

SKELETON ARGUMENT OF THE CLAIMANTS

APPENDIX C:

PROTECTION OF INDIGENOUS CUSTOMARY PROPERTY RIGHTS BY THE COMMON LAW

I. The common law has long recognized and protected property rights arising out of pre-existing customary land tenure systems

1. A feature of common law jurisdictions throughout the world is that legally enforceable rights in land may exist on the basis of longstanding use or occupancy.¹ In this century alone, Maya people have continuously used and occupied the lands in the areas where their villages are located in southern Belize, for periods far in excess of the ordinarily applicable period for establishing property rights against the Crown or private subjects on the basis of adverse possession.²

2. However, the claimants need not rely on adverse possession in order to establish their property rights. Long before the emergence of the contemporary human rights system at the international level, the British common law included as a central tenet that rights arising out of customary law and usages of a territory that pre-exist the reception of the common law into that territory, continue to be protected and incorporated into the common law.³ As articulated by the Privy Council, the common law has always required

... that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. ... it is not admissible to conclude that the Crown is, generally speaking, entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives.⁴

3. In Belize, this longstanding common law principle was affirmed in the case of *A.G. British Honduras v. Bristowe*, in which the defendants based their

¹ WILLIAM BLACKSTONE, 2 AMERICAN STUDENTS' BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, 413 (George Chase ed., Banks & Bros. 3d, 1890). ("he who could first declare his intention of appropriating any thing to his own use, and in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it, according to that rule of the law of nations. . . .") [Vol. IV, Tab 11].

² See *infra* para. 15 and notes 31-33.

³ See *AG Isle of Man v. Mylchreest*, [1879] 4 App. Cas. 294 (P.C.) (upholding customary rights to extract and sell clay on lands where Crown issued lease to third parties for mining purposes.) [Vol. 1, Tab 12]; *Bristow v. Cormican*, [1878] 3 App. Cas. 641 (H.L.) (upholding customary fishing rights in face of Crown grant of the fishery to a third party) [Vol. 1, Tab 19].

⁴ *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 at 407 [Vol. 1, Tab 15].

claim on the customary law of British settlers, which had been codified in Burnaby's Code prior to the territory's incorporation into the British Empire. The Privy Council affirmed the Supreme Court's holding that

the rights of the Crown were then acquired for the first time *salvo jure cujus libet* and without prejudice to any pre-existing rights of property, which, in accordance with *lex loci*, her Majesty's subjects were lawfully possessed and no retroactive exercise of the rights of the Crown could rightfully effect or disturb these vested interests.⁵

4. Within the body of common law doctrine that is shared among diverse jurisdictions, aboriginal rights to lands exist by virtue of historical patterns of use or occupancy and often give rise to a level of a legal entitlement in the nature of exclusive ownership, referred to as "native" or "aboriginal" title.⁶ Apart from such native or aboriginal title in its fullest sense, aboriginal rights may take the form of freestanding rights to fish, hunt, gather, or otherwise use resources or have access to lands.⁷

5. The common law doctrine of aboriginal or native title was created with reference to the international law of its time,⁸ and evolving international law has continued to inform court decisions regarding aboriginal rights into the

⁵ AG British Honduras v. Bristowe, [1878] Supreme Court Record – British Honduras, 13. Judgment No. 4 (Dec. 30, 1878 at 14 [Vol. 1, Tab 10], affirmed on appeal, A.G. British Honduras v. Bristowe, [1880] 6 App. Cas. 143 (P.C.)) [Vol. 1, Tab 11].

⁶ See Calder v. AG British Columbia, [1973] 34 D.L.R. (3d) 145 (Can.) (affirming existence of aboriginal title in Canadian law) [Vol. 1, Tab 20]; Delgamuukw v. British Columbia, [1997] 153 D.L.R. (4th) (Can.) (confirming aboriginal title as a proprietary interest) [Vol. 1, Tab 28]; Mabo v. Queensland II (1992) 175 C.L.R. 1 (Austl.) (affirming native title in Australian law) [Vol. II, Tab 14]; County of Oneida v. Oneida Indian Nation 470 U.S. 226 (1985) (affirming Indian title in US law) [Vol. 1, Tab 26]; Richtersveld Cmty. v. Alexkor Ltd and Another 2003 (6) BCLR 583 (SCA) (S. Afr.) (affirming indigenous customary title in South African law) [Vol. III, Tab 15]; Kerajaan Negeri Selangor & Ors v. Sagong Bin Tasi & Ors, [2005] 6 MLJ 289 [Vol. II, Tab 12] (affirming indigenous customary title in Malaysian law); see also KENT MCNEIL, COMMON LAW ABORIGINAL TITLE, 179-91 (1989) (giving examples of courts incorporating customary law to determine real property rights in Gold Coast (now part of Ghana), Sierra Leone, Pitcairn Island, British New Guinea (now part of Papua New Guinea), and Ocean Island) [Vol. IV, Tab 17]; S. James Anaya, *Maya Aboriginal Land And Resource Rights And The Conflict Over Logging In Southern Belize*, 1 YALE HUM. RTS. & DEV. L.J. 17, citing A.W.B. SIMPSON A HISTORY OF THE LAND LAW 20-21, 138-39 (2d ed. 1986) (providing examples of aboriginal or native title in the English common law) [Vol. IV, Tab 9].

⁷ See, e.g., Antoine v. Washington, 420 U.S. 194 (1975) (affirming Indian rights to hunt and fish) [Vol. I, Tab 16]; R. v. Sparrow, [1990] 1 S.C.R. 1075 (Can.) (affirming an aboriginal right to fish) [Vol. III, Tab 12].

⁸ See Cherokee Nation v. Georgia, 30 U.S. 1 (1831) [Vol. I, Tab 22]; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) [Vol. III, Tab 24]; Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1832) (determining the legal rights of Indians in the United States with express reference to international law doctrines, in particular the doctrine of discovery) [Vol. II, Tab 10]; see also S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 16-26 (2d ed. 2004) [Vol. IV, Tab 8].

contemporary era.⁹ Through the aboriginal or native title doctrine, the common law supports the Inter-American Commission's holding that the Maya communities of southern Belize have property rights on the basis of their indigenous customary land use practices.¹⁰

6. Although the Commission declined to comment specifically on the content of the common law as applicable to Belize in this regard,¹¹ its holding that property rights arise from and are defined by traditional indigenous land tenure patterns in fact finds reinforcement in the decisions of common law courts. For example, Viscount Haldane of the Privy Council, in his opinion upholding indigenous land rights in Nigeria, reasoned:

[I]n the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. ... The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivo* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case.¹²

II. Aboriginal title is proven upon demonstration of occupation by an indigenous people in accordance with customary practice

7. The development of the common law across Commonwealth countries and the United States supports the Inter-American Commission's focus on use and occupancy in accordance with a customary land tenure system to ground Maya

⁹ See, e.g., *Mabo II*, *supra* note 6, para. 42 (“The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.”) [Vol. II, Tab 14]; *Sesana & Ors v. Attorney General*, (52/2002) [2006] BWHC 1 (Bots.), at 202 pt. H.1 para. 3 (“the fact the Applicants belong to a class of peoples that have now come to be recognized as 'indigenous peoples' is of relevance and more particularly, I find relevant that ... Botswana has been a party to The Convention of the Elimination of All Forms of Racial Discrimination since 1974.”) [Vol. III, Tab 19].

¹⁰ *Maya Indigenous Cmty. of Toledo Dist. v. Belize*, Case 12.053, Report No. 40/04, Inter Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev (2004) [Vol. IV, Tab 6].

¹¹ *Id.* para. 110.

¹² *Amodu*, *supra* note 4, at 402-404 [Vol. 1, Tab 15]; see also Lord Denning in *Oyekan & Ors. v. Adele*, [1957] 2 All E.R. 785 (P.C.) (holding that the interests conveyed in Crown grants, though described in English form, are to be interpreted according to customary law)[Vol. III, Tab 7]; see also *Calder*, *supra* note 6 (reviewing and affirming the common law protecting “concepts of ownership indigenous to their culture.”) [Vol. 1, Tab 20].

property rights. While there are variations in the test for aboriginal title across common law jurisdiction countries, all involve proof of the same factors the Commission considered in its determination: (i) occupation of lands with which there is an historic continuity of relationship (ii) by an indigenous people (iii) in accordance with customary law.¹³

a. Occupation of traditional lands

8. Occupation is relevant to the existence of indigenous peoples' property rights in two different ways. The first is the physical fact of occupation, which across many legal systems, including the common law, provides evidence of possession in law and infuses the right with a proprietary nature.¹⁴ The second is that occupation is evidence of the applicability of the indigenous people's customary law or land tenure system to the area.

9. Consequently, intensive settled use of a territory is not required to establish occupation that gives rise to common law aboriginal title, but rather that the indigenous presence only be beyond "coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life."¹⁵ Nor is it necessary for indigenous claimants to prove

¹³ See *Mabo II*, *supra* note 6, Brennan J paras. 64-66 & Toohey J, para. 39 (aboriginal title requires proof of (i) longstanding occupation of the land (ii) according to aboriginal customary law) [Vol. II, Tab 14]; *Delgamuukw*, *supra* note 6, Lamer CJC, para. 143 ("In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (I) the land must have been occupied prior to sovereignty, (II) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (III) at sovereignty, that occupation must have been exclusive.") [Vol. I, Tab 28]; *Adong bin Kuwau v. Kerajaan Negeri Johor*, [1997] 1 MALAY. L.J. 418 (H.C.) [hereinafter *Adong*] [Vol. I, Tab 9], upheld on appeal at *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors*, [1998] 2 MALAY. L.J. 158 (C.A.) [hereinafter *Adong appeal*] [Vol. II, Tab 11] and on further appeal by the Federal Court (unreported), at 434 ("continuous occupation and traditional connection in the land for their livelihoods."); *Confederated Tribes of Warm Springs Reservation v. United States*, 177 Ct. Cl. 184, 194 (1966), quoting *Sac & Fox Tribe v. United States*, 161 Ct. Cl. 189, 202 (1963) (holding that Indian title depends on a "showing of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land.") [Vol. I, Tab 11].

¹⁴ See *Delgamuukw*, *supra* note 6, para. 114 ("prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law ... [Second] What this suggests is a second source for aboriginal title -- the relationship between common law and pre-existing systems of aboriginal law.") [Vol. I, Tab 28]; *Mabo II*, *supra* note 6, para. 53 ("The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners." ... "Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory.") [Vol. II, Tab 14]; see also BLACKSTONE, *supra* note 1, at 209 (That title is presumed from possession and a possessor has title against any other who cannot themselves prove title, are fundamental common law legal maxims) [Vol. IV, Tab 11].

¹⁵ *Mabo II*, *supra* note 6, para. 39 [Vol. II, Tab 14]; see also *Confederated Tribes*, *supra* note 13, at 194 (finding that the use and occupancy must be "continuous" does not mean that the tribe must

occupation of every part of their traditional territory;¹⁶ moreover, what constitutes occupation is to be determined according to indigenous customary law itself.¹⁷

10. In some common law jurisdictions, indigenous occupation must also be “exclusive” for aboriginal title to be found.¹⁸ However, as noted by the High Court in *Mabo v. Queensland (No.2)*:

This principle of exclusive occupancy is justified in so far as it precludes indiscriminate ranging over land but it is difficult to see the basis for the rule if it precludes title merely on the ground that more than one group utilises land. Either each smaller group could be said to have title, comprising the right to shared use of land in accordance with traditional use; or traditional title vests in the larger “society” comprising all the rightful occupiers. Moreover, since occupancy is a question of fact, the “society” in occupation

necessarily have a permanent settlement in the area, but can include “seasonal hunting areas...used only intermittently.” [Vol. I, Tab 11].

¹⁶ *Richtersveld*, *supra* note 6, paras. 23-24 (“that the fact that the Richtersveld people’s use of the subject land may only have been seasonal, and may have been sparse and intermittent due to the exigencies of their survival, does not mean that they did not have the exclusive beneficial occupation of the land. Even though the Richtersveld people may therefore not have occupied every bit of the subject land, and even if other indigenous people sometimes visited the territory, their exclusive beneficial occupation of the entire area was not affected.”) [Vol. III, Tab 15]; *Adong*, *supra* note 13, at 425 (“it is clear to me that the plaintiffs and their families, and also their ancestors, were the aboriginal people who lived in the Linggiu valley or, at the very least, were living in the surrounding areas.”) [Vol. I, Tab 9]; *Bennell v State of Western Australia* [2006] FCA 1243 at para. 792 (“the Applicants must establish a connection with the area ... however, I believe they are not required to do so in a manner that is divorced from their asserted connection to the whole claim area. I said that, if the Applicants succeed in demonstrating the necessary connection between themselves and the whole claim area (or an identified part of it that includes the Perth Metropolitan Area), they demonstrate the required connection to the Perth Metropolitan Area.”) [Vol. I, Tab 18].

¹⁷ *R. v. Marshall, R. v. Bernard*, [2005] 2 S.C.J. 44 (Can.) paras. 136, 139 (LeBel J) (“The nature and patterns of land use that are capable of giving rise to a claim for title are not uniform and are potentially as diverse as the aboriginal peoples that possessed the land prior to the assertion of Crown sovereignty. ...To impose rigid concepts and criteria is to ignore aboriginal social and cultural practices that may reflect the significance of the land to the group seeking title. The mere fact that the group traveled within its territory and did not cultivate the land should not take away from its title claim. ... The aboriginal perspective on the occupation of their land can also be gleaned in part, but not exclusively, from pre-sovereignty systems of aboriginal law. The relevant laws consisted of elements of the practices, customs and traditions of aboriginal peoples and might include a land tenure system or laws governing land use.”) [Vol. III, Tab 11]; *Uintah Ute Indians v. United States*, 28 Fed. Cl. 768, 785 (1993) (finding that the “use and occupancy” necessary to ground Indian title is established by reference to the tribe’s “way of life, habits, customs, and usages of the land.”) [Vol. III, Tab 21]; *Alexkor Ltd & Another v. Richtersveld Cmty. & Ors.* 2003 (12) BCLR 1301 (CC) para. 57 (S. Afr.) (“determination of the real character of indigenous title to land . . . involves the study of the history of a particular community and its usages.”) [Vol. I, Tab 14].

¹⁸ See *Delgamuukw*, *supra* note 6, paras. 155-159 [Vol. I, Tab 28]; *Mabo II*, *supra* note 6, para. 53 [Vol. II, Tab 14].

need not correspond to the most significant cultural group among the indigenous people.¹⁹

11. Thus, exclusive occupation “is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent.”²⁰ Shared exclusivity may result in joint title, and non-exclusive occupation may establish aboriginal rights “short of title.”²¹

12. Moreover, in the jurisprudence of South Africa and Malaysia, exclusive possession does not appear to be an essential element for an aboriginal title claim. In upholding land rights on the basis of traditional land tenure, the Constitutional Court of South Africa referred to exclusivity only with respect to determining the *extent* of the right conferred,²² and exclusivity does not appear to be a requirement of proof in the courts of Malaysia.²³

13. Because these property interests arise from traditional land tenure systems and customary law, common law courts usually look for a longstanding relationship of the people with the land. Current occupation by an indigenous people is itself evidence of longstanding relationship,²⁴ which is strengthened by evidence providing a historic continuity of relationship with the land at a time before the assertion of British sovereignty in the territory.²⁵ Any focus on occupation at the date of the assertion of sovereignty by a European power,

¹⁹ *Mabo II*, *supra* note 6, para. 44 [Vol. II, Tab 14]; *see also Delgamuukw*, *supra* note 6, para. 156 (“exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by “the intention and capacity to retain exclusive control.”) [Vol. I, Tab 28].

²⁰ *Delgamuukw*, *supra* note 6, para. 156 [Vol. I, Tab 28].

²¹ *Id.* paras. 157, 159.

²² *See Alexkor*, *supra* note 17, paras. 57-60 (holding that the character and content of indigenous title involves study of the particular community, then noting the Richtersveld community exercised a strict notion of exclusivity and the custom of prospecting, and thus affirming that their title included subsoil mineral rights) [Vol. 1, Tab 14].

²³ *See Adong appeal*, *supra* note 13 [Vol. II, Tab 11]; *Nor Anak Nyawai v. Borneo Pulp Plantation*, 6 MALAY L.J. 241, (Kuching, H.C. 2001) (hereinafter “*Borneo*”) [Vol. III, Tab 4]; *Kerajaan*, *supra* note 7 [Vol. II, Tab 12]. (None of these cases required the indigenous claimants to prove exclusive occupation.)

²⁴ *Case of Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 79 Inter-Am. Ct. H.R. SER. C para. 151 (2001) (hereinafter *Awas Tingni*) (“possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.”) [Vol IV, Tab 6]; *see also Delgamuukw*, *supra* note 6, para. 152 (“Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title.”) [Vol. I, Tab 28].

²⁵ *See Delgamuukw*, *supra* note 6, para. 145 [Vol. I, Tab 28]; *Mabo II*, *supra* note 6, para. 43 (“to amount to occupancy presence on land must have been established ‘long prior’ to the point of inquiry. That is necessarily a relative concept. In *Milirpum Blackburn J.* was content to approach the plaintiffs’ claim as requiring proof of occupancy from a “time in the indefinite past.” ... *Blackburn J.* thought it necessary that the plaintiffs prove occupancy from the acquisition of English sovereignty.”) [Vol. II, Tab 14]; *Borneo*, *supra* note 23, at 246 (“there is ample evidence ... that such rights existed before the rule of the first Rajah.”) [Vol. III, Tab 4].

however, is a construct of law based on colonial-era norms, and it is not a date that has any relevance in international human rights law, which focuses on current occupation.²⁶ Furthermore, it is inappropriate in the context of Belize, which specifically incorporated existing legal systems, including Maya customary law, into its legal architecture.²⁷

14. The longstanding relationship with the land required to establish aboriginal title must be continuous in some way. At common law, moreover, the notion of continuity does not require the occupation to have been constant nor in the same manner or form historically.²⁸ Such an approach would risk

²⁶ See *Awas Tingni*, *supra* note 24, para. 151 (“As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration”) [Vol. IV, Tab 1]; *Maya Indigenous Cmty.s.* *supra* note 10, paras. 126-127 (“the State claims that several of the villages ... were established in the 1900’s, and some as late as 1992, and that this illustrates a significant break in the continuity of occupation of the area over which title is asserted. The State also argues that ... the Maya did not occupy the region to the exclusion of other organized societies. ... the Commission is satisfied that the Mopan and Ke’kchi Maya people have demonstrated a communal property right to the lands that they currently inhabit in the Toledo District. These rights have arisen from the longstanding use and occupancy of the territory by the Maya people, which the parties have agreed pre-dated European colonization, and have extended to the use of the land and its resources for purposes relating to the physical and cultural survival of the Maya communities.”) [Vol. IV, Tab 6]; *Mary & Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1, paras. 142-145 (2002) (hereinafter *Dann Case*) (“the Danns have not been afforded equal treatment under the law respecting the determination of their property interests in the Western Shoshone ancestral lands ... this is particularly apparent in light of evidence that the Danns and other Western Shoshone have at least until recently continued to occupy and use regions of the territory that the State now claims as its own.”) [Vol. IV, Tab 5]; *Sawhoyamaya Indigenous Community v. Paraguay*, 146 Inter-Am. Ct.H.R. SER. C, (2006) (“The following conclusions are drawn ... 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.”) [Vol. IV, Tab 7].

²⁷ See, e.g. AN ACT TO DECLARE THE LAWS IN FORCE IN THIS SETTLEMENT (1855) (received royal assent and proclaimed 1856) [Vol. I, Tab 2].

²⁸ *Delgamuukw*, *supra* note 6, para. 126 (“Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.”); *Id.* para. 153 (“Needless to say, there is no need to establish “an unbroken chain of continuity” between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title.”); *Id.* para. 198 (La Forest J.) (“it is not necessary for courts to have conclusive evidence of pre-sovereignty occupation. Rather, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation.”) [Vol. I, Tab 28]; *Borneo*, *supra* note 23, at 258 (“proof of the existence of the custom as far back as living witnesses can remember is treated, in the absence of any sufficient rebutting evidence, as proving the existence of the custom from time immemorial.”) [Vol. III, Tab 4].

“perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.”²⁹ The particular location and nature of indigenous occupation can have varied over time without diminishing the rights. In *Delgamuukw v. British Columbia*, the Supreme Court of Canada observed:

This is not to say that circumstances subsequent to sovereignty [of the Crown] may never be relevant to title ... this might be the case, for example, where native bands have been dispossessed of traditional lands after sovereignty.

... after the assertion of sovereignty, the aboriginal peoples may have all moved to another area where they remained ... until the present. This relocation may have been due to natural causes, such as the flooding of villages, or to clashes with European settlers. In these circumstances, I would not deny the existence of “aboriginal title” in that area merely because the relocation occurred post-sovereignty. In other words, continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area.³⁰

15. Extensive documentary evidence, expert reports, and Maya oral tradition establish that the Maya communities presently in southern Belize exist in areas that have formed part of the ancestral territory of the Maya people since time immemorial, and certainly since prior to Spanish and later British assertions of sovereignty.³¹ Archeological sites, burial grounds and artifacts found in their lands demonstrate an ancient historical relationship of the Maya to this area,³² and the founding of Maya villages in southern Belize in modern times represents a continuity of cultural and land use patterns by the Maya people that spans centuries and predates the arrival of the first Europeans.³³

16. Since the time of contact with European powers, many Maya may have been forced at different times to leave what is now southern Belize and relocate elsewhere, or to leave Maya lands in Guatemala or Mexico and return or relocate to traditional Maya territory in southern Belize. The historic record shows that

²⁹ *R. v. Côté*, [1996] 3 S.C.R. 139 (Can.), para. 53 (Lamer CJ) [Vol. III, Tab 13].

³⁰ *Delgamuukw*, *supra* note 6, para. 145 (Lamer CJC), para. 197 (La Forest J concurring) [Vol. I, Tab 28]. See also *Fuller & Anor v. De Rose & Ors* (2006) HCA Trans 049 (Austl.) (hereinafter “*De Rose*”) (refusing leave to appeal a finding of aboriginal title for a group that settled in the area in the 1920s as a consequence of pressure by white settlement) [Vol. II, Tab 4].

³¹ See First Affidavit of Grant D. Jones; First Affidavit of Richard R. Wilk, paras. 4-40; Affidavit of Bernard Q. Nietschmann, *TMCC v. Attorney Gen. of Belize* [1996] (N° 510) attached to the First Affidavit of Deborah Schaaf and marked as **D.S.2**; GRANT D. JONES, MAYA RESISTANCE TO SPANISH RULE: TIME AND HISTORY ON A COLONIAL FRONTIER, 94 (1989) [Vol. IV, Tab 15].

³² See First Affidavit of Richard R. Wilk, para. 5.

³³ See First Affidavit of Grant D. Jones, paras. 14-17; First Affidavit of Richard R. Wilk, paras. 43, 48.

the Maya consistently have resisted efforts by the Spanish and the British to remove them or encroach upon their lands, and that, to the extent possible, they have returned to the lands from which they or their kin have been ousted.³⁴

17. In addition to the external factors that have affected Maya migratory patterns, the historical Maya system of land use also inherently involved movement. “Land use patterns of ancient and modern times necessitated a certain amount of movement of communities every 10-15 years in order to maximize the use of the land and the quantity of crops from the land.”³⁵ Such patterns of movement do not negate the existence of property rights by indigenous peoples over their traditional territories.

18. When determining that the Richtersveld people, an indigenous group, have rights to their traditional territories, the Constitutional Court of South Africa affirmed that

a nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation of land by indigenous people. It follows that the fact that the Richtersveld people's use of the subject land may only have been seasonal, and may have been sparse and intermittent due to the exigencies of their survival, does not mean that they did not have the exclusive beneficial occupation of the land. Even though the Richtersveld people may therefore not have occupied every bit of the subject land, and even if other indigenous people sometimes visited the territory, their exclusive beneficial occupation of the entire area was not affected.³⁶

19. The Malaysian High Court has also joined other common law jurisdictions in grounding indigenous property rights in proof of occupation, with attention to the particular nature of the indigenous claimants' land tenure patterns, and without applying a rigid requirement of longevity or continuity.³⁷ In one case, the court affirmed customary property rights to lands the claimant community had not moved to or settled as a village until 1955, noting that such movement within a broader territory was part of the indigenous customary land use patterns.³⁸ In another case, the court found that the claimants properly proved that their ancestors were the aboriginal people who lived in the subject territory “*or at the very least, were living in the surrounding areas.*”³⁹

³⁴ See First Affidavit of Grant Jones, paras. 26-51.

³⁵ S. James Anaya, *supra* note 6 [Vol. IV, Tab 9], citing Richard M. Leventhal, *Maya Occupation and Continuity in Toledo* (Feb. 1997); see also *id.* (“If one looks at a broader picture which includes the land to the south and west and even to the north, the Maya are utilizing these lands for hunting and agriculture from the initial occupation more than 1000 years ago.”).

³⁶ *Richtersveld*, *supra* note 6, paras. 23-24 [Vol. III, Tab 15].

³⁷ *Adong*, *supra* note 13, at 425 [Vol. I, Tab 9].

³⁸ *Borneo*, *supra* note 23, para. 18 [Vol. III, Tab 4].

³⁹ *Adong*, *supra* note 13, at 425 (emphasis added) [Vol. I, Tab 9].

20. Jurisprudence throughout common law countries can thus be seen to support the Inter-American Commission's conclusion relevant to the element of longstanding occupation that

The Maya people, through their traditional agriculture, hunting, fishing and other land and resource use practices, have occupied significant areas of land in the Toledo District beyond particular villages since pre-colonial times and that the dates of establishment of particular Maya villages, in and of themselves, are not determinative of or fatal to the existence of Maya communal property rights in these lands.⁴⁰

b. By an Indigenous People

21. The Maya claimants are indisputably an indigenous people of Belize. The reference in the preamble of the Belize Constitution to the "indigenous peoples of Belize" can only include the Maya people. The Inter-American Commission accepted this fact, and it was not disputed by the government of Belize.⁴¹

c. According to Customary Law

22. Indigenous property rights arise from, and are therefore determined with reference to, indigenous customary law. In *Mabo*, the High Court of Australia affirmed that

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. ...

Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change, too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.⁴²

⁴⁰ *Maya Indigenous Cmty's.*, *supra* note 10, para. 130 [Vol. IV, Tab 6].

⁴¹ *Id.* para. 84.

⁴² *Mabo II*, *supra* note 6, at 58, 61 (Brennan J.) [Vol. II, Tab 14]; *see also Delgamuukw*, *supra* note 6, para. 126 (Lamer CJC) ("aboriginal title originates in part from pre-existing systems of aboriginal law. The law of aboriginal title does not, however, only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day.") [Vol. I, Tab 28]; *see also Alexkor*, *supra* note 17, paras. 52-53 ("indigenous law

23. Similarly, the South Africa Constitutional Court has affirmed that “[t]he nature and the content of the rights that the [indigenous community] had in the subject land ... must be determined by reference to indigenous law. That is the law which governed its land rights.”⁴³

24. The Privy Council recognizes that while native title is ordinarily held by the aboriginal people collectively, it necessarily provides derivative proprietary rights to individuals or groups within that people in accordance with customary law:

a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession.⁴⁴

25. In a decision affirming the property rights of the indigenous Noongar people, the Federal Court of Australia noted that, because there are these different levels of customary rights-holders,

[i]t is necessary to identify the level of aggregation relevant to the particular context. In the present case, the inquiry is into ‘the communal, group or individual rights and interests of Aboriginal peoples ... in relation to land or waters’ ... So it is necessary to determine the community or group (the ‘society’, if you like), under whose laws and customs those rights and interests were held and observed. It does not matter that there may exist a smaller, or larger, group of people which may properly be regarded, for other purposes, as a ‘society’ or ‘community.’⁴⁵

26. The “relevant level of aggregation” is the level at which an aboriginal people shares the same normative structure and beliefs concerning land and land

is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. . . . It is a system of law that was known to the community, practised and passed down from generation to generation . . . Throughout its history, it has evolved and developed to meet the changing needs of the community. And it will continue to evolve . . .” [Vol. 1, Tab 14]; *Sparrow, supra* note 7, para. 68 (Dickson CJC and La Forest J.) (“Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of . . . the ‘sui generis’ nature of aboriginal rights.”) [Vol. III, Tab 12]; *Sesana, supra* note 9, at 207 pt. H.6, para. 1 (“Some of the Applicants are descendants of people who have been resident in the Kgalagadi area, more particularly the CKGR area, before the Reserve was established as such in 1961. They were, by operation of the customary law of the area, in lawful occupation of the land ...”) [Vol. III, Tab 19].

⁴³ *Alexkor, supra* note 17, para. 50 [Vol. I, Tab 14].

⁴⁴ *Amodu, supra* note 4, at 404 [Vol. I, Tab 15].

⁴⁵ *Bennell, supra* note 16, para. 425 [Vol. I, Tab 18].

tenure, which gives rise to customary rights. For the Noongar people, like the Maya of southern Belize:

the normative system governing rights to land was that of a larger community than either the ‘tribes’ mentioned by some of the early writers or the ‘estate groups’, or ‘country groups’, ... It was that normative system which supplied to members of the smaller groups their rights to occupy and use particular areas of land, and imposed on them obligations to allow certain others to use that land for certain purposes, such as food-gathering and ceremonies; ... This normative system was not formulated or enforced by any over-arching authority. The normative system derived its force from the fact that it was part of a mosaic of laws and customs that were generally observed by a community of people larger than the various ‘tribes’, ‘estate’ groups or ‘country’ groups ...⁴⁶

27. These property rights held by individuals or groups are protected under the common law, and therefore under the Constitution of Belize, along with collective aboriginal title. As noted by the Australian High Court in *Mabo II*, “native title ... may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests ... whether possessed by a community, a group or an individual.”⁴⁷

28. Maya tradition and customary law, as practiced in southern Belize, establishes that Maya people enjoy individual and family rights to their homes and gardens, agricultural fields, fallow lands, permanent tree crops, to hunt, fish and gather forest products for their subsistence needs and those of their families, all of which derive from collective community title.⁴⁸ That community title itself derives from a broader normative system shared by all the Maya in southern Belize, which permits the creation of new villages within the broader Maya traditional territory. Legal protection of the collective right is necessary to protect and ensure the enjoyment of Maya individuals’ derivative personal property or usufructory rights.

⁴⁶ *Id.* para. 350 (ii) & (iii) [Vol. I, Tab 18]. See also *id.* para. 273 (“people who all speak a particular language are not necessarily members of the same society or community. The converse is also true; a single society may transcend language differences.”); and para. 435 (“It would have been natural for speakers of a particular dialect to feel special affinity with others who spoke that dialect. It would also have been natural for them to express that affinity by using a name having regional significance; as an Englishman might refer to himself as a ‘Yorkshireman’ or ‘Cornishman’. However, there is no evidence in this case that any such affinity had normative significance. In the absence of any over-arching government, one could expect to find such evidence only by identifying substantive differences in the norms (laws and customs) operating in different dialect areas. The significant point is that there is no such evidence in the present case, and this despite the number of early writers who took an interest in the normative system governing the lives of the Aborigines with whom they came into contact.”) [Vol. I, Tab 18].

⁴⁷ *Mabo II*, *supra* note 6, para. 68 [Vol. II, Tab 14].

⁴⁸ See First Affidavit of Richard Wilk, paras. 48-73.

III. The common law as it relates to indigenous land rights should be interpreted in accordance with applicable international law

29. The customary property rights of the Maya that are affirmed by international law are also protected by the common law, as demonstrated above. The claimants do not rely solely on the common law. Given the finding of the Inter-American Commission that they hold customary property rights that are protected by Belize's international legal obligations under the Charter of the Organization of American States, and that these rights are independent of the particular formal legal regime within Belize, the claimants assert that these rights are protected by sections 3(d) and 17 of the Constitution and it is not necessary to also prove that these customary property rights are also protected by the common law of Belize. Nevertheless, the claimants submit that an interpretation of the common law consistent with Belize's international commitments concerning indigenous rights is preferable to one that is not, and that such an interpretation protects the claimants' customary property rights.

30. The customary international law norms described in Appendix B are relevant to this Court's interpretation of the common law, for

Where there is no treaty, and non controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trust-worthy evidence of what the law really is.⁴⁹

31. Thus, this Court should actively consider contemporary customary and conventional international law when determining the content of the common law of Belize regarding indigenous rights over land resources.⁵⁰

⁴⁹ The Paquete Habana, 175 U.S. 677, 700 (1900) [Vol. III, Tab 20]; See also Baker v. Canada (Minister of Citizenship and Immigration) [1999] S.C.J. No. 39, para. 70, in which the Supreme Court observed while interpreting the common law concerning administrative discretion, that, "Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, Driedger on the Construction of Statutes ... '[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.' The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries..." [Vol. I, Tab 17].

⁵⁰ For a summary exposition of the international human rights law relevant to the land and resources rights of the Claimants see Appendix B of the Skeleton Argument of the Claimants.

IV. Maya customary property rights are existing, unextinguished rights

32. Contemporary law across the globe recognizes that fundamental human rights represent a constraint on government action. This is an important change from old doctrines of parliamentary supremacy in the British tradition and inviolable sovereignty at the level of international law. In Belize, this contemporary norm is embodied in Part II of the Constitution, which provides that certain fundamental human rights limit the power of the government and its agents.⁵¹ This constraint on government action imposed by the constitutional protection of fundamental human rights conforms with contemporary international human rights norms, which generally prohibit the extinguishment of fundamental rights. Only by privileging European-based colonizer law over Maya customary law could any formal historical extinguishment invalidate these currently exercised rights. Such an approach would itself perpetuate historical discrimination against the Maya people that is no longer acceptable under section 16(2) of the Constitution of Belize.

33. By its very nature, the common law adapts over time in response to advances in society and international human rights, as best evidenced by the once accepted, now uniformly banished, common law regulating the practice of slavery. Today, the international obligations that Belize has assumed, the spirit of the Interpretation Act's direction to interpret the law in accordance with those obligations, and the preambular language of the Constitution calling for "respect for international law and treaty obligations," should all inform any interpretation of the common law of Belize.

34. Yet even without incorporating contemporary human rights principles into the common law of aboriginal title, common law doctrine establishes a high threshold for finding that aboriginal rights have been extinguished by the governing sovereign. The onus is on the party asserting that extinguishment occurred to prove a clear and plain legislative intent to extinguish aboriginal rights.⁵²

a. The continued exercise of the claimants' customary rights belies any assertion that those rights do not exist

35. At common law, occupation is evidence of possession in law, and "possession is of itself at common law proof of ownership."⁵³ This principle is

⁵¹ See BELIZE CONSTITUTION ACT, cap. 4, pt. 1, §2, pt. 2 §17 Revised Edition (2000-2003) (the constitution is the supreme law of the land and no law or act of officials is valid if it is discriminatory) [Vol. I, Tab 1].

⁵² *Sparrow*, *supra* note 7, ("the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent [Crown]") [Vol. III, Tab 12].

⁵³ *Calder*, *supra* note 6, ("In enumerating the indicia of ownership, the trial judge overlooked that possession is of itself proof of ownership. Prima facie, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial") [Vol. I, Tab 20]; *Delgamuukw*,

also affirmed in statutory law.⁵⁴ Thus, possession by indigenous people according to customary law is *prima facie* proof of unextinguished customary title. The common law of property provides that, even without title, possession gives a property right that is good against all the world except the lawful owner, including the Crown.⁵⁵

36. To extinguish means to blot out of existence, to put a total end to. The unmolested ongoing exercise of customary rights is *prima facie* proof of their continued existence. The Privy Council, in a case concerning the customary rights of the residents of the Isle of Man on Crown lands, noted:

It is scarcely conceivable, if the custom had not existed, or if the Act had really excepted clay and sand [i.e. extinguished the right], that the customary tenants should have been allowed to commit what, on the hypothesis, would have been innumerable acts of trespass on the property of the Crown without a single instance of hindrance or interruption on the part of its officers.⁵⁶

37. Similarly, courts in other Commonwealth countries have found that the continued exercise of customary rights precludes any finding of extinguishment.⁵⁷

supra note 6, para. 149 (“at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land”) and para. 152 (“an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title.”) [Vol. I, Tab 28].

⁵⁴ See, e.g. LAND ACQUISITION (PUBLIC PURPOSES) ACT, R.E. 2000, Cap. 184, s. 28. (“Where any question arises touching the title of any person to any land which may be entered upon or acquired for the purposes of this Act, or touching any estate or interest therein, the person having the ostensible possession or enjoyment of the rents and profits of such land shall, for the purposes of this Act, be deemed to be the owner of the land until the contrary is proved.”) [Vol. I, Tab 4].

⁵⁵ See *Perry v. Clissold* [1907] A.C. 73 at 79 (P.C.). (“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.”) [Vol. III, Tab 8]. For the maxims that *title is presumed from possession*, and *possession is title as against a challenger who cannot prove a better title*, see e.g. BLACKSTONE, *supra* note 1, II-196 [Vol. IV, Tab 11]; ROBERT MEGARRY AND H.W.R. WADE, *THE LAW OF REAL PROPERTY*, 102-109 (5th ed. 1984) [Vol. IV, Tab 16].

⁵⁶ *Mylchreest*, *supra* note 3 at 308 [Vol. I, Tab 12].

⁵⁷ See *Richtersveld*, *supra* note 6, para. 81 (“But the Richtersveld Community *in fact continued to occupy* the whole of the Richtersveld including the subject land, to use it, to let it, grant mineral rights in respect of it and to exercise all other rights to which it was entitled in accordance with its indigenous law ownership of the land.”) [emphasis added] [Vol. III, Tab 15]; *Borneo*, *supra* 23, para. 113 (“the Plaintiffs’ right of *temuda*, *pulau* and *pemakai menoa* had survived all the Orders and legislation. They *were exercised* in the disputed area by the Plaintiffs and their ancestors until they were prevented to do so by the total destruction of the trees by the Defendants.”) [emphasis added] [Vol. III, Tab 4]; *Côte*, *supra* note 29 (“*The fact that a particular practice, custom or tradition continued*, in an unextinguished manner, following the arrival of Europeans ... the French Regime’s failure to recognize legally a specific aboriginal practice, custom or tradition (and indeed the French Regime’s tacit toleration of a specific practice, custom or tradition) clearly

Thus, in examining the status of the rights of the indigenous San (“Bushmen”) people, the High Court of Botswana noted that, despite fairly clear statutory language prohibiting the exercise of certain customary rights, rights-respecting practical action was equally important:

The rights of the Bushmen in the CKGR were not affected ..., as they continued to live on it, and exploit it without interference from the British Government. They continued to hunt and wander about the land, without let or hindrance. ... Not only is the British Government presumed ... to have respected the "native rights" of the Bushmen ..., but the fact that it considered providing them with water, so that they could remain, is a clear indication that it did not extinguish their “native rights”.⁵⁸

b. Extinguishment of rights at common law requires clear and plain legislative intent followed by effective practical eradication of the right

i. Extinguishment can only be effected by the appropriate authority

38. The power to extinguish fundamental rights is rooted in the British constitutional doctrine of parliamentary supremacy, through which Parliament has supreme power to act as it will.⁵⁹ As described by Dicey:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.⁶⁰

cannot be equated with a "clear and plain" intention to extinguish such practices”)[emphasis added] [Vol. III, Tab 13]. International bodies apply similar standards: *see Dann Case, supra* note 26, para. 142 (“the [Indian Claims Commission] did not conduct an independent review of historical and other evidence to determine *as a matter of fact* whether the Western Shoshone properly claimed title to all or some of their traditional lands. ...In light of the contentions by the Danns *that they have continued to occupy and use* at least portions of the Western Shoshone ancestral lands, ... it cannot be said that the Danns’ claims to property rights in the Western Shoshone ancestral lands were determined through an effective and fair process”); and 145 (“the extinguishment of Western Shoshone title was justified by the need to encourage settlement and agricultural developments in the western United States, the Commission does not consider that this can justify the broad manner in which the State has purported to extinguish indigenous claims,... this is *particularly apparent in light of evidence that the Danns and other Western Shoshone have at least until recently continued to occupy and use* regions of the territory that the State now claims as its own”) [emphasis added] [Vol. IV, Tab 5].

⁵⁸ *Sesana, supra* note 9, para. 81 [Vol. III, Tab 19].

⁵⁹ See “Racial Discrimination and Unilateral Extinguishment” in KENT MCNEIL, EMERGING JUSTICE: ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA, 359 & FN 12, (2001) [Vol. IV, Tab 18].

⁶⁰ ALBERT V. DICEY, LAW OF THE CONSTITUTION, 39 (10th ed. 1959). [Vol. IV, Tab 13]; *see also* BLACKSTONE, *supra* note 1, I-161 [Vol. IV, Tab 11].

39. Because of parliamentary sovereignty, courts could not invalidate exercises of Parliament's sovereign power that deliberately interfered with private rights – though, as described below, they would interpret legislation to be consistent with rights wherever possible.⁶¹ This inability of courts to review the validity of Parliamentary acts did not of itself make those acts legal, but merely beyond review: “a legislature may not have the *right* to deprive a person of his property, but by the theory of the Constitution it has the *power*.”⁶²

40. As a question of British constitutional law, the actions of prior sovereigns with respect to indigenous peoples' rights are not relevant to the issue of extinguishment. As noted by the Supreme Court of Canada,

It is not clear that French colonial law governing relations with aboriginal peoples was mechanically received by the common law upon the commencement of British sovereignty. The common law recognizing aboriginal title was arguably a necessary incident of British sovereignty which displaced the pre-existing colonial law governing New France.⁶³

41. In Belize, since 1981, the Constitution has become the supreme law of the land and exercises of parliamentary power are now reviewable by the courts, and constrained by the protection of fundamental rights. Prior to 1981, the power to interfere with fundamental rights was circumscribed by common law principles concerning statutory interpretation and the division of powers.

42. The first of these principles, which logically follows from the doctrine of parliamentary supremacy as the source of the extinguishment power, is that the power to extinguish rights resides only in Parliament acting through legislation, and not in the executive branch, except insofar as the power is authorized or delegated to the executive through such legislation.⁶⁴

⁶¹ *Irwin v. Ontario (Attorney General)* [1932] O.R. 490, 494 (Can.) (“The unlimited power of the Legislature of the Province as to property and civil rights within the Province does not admit of question ... If the Legislature passed an Act taking away the money or other property of A ... and giving it to B ... the legislation, however inadvisable or unjust it might be, would be perfectly valid.”); Dicey, *supra* note 60, at 62-63 [Vol. II, Tab 9].

⁶² *Cleveland v. Melbourne* (1881) 1 DCA 353, 356 (Can.) [Vol. I, Tab 23].

⁶³ *Côté*, *supra* note 29, para. 49 [Vol. I, Tab 23].

⁶⁴ *MGEA v. Manitoba* [1978] 1 SCR 1123, 1137 (Can.) (“There is no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or Order in Council to bind citizens where it so acts without support of a statute of the Legislature”, and “an order of the Lieutenant-Governor in Council unsupported by any such legislation and purporting to provide such authority was ineffective”) [Vol. III, Tab 1]; *Delgamuukw*, *supra* note 6, paras. 752-3 (“Whose intention? Clearly it must be the intention of the Sovereign Power. ... How is that intention to be expressed? In my opinion it must nowadays be done by legislation in which the intention to extinguish is the intention of the Crown in Parliament or a Legislature. I do not think that subordinate legislation can be said to express the intention of the Sovereign Power unless the power to make regulations that have the effect of extinguishing aboriginal title or aboriginal rights

43. In the colonial context, in territories acquired by settlement, the customary law of the territory and the common law protect against acts of extinguishment by the executive power.⁶⁵ In other situations, the Act of State doctrine placed assertions of sovereignty and the validity of the Crown's actions in making those assertions outside the jurisdiction of common law courts; however, that doctrine does not apply to indigenous property rights.⁶⁶

44. The Colonial Laws Validity Act of 1865 authorized colonial legislatures to exercise Parliament's power to extinguish common law rights, by providing that only those colonial laws "repugnant" to British *statutory* law could be impugned by the courts:

No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation...⁶⁷

ii. Extinguishment requires Clear and Plain Legislative Intent

45. Parliament can only extinguish rights by unequivocally expressing its intent to do so. This is known as the "clear and plain intent" doctrine.⁶⁸ In order

is expressly given by the enabling legislation in a way that shows that the Crown in Parliament or a Legislature has formed the specific intention of permitting such extinguishment.") [Vol. 1, Tab 28]; In Australia, executive action has also been interpreted to have the power to extinguish, however Kent McNeil has argued convincingly that this extension of the extinguishments power is impermissibly discriminatory. See KENT MCNEIL, *EMERGING JUSTICE*, *supra* note 59 [Vol. IV, Tab 18].

⁶⁵ See KENT MCNEIL, *supra* note 6, at 179-192) [Vol. IV, Tab 17].

⁶⁶ See *Calder*, *supra* note 6. ("The Act of State doctrine has no application in the present appeal for the following reasons: (a) It has never been invoked in claims dependent on aboriginal title. An examination of its rationale indicates that it would be quite inappropriate for the Courts to extend the doctrine to such cases; (b) It is based on the premise that an Act of State is an exercise of the Sovereign power which a municipal Court has no power to review ... In the present case the appellants are not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British Crown.") [Vol. I, Tab 20].

⁶⁷ Colonial Laws Validity Act, cited in Dicey, *supra* note 60, at 105-107 ("Thus a New Zealand Act which changed the common law rules as to the descent of property, which gave the Governor authority to forbid public meetings, or which abolished trial by jury, might be inexpedient or unjust, but would be a perfectly valid law ...") [Vol. IV, Tab 13].

⁶⁸ See *Commissioner of Public Works (Cape Colony) v. Logan* [1903] AC 355, 363-364 ("the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognised by the Courts of this country as a canon of construction") [Vol. I, Tab 24]; *Nelson v. Pacific Great Eastern Railway* [1918] 1 WWR 597 (Can.), para. 14 ("If [the Legislature] had been determined to thus destroy the rights of parties along the projected line of railway, it would have so stated in clear and emphatic language. ... In a matter of this kind, it should not admit of any doubt that the Act ... while granting the privilege of construction and expropriation, also intended that there should be confiscation of

to demonstrate a clear and plain intent to extinguish a right, Parliament must have contemplated the possibility of existing rights and expressed the desire to interfere with that right. As firmly expressed by the Privy Council,

The law appears to be plain – that in order to take away the right it is not sufficient to show that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shown that the legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights.⁶⁹

46. In an indigenous rights context, this standard for clear and plain intent was upheld, and a ‘necessarily inconsistent’ approach to extinguishment firmly dismissed, by the Supreme Court of Canada in *R. v. Sparrow*,

Mahoney J. stated ... ‘Once a statute has been validly enacted, it must be given effect. If it’s necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right’. ... But Hall J. in [*Calder v. British Columbia*] stated that “the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be ‘clear and plain’”. (Emphasis added.) The test of extinguishment to be adopted, in our opinion, is that the

private rights. Where statutes thus attempt such encroachment they are subject to strict construction. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights.”) [Vol. III, Tab 3]; *Mabo II*, *supra* note 6, para. 75 (“However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so ... “This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian bands in North America.”) [Vol. II, Tab 14]; *Borneo*, *supra* note 23, at 245 (“the common law respects the pre-existing rights under native law or custom though such rights may be taken away by clear and unambiguous words in a legislation”) [Vol. III, Tab 4].

⁶⁹ *Western Counties Railway v. Windsor & Annapolis Railway* (1882) 7 App. Cas. 178 (P.C.) Lord Watson at 189 (a contract with the government for exclusive operation of a railway did not extinguish rights of prior holder of contract for operation of same railway) [Vol. III, Tab 23]; *see also MGEA*, *supra* note 64, at 1144 (affirming *Western Counties* that “There is a great difference between giving authority to make an agreement and authorizing it to be made and forthwith carried out so as to override and destroy all private rights that may stand in its way.” and holding that legislation that ‘of sheer physical necessity’ extinguished collective bargaining rights did not contain the clear and plain intent to actually do so) [Vol. III, Tab 1]; *R. v. Arcand* [1989] 3 WWR 635 (Can.) (“the Indians’ rights under Treaty No. 6 continued to exist on April 17, 1982 despite the provisions in the Migratory Birds Regulations which prohibit them from exercising the right to hunt migratory birds outside of the ‘open season’. The right itself was not extinguished. Parliament could pass legislation that has the effect of suspending or interfering with the exercise of the right and in doing so may have breached the treaty. It did not in my opinion extinguish the right.”) [Vol. III, Tab 10].

Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.⁷⁰ [emphasis in original]

47. The creation of demarcated reserves for indigenous land use can only be demonstrative of an intent to respect customary rights and protect them from encroachment – *not* to extinguish them.⁷¹

48. As noted by the Supreme Court of Canada in *Sparrow*, it is important not to

confus[e] regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.⁷²

49. As a guideline for avoiding this confusion, the Supreme Court of Canada agreed that

⁷⁰ *Sparrow*, *supra* note 7, 1098-9 [Vol. III, Tab 12]; *Delgamuukw*, *supra* note 6, para. 180 (“the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been “necessarily inconsistent” with the continued exercise of aboriginal rights, they could not extinguish those rights”) [Vol. I, Tab 28]; *Mabo II*, *supra* note 6, para. 75 (“However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so ... “This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian bands in North America.”) [Vol. II, Tab 14]; *Borneo*, *supra* note 23, at 245 (“the common law respects the pre-existing rights under native law or custom though such rights may be taken away by clear and unambiguous words in a legislation”) [Vol. III, Tab 4]; *United States v. Santa Fe Pacific Railroad* Col 314 U.S. 339, 353 [hereinafter “*Santa Fe*”] (“We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home.”).

⁷¹ *See Borneo*, *supra* note 23, para. 59 (“[T]here is no express provision [in the Order No. IX, 1920, Supplementary to Land Order No. VIII, 1920, § 2(i), which recognizes that “Native land reserves shall be made in suitable situations and these shall be divided into lots of three acres”] to say that native customary rights hitherto enjoyed by the Ibans will no longer be recognised or that they are each to be confined to the several acres of land mentioned in Order IX. Therefore, the native customary rights that existed continued to be recognised.”) (emphasis added) [Vol. III, Tab 4]; *Mabo II*, *supra* note 6, para. 76 (“[A] law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title works no extinguishment.”) [Vol. II, Tab 14]; *Adong*, *supra* note 13, at. 430-431 (“Sections 6 and 7 of the Act specifically provide for the creation of special areas exclusively for the aboriginal peoples of Malaysia, either as a reserve land or for the right to collect the produce of the jungle and to be used as hunting grounds. ... The Act does not limit the aborigines' rights therein. In order to determine the extent of aboriginal peoples' full rights under law, their rights under common law and statute has to be looked at conjunctively, for both these rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under common law.”) [Vol. I, Tab 9].

⁷² *Sparrow*, *supra* note 7, para. 36 [Vol. III, Tab 12].

a workable test that might be applied to determine whether a particular right has been extinguished or merely rendered unexercisable would be to ask whether the right would be restored if the legislation affecting it was repealed. If the answer is no, then the right must have been extinguished; if yes, it must still exist.⁷³

50. A mere lack of awareness of the rights on the part of the legislature, or a failure to affirmatively recognize their existence, cannot amount to extinguishment of those rights.⁷⁴ In considering a claim by an indigenous people, the Constitutional Court of South Africa, noted that colonial officials consistently

regarded all land in the Cape Colony as Crown land unless it was held under a grant made by the Crown. ... The reliance upon the views of the colonial government officials is misplaced. What matters is not the views of the colonial government officials but the law of the Cape Colony at the time of, and subsequent to, annexation. As we have held, the applicable law in the Cape Colony at the time of annexation respected and protected land rights of the indigenous people. No act of state or legislation extinguished the land rights of the [indigenous] Richtersveld Community subsequent to annexation.⁷⁵

iv. Extinguishment cannot occur by inconsistent grant

51. As already noted, actions taken by the state apparatus that merely ignore or assume the non-existence of indigenous peoples' rights over lands, and are inconsistent with those rights—such as fee simple grants, or leases—cannot of themselves extinguish those rights.⁷⁶ The executive branch of government can

⁷³ See *Arcand*, *supra* note 69, citing Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) Supreme Court L.R. 255 at 258 [Vol. III, Tab 10].

⁷⁴ See *Côté*, *supra* note 29, at 5-6 ("The fact that a particular practice, custom or tradition continued, in an unextinguished manner, following the arrival of Europeans ... the French Regime's failure to recognize legally a specific aboriginal practice, custom or tradition (and indeed the French Regime's tacit toleration of a specific practice, custom or tradition) clearly cannot be equated with a "clear and plain" intention to extinguish such practices under the extinguishment test of s. 35(1).") [Vol. III, Tab 13]; *Delgamuukw*, *supra* note 6, para. 180 ("a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights ... the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands.") [Vol. I, Tab 28]; *Arcand*, *supra* note 69 ("despite the provisions in the Migratory Birds Regulations which prohibit them from exercising the right to hunt migratory birds outside of the 'open season'. The right itself was not extinguished. Parliament could pass legislation that has the effect of suspending or interfering with the exercise of the right ... It did not in my opinion extinguish the right.") [Vol. III, Tab 10].

⁷⁵ *Alexkor*, *supra* note 17, paras. 75-76 [Vol. 1, Tab 14].

⁷⁶ See *Osoyoos Indian Band v. Oliver (Town)*, [2001] 110 A.C.W.S. (3d) 784 (Can.) paras. 56-57 (to determine the effect of executive Order in Council on aboriginal lands, must first look to statutory provision under which Order in Council made to see if it authorizes extinguishment. If it

only extinguish, create or transfer property rights under legislation which demonstrates a clear and plain intent to authorize them to do so.⁷⁷ If a lease or grant is issued outside the scope of statutory authority, it is invalid.⁷⁸

52. The customary land rights held by indigenous people are a burden on the underlying title of the Crown. Thus, absent express and valid extinguishment of those rights, in issuing a lease or grant, the maxim *nemo dat quod non habet* (none can pass better title than they have) applies to the Crown, so any lease or grant issued by the Crown is subject to any indigenous rights over the same land.⁷⁹

53. Even if there has been a clear and plain legislative intent to extinguish customary rights, a subsequent grant of property rights over that land to a third party does not extinguish the customary rights until such time as the third party takes action that is inconsistent with the indigenous peoples' rights.⁸⁰

does, only then can court turn to the intent and language of the Order in Council itself). [Vol. III, Tab 6].

⁷⁷ Australian common law is an exception to this rule. Kent McNeil has demonstrated convincingly that the reasoning behind this exceptional doctrine, which originated in *Mabo* – a case that did not involve the issue of extinguishments by grant – was impermissibly discriminatory, See KENT MCNEIL, EMERGING JUSTICE, *supra* note 59. [Vol. IV, Tab 18].

⁷⁸ A.G. v. Young, Court of Appeal Civil Appeal No. 15 of 2001 (Mar. 7 & 8 and June 25, 2002) (Belize). [Vol. I, Tab 13].

⁷⁹ *Bristow supra* note 3, at 667 (grants by the Crown did not establish title unless there is “some evidence of the ownership or possession of the Crown at the beginning of that title.”); [Vol. I, Tab 19] *Mylchreest, supra* note 3, at 302 (“the Lordship could only be granted subject to the rights which the customary tenants might then have acquired by custom...”). [Vol. I, Tab 12] *Delgamuukw, supra* note 6, para. 175 (Province’s submission that Crown ownership carried with it the right to grant fee simples which, by implication, extinguish aboriginal title ... did not take into account the provision that such ownership is subject to “any Interest other than that of the Province in the same” including aboriginal title); [Vol. 1, Tab 28] *Santa Fe, supra* note 70 at 347 (“If the right of occupancy of the Walapais was not extinguished prior to the date of definite location of the railroad in 1872, then the respondent's predecessor took the fee subject to the encumbrance of Indian title”). [Vol. III, Tab 22].

⁸⁰ *De Rose supra* note 30, at para. 156 (“the grant of the right could have an extinguishing effect only when the right was exercised, since it was only then that the precise area or areas of land affected by the right could be identified”) [Vol. II, Tab 4]; *Alexkor, supra* note 17, para. 91 (“The evidence shows that the state subsequently treated the subject land as its own, required the Community to leave it, exploited it for its own account and later transferred it to Alexkor. All this happened after 1913 and *effectively* dispossessed the Community of all its rights in the subject land.”) (emphasis added) [Vol. I, Tab 14]; Northern Territory of Australia v. Alyawarr, Kayteye, Warumungu, Wakaya Native Title Claim Group (2005) FCAFC 135 (Aust.) (“The relevant extinguishment of native title rights and interests derives only from inconsistency with the rights historically conferred by those leases. ... The issue therefore reduces to the question whether a native title right of permanent settlement is inconsistent with a pastoral leaseholder's rights. There is no logical reason why it must be so.”). [Vol. III, Tab 5].