Land (Lake Condah and Framlingham Forest) Act*, Sections 6 (1) & 7 (1), *supra* note 130; *Aboriginal Land Grants (Jervis Bay Territory) Act 1986*, Sections 39 & 77, *supra* note 130, Section 14.

to indigenous peoples,<sup>133</sup> the indigenous peoples of Australia hold *de facto* no sub-surface rights to their collective fee simple lands. Equally, in New Zealand, indigenous peoples generally hold no sub-surface rights to lands conveyed to them. Instead, the *Crown Minerals Act 1991* stipulates that as a general rule all sub-surface resources of particular national importance – including all petroleum, gold, silver, and uranium – are owned by the Crown, even if they are situated on privately held land.<sup>134</sup> Yet the transfer of title to land has to include title to sub-surface resources if these resources were known and used by the Maori at the time of the conclusion of the *Treaty of Waitangi*. This has been expressly laid down as regards jade (*pounamu*), which has been used by Maori since time immemorial and which therefore always has to be included in the transfer of title to land.<sup>135</sup>

There are also significant national differences regarding the question in how far indigenous peoples can prevent individuals or the government from entering and using their collective fee simple lands. Whereas title to land generally includes the right to use the land exclusively and to prevent others from entering or using it, indigenous peoples are often restricted in their right to exclude others. In Canada, many CLC agreements contain clauses according to which individuals have the right to enter the land for recreational and transit purposes.<sup>136</sup> However, indigenous peoples can veto mineral prospecting and extraction on their lands. In Australia, with its concurrent jurisdiction between the federation and the States, there are huge regional differences as regards the rights of indigenous peoples to exclude others from entering their lands. Whereas in the Northern Territory indigenous peoples have far-reaching rights to prevent others from entering and using their lands,<sup>137</sup> other state laws even allow for resource exploration and extraction on collective fee simple land

<sup>133</sup> *Aboriginal Land Rights (Northern Territory) Act*, Section 12 (2), *supra* note 130; *Aboriginal Lands Trust Act 1966* (SA) (No. 87), Section 16 (2) [*Aboriginal Lands Trust Act 1966*]; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), Part 3, Division 3, *supra* note 130; *Maralinga Tjarutja Land Rights Act*, Part 3, Division 4, *supra* note 130.

<sup>134</sup> *Crown Minerals Act 1991* (No. 70), Section 10.

<sup>135</sup> *Ibid.*, Section 11 (2).

<sup>136</sup> See e.g. *Nisga'a Final Agreement*, Section 6.2, *supra* note 119; *Maa-nulth First Nation Final Agreement*, Section 5.2.7, *supra* note 119; *Inuvialuit Final Agreement*, Section 7.14, *supra* note 118; *Gwich'in Agreement*, Sections 20.2.1 & 20.2.3, *supra* note 119; *Nunavut Land Claims Agreement*, Sections 21.3.1 & 21.3.9, *supra* note 119; *Labrador Inuit Land Claims Agreement*, Section 4.15.13, *supra* note 119; *Nunavik Inuit Land Claims Agreement*, Section 12.2.6, *supra* note 119; *Council for Yukon Indian Umbrella Final Agreement*, Sections 5.15.3 & 6.3.0, *supra* note 119.

<sup>137</sup> *Aboriginal Land Act 1978* (NT) (No. 106), Sections 4-5.

without the indigenous group's prior consent.<sup>138</sup> As regards New Zealand, where land is conveyed to indigenous peoples either as financial or as cultural redress, a distinction has to be made: land given as financial redress for past wrongs is generally transferred as fully-fledged fee simple title, thus containing the comprehensive right to exclude others.<sup>139</sup> In contrast, land conferred as cultural redress often constitutes land to which there is a public interest of access, use, and preservation. Hence, these lands are generally conveyed under the condition that others may still access and use the land for recreational purposes and that certain measures to preserve the environment, landscape, or sites of historical value can be taken by the government.<sup>140</sup>

The amount of protection accorded to indigenous peoples against the involuntary loss of their collective fee simple land also differs among the several States. In general, land held by indigenous peoples in form of collective fee simple title can be condemned by the respective government under the same condition as any other privately held land. In addition – unlike reservations which are tax-exempted – fee simple land is generally liable to tax, and hence can be seized in case these taxes cannot be paid. In order to prevent involuntary loss of land as a result of unpaid taxes, several Australian States have expressly exempted land conveyed to indigenous groups from tax liability,<sup>141</sup> and some – but not all – of the Canadian CLC agreements contain provisions stipulating that seizure of land for unpaid taxes is not possible.<sup>142</sup>

<sup>138</sup> *Aboriginal Land Rights Act 1983* (NSW) (No. 42), Section 45 (11)-(13) [*Aboriginal Land Rights Act 1983*]; *Aboriginal Lands Trust Act 1966*, Section 16 (9), *supra* note 133.

<sup>139</sup> Office of Treaty Settlements, *supra* note 121, 126.

<sup>140</sup> *Reserves Act 1977* (No. 66), Section 77; *Conservation Act 1987* (No. 65), Section 27.

<sup>141</sup> See e.g. *Aboriginal Land Rights Act 1983*, Section 43, *supra* note 138; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act*, Section 40, *supra* note 130, *Maralinga Tjarutja Land Rights Act 1984*, Section 38, *supra* note 130. In the Northern Territory, where most indigenous fee simple land is situated, no land taxes are imposed on land owners. See also B. Dawson, 'Final Report to Commonwealth Grants Commission: Material Differences in Land Tax Between States and Territories in Relation to Value of a Landowner's Taxable Holdings of Land' (October 2009), available at [http://www.cgc.gov.au/attachments/article/27/Material\\_differences\\_in\\_land\\_tax.pdf](http://www.cgc.gov.au/attachments/article/27/Material_differences_in_land_tax.pdf) (last visited 15 June 2013), 1 & 22.

<sup>142</sup> See e.g. *Nunavut Land Claims Agreement*, Section 22.2.5, *supra* note 119; *Tlicho Agreement*, Section 18.1.12, *supra* note 119; *Council for Yukon Indians Umbrella Final Agreement*, Section 21.3.1, *supra* note 119. In contrast, see *Nisga'a Final Agreement*, Section 3.8, *supra* note 119; *Tsawwassen First Nation Final Agreement*, Sections 4.7-4.8, *supra* note 119; *Labrador Inuit Land Claims Agreement*, Section 4.4.11, *supra* note 119.

## 2. Land Use and Management Rights

Although derivative rights to the land itself give indigenous peoples the opportunity to regain and to reconnect with some of their ancestral lands, the lands conveyed are generally considerably smaller than their traditional territories. In addition, governments often convey only land in areas which are of no interest to non-indigenous people due to their remoteness and extreme climate conditions. For these reasons, indigenous peoples have increasingly turned their attention to land use and co-management rights in order to realize their rights to their ancestral lands. The major advantage of this approach is that such use and management rights can also be transferred in areas where third parties hold rights to the land since the main focus is on shared use and reconciliation of interests.

Such use and management rights can either be derived from historical treaties if these treaties contain clauses according to which the indigenous peoples cede their lands to the colonial powers but in return are guaranteed the continued and perpetual existence of their rights to hunt, fish, or use other resources on their traditional territories. Such treaties were concluded in the USA and Canada. Whereas in the USA – according to the plenary powers doctrine – Congress can abrogate such treaty rights at any time without the tribes' consent,<sup>143</sup> existing treaty rights are constitutionally protected under Section 35 (1) *Constitution Act, 1982* in Canada.<sup>144</sup> As regards New Zealand, indigenous peoples' use rights are protected in one universal historical document, the *Treaty of Waitangi*. The *Treaty of Waitangi* is not considered to be legally binding; however, if a piece of legislation refers to the Treaty, adherence to its principles takes precedence over a literal reading of the text.<sup>145</sup>

Complementary to historical treaty rights, the Canadian, New Zealand, and Australian governments have also concluded several modern co-management and co-use agreements with indigenous groups regarding hunting and fishing, sub-surface resources, and sacred sites. As regards Canada, such co-use and co-management rights are usually included in the CLC agreements. Use and management rights are often granted with regard to lands, which form part of the traditional territory of the respective group but are not transferred to the group in form of collective fee simple title. Hence, in the CLC process, these

<sup>143</sup> *Lone Wolf v. Hitchcock*, US Supreme Court, (1903) 187 US 553, 566.

<sup>144</sup> *Simon v. The Queen*, Supreme Court of Canada, [1985] 2 SCR 387, paras 24 & 33.

<sup>145</sup> *New Zealand Maori Council v. Attorney-General*, New Zealand Court of Appeal, [1987] 1 NZLR 641, 664.

rights are generally regarded as secondary rights. In contrast, under the New Zealand land policy, modern co-use and co-management rights are regarded as an equally or even more effective way to implement indigenous land rights, and whereas little land is conveyed in form of fee simple title, extensive use and management rights over vast parts of New Zealand have been conferred to indigenous groups. There are several co-management agreements regarding mountains sacred in Maori culture,<sup>146</sup> rivers,<sup>147</sup> and lakes.<sup>148</sup> Particular notice needs to be taken of the Sealord Deal granting Maori commercial fishing rights worth around NZD 150 million.<sup>149</sup>

In Australia, co-use and co-management rights of indigenous peoples are generally realized through *Indigenous Land Use Agreements* (ILUAs), which were introduced in reaction to the 1992 *Mabo* decision. ILUAs are voluntary out-of-court settlements of native title disputes, which become binding upon their registration with the National Native Title Tribunal. So far, over 500 ILUAs have been concluded.<sup>150</sup> They deal with a vast range of matters including resource development, access to native title land, management of wildlife and natural resources, land and water management, or management of national parks.<sup>151</sup> Several of the ILUAs concluded between indigenous groups and the Crown concern co-use and co-management of land and natural resources. In addition to the ILUA system, more than 20 so-called *Joint Management Agreements* have been concluded between the Crown and indigenous groups, the most well-known being the *Uluru-Kata Tjuta National Park Agreement* and the *Kakadu*

<sup>146</sup> J. Ruru, 'Indigenous Peoples' Ownership and Management of Mountains: The Aotearoa/New Zealand Experience', 3 *Indigenous Law Journal* (2004), 111.

<sup>147</sup> See in particular *Deed in Relation to Co-Governance and Co-Management Arrangements for the Waikato River* (31 May 2010).

<sup>148</sup> See in particular *Te Arawa Lake Settlement*. A summary of the *Deed of Settlement* is available at <http://nz01.terabyte.co.nz/ots/DocumentLibrary/TeArawaLakesSettlementSummary.pdf> (last visited 15 June 2013).

<sup>149</sup> H. K. Guth, 'Dividing the Catch: Natural Resource Reparations to Indigenous Peoples: Examining the Maori Fisheries Settlement', 24 *University of Hawai'i Law Review* (2001) 1, 179, 182.

<sup>150</sup> See Australian Human Rights Commission, '500th Indigenous Land Use Agreement a Good Sign for Principled Agreement-Making' (1 April 2011), available at [http://www.hreoc.gov.au/about/media/media\\_releases/2011/26\\_11.html](http://www.hreoc.gov.au/about/media/media_releases/2011/26_11.html) (last visited 15 June 2013).

<sup>151</sup> D. Craig, 'Native Title and Environmental Planning: Indigenous Land Use Agreements', 17 *Environmental and Planning Law Journal* (2000) 5, 440, 445; J. Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (2006), 286.

*National Park Agreement*.<sup>152</sup> Under the *Joint Management Agreement* system, title to land is granted to its traditional owners, who in turn lease back that land to the Australian government for its management as a national park.<sup>153</sup> Yet, since such joint management takes place on collectively held fee simple land, it does not constitute an additional means to realize indigenous land rights. Instead, it restricts indigenous fee simple title as regards significant sites, which otherwise would not have been conveyed to indigenous groups, similar to the conveyance of land as cultural redress in New Zealand.

In the contiguous States of the USA, as a general rule, co-use and co-management rights outside of Indian trust lands are not transferred to indigenous peoples.<sup>154</sup>

### 3. Conclusion

Through the conveyance of property and quasi-property rights to indigenous peoples, the transfer of use and management rights and the affirmation and enforcement of historical treaty rights, indigenous peoples could secure and – to a certain degree – regain ownership and control over vast tracts of their historical land base. The key aspects of the different national land policies, however, differ significantly. Whereas the US government has – at least in the contiguous States – not transferred modern land rights to indigenous peoples to any substantial extent but instead relies on the reservation or tribal trust land system to protect historical land rights, modern land rights in form of collective fee simple title and use and co-management rights are at the center of the Canadian, New Zealand, and Australian land policy. The governments' motives for the conveyance of land rights to indigenous peoples vary. They range from providing legal certainty through the exchange of potential aboriginal rights for secure derivative land rights to restitution for past injustices and the creation of a sufficient land base to ensure economic development and cultural survival of indigenous peoples.

<sup>152</sup> See Agreements/Treaties and Negotiated Settlements Project, 'Joint Management Agreement' (2011), available at <http://www.atns.net.au/subcategory.asp?subcategoryid=150> (last visited 15 June 2013).

<sup>153</sup> Australian Government - Department of Agriculture Fisheries and Forestry, 'Indigenous Australians: Natural Resource Management' (2007), available at [http://www.daff.gov.au/\\_data/assets/pdf\\_file/0009/29097/indigenous.pdf](http://www.daff.gov.au/_data/assets/pdf_file/0009/29097/indigenous.pdf) (last visited 15 June 2013).

<sup>154</sup> Co-management regimes exist, however, in Alaska (see *Alaska National Interest Lands Conservation Act* (16 USC 3101); *Migratory Bird Treaty Act* (16 USC 703); *Marine Mammal Protection Act* (16 USC 1361)) and Hawaii (Kaho'olawe Island Reserve).

One problem in this context is, however, the unequal bargaining position of indigenous peoples. Due to their better financial resources, higher level of expertise, and application of their legal framework, governments are in a much more powerful position than indigenous peoples. Through the recognition of the aboriginal title doctrine, governments were initially put under pressure to negotiate with indigenous peoples and to ensure that their interests are taken into account. Yet, as a result of the more recent judgments of Canadian and Australian courts regarding aboriginal title rights and the enactment of restrictive laws in Australia and New Zealand, the domestic pressure on governments to realize and protect indigenous peoples' land rights has declined significantly in recent years.<sup>155</sup>

#### D. Compatibility of the Several National Regimes With Obligations Under International Law

The handling of indigenous land rights is, however, no longer a purely national matter. Since the 1980s, several international organizations, bodies, and courts have committed themselves to protect and promote indigenous land rights. Through the drafting of agreements, the adoption of declarations, and the issuance of judgments, they have tried to encourage governments to guarantee a minimum level of rights to indigenous peoples as regards their traditional lands. Whether the States subject to this study act in accordance with minimum standards under international law shall be explored in this chapter.

In this context, it needs to be mentioned that the protection and promotion of indigenous peoples' rights are always embedded in a human rights framework. Yet there are two paths to protect and promote indigenous peoples' rights. On the one hand, indigenous peoples aim at the creation of special forums and bodies which exclusively deal with the situation of indigenous peoples and represent their interests at the international level, as well as at the elaboration and adoption of progressive provisions and instruments which only focus on indigenous peoples' rights. As a special international institution for the protection of indigenous peoples' rights, the Expert Mechanism on the Rights of Indigenous Peoples (and the Working Group on Indigenous Populations as its predecessor), the Permanent Forum on Indigenous Issues, and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of

<sup>155</sup> A. Erueti, 'The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law', 23 *Arizona Journal of International and Comparative Law* (2006) 3, 543, 579-581.

Indigenous Peoples need to be mentioned. All of these institutions have been established since the early 1980s within the United Nations framework and have been active on the question of indigenous peoples' land rights. With regard to special instruments for the protection of indigenous rights, first mention has to go to the International Labour Organization *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169)<sup>156</sup> of 1989. This Convention remains – besides the outdated assimilationist ILO *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO Convention No. 107)<sup>157</sup> – as of today the only binding international instrument exclusively dealing with the rights of indigenous peoples.<sup>158</sup> Although the *ILO Convention No. 169* has so far only been ratified by 22 States,<sup>159</sup> its relevance goes far beyond the limited number of ratifications. National and international organizations and courts consult the convention on a regular basis when rights of indigenous peoples are concerned – even if the State in question has not ratified it – and therefore at least the central provisions of the *ILO Convention No. 169* are nowadays to be regarded as customary international law.<sup>160</sup> Another special instrument for the protection of indigenous peoples that needs to be mentioned is the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which was adopted by the General Assembly in 2007.<sup>161</sup> While a General Assembly resolution is not *per se* binding,<sup>162</sup> the UNDRIP is one of the most-

<sup>156</sup> ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169].

<sup>157</sup> ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 [ILO Convention No. 107].

<sup>158</sup> Although *ILO Convention No. 107* remains binding on those 17 States which have ratified it, it was declared closed for ratification after the adoption of *ILO Convention No 169*. In case a State has ratified both Conventions, *ILO Convention No. 107* is completely replaced.

<sup>159</sup> See ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)', available at [http://www.ilo.org/dyn/normlex/en/?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314) last visited 15 June 2013).

<sup>160</sup> S. J. Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State', 21 *Arizona Journal of International and Comparative Law* (2004) 1, 13, 40; Anaya, *Indigenous Peoples in International Law*, *supra* note 5, 61.

<sup>161</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1 [UNDRIP].

<sup>162</sup> See Arts 10 & 11 *Charter of the United Nations*.

discussed texts in the history of the United Nations<sup>163</sup> and has been supported by a broad majority of States.<sup>164</sup> Therefore, many of the aspects laid down in the Declaration have to be considered to constitute customary international law.<sup>165</sup>

On the other hand, as another approach to realize their land rights, indigenous peoples invoke general human rights norms and instruments and demand their adaptation to the special situation of indigenous peoples. In particular, the *International Covenant on Civil and Political Rights* (ICCPR),<sup>166</sup> the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),<sup>167</sup> and the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD)<sup>168</sup> at the international level, and the *Charter of the Organization of American States*<sup>169</sup> in conjunction with the *American Declaration of the Rights and Duties of Man*,<sup>170</sup> the *American Convention on Human Rights*,<sup>171</sup> and the *African Charter on Human and Peoples' Rights*<sup>172</sup> at the regional level are employed to this end. Indigenous peoples rely on the progressive interpretation of these norms by international courts and human rights treaty bodies to further their cause.

Ultimately, these two approaches supplement one another. Courts and committees often refer to special instruments for the protection of indigenous

<sup>163</sup> M. Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples', 58 *International and Comparative Law Quarterly* (2009) 4, 957, 969-970.

<sup>164</sup> In the General Assembly 143 States voted in favor of UNDRIP with four States (Australia, Canada, New Zealand, and the USA) voting against and 11 abstaining. 34 States did not participate in the vote. All four States opposing the UNDRIP have since then changed their vote in favor of the Declaration. See UN News Centre, 'United States' Backing for Indigenous Rights Treaty Hailed at UN' (17 December 2010), available at <http://www.un.org/apps/news/story.asp?NewsID=37102> (last visited 15 June 2013).

<sup>165</sup> Barelli, *supra* note 163, 966-967; C. Charters, 'The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples', 4 *New Zealand Yearbook of International Law* (2007), 121, 123.

<sup>166</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR].

<sup>167</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 [ICESCR].

<sup>168</sup> *International Convention on the Elimination of all Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195.

<sup>169</sup> *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3.

<sup>170</sup> *American Declaration of the Rights and Duties of Man*, OAS Res. XXX, 2 May 1948, OEA/ser.L/V/II.23, doc. 21, rev. 6 (1979) [American Declaration].

<sup>171</sup> *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 [ACHR].

<sup>172</sup> *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217.

peoples' rights to interpret general human rights obligations and, in turn, international organizations look at the international jurisprudence when developing new progressive instruments for the protection and promotion of indigenous peoples' rights.

## I. Duty to Recognize and Protect Inherent Indigenous Land Rights

That indigenous peoples have inherent rights to their ancestral lands based on their occupation and use since time immemorial and their continued special relationship to the land is no longer disputed. Art. 13 *ILO Convention No. 169* calls upon States to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands [...] which they occupy or otherwise use”,<sup>173</sup> and Art. 14 (1) *ILO Convention No. 169* lays down the duty to recognize “[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy”.<sup>174</sup> That such recognition is of a purely declaratory nature was confirmed by the ILO Committee of Experts in its *Observations on Peru* in which it held that “under the Convention traditional occupation conferred a right to the land, whether or not such a right was recognized [by the State]”.<sup>175</sup> The wording of the UNDRIP is even clearer. In its Preamble, it 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”.<sup>176</sup> Furthermore, it points out that control over the developments of their lands and its natural resources enables indigenous peoples not only to preserve and strengthen their cultures and traditions but also to promote their development in accordance with their needs.<sup>177</sup> Consequently,

<sup>173</sup> *ILO Convention No. 169*, Art. 13, *supra* note 156, 1387.

<sup>174</sup> *Ibid.*, Art. 14 (1), 1387.

<sup>175</sup> ILO Committee of Experts, ‘Observations on Peru: Indigenous and Tribal Peoples Convention, 1989 (No. 169)’ (2002), available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2214952](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2214952) (last visited 15 June 2013), para. 7. See also B. Feiring & Programme to Promote ILO Convention No. 169 - International Labour Standards Department, ‘Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169’ (2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_106474.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf) (last visited 15 June 2013), 94.

<sup>176</sup> UNDRIP, Preamble (para. 7), *supra* note 161, 2 (emphasis added).

<sup>177</sup> *Ibid.*, Preamble (para. 10), 2.

Art. 25 UNDRIP stipulates the indigenous peoples' right "to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands",<sup>178</sup> and Art. 26 UNDRIP recognizes in a declaratory manner that indigenous peoples "have the right" to their ancestral lands.<sup>179</sup>

Within the framework of the universal and regional protection of human rights, the idea of a deeply felt cultural and spiritual relationship of indigenous peoples to their ancestral lands has also been taken up by several courts and committees, and States have been requested to recognize and protect the inherent rights of indigenous peoples to these lands. For example, the Human Rights Committee (HRC) in its *General Comment No. 23* has alluded to this special relationship by stating that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples".<sup>180</sup> The HRC has repeatedly held that indigenous peoples have inherent rights to their lands based on this special relationship. For example, in its *Concluding Observations on Canada*, it refers to indigenous peoples' rights to their lands as "inherent aboriginal rights",<sup>181</sup> and in several *Concluding Observations* the HRC has implicitly classified indigenous peoples' land rights as inherent by subsuming them under Art. 1 (2) ICCPR, i.e. the right of peoples to freely dispose of their natural wealth and resources<sup>182</sup> – a right which is always inherent.<sup>183</sup> Likewise, the Committee on the Elimination of Racial Discrimination (CERD) "calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their

<sup>178</sup> *Ibid.*, Art. 25, 7.

<sup>179</sup> *Ibid.*, Art. 26, 8.

<sup>180</sup> Human Rights Committee [HRC], *General Comment No. 23*, UN Doc CCPR/C/21/Rev.1/Add.5, 26 April 1994, 4, para. 7 [HRC, General Comment No. 23].

<sup>181</sup> HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Canada*, UN Doc CCPR/C/79/Add.105, 7 April 1999, 2, para. 8 [HRC, *Concluding Observations on Canada*].

<sup>182</sup> See e.g. *ibid.*; HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Chile: Addendum: Information Provided by the Government of Chile on the Implementation of the Concluding Observations of the Human Rights Committee (CCPR/C/CHL/CO/5)*, UN Doc CCPR/C/CHL/CO/5/Add.1, 22 January 2009, 5-6, para. 19; HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Sweden*, UN Doc CCPR/C/SWE/CO/6, 7 May 2009, 7, para. 21.

<sup>183</sup> See e.g. ICCPR, Art. 47, *supra* note 166, 185 and ICESCR, Art. 25, *supra* note 167, 11: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources".

communal lands, territories and resources<sup>184</sup> and has in several Concluding Observations and decisions requested States to respect and protect the rights of indigenous peoples to their traditional lands.<sup>185</sup> On a regional level, the Inter-American Court of Human Rights (IACtHR),<sup>186</sup> the Inter-American Commission on Human Rights (IACHR)<sup>187</sup> and the African Commission on Human and Peoples' Rights (ACHPR)<sup>188</sup> have also recognized the close ties of

<sup>184</sup> Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXIII*, UN Doc HRI/GEN/1/Rev.9 (Vol. II), 27 May 2008, 285, 286, para. 5 [CERD, General Recommendation XXIII].

<sup>185</sup> CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations the Committee on the Elimination of Racial Discrimination: Argentina*, UN Doc CERD/C/65/CO/1, 10 December 2004, 4, para. 16 [CERD, Concluding Observations on Argentina]; CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14, 14 April 2005, 4, para. 17 [CERD, Concluding Observations on Australia (2005)]; CERD, *Early Warning and Urgent Action Procedure: Decision 1 (68): United States of America*, UN Doc CERD/C/USA/DEC/1, 11 April 2006, 3, para. 8 [CERD, Decision 1 (68)].

<sup>186</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79, 74, para. 149 [Awas Tingni Case]; *Moiwana Community v. Suriname*, Judgment of 15 June 2005, IACtHR Series C, No. 124, 54-55, paras 130-135 [Moiwana Case]; *Indigenous Community Yakye Axa v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125, 74-77, 79, paras 124, 131, 135-137, 140 & 154; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146, 71-72, paras 118-121, 128 & 131 [Sawhoyamaxa Case]; *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172, 24 & 28, paras 82 & 95-96 [Saramaka Case].

<sup>187</sup> *Mary and Carrie Dann v. United States*, IACHR Case 11.140, 27 December 2002, Report No. 75/02, para. 128 [Dann Case]; *Maya Indigenous Communities of the Toledo District v. Belize*, IACHR Case 12.053, 12 October 2004, Report No. 40/04, para. 114 [Maya Indigenous Communities Case]. See also IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10, rev. 1, 24 April 1997, 115: "For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to 'the geographical space necessary for the cultural and social reproduction of the group'" (footnotes omitted).

<sup>188</sup> African Commission on Human and Peoples' Rights (ACHPR), 'Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples' (2007), available at [http://www.achpr.org/files/special-mechanisms/indigenous-populations/un\\_advisory\\_opinion\\_idp\\_eng.pdf](http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf) (last visited 15 June 2013), 4, para. 12; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, ACHPR Communication No. 276/2003, 4 February 2010, 36-37, 60 & 64-66, paras 154, 156, 227 & 244-251 [Endorois Case] with further references.

indigenous peoples with their ancestral lands as the basis of their culture and identity, and based on this assumption they have repeatedly stressed the inherent nature of indigenous land rights.<sup>189</sup>

Although the existence of inherit indigenous land rights is undisputed under international law, their legal nature, protection, and requirements regarding the burden of proof are less evident.

## 1. Legal Nature

When reading Art. 14 (1) *ILO Convention No. 169*, it is striking that a distinction is being made between “lands which [indigenous peoples] traditionally occupy” and “lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities”.<sup>190</sup> Whereas Art. 14 (1) *ILO Convention No. 169* accords “rights of ownership and possession”<sup>191</sup> to indigenous peoples regarding the former, it only recognizes use rights as regards to the latter. The UNDRIP does not draw such a clear distinction between rights to traditionally occupied lands and rights to traditionally used lands. Instead, it stipulates more generally that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use”.<sup>192</sup> Yet it cannot be the intention of this provision to accord full ownership rights to indigenous peoples to all lands which they have somehow used in the past irrespective of the nature, exclusivity, and intensity of their traditional land use. Instead, the enumeration of several rights that might accrue to indigenous peoples implies that a gradation of rights to the land depending on its traditional use must be possible. However, at the same time, the *ILO Convention No. 169* and the UNDRIP make clear that in case of an exclusive occupation indigenous peoples’ rights to the land amount to full ownership

<sup>189</sup> *Awas Tingni Case*, *supra* note 186, 74 & 75, paras 149 & 151; *Moiwana Case*, *supra* note 186, 54-55, paras 130-135; *Sawhoyamaxa Case*, *supra* note 186, 73, para. 128; *Saramaka Case*, *supra* note 186, 27 & 28, paras 93 & 96; *Maya Indigenous Communities Case*, *supra* note 187, paras 115, 117 & 127; IACHR, *Third Report on the Human Rights Situation in Colombia*, OAS Doc OEA/Ser.L/V/II.102 doc. 9, rev. 1, 26 February 1999, Ch. X, para. 19 [IACHR, Human Rights Situation in Colombia]; IACHR, *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*, OAS Doc OEA/Ser.L/V/II doc. 34, 28 June 2007, 62, para. 231; *Endorois Case*, *supra* note 188, paras 190 & 196-209.

<sup>190</sup> *ILO Convention No. 169*, Art. 14 (1), *supra* note 156, 1387.

<sup>191</sup> *Ibid.*

<sup>192</sup> UNDRIP, Art. 26 (2), *supra* note 161, 8.

rights. Regarding these inherent ownership rights, indigenous peoples must – on the basis of the fundamental principle of non-discrimination<sup>193</sup> – not be placed in a worse condition than holders of derivative, state-defined ownership rights. This has also been emphasized by the IACtHR, which held that “traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title”,<sup>194</sup> and by the IACHR, which stated that “respect for and protection of the private property of indigenous peoples on their territories is equivalent in importance to non-indigenous property, and [...] mandated by the fundamental principle of non-discrimination”.<sup>195</sup>

Therefore, the Australian approach, under which indigenous land rights are never regarded as a right to the land itself but only as a bundle of rights is not in accordance with international law. However, the Canadian and US practice is also not entirely in conformity with the States' international legal obligations, since they accord a lesser status to indigenous land ownership than to fee simple title. For example, the statement by the Supreme Court of Canada in *Delgamuukw* according to which aboriginal titles – unlike fee simple titles – are subject to immanent limitations of use,<sup>196</sup> are irreconcilable with the principle of non-discrimination. Likewise, the US Supreme Court's classification of aboriginal title rights neither as full ownership nor as unrestricted possession, occupation, and use rights but merely as “permissive occupation”<sup>197</sup> is not in accordance with the obligation to treat indigenous and non-indigenous ownership rights equally. With regard to New Zealand, the nature and extent of an aboriginal title and hence New Zealand's compliance with international obligations is hard to ascertain. Since almost all original land rights were extinguished during the land reforms in the 19th and early 20th centuries, the New Zealand courts have never explored this question in detail.

Under international law, the inherent ownership rights of indigenous peoples do not necessarily have to comprise sub-surface rights. Art. 15 (2) *ILO Convention No. 169* expressly states that States may retain the ownership of mineral or sub-surface resources. The UNDRIP does not contain such a provision. Yet the preliminary works on the Declaration suggest that this omission cannot be regarded as a departure from the principle that States may

<sup>193</sup> See *ILO Convention No. 169*, Art. 3, *supra* note 156, 1385; UNDRIP, Preamble (paras 5 & 18), *supra* note 161, 2 & 3. See also *ibid.*, Arts 2 & 46 (3), 3 & 11.

<sup>194</sup> *Sawhoyamaxa Case*, *supra* note 186, 73, para. 128.

<sup>195</sup> *Maya Indigenous Communities Case*, *supra* note 187, para. 119.

<sup>196</sup> *Delgamuukw Case*, *supra* note 38, 1080-1081, para. 111.

<sup>197</sup> *Tee-Hit-Ton Indians Case*, *supra* note 40, 277-279.

retain sub-surface rights. Whereas indigenous peoples tried to have a provision included stipulating their right to sub-surface resources,<sup>198</sup> States strictly opposed the inclusion of such a provision throughout the negotiations.<sup>199</sup> Several Special Rapporteurs have also recognized the right of States to retain rights to sub-surface resources. For example, according to José R. Martínez Cobo, the sub-surface resources under indigenous lands are to be regarded as the exclusive property of the respective indigenous communities only “[w]here possible within the prevailing legal system”,<sup>200</sup> and Erica-Irene Daes observes that “[t]here appears to be widespread understanding that natural resources located *on* indigenous lands [...] belong to the indigenous peoples that own the land or territory” but “[t]here is not such agreement concerning subsurface resources”.<sup>201</sup>

The right of States to reserve certain resources for themselves is also recognized under the universal and regional human rights framework. For example, the CERD distinguishes between property and ownership rights of indigenous peoples to their ancestral lands and rights to participate in the exploitation, management, and conservation of the resources located on this

<sup>198</sup> See Chairman-Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Third Session*, UN Doc E/CN.4/Sub.2/1984/20, 8 August 1984, para. 114.

<sup>199</sup> See Human Rights Commission, *Indigenous Issues: Report of the Working Group Established in Accordance With Commission on Human Rights Resolution 1995/32*, UN Doc E/CN.4/2000/84, 6 December 1999, 16-17, paras 92-93; Human Rights Commission, *Indigenous Issues: Report of the Working Group Established in Accordance With Commission on Human Rights Resolution 1995/32*, UN Doc E/CN.4/2001/85, 6 February 2001, 18-19, paras 107-110. See also S. Errico, ‘The Controversial Issue of Natural Resources: Balancing States’ Sovereignty with Indigenous Peoples’ Rights’, in S. Allen & A. Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011), 329, 339-340.

<sup>200</sup> Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7/Add.4, March 1987, para. 543 [Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Populations*].

<sup>201</sup> Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty Over Natural Resources: Final Report*, UN Doc E/CN.4/Sub.2/2004/30, 13 July 2004, 13-14, paras 42-43 (emphasis in the original).

land.<sup>202</sup> Likewise, the IACHR, the IACtHR, and the ACHPR recognize the States' rights to retain the sub-surface resources located on indigenous lands.<sup>203</sup>

Hence Australia's approach to generally not accord ownership rights to sub-surface resources to indigenous peoples is not *per se* irreconcilable with its obligations under international law. Yet, under the principle of non-discrimination, indigenous peoples must not be denied sub-surface resource rights if such rights are accorded to non-indigenous owners under the respective national framework.<sup>204</sup> Furthermore, even if non-indigenous owners cannot claim sub-surface resource rights, indigenous peoples must be able to claim at least rights to those resources, which they have traditionally used and which are therefore of a particular importance to their culture, economy, or way of life.<sup>205</sup> The recognition of the Maori's right to jade (*pounamu*) is a positive example for this approach.

Despite the obligation to treat indigenous and non-indigenous land rights equally, one particular unequal treatment is generally not regarded as inconsistent with international law: the classification of aboriginal titles as inalienable, although it places a restriction on indigenous peoples, which does not apply to fee simple title holders and restricts their economic freedom. The inalienability, although not expressly called for in international instruments, is generally regarded as a reasonable means to prevent future landless generations. To a certain degree, this is reflected in the UNDRIP, which in its Art. 26 (3) obliges States to recognize indigenous land rights "with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".<sup>206</sup> Since indigenous peoples had not traded in land before the arrival of the colonial powers, this might imply an obligation, or at least a permission, to prevent

<sup>202</sup> CERD, *Prevention of Racial Discrimination, Including Early Warning Measures and Urgent Action Procedures: Decision 1 (67): Suriname*, UN Doc CERD/C/DEC/SUR/2, 18 August 2005, 2, para. 4.

<sup>203</sup> *Saramaka Case*, *supra* note 186, 36, para. 122; IACHR, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, 74, para. 180 [IACHR, Norms and Jurisprudence of the Inter-American Human Rights System]; *Endorois Case*, *supra* note 188, 70-71, paras 266-267.

<sup>204</sup> Anaya, *Indigenous Peoples in International Law*, *supra* note 5, 143; G. Ulfstein, 'Indigenous Peoples' Right to Land', 8 *Max Planck Yearbook of United Nations Law* (2004), 1, 28.

<sup>205</sup> S. J. Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resources Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources', 22 *Arizona Journal of International and Comparative Law* (2005) 1, 7, 16.

<sup>206</sup> UNDRIP, Art. 26 (3), *supra* note 161, 8.

alienation – especially since Art. 25 UNDRIP emphasizes the indigenous peoples’ “responsibilities to future generations” in regard to their lands.<sup>207</sup> The IACHR takes a clear stand against the alienability of indigenous lands. It characterizes the “recognition by [a] state of the permanent and inalienable title of indigenous peoples” as a general international legal principle,<sup>208</sup> and emphasizes in a report concerning indigenous peoples’ rights over their ancestral lands and resources that “[e]ffective security and legal stability of lands are affected whenever the law fails to guarantee the inalienability of communal lands and instead allows communities to freely dispose of them, to establish liens, mortgages or other encumbrances, or to lease them”.<sup>209</sup>

## 2. Protection

With regard to the protection of indigenous land rights, international law distinguishes between protection against unilateral extinguishment of inherent indigenous land rights and protection against their infringement.

### a. Extinguishment

As a general rule, compulsory acquisition of indigenous lands and relocation of indigenous peoples is contrary to international law. Art. 16 *ILO Convention No. 169* stipulates that relocations may only take place under exceptional circumstances and even then only with the indigenous peoples’ free and informed consent. In case such a relocation takes place, the State is under an obligation to enable the indigenous peoples to return to their lands as soon as possible or – if such a return is not possible – to provide them with lands of equal quality or, if expressly requested by the indigenous group, compensate them in money or in kind. A unilateral taking of land is not envisaged. The UNDRIP also prohibits States from relocating indigenous peoples without their free, prior, and informed consent and an agreement on just and fair compensation. Where it is possible, indigenous peoples must be given the option to return.<sup>210</sup> In addition, States are called upon to provide effective mechanisms to prevent any action aiming at or resulting in indigenous peoples’ dispossession of their

<sup>207</sup> *Ibid.*, Art. 25, 7.

<sup>208</sup> *Dann Case*, *supra* note 187, para. 130.

<sup>209</sup> IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 37, para. 89.

<sup>210</sup> UNDRIP, Art. 10, *supra* note 161, 5.

lands or resources.<sup>211</sup> Likewise, in its *General Recommendation XXIII*, the CERD instructs States not to take away indigenous lands without the indigenous peoples' free and informed consent.<sup>212</sup> The IACHR and the ACHPR also prohibit States from arbitrarily acquiring indigenous lands. In the *Dann Case*, the IACHR stated that an aboriginal title may only be extinguished or changed "by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property"<sup>213</sup> and only against fair compensation.<sup>214</sup> The IACHR further clarifies that the State's aim to encourage agricultural developments cannot justify the extinguishment of indigenous land rights.<sup>215</sup> In its *Endorois* decision, the ACHPR made a similar statement. According to the ACHPR, the eviction of an indigenous community cannot be justified "with reference to 'the general interest of the community' or a 'public need'".<sup>216</sup>

Since compulsory acquisitions of indigenous lands are generally prohibited, indigenous land rights enjoy *de facto* a higher level of protection than non-indigenous land rights. This can be justified with the special cultural importance of land for indigenous peoples and their origin in a time before the formation of the State.

In view of the foregoing, the USA, Australia, and New Zealand do not act in accordance with their international legal obligations. As regards the USA, the still valid precedent of the US Supreme Court in *Tee-Hit-Ton Indians v. United States*, according to which an aboriginal title can be unilaterally extinguished without compensation,<sup>217</sup> has repeatedly been criticized by international institutions.<sup>218</sup> But also Australia has repeatedly been internationally criticized for its extinguishments of aboriginal titles. In particular, the fact that the Australian

<sup>211</sup> *Ibid.*, Art. 8 (2) (b), 4.

<sup>212</sup> CERD, *General Recommendation XXIII*, *supra* note 184, 286, para. 5.

<sup>213</sup> *Dann Case*, *supra* note 1867 para. 130.

<sup>214</sup> *Ibid.*, paras 130-131 & 143-145. See also IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 37-38, para. 90.

<sup>215</sup> *Dann Case*, *supra* note 187, para. 145.

<sup>216</sup> *Endorois Case*, *supra* note 188, 57, para. 215.

<sup>217</sup> *Tee-Hit-Ton Indians Case*, *supra* note 40, 285.

<sup>218</sup> Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship: Final Working Paper*, UN Doc E/CN.4/Sub.2/2001/21, 11 June 2001, paras 44-45 [Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Final Working Paper]. See also *Dann Case*, *supra* note 187, paras 140-145; CERD, *Decision 1 (68)*, *supra* note 185, 2-3, paras 6-10.

government has in the past suspended the RDA several times in order to be able to unilaterally extinguish indigenous land rights in a discriminatory manner has been criticized by the HRC,<sup>219</sup> the CERD,<sup>220</sup> and the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Erica-Irene A. Daes.<sup>221</sup> The protection New Zealand accords to indigenous peoples is also regarded as insufficient. In theory, the parliamentary supremacy and the lack of a constitutionally entrenched bill of rights affect all New Zealanders equally. In practice, however, it is foremost the traditional land rights of the Maori that are affected, with the best-known example being the *Foreshore and Seabed Act 2004*. The actions taken by the government, i.e. the unilateral extinguishment of all potential aboriginal rights instead of negotiating with the Maori, have been condemned by several international institutions, *inter alia*, the CERD<sup>222</sup> and the Special Rapporteurs on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples Rodolfo Stavenhagen<sup>223</sup> and S. James Anaya.<sup>224</sup> Although the New Zealand government reacted to this criticism by repealing the *Foreshore and Seabed Act*, Maori land rights remain vulnerable to extinguishment. So far, the New Zealand government has not

<sup>219</sup> HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Concluding Observations on Australia*, UN Doc A/55/40 Vol. I (2000), 71, para. 498, 508-511.

<sup>220</sup> CERD, *Concluding Observations on Australia (2005)*, *supra* note 185, 4, para. 16.

<sup>221</sup> Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 16, para. 47.

<sup>222</sup> CERD, *Decision 1 (66): Foreshore and Seabed Act 2004*, UN Doc CERD/C/66/NZL/Dec.1, 11 March 2005, 1-2, paras 4-7. See also CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination on Racial Discrimination: New Zealand*, UN Doc CERD/C/NZ/CO/17, 15 August 2007, 4, para. 19 [CERD, Concluding Observations on New Zealand].

<sup>223</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Indigenous Issues: Human Rights and Indigenous Issues: Addendum: Mission to New Zealand*, UN Doc E/CN.4/2006/78/Add.3, 13 March 2006, 21, para. 92 [Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Mission to New Zealand].

<sup>224</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *The Situation of Maori People in New Zealand (Addendum)*, UN Doc A/HRC/18/35/Add.4, 31 May 2011, 16, para. 56 [Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, The Situation of Maori People in New Zealand].

reacted to requests to introduce a constitutionally entrenched bill of rights<sup>225</sup> or a constitutional or at least statutory entrenchment of the *Treaty of Waitangi* within the national legal system.<sup>226</sup> Canada, on the other hand, is expressly praised for its constitutional protection of the continuous existence of aboriginal titles and rights under Section 35 *Constitution Act, 1982* under which the extinguishment of inherent indigenous rights is only possible with the express consent of the indigenous group concerned.<sup>227</sup>

## b. Infringement

Property and other similar rights are never absolute but can under certain circumstances be infringed by the State in the public interest. There is general agreement, however, that indigenous land rights must not be placed in a worse position than non-indigenous land rights. Therefore, indigenous land rights may only be infringed under the same conditions that apply to non-indigenous land rights,<sup>228</sup> i.e. the intended restrictions must have been previously established by law, be necessary and proportional, and have the aim of achieving a legitimate objective in a democratic society.<sup>229</sup> Yet the prohibition of less favorable treatment alone is not enough to adequately protect the interest of indigenous peoples. Instead, it is nowadays generally recognized that States are under the obligation to adopt positive measures to effectively protect inherent indigenous land

<sup>225</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Mission to New Zealand*, *supra* note 223, 21, para. 91; CERD, *Concluding Observations on New Zealand*, *supra* note 222, 2, para. 12.

<sup>226</sup> HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: New Zealand*, UN Doc CCPR/C/NZL/CO/5, 7 April 2010, 5, para. 20; CERD, *Concluding Observations on New Zealand*, *supra* note 222, 3, para. 13; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *The Situation of Maori People in New Zealand*, *supra* note 224, 21, para. 77.

<sup>227</sup> Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 32-33, para. 105.

<sup>228</sup> See *ILO Convention No. 169*, Art. 3 (1), *supra* note 156, 1385; UNDRIP, Art. 1, *supra* note 161, 3; CERD, *Decision 1 (68)*, *supra* note 185, 2-3, para. 7; Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 41, para. 144 (c); *Maya Indigenous Communities Case*, *supra* note 187, para. 119; *Sawhoyamaxa Case*, *supra* note 186, 71-72, para. 120.

<sup>229</sup> See e.g. *Saramaka Case*, *supra* note 186, 37-38, para. 127 with further references.

rights.<sup>230</sup> This does not constitute discrimination against the non-indigenous population because

“[i]t is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. [...] In the context of members of indigenous and tribal peoples, [...] special measures are necessary in order to ensure their survival in accordance with their traditions and customs”.<sup>231</sup>

The granting of participatory rights regarding all decisions which potentially affect aboriginal titles and rights is generally regarded as an adequate special measure to protect indigenous peoples' land rights against infringements threatening their cultural or physical survival. Yet these participatory rights do not generally amount to a right to veto in favor of the indigenous communities concerned. Instead, the principle to effectively involve indigenous peoples in all decisions affecting them requires States in most cases merely to consult indigenous peoples “in good faith, through culturally appropriate procedures and with the objective of reaching an agreement”<sup>232</sup> but not to abandon a project if no consensus can be reached. Only if a proposed governmental measure would have a substantial impact on the land and lives of indigenous peoples – which is in particular the case with regard to large-scale resource exploitation projects on indigenous lands – the obligation to consult will be transformed into an obligation to obtain the free, prior, and informed consent of the indigenous group concerned, i.e. a full right of veto in favor of indigenous peoples.<sup>233</sup>

<sup>230</sup> See e.g. HRC, *General Comment No. 23*, *supra* note 180, 4, para. 7; IACHR, *Third Report on the Human Rights Situation in Paraguay*, OAS Doc OEA/Ser.L/V/II.110 doc. 52, 9 March 2001, Ch. IX, para. 13; *Dann Case*, *supra* note 187, paras 126-127; *Saramaka Case*, *supra* note 186, 25-26, para. 85; *Endorois Case*, *supra* note 188, 48 & 51, paras 187 & 196.

<sup>231</sup> *Saramaka Case*, *supra* note 186, 31, para. 103.

<sup>232</sup> *Ibid.*, 40, para. 133.

<sup>233</sup> See e.g. HRC, *Ángela Poma Poma v. Peru*, Communication No. 511/1992, UN Doc CCPR/C/95/D/1457/2006, 24 April 2009, 11, para. 7.6 [*Ángela Poma Poma v. Peru*]; CERD, *Consideration of Reports Submitted By States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ecuador*, UN Doc CERD/C/62/CO/2, 2 June 2003, 3-4, para. 16; *Saramaka Case*, *supra* note 185, 40, para. 134; *Endorois Case*, *supra* note 188, 77, para. 291; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Summary of Cases Transmitted to Governments and Replies Received (Addendum)*, UN Doc A/HRC/9/9/Add.1, Annex 1, 15 August 2008, 92, 100, paras 39-40 (translation

The US and New Zealand approach according to which indigenous land rights might be infringed at any time without prior consultation of the indigenous groups concerned are not in accordance with international law.<sup>234</sup> The right to negotiate entrenched in the Australian NTA is in its current form also not in conformity with international law. Since States and enterprises may call upon the National Native Title Tribunal to decide if negotiations fail, and the Australian government may even override these decisions in the national interest or the interest of a State or Territory, there is little incentive to reach an amicable agreement with the indigenous groups concerned.<sup>235</sup> The Canadian approach, on the other hand, is generally assessed as positive. Although inherent

by L. Rodríguez-Piñero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement', in Allen & Xanthaki, *supra* note 199, 457, 473-474 (footnotes omitted); Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report to the Human Rights Council*, UN Doc A/HRC/12/34, 15 July 2009, 16-17, paras 47-49; Expert Mechanism on the Rights of Indigenous Peoples, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, UN Doc A/HRC/EMRIP/2010/2, 17 May 2010, 9, para. 34. See also International Law Association, 'Final Report Sofia (2012): Rights of Indigenous Peoples' (September 2012), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (last visited 15 June 2013), 6-7; T. Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law', 10 *Northwestern Journal of International Human Rights* (2011) 2, 54; J. Gilbert & C. Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent', in Allen & Xanthaki, *supra* note 199, 289, 304-328; Rodríguez-Piñero, *supra* note 233, 470-475.

<sup>234</sup> With regard to the US, see CERD, 'Early Warning Urgent Action Letters to the United States' (9 March 2012), available at <http://www2.ohchr.org/english/bodies/cerd/docs/CERDUnitedStates.pdf> (last visited 15 June 2013); CERD, *Decision 1 (68)*, *supra* note 185, 3, paras 7 (d) & 10 (b); CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc CERD/C/USA/CO/6, 8 May 2008, 10, para. 29; *Dann Case*, *supra* note 187, para. 140; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *The Situation of Maori People in New Zealand*, *supra* note 224, 15-16, para. 52; Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 17, para. 48.

<sup>235</sup> See CERD, *Decision (2) 54 on Australia*, UN Doc A/54/18, 29 September 1999, 6, 7, para. 7; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples: *Situation of Indigenous Peoples in Australia (Addendum)*, UN Doc A/HRC/15/37/Add.4, 1 June 2010, 8-9, paras 26-30 [Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples Situation of Indigenous Peoples in Australia].

indigenous land rights can still be unilaterally infringed for a wide range of legislative purposes despite their constitutional protection, the requirements for such infringements are in accordance with international law. In particular, the Canadian Supreme Court's assumption that indigenous participatory rights may in some cases amount to a right to veto,<sup>236</sup> and that participatory rights also exist before the existence of an aboriginal title has been established,<sup>237</sup> is to be praised.

### 3. Burden of Proof

With regard to the burden of proof, two questions are relevant: how to distinguish between inherent ownership rights and mere use rights, and what requirements apply regarding the proof of a continuous occupation or use of the land.

#### a. Occupation

As mentioned above, indigenous peoples have ownership rights only to those lands, which they have traditionally and exclusively occupied. To all lands, which they have used otherwise, they only have continuous use rights. The distinction between rights to traditionally occupied lands and rights to lands traditionally used otherwise must, however, not be understood as denying nomadic peoples aboriginal titles *per se*. Since the majority of indigenous peoples traditionally used their lands in a nomadic or semi-nomadic way, such an interpretation would amount to a denial of the existence of inherent indigenous ownership rights. Instead, it is recognized that in principle nomadic peoples can also fulfill the requirements of occupation.

According to the narrow, Eurocentric interpretation, an occupation requires settlement, possession, use, and effective control over a tract of land – requirements which most nomadic peoples do not fulfill.<sup>238</sup> However, the *ILO*

<sup>236</sup> *Delgamuukw Case*, *supra* note 38, 1112-1113, para. 168.

<sup>237</sup> *Haida Case*, *supra* note 49, para. 10; *Taku River Case*, *supra* note 49, 652, para. 21.

<sup>238</sup> The Oxford English Dictionary defines “occupy” as “[t]o hold possession of; to have in one’s possession or power; to hold (a position, office, or privilege)” or “[t]o live in and use (a place) as its tenant or regular inhabitant; to inhabit; to stay or lodge in” (‘Oxford English Dictionary Online’ (2012), available at <http://www.oed.com/> (last visited 15 June 2013)) and Black’s Law Dictionary defines “occupancy” as “[t]he act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, esp. of a dwelling or land [and it] denotes whatever acts are done on the land to manifest a claim of exclusive control and to indicate to the public that the actor has appropriated the land” (B. A. Garner (ed.), *Black’s Law Dictionary*, 9th ed. (2009), 1184).

*Convention No. 169* stipulates that “[i]n applying the provisions [...] governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories”,<sup>239</sup> their “social, cultural, religious and spiritual values and practices”,<sup>240</sup> and their “customs or customary laws”.<sup>241</sup> Likewise, the UNDRIP stresses that the recognition of indigenous peoples’ rights to their lands “shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned”.<sup>242</sup> Therefore, possession and control are not to be defined solely according to the European concept but indigenous views are also to be taken into account. The IACtHR<sup>243</sup> and ACHPR<sup>244</sup> have also stressed that nomadic peoples can hold inherent ownership rights to their traditional lands. Whether a nomadic people can claim ownership rights or merely use rights depends on the nature, exclusivity, and intensity of their traditional use of the land. In case a nomadic people wanders a region randomly in search of food, water, or other resources without any special relationship to a particular area, or in case it shares a tract of land with other indigenous groups, this does not amount to occupation.<sup>245</sup> Yet if a nomadic people permanently and exclusively ranges a definite area of land, thereby visiting religious sites, using natural resources in accordance with their culture and way of life, and returning annually to good campgrounds they can claim ownership rights to the land.<sup>246</sup> The requirements in terms of exclusivity must not be applied too strictly. If a nomadic group from time to time tolerates the use of the land by other groups or there have been

The term “possession” is defined as “[v]isible power or control over something (defined by the intention to use or to hold it against others) as distinct from lawful ownership; *spec.* exclusive control of land” (‘Oxford English Dictionary Online’, *supra* note 238) or “[t]he fact of having or holding property in one’s power; the exercise of dominion over property” (Garner, *supra* note 237, 1281). See also Ulfstein, *supra* note 204, 18.

<sup>239</sup> *ILO Convention No. 169*, Art. 13, *supra* note 156, 1387.

<sup>240</sup> *Ibid.*, Art. 5, 1385.

<sup>241</sup> *Ibid.*, Art. 8 (1), 1386.

<sup>242</sup> UNDRIP, Art. 26 (3), *supra* note 161, 8.

<sup>243</sup> See statement by Galio Claudio Enrique Gurdían Gurdían, in *Awas Tingni Case*, *supra* note 186, 29-31, para. 83 (f) and expert opinion by Rodolfo Stavenhagen Gruenbaum in *Awas Tingni Case*, *supra* note 186, 23-26, para. 83 (d); *Sawhoyamaxa Case*, *supra* note 186, 74, para. 131. See also IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, para. 55 (footnote 135).

<sup>244</sup> *Endorois Case*, *supra* note 188, 48, para. 187. Regarding the land use of the Endorois see *ibid.*, 13, para. 73.

<sup>245</sup> K. McNeil, *Common Law Aboriginal Title* (1989), 202.

<sup>246</sup> *Ibid.*, 203-204.

occasional trespasses by other groups, it will still have exclusive control over the land provided it intends to exclusively control the land and can generally enforce such an exclusive control.<sup>247</sup>

The Australian approach under which indigenous peoples are only accorded a bundle of rights but not rights to the land itself is therefore not in accordance with international law. Neither the Torres Strait Islanders, who often lived in permanent settlements and practiced agriculture, nor the Aboriginal peoples who had paths they regularly followed and areas they exclusively used, wandered the land aimlessly. Therefore, they cannot generally be denied ownership rights. The decision by the Canadian Supreme Court in *R. v. Marshall; R. v. Bernard*, in which it held that exclusive seasonal hunting, fishing, or gathering activities in a particular area were not sufficient to establish occupation,<sup>248</sup> is also to be criticized. Instead of respecting and taking due account of indigenous customs, traditions, and ownership structures, the Court exclusively applied European standards, which indigenous peoples generally cannot fulfill.

## b. Continuity

Since the source of indigenous land rights is the traditional occupation and use of the land since time immemorial, the question arises if indigenous land rights continue to exist in case the manner of use has changed over the years.

The HRC noted in this connection that “article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology”,<sup>249</sup> and the IACHR stressed that “the history of indigenous peoples and their cultural adaptations along time are not obstacles for preserving their fundamental relationship with their territory, and the rights that stem from it”.<sup>250</sup> The statements in the preamble of the UNDRIP according to which indigenous peoples have a “right to development in accordance with their own needs and

<sup>247</sup> *Ibid.*, 204 with further references; Ulfstein, *supra* note 204, 19. See also *Richtersveld Community v. Alexkor Ltd.*, Supreme Court of Appeal of South Africa, (2003) 6 South African Law Reports 104, para. 24.

<sup>248</sup> *Marshall Case*, *supra* note 73, 247, 251-252 & 523, paras 58, 70 & 77.

<sup>249</sup> HRC, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993, 14-15, para. 9.4 [Mahuika Case].

<sup>250</sup> IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 27-28, para. 70. See also *ibid.*, 11 & 12, paras 35 & 36.

interests”<sup>251</sup> and “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs”<sup>252</sup> can also only be interpreted as a right of indigenous peoples to develop culturally without losing their inherent rights to the land.<sup>253</sup> Hence, as long as there is a historical, continuous presence of an indigenous people within a certain area and an on-going tie to the pre-colonial society, the inherent indigenous land rights continue to exist, even if the manner of land use has changed.<sup>254</sup> Therefore, in order to prove their inherent land rights, indigenous peoples only have to prove that their ancestors have occupied or otherwise used the land.

The burden of proof under the Australian NTA is not in accordance with these stipulations. Under the NTA, indigenous groups are required not only to prove the individual laws and customs under which they hold rights to the lands but also their uninterrupted adherence. There is no assumption of a continued relationship to the land based on its on-going use and settlement.<sup>255</sup> This has been criticized by the CERD,<sup>256</sup> the Committee on Economic, Social and Cultural Rights (CESCR),<sup>257</sup> and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya<sup>258, 259</sup>. The approach by the Canadian Supreme Court, which requires indigenous peoples claiming aboriginal rights to prove that a practice is integral

<sup>251</sup> UNDRIP, Preamble (para. 6), *supra* note 161, 2.

<sup>252</sup> *Ibid.*, Preamble (para. 9), 2.

<sup>253</sup> See also *ILO Convention No. 169*, Preamble (para. 5) & Art. 7 (1), *supra* note 156, 1384 & 1386.

<sup>254</sup> IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 11-12, para. 35.

<sup>255</sup> *Yorta Yorta Aboriginal Community Case*, *supra* note 80, paras 44 & 46-47.

<sup>256</sup> CERD, *Concluding Observations on Australia (2005)*, *supra* note 185, 4, para. 17; CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17, 13 September 2010, 5, para. 18.

<sup>257</sup> CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4, 12 June 2009, 9, para. 32.

<sup>258</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Situation of Indigenous Peoples in Australia*, *supra* note 235, 8, para. 26.

<sup>259</sup> In March 2011, the Green Party introduced the *Native Title Amendment (Reform) Bill 2011* to lower the burden of proof. Whether this will lead to a revision of the NTA remains to be seen; see also McHugh, *supra* note 37, 132-133.

to their culture and has had an uninterrupted continuity since pre-contact times,<sup>260</sup> is also not in accordance with international law.

## II. Duty to Demarcate Indigenous Lands and Convey Secure Legal Status

Several obligations for States arise from the international recognition of the existence of inherent indigenous land rights. The most important ones are the duty to identify and demarcate indigenous lands and – in a next step – the duty to effectively protect indigenous land rights by granting indigenous peoples a secure legal status to their lands through the conveyance of rights recognized under the national legal system.

### 1. Duty to Demarcate

Demarcation means “the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground”.<sup>261</sup> Without demarcation, State representatives or third parties are not able to ascertain as to which lands indigenous peoples hold rights. Since “[p]urely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked”,<sup>262</sup> the duty to demarcate is widely recognized under international law. The *ILO Convention No. 169* calls upon States to “take steps as necessary to identify” indigenous lands,<sup>263</sup> the HRC demanded in its *Concluding Observations on Brazil* that “in light of article 27 of the Covenant, all necessary measures should be taken to ensure that the process of demarcation of indigenous lands be speedily and justly settled”,<sup>264</sup> and the CESCR expressed its concern that Russia still has not enacted any legislation to facilitate the demarcation of indigenous lands.<sup>265</sup> Likewise, the IACHR and

<sup>260</sup> *Van der Peet Case*, *supra* note 76, 549 para. 46.

<sup>261</sup> Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 17, para. 50.

<sup>262</sup> *Ibid.*

<sup>263</sup> *ILO Convention No. 169*, Art. 14 (2), *supra* note 156, 1387.

<sup>264</sup> HRC, *Consideration of Reports Submitted by States Parties Under Article of the Covenant: Concluding Observations of the Human Rights Committee: Brazil*, UN Doc CCPR/C/79/Add.66, 24 July 1996, 5, para. 32.

<sup>265</sup> CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc E/C.12/1/Add.94, 12 December 2003, 2, para. 11.

the IACtHR have repeatedly stressed the importance of demarcation. In several reports<sup>266</sup> and decisions,<sup>267</sup> the IACHR has referred to the duty to demarcate indigenous lands, and the IACtHR held in its *Awás Tingni* decision that the failure to demarcate indigenous lands “has created a climate of constant uncertainty among the members of the Awás Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property”.<sup>268</sup> It therefore requested Nicaragua to adopt all necessary legislative, administrative, and other measures to demarcate the lands of the Awás Tingni, and until then to abstain from acts that might affect the potential land rights of the indigenous community.<sup>269</sup> The UNDRIP does not contain any express obligations to demarcate indigenous lands. Such an obligation is, however, implied in Art. 26 (3) UNDRIP, which obliges States to recognize and protect indigenous lands since the protection of indigenous lands is not possible without prior demarcation.<sup>270</sup>

## 2. Duty to Convey Secure Legal Status

From the obligation to take all necessary measures to legally recognize and protect indigenous lands follows that demarcation as a merely factual act does not suffice to adequately protect indigenous ownership and use rights. Instead,

See also CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Brasil*, UN Doc E/C.12/BRA/CO/2, 12 June 2009, 3-4, para. 9 [CESCR, Concluding Observations on Brazil].

<sup>266</sup> IACHR, *Human Rights Situation in Colombia*, Ch. X, Recommendation 2: “The State should take appropriate measures to ensure that the process of legal demarcation, recognition and granting title to land and use of natural resources to indigenous communities is not hindered or delayed by bureaucratic difficulties”. IACHR, *Second Report on the Human Rights Situation in Peru*, OAS Doc OEA/Ser.L/V/II.106 doc. 59, 2 June 2000, Ch. X, para. 16: “The recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community’s integrity”.

<sup>267</sup> *Yanomami Indigenous Peoples v. Brazil*, IACHR Case 7615, Resolution No. 12/85, OEA/Ser.L/V/II.66/ doc. 10, rev. 1, 24; *Maya Indigenous Communities Case*, *supra* note 187, paras 132, 152, 193 & 197 (2).

<sup>268</sup> *Awás Tingni Case*, *supra* note 186, 76, para. 153.

<sup>269</sup> *Ibid.*, 76 & 81, paras 153 & 164. See also *Moiwana Case*, *supra* note 186, 81, para. 209; *Yakye Axa Case*, *supra* note 186, 77, 98 & 102, paras 143, 215 & 233; *Sawhoyamaxa Case*, *supra* note 186, 77 & 104, paras 143 & 239; *Saramaka Case*, *supra* note 186, 34 & 56, paras 115 & 194 (a).

<sup>270</sup> UNDRIP, Art. 26 (3), *supra* note 161, 8.

the demarcation is only a prerequisite for the assignment of a secure legal status to the land, which is recognized under the national legal system. Only through such a secure legal status indigenous lands rights can be effectively protected against interferences by the State or third parties. Therefore, the *ILO Convention No. 169*,<sup>271</sup> the UNDRIP,<sup>272</sup> several Special Rapporteurs<sup>273</sup> and UN treaty bodies,<sup>274</sup> as well as the IACHR, the IACtHR, and the ACHPR<sup>275</sup> unanimously request States to convey nationally recognized land rights to indigenous peoples' lands following the demarcation of their lands. These derivative land rights must adequately reflect the nature and content of the inherent indigenous land rights. Hence, a distinction has to be made between rights to traditionally occupied lands and to lands traditionally used otherwise.

#### a. Traditionally Occupied Lands

Since the conveyed land rights shall adequately reflect the inherent indigenous land rights, the transfer of mere access rights or the acquiescence of *de facto* ownership to traditionally occupied lands are not sufficient means to recognize and effectively protect inherent indigenous ownership rights. Instead,

<sup>271</sup> *ILO Convention No. 169*, Art. 14 (2), *supra* note 156, 1387.

<sup>272</sup> UNDRIP, Arts 26 (3) & 27, *supra* note 161, 8.

<sup>273</sup> Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Populations*, *supra* note 197, para. 514; Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 13-14, para. 38; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Situation of Indigenous Peoples in the Russian Federation (Addendum)*, UN Doc A/HRC/15/37/Add.5, 23 June 2010, 10-11, para. 35 [Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Situation of Indigenous Peoples in the Russian Federation*].

<sup>274</sup> See HRC, *General Comment No. 23*, *supra* note 180, 4, para. 7; *Mahuika Case*, *supra* note 248, 9 & 15, paras 7.1 & 9.5; *Ángela Poma Poma v. Peru*, *supra* note 233, 10, para. 7.2; CERD, *Concluding Observations on Argentina*, *supra* note 185, 4, para. 16; CESCR, *General Comment No. 21*, UN Doc E/C.12/GC/21, 21 December 2009, 2, para. 7; CESCR, *Concluding Observations on Brazil*, *supra* note 265, 3-4, para. 9; CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, E/C.12/RUS/CO/5, 1 June 2011, 3, para. 7.

<sup>275</sup> See *Moiwana Case*, *supra* note 186, 54-55, para. 133; *Yakye Axa Case*, *supra* note 186, 77 & 79, paras 143 & 155; *Sawhoyamaya Case*, *supra* note 186, 73, para. 128; *Saramaka Case*, *supra* note 186, 34, para. 115; *Dann Case*, *supra* note 187, para. 130; *Maya Indigenous Communities Case*, *supra* note 187, para. 115; *Endorois Case*, *supra* note 188, 48, 54 & 55, paras 187, 205 & 209.

indigenous peoples must be given legally secure rights which have to exceed mere use rights.

The question arises, however, whether indigenous peoples are entitled to the transfer of title to the land or whether the formal title can remain with the State as long as the indigenous groups are given far-reaching substantive rights to the land, which are more or less equivalent to the rights typically enjoyed by an owner.

The *ILO Convention No. 169* is rather vague concerning this matter. According to Art. 14 (2) *ILO Convention No. 169*, States shall take the necessary measures “to guarantee effective protection of [indigenous peoples’] rights of ownership and possession”.<sup>276</sup> From this wording, it is unclear what exactly is required by States. The ILO Committee of Experts clarifies that it “does not consider that the Convention requires title to be recognized in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them, although the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention”.<sup>277</sup> Hence, according to the ILO Committee of Experts, the legal title to the land can remain with the State. If the title remains with the State, this does not mean, however, that the State is free to exercise its ownership powers. Instead, the obligation to recognize the indigenous peoples’ ownership rights restricts the formal legal title of the State.<sup>278</sup> The *Guide to ILO Convention No. 169* (2009) confirms this interpretation of Art. 14 (2) *ILO Convention No. 169* by stating “[t]hese procedures [to protect indigenous peoples’ rights to ownership and possession] can take a variety of forms; in some cases they will including demarcation and titling while in other they may imply the recognition of self-governance arrangements or co-management regimes”.<sup>279</sup> Likewise, the UNDRIP does not require States to confer formal title to indigenous peoples. Art. 26 (3) merely requires States to give “legal recognition and protection” to indigenous lands without stipulating how this obligation is to be implemented.<sup>280</sup>

The IACHR also does not require States to convey legal title to indigenous peoples. In its decision in *Maya v. Belize*, it criticizes Belize for not having “titled

<sup>276</sup> *ILO Convention No. 169*, Art. 14 (2), *supra* note 156, 1387.

<sup>277</sup> ILO Committee of Experts, ‘Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway (Ratification: 1990)’, available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100\\_COMMENT\\_ID:2148151](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID:2148151) (last visited 15 June 2013), para. 17.

<sup>278</sup> Ulfstein, *supra* note 204, 20-21.

<sup>279</sup> Feiring & Programme to Promote ILO Convention No. 169, *supra* note 175, 95.

<sup>280</sup> UNDRIP, Art. 26 (3), *supra* note 161, 8.

or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists”,<sup>281</sup> and in its report on *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources*, it states that indigenous peoples have the right to be granted “a formal title to property or another similar form of State recognition”.<sup>282</sup>

The conveyance of formal title in all cases in which an indigenous people claims ownership to land is also not required from a teleological point of view. The conveyance of legal title is not an end in itself but merely one of several means to ensure an indigenous people’s control and permanent use of its ancestral lands. This ultimate objective may be equally well or even better achieved by other means than the conveyance of a formal title to the land. Insisting on the conveyance of formal title might even be contrary to indigenous peoples’ interests in case they have identified other approaches as more appropriate to ensure effective control over their lands. Consequently, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Erica-Irene A. Daes, regards the policy of holding land in trust for indigenous peoples as problematic only if it contravenes the will of the indigenous peoples concerned.<sup>283</sup> Likewise, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya, argues that

“rights to use the land and its renewable and common resources, while title ownership remains with the State [...] could be sufficient to comply with relevant international standards, if they are well established, implemented, judicially protected, and working in concert with other entitlements such as those of consultation and consent, compensation, environmental protection and development”.<sup>284</sup>

<sup>281</sup> *Maya Indigenous Communities Case*, *supra* note 187, para. 133 (emphasis added). See also *ibid.*, paras 135, 152 & 194.

<sup>282</sup> IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 34-35, para. 83 (emphasis added). See also *ibid.*, 33-34, para. 82 (note 223): “Indigenous and tribal peoples, therefore, have the right to enjoy formal title, or other instruments that recognize their property over the lands where they live and develop their cultural and subsistence activities”.

<sup>283</sup> Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 42, para. 149 (d).

<sup>284</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Situation of Indigenous Peoples in the Russian Federation*, *supra* note 273, 10, para. 31.

Since the majority of Indian tribes in the US rejects the conveyance of legal title and often even tries to have the fee simple titles acquired on the market to be transformed into trust land, the US government's focus on the tribal trust land system raises no objections. On the other hand, the reservation system as applied in Western Australia is not in accordance with international law as it transfers merely use rights but no right of continuance to indigenous peoples. Since the conveyance of formal title is generally in accordance with international obligations, the transfer of collective fee simple title under the Canadian CLC Policy and Australian state or territory legislation cannot be criticized *per se*. Yet, since the derivative land rights shall adequately reflect nature and content of the inherent indigenous land rights, the fact that some CLC agreements and some Australian land laws allow for the alienation of the conveyed lands is to be viewed critically. Another problem is that the fee simple titles conveyed to indigenous peoples in Canada and Australia do not include a broad right to exclude others. Instead, indigenous peoples are obliged to tolerate the use of their land by state representatives and third parties to a higher degree than other fee simple title holders. With regard to Australia, the fact that several land laws allow for the exploitation of natural resources without prior extensive consultations and adequate financial participation of the indigenous owners is also a matter of concern. With regard to Canada it is problematic that under some CLC agreements the collective fee simple land is subject to real estate tax and can even be seized to recover unpaid taxes. The tax liability and possibility to seize do not place indigenous peoples in a less favorable position than other fee simple title holders. However, the Canadian government does not take into account that in certain cases the special situation of indigenous peoples requires positive discrimination. The fee simple title shall only protect the inherent indigenous rights by mitigating the risk of loss of their land but not place additional duties on indigenous peoples. The tax liability, however, impairs the status of indigenous peoples to their lands since they do not have to pay taxes for their inherent land rights. With regard to Canada, the fact that aboriginal titles and rights are permanently extinguished or made unenforceable in return for the conveyance of fee simple title to certain parts of the indigenous peoples' traditional lands is also internationally criticized and

rejected as assimilationist.<sup>285</sup> However, a positive feature of the Canadian legal system is that not only the inherent land rights but also the rights given to indigenous peoples under the CLC agreements are constitutionally protected.<sup>286</sup> Hence overall, the derivative land rights of indigenous peoples enjoy a higher degree of protection than other fee simple titles.

Besides the conveyance of formal title, Canada and Australia pursue another approach to protect the inherent ownership rights of indigenous peoples to their ancestral lands: the installation of co-management regimes. The installation of co-management regimes without concurrent conveyance of title to the land is only adequate if indigenous peoples are given effective and perpetual control in form of real co-decision and co-governance competences. A purely advisory co-management or minor participatory rights as well as terminable co-management agreements are not sufficient. It is also not sufficient if recommendations by co-management bodies, in which the majority of members are indigenous peoples' representatives, are not legally binding but only generally followed in practice since mere *de facto* rights never suffice.

#### b. Lands Traditionally Used Otherwise

Due to the multitude of different forms of traditional land uses it is difficult to determine in the abstract how the inherent use rights of indigenous peoples are to be realized and protected within the national legal systems. It is, however, established that – since inherent use rights are less far-reaching than inherent ownership rights – the rights transferred to indigenous peoples under the national legal systems can altogether be less comprehensive than in the case of a traditional occupation of the land.

Australia and Canada have both transferred use rights based on agreements and legislation relevant to indigenous peoples. The transfer of such legally secure use rights is essential for the survival of indigenous cultures since many indigenous peoples feel committed to honor a resource through its constant use. Whether the transfer of mere use rights suffices to protect the inherent indigenous use rights must, however, be doubted. Indigenous peoples have never viewed themselves as mere users of the land but also as its guardians, who

<sup>285</sup> Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 30 & 31, paras 99 & 102; CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/1/Add.31, 10 December 1998, 4, para. 18.

<sup>286</sup> *Constitution Act, 1982*, Section 35 (1) & (3).

are responsible for the balance of nature. This idea, which is deeply entrenched in indigenous culture and spirituality, can only be accommodated if indigenous peoples are given not only use rights but also participatory rights regarding the management of their traditionally used lands and resources. There is no general answer to the question how far-reaching these participatory rights have to be; this has to be assessed on a case by case basis. Due to the less intensive connection to the land, the content and extent of these participatory rights can, however, be less far-reaching than the participatory rights which are transferred based on traditional occupation.

Noteworthy is the Canadian approach. In the CLC agreements, the Canadian government always transfers participatory rights together with use rights. Furthermore, indigenous peoples are often given a financial share in the exploitation of their traditionally used resources in recognition of their special relationship. The Australian ILUAs, on the other hand, transfer in many cases only use rights to indigenous peoples. By no means in accordance with international obligations is the US policy according to which indigenous peoples are generally not given any preferential use or management rights outside of their reservations unless such rights were guaranteed to them in a historical treaty.

### III. Duty to Redress Past Grievances

In addition to the obligation to demarcate and convey secure legal status to lands still occupied and used by indigenous peoples, the recognition of inherent land rights has also led to an obligation of States to provide reparation to indigenous peoples for unfair and illegal takings of land in the past. The existence of such an obligation has been widely recognized in international legal instruments and by international and regional courts and human rights bodies. Because of the fundamental importance of land as the basis of an indigenous people's economic livelihood and source of its spiritual and cultural identity, the obligation to redress past grievance is primarily an obligation to hand back the lands traditionally owned or otherwise occupied and used to indigenous peoples and only secondarily a duty to provide financial compensation in the form of alternative land or cash.<sup>287</sup> The return of the land has to be carried out by transferring secure legal status to the land within the national legal framework. The rights transferred as a means of redress have to be of the same nature and

<sup>287</sup> See *ILO Convention No. 169*, Art. 16 (3) & (4), *supra* note 156, 1388; UNDRIP, Art. 28, *supra* note 161, 8; CERD, *General Recommendation XXIII*, *supra* note 184, 286, para. 5; *Sawhoyamaxa Case*, *supra* note 186, 73, para. 128; IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 53, 124.

extent as the rights transferred to secure the continuous original indigenous land rights.

Under Art. 28 UNDRIP, the right to redress is not time-limited. According to the wording of Art. 16 (3) and (4) *ILO Convention No. 169*, the right to redress seems to be restricted to takings of lands after the entry into force of the Convention. Yet the ILO Governing Body has declared that the Convention also applies if “the effects of the decisions that were taken at that time continue to affect the current situation of the indigenous peoples in question”.<sup>288</sup> Likewise, the HRC has declared that historical inequities, which threaten the way of life and culture of an indigenous people, constitute a violation of Art. 27 ICCPR as long as they continue.<sup>289</sup> Even more far-reaching the IACtHR has held that, “[a]s long as [the unique spiritual relationship with their traditional lands] exists, the right to claim lands is enforceable.”<sup>290</sup> Similar statements were issued by the IACHR<sup>291</sup> and the ACHPR.<sup>292</sup> The right to restitution is, however, always subject to feasibility.<sup>293</sup> If a large number of private landowners had to be expropriated in order to return land to indigenous peoples, restitution would be disproportionate and therefore legally not possible.

New Zealand’s approach is most consistent with these international obligations. During the land reforms of the 19th and early 20th centuries, almost all inherent indigenous land rights were extinguished. Nevertheless, as redress for the illegal, unfair, and discriminatory taking of indigenous lands, co-management regimes have been installed in large numbers all over New Zealand – not only to land but also to maritime resources, rivers, and lakes. In many cases,

<sup>288</sup> ILO Committee of Experts, ‘Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)’, available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012\\_COMPLAINT\\_PROCEDURE\\_ID,P50012\\_LANG\\_CODE:2507203,en:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507203,en:NO) (last visited 15 June 2013), para 36. See also ILO Committee of Experts, ‘Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)’, available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012\\_COMPLAINT\\_PROCEDURE\\_ID,P50012\\_LANG\\_CODE:2507219,en:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507219,en:NO) (last visited 15 June 2013), para. 29.

<sup>289</sup> HRC, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, UN Doc CCPR/C/38/D/167/1984, para. 33.

<sup>290</sup> *Sawhoyamaxa Case*, *supra* note 186, 74, para. 131.

<sup>291</sup> *Dann Case*, *supra* note 187, para. 167.

<sup>292</sup> *Endorois Case*, *supra* note 188, 55, paras 209 & 210.

<sup>293</sup> See *ILO Convention No. 169*, Art. 16 (3), *supra* note 156, 1388; UNDRIP, Art. 28 (1), *supra* note 161, 8.

these co-management rights amount to co-governance. In Australia, it is also possible, to some degree, to claim restitution and financial compensation for the illegal extinguishment of native titles in the past. Yet such claims are restricted to the time after the adoption of the RDA in 1975, which is a cause of concern from an international law point of view. In Canada, there is no procedure to claim restitution or compensation for past illegal, unfair, and discriminatory takings of indigenous lands. The CLC Policy as the only procedure to claim the transfer of secure legal status to land is *a priori* not applicable to areas which are subject to historical land cession treaties. Likewise, under the US legal system there is currently no procedure under which indigenous peoples can claim redress for past grievances.<sup>294</sup>

## E. Appraisal

It is a fact that nowadays vast areas of traditional indigenous lands are owned by non-indigenous people, who have been using and living on these lands for generations and thus are also worthy of protection in their continued use. Therefore, not all lands traditionally used and occupied by indigenous groups can be transferred to indigenous peoples. Nevertheless, the national governments have to try to reconcile the interests of the non-indigenous majority with those of the indigenous minority in order to redress past injustices without creating new ones. In order to achieve this goal, States can learn from each other's experiences. All States subject to this study possess several weaknesses but also some strong points regarding the realization and protection of indigenous land rights.

The example of New Zealand shows that co-management is in many cases the most appropriate way of realizing and protecting indigenous land rights. Not only does co-management come closer to the indigenous peoples' idea of humans as guardians and part of the land than the conveyance of fee simple title, which mirrors the European concept of humans as rulers over the Earth, but the transfer of co-management is also more widely applicable and easier to convey to the public than the conveyance of fee simple title. Whereas co-management is based on the balancing of different interests, the focus of fee simple title is to enforce one's own interests against all others. Therefore, co-management is also possible as regards national parks, other important cultural, historical or

<sup>294</sup> In 1946 the US Congress established the Indian Claims Commission (ICC) to hear claims of Indian tribes against the US. It was in operation until 1978. The ICC could, however, only award financial compensation to indigenous peoples but not return lands to Indian tribes.

recreational sites and even areas to which third parties hold rights, whereas the conveyance of title or similar ownership rights to those areas would lead to nationwide protests of the non-indigenous population. The co-management rights transferred by the New Zealand government are quite strong and often amount to co-governance. Furthermore, New Zealand could serve as a model for other States since it not only transfers rights to areas to which indigenous peoples still hold inherent indigenous land rights. Since the New Zealand government sees the transfer of derivative land rights as a means of reparation for illegal, unjust, and discriminatory taking of indigenous lands, it also transfers rights to lands, to which the Maori's aboriginal titles have been extinguished in the past – unlike the USA and Canada, which do not transfer derivative rights to indigenous peoples in regions which are covered by historical treaties. Canada, however, could serve as a model for other States in-so-far as it is the only State which constitutionally protects inherent and derivative indigenous land rights, whereas in the other States subject to this study indigenous land rights can be unilaterally infringed or extinguished by the State. The USA, on the other hand, is to be commended for providing more extensive protection to tribal trust lands than to ordinary fee simple lands and for guaranteeing far-reaching self-government rights to Indian tribes on their reservations. With regard to Australia, only the Northern Territory and South Australian approaches are noteworthy. In these federal units indigenous peoples are given far-reaching co-management rights as regards national parks and hold a disproportionate amount of land in relation to their percentage of the overall population. In all other Australian States and Territories, indigenous peoples hold hardly any recognized rights to the land. In particular, the weak status of an aboriginal title is to be criticized since indigenous peoples are not provided with a meaningful leverage against the respective State governments. The Australian federal government – which unlike the US, the Canadian, and the unitary New Zealand government does not have exclusive competencies concerning indigenous peoples and their lands – should intervene and force the States to adequately recognize and protect indigenous land rights.

It remains to be hoped that States cease hiding from their historical responsibilities towards indigenous peoples, but instead try to find ways and means to effectively and permanently protect and preserve the rights of indigenous peoples to their ancestral lands in line with international standards and in cooperation with the indigenous peoples concerned. Only then can the indigenous peoples' survival as separate peoples be permanently secured.