RIGHTS TO LAND, FRAGMENTATION AND FAIRNESS:

THE PROBLEM OF TRANSNATIONAL LEGAL GOVERNANCE FOR INDIGENOUS GROUPS

By

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DECLARATION

'I certify that this work has not been accepted in substance for any degree, and is not concurrently being submitted for any degree other than that of Doctor of Philosophy being studied at the University of Greenwich. I also declare that this work is the result of my own investigations except where otherwise identified by references and that I have not plagiarised the work of others'.

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ABSTRACT

This thesis identifies what legal rights to land exist for persons claiming a special socio-economic, cultural and communal relationship to land. Through empirical case studies and legal examples, it identifies and evaluates land rights and related remedies through the theoretical lens of transnational law. This theoretical approach investigates modern law-making in contexts that challenge state sovereignty to include *actors, norms and processes* in 'globalised' contexts as part of the investigation. Rights are discussed through a legal framework placing 'Indigenous' *actors* (regardless of whether they enjoy formal legal protection) at the analytical core and includes *norms* (state and non-state, contract and policy norms) on land rights. Evidence of Indigenous rights is identified in transnational legal contexts of common law aboriginal Title, international human rights law on 'displacement', 'rights to abode', private contractual arrangements, financial policy resettlement 'standards' and definitions of 'Indigenous' in law and policy. Land rights might include a legally binding, independent and fundamental ownership right or collateral rights supporting the development of such right into a legally binding norm. Canada and Australia are key jurisdictions from which legal evidence is collected. Further evidence is drawn from countries typically un-associated with Indigenous persons, including Mongolia and the Chagos Islands to compare application of law and policy on land rights in disparate jurisdictions thus ascertaining any uneven application of the law in plural social contexts. To understand any disparity in the availability of rights and remedies, each chapter suggests evidence of legal, economic and political 'transnational governance *processes'* within judicial interpretation and development project spaces that resonate with colonial *agricultural arguments* and ultimately, compromise availability and effectiveness of land rights. Concluding suggestions explore what special measures might advance protection for Indigenous actors thus contributing to legal and development goal narratives on a 'thick' international rule of law and global fairness.

CONTENTS

DEFINED TERMS

The following terms used in this thesis have the following meanings:

'ACHPR' means the African Charter on Human and Peoples' Rights, adopted 27 June 1981.

'Agricultural Argument' means a key transnational governance paradigm repeating throughout this thesis, which premised that only settled and intensive cultivation of land can be regarded as a 'proper' or 'effective' occupation of land, and only agriculture can be regarded as a basis of a real land tenure system.[1]

'American Convention' means the American Convention on Human Rights [Pact of San Jose], entered into force 18 July 1978, OAS Treaty Series No. 36, 1144 UNTS 123, 9 ILM 99 (1969).

'Chagos' case means the Chagos case discussed in chapter 6.

'ECHR' means the European Convention on Human Rights entered into force 3 September 1953, ETS 5, 213 UNTS 221, as amended in 1970, 1971, 1990 and 1998.

'Fairness' or 'Justice' has the meaning given to it in Chapter 2.

'Guiding Principles' means the United Nations Guiding Principles on Internal Displacement 1998.

'Human Rights' refers to civil, political and socio-economic rights as they specifically apply to Indigenous groups herein. For example, rights to property, private life, and adequate standard of living including food and culture.

'ICCPR' means the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

'ICERD' means International Convention on the Elimination of all Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969, 660 UNTS 195.

[1] Flannagan T, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science 589, 590; Gilbert J, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.

'ICESCR' means the International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

'ILO Convention' means the ILO Convention No. 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989, entry into force 5th September 1991, 72 ILO Official Bull. 59; 28 ILM 1382 (1989).

'ILC Draft Articles' means the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001.

'Imperialist'[2] or 'Imperialist Thinking' means an ongoing power structure replicating colonial and neoliberal thinking on the superiority of Western culture, private property and market forces (as understood by legal post-colonial scholars advancing third world approaches to international law).

'Indigenous', 'Indigenous Persons', or 'IPs' mean people who self-identify as having special attachments to their traditional land with distinctive claims to land which that require legal protection. These claims include, *inter alia*, collective rights to land, distinctive way of life dependent on a deep cultural and often spiritual connection to land and rights to own, use and access their traditional land and the natural resources thereon[3]. Related to this special connection is a unique type of discrimination and marginalisation experienced in ongoing processes of land dispossession.

IPs might enjoy formal legal recognition in specific social and historic contexts, for example of settler colonialism in Canada and Australia where they are legally termed (in this study, always in capital) 'Aboriginal', consistent with the domestic constitutional and a statutory law of those countries. In Australia, the term describes Aboriginal and Torres Strait Islander peoples. The term 'Indigenous' is also used in all other social and historical situations in which communities do *not* enjoy formal legal recognition of their special relationship to land but nonetheless claim legal recognition as having a special relationship to land against which

[2] Anghie A, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007) 245, 273-274. Drawing on Anghie's work, the term 'imperialism' refers to a context including, but wider than actual 'colonialism', in which a broader set of practices deployed by those with great power including governments, international finance institutions and corporations, govern the world according to its own vision and agenda. Those practices of control are varied and may or may not include actual conquest, occupation or settlement as is classically understood as colonialism. Anghie's other examples of imperialist thinking include the ongoing process of globalisation and its privileging of neoliberal economic interests and institutions such as the World Bank. Other examples include the United States' war on terror that for Anghie, is animated by principles and policies that, when taken together, closely resemble, if not reproduce, imperialism, such as the reproduction of a new 'other': the terrorist as opposed to the savage native.

[3] Report of the African Commission Working Group of Experts on Indigenous Populations/Communities (2005) 89.

they should not be discriminated and seek legal protection through special measures. The Chagos and Mongolian studies provide empirical examples of those legal assertions to formal Indigenous status.

‘Kampala Convention’ means the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted by a Special Summit of the African Union, held in Kampala, Uganda, on 22 October 2009 and entered into force on 6 December 2012.

‘Optional Protocol’ means the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted 10 December 2008, entered into force 10 May 2013, issued in GAOR, 63rd sess., Suppl. no. 49.

‘OT Project’ means the Oyu Tolgoi mining project in Mongolia discussed in chapter 8.

‘Pilbara Project’ means the mining project in the Pilbara region of Western Australia discussed in chapter 7.

‘UDHR’ means the Universal Declaration of Human Rights, adopted 10 December 1948 UNGA Res 217 A (III), UN Doc. A/810 at 71 (1948).

‘UN Basic Principles’ means the 2007 Basic Principles and Guidelines on Development Based Evictions and Displacement.

‘UNDRIP’ means the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 2 October 2007, A/RES/61/295.

‘Vienna Convention’ means the Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980 1155 UNTS. 331.

INTRODUCTION: A RISING TIDE LIFTS ALL BOATS…WHEN EVERYONE HAS A BOAT

In a 1963 speech on US economic policy, President John F. Kennedy said that 'a rising tide lifts all boats'. Since then, Kennedy's aphorism has supported the now debunked political ideology of trickle-down economics in which increase in gross domestic product is the 'silver bullet' for development and global fairness. Yet Kennedy's pithy observation overlooks one very important point: a rising tide lifts all boats *only when everyone has a boat*. This is particularly the case when the 'object' of the study is the land rights of the Indigenous people, whose existence is threatened by the rising tide of economic development and mega development projects that fuel it.

This introduction offers a broad outline of the thesis: identifies the key themes emerging in this thesis on Indigenous land rights and places them into a wider contemporary legal, political and economic discourse. It then discusses the rationale for the thesis and gives an overall summary of the structure of the thesis.

The core themes of the thesis are drawn from tensions between modern neoliberal economic values and 'other' traditional ties to land, including cultural, social and even spiritual links between individuals or groups and land. The more 'traditional' ties can clash with the neoliberal ideology that conceives of land as a key source for economic development and wealth creation, particularly when the latter goals are predicated on the exclusion of traditional ties to land. The tensions between old and new approaches ripple into wider questions on legal fragmentation, global fairness and our common humanity. This thesis thus, investigates Indigenous land rights and remedies in a context of globalisation[1], development projects and surrounding neoliberal economic land narratives and resulting tensions.

The aim is to identify what *legal* evidence exists of a right to land for Indigenous actors and *how* specific economic, political and legal processes identified herein might affect those rights. To do so, the thesis takes a theoretical, empirical and policy-orientated approach to

[1] There is no universally accepted definition or theory of globalisation. Instead, there is a preference in understanding globalisation as an abstract concept or process characterised as the growth of increasingly connected global processes such as trade, commerce and travel. As it relates to law, globalisation refers to a shift away from the paradigm that has dominated social and legal thought over the last two hundred years being methodological paradigm of the Westphalian Model. This is the idea that the state presents the ultimate point of reference for both domestic and international law and instead focuses on global legal convergence between laws (both formal and informal) and understandings of globalisation. This inter-connectivity sheds light on the power imbalances between powerful and less powerful countries in the context of colonialism and neoliberal ideologies and consequently develop critiques of law as neutral and objective: such as post-colonial globalism scholarship.

Indigenous land rights in the context of 'globalised' law-making that goes beyond state-centrism in international law. It draws not only on the state-centric view of law as rules created by a state authority, but also on the transnational approach to law that includes actors claiming Indigenous status (regardless of formal legal status as Indigenous) and private actors as valid stakeholders in law-making. Subsequently, legal norms or 'rights' to land might emanate from a number of legal sources and thus exist along a legal 'continuum' which includes state made laws as well as 'soft', non-legally binding rules, standards and contracts in which private actors such as corporates and international institutions play an active legal role. The identification and testing of those norms through the empirical studies offers an empirical and policy-orientated approach to Indigenous land rights herein. Because of this holistic approach, it encourages a re-thinking of law-making and sovereignty as unbounded from state actors, norms and processes and its traditional concerns over control and national territory.

Legal rights examined fall along a broad continuum of rights to land that includes public and private legal sources. Starting in public sources of law, we consider Aboriginal title rights in Canada and Australia, international human rights on land displacement to ask whether rights to land can take the form of non-*derogable* rights based on non-discrimination. Those studies examine what scope exists for an independent 'ownership' right to land in international law and domestic legal systems and for any 'collateral' or ancillary rights to land in international and domestic law which might support the development of a clear and coherent legally binding right to land. Later studies identify land rights under private governance mechanisms such as international policy and private contract arrangements. In sum, that is the transnational legal 'continuum' of *norms* that we investigate in this thesis, where the legal rights are analysed and understood in the narrative of a wider and perhaps more highly contested set of legal, economic and political *processes* of relevance to research and practice, more specifically justified and discussed in each chapter.

The processes explored herein represent a 'microcosm' of the international tensions and conflicts resulting from Kennedy's aphorism. Fittingly, the 'boat' metaphor extends to legal rights to land of groups asserting a special socio-economic and cultural relationship over it. The conflict coalesces around how this special relationship to land parlays with public, private, historic and ongoing transnational legal, political and economic policies relating to land and the exclusionary effects of those policies for individuals with traditional land ties.

Global surveys identify nearly 300 million Indigenous people (IPs) worldwide, nearly five per cent of the World's population,[2] with poverty rates demonstrating severe disadvantage and marginalisation based on a range of socio-economic indicators. The logical premise is that Indigenous groups do not enjoy a stable boat, legally certain or consistent rights over their traditional land. Indeed, the historical experience of groups is, as argued and concluded in this thesis, one of state sponsored land theft which international law consistently sanctions through a number of remarkable policies identified herein.

The rich body of legal cases presented in this thesis indicate a staggering lack of legal provision for and attention to issues of Indigenous persons spanning time and space. Chapter 3, for example, demonstrates how despite case law dating as far back as 1823[3] Indigenous rights under Aboriginal title in Canada and Australia have not moved beyond a limited language of usage and occupation. The focus on international case law hailing from jurisdictions not usually associated with Indigenous persons for example Mongolia, the Chagos Islands and Africa demonstrates that over a period of almost three hundred years there has been a startling lack of legal attention devoted to the development of formal law on Indigenous rights. Indeed, it was not until the 2000s that the international community took seriously the Indigenous special relationship to land and in 2007 produced the non-binding United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which provides legal evidence of the aspiration to elaborate Indigenous land rights as closely as possible to a fundamental 'ownership' right to land. The thesis identifies many other examples of a policy of legal dispossession of Indigenous land rights which inform the conclusion that metaphorically the 'boat' of Indigenous rights is at best, fragmented, inchoate and highly vulnerable to sinking.

The discourse on globalisation as a driver of economic growth, stability and global fairness has been associated with overall gains but the latter are not evenly distributed and may be obtained at a cost for some groups. The effects of increasing globalisation on equality and fairness raise concerns over rising individualism over cosmopolitanism and the erosion and repeal of human rights in the face of market forces. Indeed, the social effects of the neoliberal approach to development, some of which are discussed in this thesis, enable a

[2] Background Paper to the World Conference on Indigenous Peoples held on 22 September 2014 under the auspices of the UN under Resolution adopted by the General Assembly on 21 December 2010, UN Doc: A/RES/65/198A <www.un.org/en/ga/69/meetings/Indigenous/background.shtml> accessed 15 November 2016.
[3] *Johnson v Mc'Intosh* [1823] 21 US (8 Wheat).

handful of private interests to maximise personal gains, without lifting all boats or indeed by depriving some actors to have access to any boats.

Clear evidence of how rising inequality affects us all is demonstrable in the 2016 vote of the United Kingdom to leave the European Union. The vote, to the surprise of many, cut through traditional political and sociological divides. The UK experience is not an anomaly and sits amongst a tide of international nationalist movements in the US and Europe seeking to take back national control and sovereignty and is possibly a vote against continued public misinformation.[4]

In the shadow of the current anti-globalisation movement, it is possible to find an echo of the primary concern of this thesis: the advancement of land rights for Indigenous groups. There is strong legal, social and political value found in the advancement of Indigenous rights to land: the analogy of our shared boat and common humanity. In this task, lawyers have a privileged role through their ability to analyse and make suggestions on how legal, political economic, public and private institutions might improve legal protection for those left out of economic development: the '*Bottom Billion*'[5] to coin Paul Collier's phrase. Law and transnational law must do a better job at providing legal protection to those millions of people claiming Indigenous status.

The pre-global financial crisis era of readily available funding has forged an interesting turn in economic policy that promotes the use of domestic goods and services and has the potential to advance *legal rights* to land. In the post 2008, financial climate the availability of large amounts of debt for resource development projects has dried up. Political insecurity in the Middle East, economic sanctions on Russia and now economic uncertainty in the European block have compounded the availability of funds. For lawyers practising transnational law and resource governance, these political and economic events have squeezed and dried up global financial markets requiring transnational lawyers to take seriously the economic benefits to issues of local 'indigenisation'. This growing 'indigenisation' policy requires alternatives to international financial markets in order for

[4] University College London's letter coordinated through its Constitution Unit, signed by over 250 leading academics and published in the Telegraph dated 14 June 2016, denouncing the letter of public information in the Brexit referendum campaign <www.ucl.ac.uk/constitution-unit/constitution-unit-news/130616> accessed 15 November 2016.
[5] Collier P, *The Bottom Billion: Why the Poorest Countries are Failing and what can be done about it* (OUP 2008).

investments to function and to ensure economic return. Examples might include enthusiasm for the development of local financing and the use of local goods and services.

This policy direction offers IPs an opportunity to have their rights included and advanced. The need for commercial actors to take national social issues seriously in the face of an uncertain international climate might create important 'carrots' and 'sticks' through which a strong case for legal reform on Indigenous land rights within public, private, national and international institutions might be advanced. Of course, this approach comes with its own set of limitations and implies a number of practical conditions that could stunt the effectiveness and availability of legal reform. However, as I demonstrate, this is not a reason to disengage with the topic. Lawyers can play an interesting role in this broader debate; it is they who have the ability to analyse and make suggestions on how legal, political, economic institutions might be improved to advance Indigenous rights to land based on a common denominator of fairness and justice.

Rationale for the Thesis

The reasons for producing this thesis are numerous and best understood through a desire to provide a theoretical/academic, empirical and policy-orientated approach to Indigenous land rights in the context of development and thus contemporary (non-state centric) law-making in general. Influential in this approach is the writer's own previous career as a project finance lawyer during which, work was conducted on the performance standards of various international financial institutions, some of which are explored herein and undertaking of consultancy work on natural resource legislation. Previous experiences provided the academic enthusiasm to understand better the law on Indigenous land rights and the desire to understand processes of practical implementation in natural resource contexts.

This practical experience was a key driver in the theoretical approach of the thesis that places an 'actor' and 'rule of law' focus at the heart of the legal analysis of Indigenous land rights, thus making groups valid participants in the law-making processes. This is important as the steady increase in globalisation processes of which development projects are archetypal, means that the likelihood of more clashes between actors with differing land related ideologies and interests will continue, with serious legal and social effects for IPs. Formative in the decision to conduct the thesis was the author's own scholarly curiosity in investigating and engaging with *what the law is* in the globalised context and what processes (legal, social, economic) which might affect the application and availability of those rights.

What follows demonstrates that the transnational legal framework on this topic is disparate and fragmented. It is not clear where, within a contemporary transnational context, rights to land might be located. Consequently, the thesis attempts through academic and empirical research, to start at least, to fill in the gaps of where evidence of rights can be located and when located, the processes through which implementation occurs or in some cases, the processes or contexts which restrain implementation of legal rights.

Moreover, previous practical experience as a project finance lawyer provoked an academic desire to re-engage critically with neoliberal ideology based on the primacy of economic developmental and the use of finance structures and institutions such as those discussed in chapter 8 as necessary enabling conditions for the advancement of 'development'. Drawing on understandings from that period in practice, the thesis takes a critical and policy focused eye to examine what those processes mean *to Indigenous actors* turning attention to IPs rather than investors, corporate and shareholders. I hope that this approach shines new light and empirical findings on some previously under researched specific political and economic processes delineated in chapter 3, to explore what they mean for Indigenous actors in terms of access to rights and remedies and ultimately, fairness. In principle, there is no reason why the empirical evidence, conclusions and recommendations made in this thesis cannot be applied to other similar transnational settings in which for example Indigenous rights and natural resource governance norms overlap and conflict. The contribution of such new empirical knowledge was a motivating factor for the thesis.

Drawing on the empirical evidence, I seek to add legal insights and recommendations into how a 'thick' rule of law advancing fairness for Indigenous groups could be delivered in the context of transnational legal processes. More broadly, the thesis aims to bring transnational legal insights into the advancement of the post 2015 Sustainable Development Goals (SDGs) for IPs within its spirit of a 'common humanity' and broad applicability to the 'international community'. Informing the advancement of the SDGs is thus another rationale for this thesis. It suggests that for Indigenous persons, the SDGs can only be substantively advanced through a conversation which identifies rights to land and shines light on the typically conflicting processes through which those rights travel and the 'breaks' those processes might have for the advancement of rights and thus, the SDGs. Finally, the thesis aims to make a practical contribution to the emerging field of transnational legal theory (TLT).

Structure of the Thesis

Given the public and private 'globalised' perspective of the thesis, chapter 1 makes the case for situating the thesis within the TLT, which incorporates a transnational legal methodological framework of '*actors, norms and processe*s'. In essence, this framework challenges the assumption that law always emanates from sovereign actors, authoritative, institutionalised processes grounded in a state-based system of norm creation and flowing from this, that law is always implemented in the context of a state based system of actors and norms. Transnational legal theory is open to the examination of rights within political, economic, historical and cultural context becomes important, opening up the legal space of investigation to internal inter-disciplinary research[6] and gives voice to the political, economic and social issues and subtexts at play in modern relations.[7] Learning from that framework and previous successful studies, the thesis explores what issues and *processes* of power and influence for example economic and political, have eroded the state's ability in the global era to administer and control the institutions of norm creation.[8]

Drawing on TLT's tri-partite approach to actors, norms and processes of law-making, chapter 1 finds evidence of the transnational legal approach in the following manner. The thesis focuses on *actors* revolves around Indigenous persons and non-state private entities thus involving them as valid participants in law-making. Following from this, the 'sources' of legal *norms* are not necessarily bounded to the state and its actors as the primary subjects of international law. Finally, chapter 1 finds evidence of transnational 'processes' specifically relating to this thesis which might which aid in understanding and implementation of the rights to land located herein. It is suggested that in order to understand the positivist black letter law on the topic of Indigenous rights to land in the context of globalisation an understanding of the political, economic and historic context and related processes through which those rights are implemented is required.

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[6] Transnational approaches require a combination of diversified rules in areas such as corporate, labour, constitutional, environmental and contract law see P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50, 57. During the course of this research, conversations related to issues of anthropology, history, sociology, development and economy were encountered which spoke towards and justified a transnational approach.

[7] As Davies notes although Hart did not himself explore the full implications of this view (on law only as a state centred sovereign command), there can be no doubt that there is a political subtext at work here which cements the power of a conventional legal hierarchy, M Davies, 'Legal Pluralism' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012).

[8] P Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 Indiana Journal of Global Legal Studies 29, 4.

Chapter 2 identifies and discusses the empirical sources used in the thesis and explores how they complement and advance the theoretical focus of the thesis in TLT. It explains how the theory informs and justifies the thesis's approach towards using specific primary and secondary data sources to understand, test and verify its 'transnational' approach to Indigenous land rights focusing on the actors, norms and processes and explains how they have been organised. The chapter explains the rationale behind the deliberate choice of primary and secondary legal sources (including empirical case studies). At the same time, it outlines the specific challenges relating to transparency and access to information encountered in the collection of empirical sources, how these challenges have been addressed and explains salient qualifications and assumptions to the thesis. Finally, it presents the thesis's methodological approach to the idea of 'Fairness' and 'Justice' which overarches the thesis. The 'idea' of Fairness is drawn from and shaped by the literature discussed in that chapter to form a 'benchmark' against which the rights to land identified in the individual chapters and the processes through which they are interpreted, are repeatedly tested and verified.

Having set the theoretical and methodological foundation of the thesis, chapter 3 delineates two transnational governance paradigms relating to the interpretation and enforcement of the norms located in the previous chapter.

The first paradigm is used by *state actors* such as judges who in common law jurisdictions, typically interpret case law to produce general legal principles. Private actors such as international organisations[9] (IOs) and commercial entities use the second paradigm to deal with rights or issues of public policy. The transnational governance paradigms are identified through a review of secondary legal and economically focused literature discussed therein. For example, the first governance 'thread' emanates historically from the colonial roots of state sovereignty and control as understood primarily through the agricultural argument that prioritised economic, settled, exclusive privately owned land within a historic situation of European colonial encounter and cultural superiority. The latter paradigm explored in later chapters is sourced from evidence of how resettlement processes and methods of implementation are, through fragmented processes of 'informal' contracting out[10], translated

[9] In this thesis, International Organisations refer to international finance institutions such as the European Bank for Reconstruction and Development and the International Finance Corporation.

[10] The resettlement processes and private arrangements discussed in this thesis are referred to as 'informal' as given their primary commercial functions they do not invoke issues of formal *state responsibility* under international law as explained in chapter 5. There is for example, no express agreement under which the state delegates resettlement related tasks to the

into specific private arrangements and public policy related standards on land and IPs of IOs.[11] These policies are driven primarily by functionality and certainty that work to consolidate and continue the prioritisation of private settled land rights originating from the days of the agricultural argument.[12]

The fundamental concept linking these two public and private governance paradigms is that of transnational Imperialism as understood by legal post-colonial scholars advancing third world approaches to international law. Each empirical study then explores what case specific *legal, economic and political barriers or processes* might emerge from the transnational governance paradigms that might compromise the effectiveness and application of a right to land and access to remedies and the ability of groups to obtain substantive equality.

The application of this framework of actors, norms and processes supports and justifies the structure of the thesis in the following ways.

Chapters 4 through 8 present the findings from the empirical studies of Indigenous land rights in a number of transnational legal contexts. Starting from state centred law, chapter 4 identifies typical liberal special equality measures for Aboriginal groups in Australia and Canada as legally recognised *actors* under formal state made statutory[13] and constitutional[14] *norms*. Having identified evidence of a state-centric right to land in Canada and Australia, those rights are then 'tested' through a typical method of legal interpretation used in common law jurisdictions: judicial interpretation. In sum, the chapter finds that the legal parameters and narratives through which rights are developed and implemented are characterised by fragmentation through for example, the shaping of rights as 'sui generis', unbundled and 'site specific' rights to specific land. Moreover, rights are only recognised through satisfaction of onerous legal requirements steeped in judicial 'Originalism'. Evidence of this parochial 'Originalist' judicial construction can be found in the European narrative on 'prior occupation', legal evidence of ongoing 'authentic' connection to traditional culture and judicial blockage when groups attempt to confront this legal originalism to request the

private entity. This does not detract from the important private duties and obligations between for example the Traditional Owners and Rio Tinto under the Participation Agreements discussed in chapter 7.

[11] The policies analysed in this thesis are the International Financial Corporation's 2012 and the European Bank of Reconstruction and Development's 2014 risk management safeguard policy 5 on land and involuntary resettlement policy and safeguard policy 7 on Indigenous peoples.

[12] T Flannagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science, 589, 590; J Gilbert, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.

[13] Native Title Act 1993.

[14] Section 35 of the Canadian Constitution Act 1982.

adaption of traditional rights to modern commercial equivalents of those same rights. Those parochial and Euro-centric legal processes of interpretation have, it is argued worked to continue the continuum starting from the days of Vattel through which Imperialist thinking has limited Indigenous rights to 'use and occupation'. In sum, those legal requirements might resonate and continue the political and economic governance policies and processes discussed in chapter 2 relating to the agricultural argument positing the superiority of settled European cultivation. Arguably, the continuation of these transnational governance processes compromise Fairness, the thick rule of law and advancement of redistributive practices for IPs.

Moving along the continuum of state centred law, chapter 5 identifies 'displaced' Indigenous and non-Indigenous groups as legally recognised *actors* under international human rights *norms* evidenced in *jurisprudence and legal instruments*. Through a review of legal sources, evidence of legal rights to land is also found in legal instruments pertaining to the land rights of displaced groups are typically characterised through a structurally piecemeal, fragmented and soft 'voluntary' legal approach which might compromise the practical use and application by actors or their legal representatives' efforts to protect rights to land.

Evidence of a growing international legal practice of collateral rights to land are found in case law that finds violations of displaced communities rights to property, family life and privacy, freedom of movement and in some cases, food and adequate livelihoods. However, in the few cases in which socio-economic rights violations are declared, the international legal system handles and implements those cases through non-judicial forums that rely on weak reporting and non-binding legal monitoring mechanisms. The chapter suggests that the structural dichotomy of the *human rights treaty bodies* into judicial mechanisms like the European Court of Human Rights, charged with protecting civil and political rights and non-judicial mechanisms like the Human Rights Commission charged with implementing socio-economic rights indicates a wider structural bias within the human rights system towards civil and political rights.

Moreover, significant 'structural' access to justice barriers are found in evidence of significant time barriers in the implementation and enforcement of international law judgements and the inability of actors to obtain access to judicial rather than non-judicial redress mechanisms and obtain financial aid to facilitate access to those mechanisms. Other 'structural' barriers to justice include the inability of international law to hold states

responsible for the acts of commercial entities under legal rules of state responsibility. This is even if those entities are undertaking public policy related functions such as land resettlement through processes echoing 'contracting out' or 'privatisation' techniques, which is often the case in resettlement policies and plans used in the context of development projects. Legally, this fragmented arm's length process means that affected communities sit in the shadow of the law leaving them with little legal visibility unable to hold states to account through structures of international law. It is tentatively concluded that the legal barriers resonate harmonisation with Imperialist thinking within the judiciary which through interpretation, prioritises the superiority of settled and private modern economic relations over land. The judicial tendency to frame rights in terms of property and possessions for example, suggests a judicial subversion of socio-economic rights to more market friendly human rights. This parochial legal approach indicates a legal neglect or general ambivalence to the topic and perhaps, a judicial harmonisation with the political and economic transnational governance paradigm on settled and private land relations within the law. This arguably demonstrates legal support to a continuing transnational legal governance paradigm discussed in chapter 3, which resonates the agricultural argument, and with it, the prioritisation of private, settled and land relations. Indeed, the evidence in chapter 5 supports broader political comments made by lawyers working in the field of Indigenous rights who comment on the difficulty in pursuing Indigenous land claims due to serious funding resources for advancing Indigenous rights to land[15] and an overall lack of political will.[16]

The chapter concludes that a legal approach, which does not translate the full social, political cultural and economic relations to land of Indigenous groups, discriminates against plural non-economic relations, shows tendencies towards subjugating socio-cultural land relations to economic ones and, has implications for promoting the developmental narrative on Fairness.

Having explored what evidence of land rights exist in state centred common law Aboriginal title and international human rights systems, the thesis then turns to three specific case studies in chapters 6 and 7 all involving *actors* claiming Indigenous status regardless of formal state recognition. Chapter 6 identifies the Chagossian community as valid legal *actors* claiming Indigenous status (regardless of denial of such status under international

[15] Reference is made to a legal advisor to Indigenous groups who prefers to remain anonymous.
[16] Interview with Lucy Claridge, Head of Law, Minority Rights Group (London, UK,, 17 June 2015); interview with Clive Baldwin, Clive Baldwin, Senior Legal Advisor, Human Rights Watch (London, UK, 19 June 2015).

law) and right to return to their traditional land in the Chagos Islands. Rights are claimed pursuant to legal norms which relate to land rights and remedies of return identified in the following sources: the international legal definition of 'Indigenous', the English Magna Carta right to abode and the related legal remedy to return and the European court's application of human rights to land and property rights. The study suggests that inability of those rights to be meaningfully applied to the Chagossians in any way: as 'fundamental' ownership rights or collateral legal rights to land, is constrained due to the 'post-colonial' manner in which those rights are legally interpreted.

Evidence of that 'post-colonial' executive and supporting judicial narrative is found in the provision of legal support to the political use of domestic royal prerogative power without confirming legal precedent of use for exiling a settled population. Second, through a parochial legal interpretation of Magna Carta rights of abode and related remedy of return from 'fundamental' legal rights to diluted 'important' rights capable of extinguishment for economic, military and environmental reasons, providing legal support to executive considerations of economy, military use and environmental protection as a rationale for avoiding return. Third, in a narrow legal interpretation of the English public law right to rely on executive statements to create a legitimate expectation of return in a manner which is divorced from the doctrine's fundamental basis in fairness. Fourth, at the international level there is evidence of confirming legal practice of a limited judicial interpretation of Article 56 of the European Convention which has denied Chagossians' access to international law and valuable supporting legal precedent and international instruments upon which a right to land and remedy of return could be developed. This legal policy position has denied access to justice for claimants based on claims of territoriality. Achieved through a hardening of territorial applicability rules that work to prevent potential claimants from accessing legal redress through the courts, the policy undermines the vision of a rule of law, which embraces human rights for all.[17] For Chagossians, the limited reading of the extra-territorial scope of the Convention has created a legal black hole thus assisting in the continued exclusion and dispossession of the Chagossians.

Chapter 6 also extends a legal issue that is built upon in a later chapter. The study argues that as currently applied, the international legal definition of Indigenous is highly fragmented and Euro-centric, making it conceptually difficult for marginalised Indigenous

[17] T Bingham, *The Rule of Law* (Penguin Books 2011) 67.

actors to obtain legal recognition, access to the canon of Indigenous rights and protection under international law through a common legal standard. Evidence from the Chagos case and other comparative social contexts, reports and studies, suggest that the practical result of this legal fragmentation might create a space through which parochial and biased executive and legal interpretations of the definition dis-apply status to groups such as the Chagossians asserting Indigenous status but fail to satisfy racialised Euro-centric conditions. The chapter suggests that inherent within the international legal definition of Indigenous is a narrative which privileges recognition to a historical situation in which IPs are given legal recognition and protection if they have experienced a very specific encounter of settler colonialism. This encounter requires Europeans to have made transnational crossings over 'salt or blue' water in order to implement the agricultural argument in overseas territories. Chapter 6 discusses how application of the Indigenous definition in non-salt water and settler colonial contexts such as the Chagos case, who claim Indigenous status, has been constrained by this Euro-centric bias.

When placed together, chapter 6 argues that the above evidence replicates colonial and neoliberal thinking on the superiority of Western culture, neoliberal political and market forces and private relations over land all of which have roots in the political and economic transnational governance paradigm of the 'agricultural argument' and Imperialist thinking discussed in chapter 3. Imperialist thinking is for example demonstrable through the continuation of a legal policy which fails to question the biased Eurocentric legal structures which control access to the definition of indigeneity and legal arguments against resettlement which align with political and economic processes overly concerned with the macro-political, financial and ecological costs of resettlement. These transnational legal processes have, it is argued, diluted and fragmented Chagossians' rights to land, ultimately, placing 'brakes' on the ability of Chagossians to advance Fairness, a 'thick' rule of law and substantive equality in the form of recognition of their traditional rights, appropriate compensation and ultimately, legal right to return. Consequently, understanding these processes might provide clues into why the Chagossian people continue their historic struggle emanating from colonial times, for legal rights to their traditional land.

Moving from a specific domestic context involving rights to land within *state centred norms*, chapter 7 provides an example of rights to land emerging *from plural public and private norms* applicable to Aboriginal actors. In this study, Aboriginal Traditional Owners (TOs) in Pilbara, Australia are identified as legally recognised *actors* pursuant to a hybrid of formal

state made legal norms contained in the Native Title Act and bespoke *private contractual norms* called Participation Agreements relating to land rights and access. These 'hybrid' rights are made between Rio Tinto (RT) and TOs under Participation Agreements relating to an iron ore project.

That study explores the Pilbara Project as an example of 'non-legal' contracting in which commercial entity, RT, enters into private legal arrangements with TOs that are legally binding on the parties under private contractual arrangements and are not subject to international law as they did not include the state, thus 'sit in its shadows'. Pursuant to these arrangements, RT implements important public policy land access and compensation obligations towards TOs that build upon and facilitate implementation of the domestic Australian Native Title Act 1993[18] (NTA). The agreements form part of a comprehensive Australian countrywide corporate policy in which RT enters into agreements with all TOs.

The specific legal rights to land in the Participation Agreement[19] (PA) include mechanisms relating to the continued access to land in specific highly sensitive areas of cultural significance. This provides groups with a fundamental and exclusive ownership right to land for the duration of the PA. Traditional areas identified in consultation with TOs are delineated into land registration systems such that RT is on notice of those legal rights. In this case, information systems embed signifiers of Indigenous recognition at grassroots 'living' project level, advancing the conceptual idea of land as a shared space recognising plural public and private relations over land. Other rights discussed in that study include enhanced compensation and consultation rights.

Chapter 7 provides evidence that the effectiveness of the rights to land are directly affected by corporate practices surrounding the legal labelling of TOs within the PA, economic movements in commodity prices and very specific anthropological considerations relating to how the TO group make decisions in conformity with traditional customs and organisation structures. The ability of the PA to advance Fairness is however, constrained by the following processes. First, the creation of the rights identified in this study are subject to

[18] As amended in 1988.

[19] 'Participation Agreement' or 'PAs' mean the claim wide private governance arrangements relating to amongst other things, traditional land access and compensation between the Aboriginal traditional owners (TOs) and Rio Tinto in the Pilbara region of Western Australia discussed in chapter 7 and subject to confidentiality arrangements.

economic imperatives, are crafted as the specific need arises and do not form part of a nationwide uniform private sector policy amongst corporates operating in Australia.

The result is a patchy and fragmented national framework in which some communities have more robust land rights than others, with potential social conflict ramifications. The specific conditions required to incentivise corporate actors to engage, for example, the catalyst of a sophisticated national legal framework and the fact that the Pilbara operations are of immense financial significance to RT would make it difficult for advocates to promote replication of the private legal governance model of the PA in another jurisdiction. This specificity limits the applicability of this specific governance model on a transnational level. The chapter finds that the decision for RT to enter into and apply legal rights within the PA are contingent and exposed to economic imperatives such as fluctuating commodity prices and the economic value, need for business certainty and financial importance of the Pilbara project to RT. Drawing from this evidence, the study finds evidence of new forms of non-state sovereignty that replace the state made colonial agricultural argument into new *non-state* forms of sovereignty. Therefore, through new concerns on economic *functionality and certainty* the private actors, norms and processes work to subsume and continue the same concerns of control and the prioritisation of private land rights into modern globalised contexts.

Conceptually at least, the PA extends an empirical example of transnational legal processes demonstrated by the contribution and effects of globalisation practices and thus the presence of non-state actors in areas of typical state centred responsibility, in this case Aboriginal land rights. They attempt to accommodate normatively conflicting and sensitive sites of global governance relating to conflicting and overlapping rights to land of Aboriginal interests and natural resource project developers and thus offer an empirical example of how competing 'circuits' of land relations existing in the same space might be practically accommodated. On balance, the study provides basic principles and recommendations, not least on the vital importance of a national legal framework upon which 'springboard' enhanced land access and compensation and decision making frameworks can be advocated so as to advance a 'thick' rule of law. In this way chapter 7 explores how modern governance paradigms might possibly enhance state law on Indigenous land rights.

On the other hand, chapter 8 explores how modern governance paradigms might work to vacate development spaces of Indigenous land rights. That study identifies Mongolian

pastoralist herders as valid legal *actors* claiming Indigenous status, in the context of a copper and gold mine in Mongolia notwithstanding exclusion of domestic legal recognition. In the context of the Oyu Tolgoi development project, rights to land are identified in voluntary *soft law norms*: 'international policy 'standards' on land resettlement and Indigenous persons developed and applied by private actors like IOs, here the International Finance Corporation (IFC) and the European Bank for Reconstruction and Development (EBRD), or their private clients such as RT. Private entities such as the IFC, the EBRD or the project developer, who in the OT Project is RT, take key decisions surrounding categorisation of persons as Indigenous and thus application of the Policies.

It is also possible to compare the projects in chapters 7 and 8 as they contain the same corporate actor: Rio Tinto, as responsible for land rights. Taking a comparative 'spatio-legal approach'[20] it is possible to observe whether corporate policy on the issue of Indigenous land rights differs depending on the spatial setting of the project and whether the countrywide Australian policy of entering into PAs extends to the Mongolian project space.

Chapter 8 provides evidence that availability, effectiveness and implementation of the policy-based rights to land identified in the OT Project are compromised because of the following economic and political processes. First, an inherent bias within Policies in favour of land rights that generate '*productive potential*' resonates a basis in the colonial agricultural argument. Second, through evidence that IO's internal institutional practice harmonises the involvement in human rights issues with political mandates and economic cost. Third, through the dis-application of legal Indigenous status to herders due to a lack of national recognition as Indigenous and the inapplicability of an international legal definition to a non-European settler colonial context involving a historical transnational crossing over 'salt or blue' water to implement the agricultural argument in overseas territories. Other reasons for dis-applying Indigenous status include respect for political state sovereignty and a preference to categorise herders socially as 'vulnerable' instead of Indigenous in a bid to prevent 'anti-modernisation' labels.

The study's findings on the applicability and non-applicability of Indigenous legal status speak to spatio-legal studies exploring how the gentrification of native spaces in the city for

[20] D Delaney D, *The Spatial, the Legal and the Pragmatics of World Making: Nomospheric Investigations* (Routledge 2010). Applying legal geography's 'bottom up' approach moves beyond state bounded legal relation to instead foreground spaces in which plural types of legal relations. The objective is to flush out broader complexities weighing on the law, for example, competing ideologies that can lead to gaps, slippages and the uneven application of law in different spatial settings. D Delaney, 'Legal geography I' (2015) 39 Progress in Human Geography 96.

more effective uses means that urban spaces are now void of Indigenous sovereign presence, stretching the historic legal concept of *terra nullius* into contemporary *urbs nullius.*[21] Chapter 8 argues that a similar gentrification occurs in the implementation of resettlement policy to form a project space devoid of Indigenous presence. That is why in the Mongolian study we ask whether the Policies move from a legal *terra nullius* to a new *policy nullius*. Deploying Coulthard's narrative, the question is whether there is a move from the colonial economic and cultural 'double process'[22], into a contemporary 'double process'. This process champions economic accumulation through a policy language focusing on land as only having *productive potential* and cultural superiority. This is achieved through evidence of policies narrowing, fragmenting and confusing the praxis of applying Indigenous identity into smaller spaces for recognition. For example, the fragmented nomenclature of 'displaced persons', 'indigenous' or 'vulnerable' persons appearing within Policies and practice and the policy of using 'vulnerable' in lieu of Indigeneity confuse the legal landscape denying groups a consistent and intelligible legal basis upon which to claim rights.

The chapter finds evidence of further legal barriers facing herders in seeking legal recourse to IOs due to their internal mandate political prohibitions and, to states indirectly for the acts of private entities or IOs conducting land and resettlement activities. The legal ambiguity surrounding whether international law applies to those economic IOs who extend tangible human rights obligations, creates serious deficits in herders' ability to seek legal recourse against those entities. Moreover, the chapter extends concerning evidence of a lack of national publicity of possible avenues through which herders can directly access international human rights instruments. Access to legal rights is also blocked through a parochial legal and policy approach to Indigenous identity which denies resettled herder groups of Indigenous identity and related to that, claims to ownership of traditional land and collateral rights to land based on loss of livelihood and food security.

Evidence of use of economic 'project finance' ordering structures through which the Policies are implemented and the conflicting socio-economic motivations of the state caused by the transnational legal framework in which the government is a shareholder and owes human rights obligations towards herders, all obfuscate the ability of actors to claim rights or remedies. The use of insulating project finance structures by which affected communities are kept at arm's length adds to the fragmentation of rights and remedies and promotes the

[21] Blomley N, 'Making Space for Property' (2014) 104 Annals of the Association of American Geographers 1291.
[22] Coulthard GS, *Red Skin, White Masks* (University of Minnesota Press 2014).

distancing of Indigenous actors as valid law-making participants in the project thus legally dispossessing groups in an 'international' space. Finally, evidence of a lack of knowledge amongst herders of availability recourse to international law of complaints mechanism under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights also suggests a legal and political position that prioritises economic relations over land.

The overall analysis suggests comprehensive reasons for why these 'soft' norms, in this case, inevitably fail to achieve their objectives of promoting development and doing no harm. It argues that the methods of transnational legal governance through which those rights are interpreted demonstrates the continuation on an international level of the political and economic transnational governance paradigms identified in chapter 3. As argued throughout this thesis, this study evidences that rights to land and their application or non-application continues to be justified through new concerns on economic functionality and certainty that subsume and continue colonial agricultural arguments. The result of these transnational governance processes is that commercially focused private entities through fragmented and diluted processes of resettlement conduct important public policy functions through risk management standards. The legal challenge these processes cause for affected communities are serious as they are unable to seek legal accountability from states who are themselves compromised by their economic participation in development projects. In sum, these processes might compromise the ability of Indigenous groups to access rights to land and related remedies thus 'braking' advancement of a thick rule of law as elaborated in the SDGs.

Chapter 9 distils the main findings and highlights the range of contributions that the transnational legal framework allows for in the study of legal rights to land in a wide range of settings.

The comparative lens of this thesis, in which different jurisdictions, actors and legal norms are placed into conversation with each other, shines light on one salient conclusion of the thesis: that of the uneven application of law and policies in different settings. This conclusion feeds into and justifies a salient finding of the thesis: the vital importance of a national legal framework recognising Indigenous rights as a *minimum legal standard*.

It is to a consideration of the thesis that I now turn.

CHAPTER 1: A TRANSNATIONAL LEGAL APPROACH TO INDIGENOUS LAND RIGHTS

As the following chapter argues through an examination of pertinent literature, transnational legal theory and scholarship, (TLT) offers a suitable framework through which this thesis' is theorised and contextualised. The chapter opens with a brief recall of the thesis's objectives and then introduces TLT and its focus on unbounded state *actors, norms and processes* as suitable methodological tools through which to examine the thesis's focus on Indigenous 'actors' and 'norms' in a 'globalised' state and non-state perspective.[1] The following 3 sections explore relevant literature speaking to actors, norms and processes generally and in the context of vulnerable communities and Indigenous persons within 'globalised' contexts such as development projects, and within each section, describe how the idea of actors, norms and processes is applied to the thesis.

The aim of this work is to identify what *legal* evidence exists of a right to land for Indigenous people (IPs) and having identified rights, *how* specific economic, political and legal processes might affect those rights. The legal 'participants' and 'sources' from which evidence is gathered for the thesis take a 'globalised' perspective. For example, the thesis includes the state-centric view of law as rules created by a state authority and adds actors claiming Indigenous status (regardless of formal legal status as Indigenous) as well as private actors as valid participants in law-making. Subsequently, legal norms or 'rights' to land might emanate from a number of legal sources and thus exist along a legal 'continuum' which includes state made laws as well as 'soft', non-legally binding rules, standards and contracts in which private actors such as corporates and international institutions play an active legal role. For the following reasons, TLT is a suitable lens for such a legal analysis.

[1] There is no universally accepted definition or theory of globalisation. Instead, there is a preference in understanding globalisation as an abstract concept or process characterised as the growth of increasingly connected global processes such as trade, commerce and travel. As it relates to law, globalisation refers to a shift away from the paradigm that has dominated social and legal thought over the last two hundred years being methodological paradigm of the Westphalian Model. This is the idea that the state presents the ultimate point of reference for both domestic and international law and instead focuses on global legal convergence between laws (both formal and informal) and understandings of globalisation. This inter-connectivity sheds light on the power imbalances between powerful and less powerful countries in the context of colonialism and neoliberal ideologies and consequently develop critiques of law as neutral and objective: such as post-colonial globalism scholarship.

TLT departs from a view of law that for Hart finds its ultimate identity and unity in its ability to be 'recognised[2]' by legal officials.[3] Transnational legal scholars continue to acknowledge the important role played by state institutions in law-making yet in the light of increasing political and economic globalisation, they contest the monopoly states have on law-making. Therefore, TLT focuses on a contextual framework of law made up of increasingly globalised transnational legal processes[4] or networks to include the theory and practice of how 'public and private actors, nation states, international organisations, multinational enterprises, non-governmental organisations and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalise rules of transnational law'.[5]

As Zumbansen notes, given this plurality TLT is open to the examination of rights within political, economic, historical and cultural context[6] and related processes. Herein, the specific context of globalisation speaks of the creation of political and economic 'transnational' governance paradigms relating to land and their relationship with ideologically 'clashing' 'other' socio-economic, cultural and communal relations to land held by Indigenous groups. Akin to Samuel Huntington's 'clash of civilisations'[7], the studies in chapter 4 through 8 extend examples of sensitive sites of transnational law in which the interests of Indigenous actors meet, overlap, conflict, are subverted to and at times co-exist with the political and economic governance *processes* and paradigms identified in chapter 3. The underlying suggestion is that those specific governance paradigms shape the availability and effectiveness of Indigenous land rights and consequently have serious implications for fairness.

[2] See Tamanaha B, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2007) 30 Sydney Law Review 375, 394 stating 'to view law in this manner is confusing, counter-intuitive and hinders a more acute analysis of the many different forms of social regulation involved'.

[3] HLA Hart, *The Concept of Law* (2nd edn, Oxford Clarendon Press 1994).

[4] Transnational legal processes as it specifically speaks to law depart from Hart's idea of law that have come to frame dominant methodological paradigm of the Westphalian state-ordered model. That model presents the state as the ultimate point of reference for both domestic and international law and places law's ultimate identity and unity in its ability to be 'recognised' by legal officials and dispensed by the state (HLA Hart, *The Concept of Law* (2nd edn, Oxford Clarendon Press 1994). It draws on broad conceptual and theoretical ideas of legal pluralism and law and society theories of Ehlrich's 'living law' as described in this chapter.

[5] Koh HH, 'Transnational legal processes' (1996) 75 Nebraska Law Review 181.

[6] Transnational approaches combine rules in areas such as corporate, labour, constitutional, environmental and contract law. On this connectivity, see P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50, 77. During the course of this research, conversations related to issues of anthropology, history, sociology, development and economy were encountered which spoke towards and justified a transnational approach.

[7] Referring to political scientist Samuel P. Huntington's seminal hypothesis that religious and cultural identities will be the primary source of conflict in the post-Cold War world.

As the following describes, there is already a range of theoretical literature concerned with the impact of globalisation and increasing transnational action in which non-state actors, individuals and institutions co-operate and interact with state actors on international law. Common to this literature is scholarly scepticism of the nation state[8] as the sole dispenser of legal authority and a related critique of firm binaries between public and private law.[9] Instead, legal scholars have started to identify law-making beyond the state and specifically in the light of global trends in governance and globalisation. In response to the legal 'turn', transnational legal studies include *non-state entities* such as vulnerable persons, private corporations and international organisations[10] (IOs) as valid participants in international law-making.

The 'state plus approach to law making is not new in legal theory and shares common ground with the socio-legal theories of Ehlrich's 'living law', Tamanaha's ideas on the relationship between social practices and law[11] and Schaffer's appreciation of *pluralist* legal orders comprised of interacting, interlinked, interdependent, multilevel orders, which capture much going on in the world.[12] In this thesis, a good illustration of these new transnational legal networks are the development projects studies which enable private actors to create and implement legal norms relating to land rights such as those identified in chapters 7 and 8, with significant normative impact on IPs.

Given the obvious complexity of a legal theory that includes so many public and private legal orders, some transnational scholars apply a methodological focal point that explores law through a framework of '*actors, norms and processes'.*[13] An approach in actors' norms and processes continues the 'globalised' approach to law, which, at its essence, departs from

[8] G De Búrca G and others, *Critical Legal Perspectives on Global Governance Liber Amicorum David Trubek* (Hart 2014) arguing that international law needs to be open to new normative mechanisms beyond the state if it is to remain relevant and JL Goldsmith, *The Limits of International Law* (OUP 2007) for an excellent economic rationale theory perspective of law. In contrast other scholars analyze the increased growth of fragmented and piecemeal informal norms that compromise the development of new state centric international laws; OK Fauchald & A Nollkaemper, *The Practice of International and National Courts and the (De)Fragmentation of International Law* (Hart 2012) 218.

[9] P Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 Indiana Journal of Global Legal Studies 29; P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50.

[10] In this thesis, International Organisations refer to international finance institutions such as the European Bank for Reconstruction and Development and the International Finance Corporation.

[11] Brian Tamanaha's ideas on the relationship between social practices and law in B Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 Journal of Law and Society 296, 313 discussing relationships between social practices and law: 'law is whatever people identify and treat through their social practices as 'law (or recht or droit, and so on)'.

[12] Law actually encompasses *pluralist* legal orders comprised of interacting, interlinked, interdependent, multilevel orders, which capture much going on in the world in G Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23 EJIL 669, 672.

[13] P Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 Indiana Journal of Global Legal Studies 29.

and challenges the assumption that law emanates from authoritative, institutionalised processes grounded in a state-based system of norm creation and implementation. A focus is placed on exploring law-making as a process that includes state and non-state *actors* and the creation of non-binding but influential private *norms* ('soft' law[14]) outside of the institutional, state-based systems of rule setting as important sources of law. Finally, the methodological framework of actors, norms and processes explore what *processes* of power and influence for example economic and political, have eroded the state's ability in the global era to administer and control the institutions of norm creation.[15] The thesis applies the framework in the following ways.

Actors

The following section identifies relevant legal literature on actors in globalised contexts: vulnerable, Indigenous and private entities and their inter-relationship. It concludes by showing how the case studies in this thesis relate to that literature and contribute new knowledge into the growing collection of transnational actor focused literature emerging within research centres on transnational law, for example at LSE[16] and Kings College[17] and elsewhere.

Previous studies in transnational law bring *affected actors* into the law-making processes by exploring the human and social effects on communities of increased state and private collaboration. A good starting point is an analysis of literature arguing the emerging responsibility of private actors for human rights obligations and adverse effects of development projects on affected communities. The connections between economic actors in transnational legal contexts have led scholars to argue that private entities such as IOs are significant private actors in global governance and law-making to whom human rights obligations attach. Successful relevant empirical studies taking an 'actor' focused approach to issues of environmental and human rights harms in the context of development projects and globalisation include Clapham's work arguing that human rights obligations bind both the states participating in the negotiations at the World Trade Organisation, and importantly,

[14] D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 319 stating 'there is no accepted definition of 'soft law' but it usually refers to any international instrument other than a treaty that contains principles, norms, standards or other statement of expected behaviour'.
[15] P Zumbansen, 'Lochner Disembedded' (n 12) 4.
[16] Transnational Law Project at the London School of Economics <www.lse.ac.uk/collections/law/projects/tlp.htm>accessed 15 November 2016.
[17] Dickson Pool Transnational Law Institute < www.kcl.ac.uk/law/tli/index.aspx> accessed 15 November 2016.

the WTO itself.[18] Ong and Leader's[19] work provides a comprehensive study of the role of states, corporations and IOs in the context of international development projects such as the Chad Cameroon pipeline and the Georgia, Azerbaijan and Turkish Baku Tbilisi Ceyhan oil pipeline and the human rights effects of those ventures on local communities. Margot Salomon's[20] work on globalisation and human rights accountability for extractive industry projects presents a case in which international finance institutions and corporates are new legal 'duty bearers'. Other studies 'grow' TLT by concentrating on the internal decision making, tensions and conflicts within IOs through excellent ethnographic and legal study[21] to demonstrate how the World Bank[22] is a key part of transnational legal processes, norm emergence and show how internal decision making affects legal implementation.[23]

Some studies focus on *how* serious issues of public policy and human rights might be fragmented or 'contracted out' to be implemented by non-state actors who increasingly take control of territory and populations and against which affected actors have no direct legal recourse.[24] For example, the implementation of land resettlement policies by private IOs and non-state actors are archetypal process demonstrating this conceptual turn away from state apparatus to non-state actors.[25] Other's focus on practical legal social and environmental instruments such as the Equator Principles that apply to banks and, through which private actors might take on new roles of human rights protectors and social actors

[18] Notwithstanding the fact that the WTO is an inter-governmental non-state actor, Clapham argues that the WTO is an international organisation with international personality and thus bound by general international law; A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 163, 164. On IO's and their positive legal obligations generally Sands P and Klein P, *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell 2009).

[19] S Leader & DM Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011).

[20] M Salomon Tostensen A & W Vandenhole, *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007).

[21] GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012).

[22] This refers to the group of five institutions of the International Bank for Reconstruction and Development, the International Development Association, the private sector arm of the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes. In this study, references to the World Bank Group include its affiliate, the IFC.

[23] GA Sarfaty, 'The World Bank and the Internalization of Indigenous Rights Norms' (2005) 114 Yale LJ 1791, 1793. Sarfaty notes that conventional transnational legal processes theory fails to take account for the internal dynamics and conflicts of transnational legal processes carried out by actors such as the World Bank. Such an approach would demonstrate that processes of transnational norm emergence and internalisation are more nuanced than has been suggested in contemporary normative theories.

[24] Philip Alston, The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, in P Alston (ed), *Non-State Actors and Human Rights* (OUP 2005), A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) and generally S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

[25] R Shamir, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.

through social responsibility policies: thus 'moralising the market'.[26] De Schutter[27] explores the impacts on the human rights of vulnerable host communities of international investment agreements, political insurance processes[28] with others discussing the human rights impacts of stabilisation of law clauses used in concession contracts relating to development projects entered into between states and private investors[29]. Studies suggest how these clauses might discourage or de-motivate states from taking action to protect human rights or apply new laws that may affect profits.[30]

Studies also take a 'bottom up' approach focusing on what 'soft' non-judicial legal redress avenues are offered by private actors. Kingsbury examines the proliferation of non-legally binding ombudsman complaints mechanisms comprised of a plural public/private form of legal authority functioned with drawing attention to the hardship caused by particular private sector policies.[31] Pursuant to these mechanisms, affected communities can lodge direct

[26] Ibid. Shamir dubs the process or 'turn' in which issues of socio-moral public policy become part of corporate social responsibility objectives as the 'moralisation of the market'. This process makes the private sector a new 'socio-moral public' policy regulator and issues of social policy become grounded in utilitarian and neo-liberal thinking on risk management to produce a business- case approach to social policy issues.

[27] Od Schutter JFM Swinnen & J Wouters, *Foreign Direct Investment and Human Development: the Law and Economics of International Investment Agreements* (Routledge 2013), ch 6.

[28] Ibid. The authors note that risk management techniques such as MIGA political risk insurance work so effectively that the credit rating of a given project are often higher than those of the underlying state or corporation in question, making it easier to conduct long term business in risker places. The idea is that these insurance policies which whilst containing similar social performance standards as those applicable to the IFC, might create a *moral hazard* on the part of the insured shareholders. Knowing it is insulated against regulatory changes the firm may decide not to take precautions against the occurrence of events that, because of their social costs, may predictably trigger regulatory responses that are costly to the firm (for example, certain social harms). Relating to this project, the process effectively 'privatises' issues of public policy into insurance risk thus encouraging the long term dis-engagement and ambivalence towards issues of public policy such as the question of Indigenous status. It also has serious implications for governments who according to the insurance terms, would be exposed to compensate MIGA for a breach of contract caused by political risk, thus potentially dis-incentivising the state to engage in issues of public policy which have the potential to trigger a breach of contract claim under the insurance policy.

[29] Much has been written on the human rights effects of stabilisation clauses which in order to provide continued business certainty to corporates investing in long term development projects, 'freeze' laws applicable to the project to those in place at the date of signing the investment agreement. Clauses might also 'rebalance' the project economics, stipulating that the investor comply with new laws but also requiring that the investor be compensated for the cost of complying with them so that it remains in the same economic situation it would have been in had the laws not changed. See A Shemberg, 'Stabilization Clauses and Human Rights – A Research Project conducted for the IFC and the UN Special Representative to the Secretary General on Business and Human Rights' (2008); L Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development' (2009) *OECD Investment Policy Perspectives* (OECD Publishing Paris). Given that development projects can last up to and beyond 30 years such a provision ties the government's hands preventing them from passing laws relating to public policy and human rights. Examples of adverse human rights effects caused by the use of these clauses are examined in the context of the Baku Tbilisi Ceyhan oil pipeline project in S Leader & D Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011).

[30] L Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development' (2009) *OECD Investment Policy Perspectives* (OECD Publishing Paris) 10. The paper notes how those clauses make it more costly for host states to raise social and environmental standards in line with evolving international law and in favouring measures that are less costly to the investor even if they are less effective, broad stabilisation clauses may trigger normative tensions between different host government obligations, namely between the obligation to honour contractual commitments on the one hand, and the obligation to comply with evolving international (human rights, environmental) law, on the other.

[31] I Brownlie GS Goodwin-Gill & S Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon 1999) 336.

complaints with IOs which might then be scrutinised independently.[32] Studies focusing on the project governance activities of private entities also confirm the impacts on communities of poor project management of large development projects.[33] In his work on how to make public investment projects succeed for affected communities, Klakegg advances a plural and front-end organisational approach.[34] Based on comprehensive fieldwork of public and private development projects Williams et al[35] conclude that, although project assessments performance standards and ongoing diligence are useful for the management of social issues there are clear reasons why they do not work.

Project management literature resoundingly concludes that even well managed projects often turn out to be a failure from the perspective of affected societies. Klakegg's findings that institutions rarely make attempts to learn from past projects resonate in the number of land and resettlement complaints lodged with various financial institutions' ombudsman mechanisms spanning a period of 20 years[36]. The failure to learn comes despite high level sociological and economic input[37] in to the development of policies and the copious 'opportunities' these complaints and reports have provided for lessons to be learnt and processes to be developed.[38] Failure to learn from previous lessons is, according to Williams and Klakegg, due to project time pressure preventing managers from thinking ahead and questioning assumptions as well as a mismatch in incentives between the organisation and

[32] These mechanisms were created to provide a degree of independent scrutiny and public accountability for compliance of its policies: for an overview of the inspection panel and its historical development see Alfredsson G and Ring R, *The Inspection Panel of the World Bank : a different complaints procedure* (Raoul Wallenberg Institute human rights library, Martinus Nijoff Publishers 2000).

[33] I Dunovic, 'Megaprojects, Risks in the Front End of Mega Projects' (2014) RFE Working Group Report www.mega-project.eu/assets/exp/docs/Risk_in_the_Front_End_of_Megaprojects.pdf accessed on 15 November 2016.

[34] OJ Klakegg, 'Governance of Major Public Investment Projects: In Pursuit of Relevance and Sustainability' (PhD thesis, Norwegian University of Science and Technology, 2010) in which he notes that, the same theoretical framework is applicable to private projects or public-private ventures.

[35] T Williams and others, 'Identifying and Acting on Early Warning Signs in Complex Projects' (2012) 43 Project Management Journal 37.

[36] 'Involuntary Resettlement', Emerging Lessons Series No. 1, The Inspection Panel (April 2016). The executive summary report states that the report on involuntary resettlement is the first in a series of papers to be published by the World's Bank Inspection Panel drawing on the main emerging lessons from its caseload over 22 years.

[37] The high level, scathing 1992 Morse Report commissioned by the bank after the catastrophic Narmada valley project was the first such effort. More recently, starting in 2012, the World Bank has been conducting an extensive external consultation process with governments and civil society groups on its environmental and social safeguard. Reforms relate to complex development matters, including Indigenous rights, human rights, climate change, and a number of social issues, through for example, modernised standards inclusive access to development benefits through the introduction of a non-discrimination principle. <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> accessed 15 November 2016.

[38] 'Involuntary Resettlement', Emerging Lessons Series No. 1, The Inspection Panel, (April 2016) 4 notes the frequency in which involuntary resettlement occurs due to the large number of development projects which result in a change in land use. These include mining, hydroelectric, road and water projects. The Assessment Report Complaint filed to the IFC's Complaints Advisory Ombudsman on the Zambia Konkola Copper Mine Project November Office of the Compliance Advisor/Ombudsman of the IFC and MIGA (2003) 17. The report concluded that resettlement is a difficult and dangerous part of development to be undertaken only when other alternatives do not exist. For a more general discussion on ombudsman see I Brownlie GS Goodwin-Gill & S Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon 1999) 327.

the individuals, amongst others things.[39] These theoretical and empirical findings resonate in the ombudsman complaints discussed in chapter 8 in which current complaints repeat the same issues largely involving tensions relating to Indigenous identity, consultation and compensation conflicting with project timelines.

In the context of this research, comments by the Department for International Development suggest that responsible private entities would actually like clear guidance grounded in law on what to do.[40] Confirming this approach, legal counsel to the Yamatji Marlpa Aboriginal Corporation[41] discussed the importance of building trust with communities through the preparation of agreed 'heads of terms' document, agreed in accordance with Indigenous and non-Indigenous formalities.

Theoretical literature[42] on governance cautions against the exclusive use of top-down project initiatives, noting that these should combine with bottom-up interactive activities of the public and other stakeholders. Bottom up activities include open discussion with stakeholders and a transparent decision-making process. Miller and Hobbs[43] say that 'a specific governance regime must adapt to the particular project and its context, rather than a homogenous 'cookie-cutter' approach. The proposed method is thus not to design a homogenous governance policy regime *per se* but rather to identify applicable *design criteria* when developing a governance regime for a megaproject. General findings of project governance scholars note that most governments, corporations and organisations do not have a governance framework, formalised or not, anchored at a high level[44] or at a minimum an awareness of the essential characteristics and principles of what a framework might look like. In light of this literature and evidence collected in interviews discussed above, such a framework might set out commonly agreed intentions, purpose and agreed course of action according to which groups agree to work with the state or private entities.[45]

[39] T Williams and others, 'Identifying and Acting on Early Warning Signs in Complex Projects' (2012) 43 Project Management Journal 37, 49.
[40] Interview with Iris Krebber, Senior Land Policy Lead, DFID (By telephone 18 February 2015).
[41] Yamatji Marlpa Aboriginal Corporation, the native title representative body for the Traditional Owners of the Pilbara, Murchison and Gascoyne regions of Western Australia. Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2016).
[42] A Shiferaw, OJ Klakegg & T Haavaldsen, 'Governance of Public Investment Projects in Ethiopia' (2012) 43 Project Management Journal 52.
[43] R Miller & B Hobbs,' Governance Regimes for Large Complex Projects' (2005) 36 Project Management Journal 42.
[44] T Williams and others, 'Identifying and Acting on Early Warning Signs in Complex Projects' (2012) 43 Project Management Journal 37.
[45] Interview with Michael Meegan, legal counsel to YMAC (By telephone 4 August 2016).

Drawing from the above, the findings of this thesis and conversations with Klakegg[46], chapter 9 extracts general principles which focus on the land rights of Indigenous actors and might be useful for private actors concerned with the design of a governance framework aimed at minimum compliance with the 'do no harm'[47] principle to communities.

As we have seen application of TLT to general issues of vulnerable host communities for example has been made however application to the specifics of *Indigenous land rights* is a nascent research field and is evidenced through a few legal works presenting an 'actor' focused approach to Aboriginal rights. Work includes scholarship of John Borrows in *Recovering Canada: The Resurgence of Indigenous Law*[48] and his later *Freedom and Indigenous Constitutionalism.*[49] Borrows' enchanting focus on the law of Canadian Aboriginal title through the Anishinabek spirit of Nanabush provides a catalyst and actor based focus through which he identifies legal evidence of a hidden cultural (dis) order[50], frozen and 'Originalist' trend in judicial interpretation of Canadian jurisprudence on Aboriginal rights which inform the actor-based approach of chapter 4.

IPs are indeed, amongst the world's most vulnerable and marginalised groups. Much of their vulnerability coalesces on their struggle for recognition of their special attachment to their traditional land[51] and specific way of life characterised by a deep cultural and often spiritual connection to land and a related unique type of discrimination and marginalisation experienced in ongoing processes of land dispossession.

Legal practice does, *prima facie*, recognise this special relationship as essential for self-identification and the physical, mental and social health of Indigenous peoples. As the Inter-American Court of Human Rights notes 'for Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy... to preserve their cultural legacy and transmit…to future

[46] Conversation with Professor Ole Klekegg, Norwegian University of Science and Technology on 20 February 2015 discussing methods for operationalising his governance of project framework within the specific context of this thesis (accommodating the rights of land connected persons into mega-project design).
[47] Referring to the growth of the soft law guiding principles extended by the United Nations Human Rights Council requiring that corporations and business enterprises 'should avoid infringing on the human rights of others'. Principle 11 of the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc: (A/HRC/17/31), endorsed by resolution 17/4 of 16 June 2011.
[48] J Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002).
[49] J Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016).
[50] 'J Borrows, Recovering Canada' (no. 48) 57.
[51] B Kingsbury, 'Indigenous Peoples' *Max Planck Encyclopaedia of Public International Law.* Entry provides a detailed description of the law relating to 'Indigenous peoples', their distinctive claims for example to collective rights to land and policies relating to groups. S Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievement and Continuing Challenges' (2011) 22 (1) EJIL 121, 127 on the 'specific ways of life and a view of the world characterised by their strong, often spiritual relationship with the land'.

generations'.[52] This relationship is not only a 'mere instrument of agricultural production but part of a geographical and social, symbolic and religious space, with which the history and current dynamics of these peoples are linked': a relationship to land defined by its plural communal, spiritual, cultural, social and economic preferences.[53] Evidence of this land connection can be seen in art as a central part of Australian Aboriginal life.

Aboriginal art is connected intimately to land, law and religious belief. It frequently depicts the profound connection Aboriginal persons' feel between themselves and the land on which they live. Mick Dodson, (former Aboriginal and Torres Strait Islander Justice Commissioner) describes the powerful connection between person and land:

> To understand our law, our culture and our relationship to the physical and spiritual world, you must begin with land. Everything about Aboriginal society is inextricably woven with, and connected to, land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence. We have grown that land up. We are dancing, singing, and painting for the land. We are celebrating the land. Removed from our lands, we are literally removed from ourselves'[54].

This relationship to the land is a common parameter distinguishing Indigenous groups from other communities or groups dispossessed in terms of power or wealth'.[55] This unique bond renders them particularly vulnerable if their land and resources are through processes of globalisation, privatisation and development transformed, encroached upon or degraded.[56] Thus, for IPs understanding rights to land is not limited to parochial objectives of securing increased agricultural production on land and subsequently, legal remedies for loss of traditional lands are not solely a matter of financial compensation based on the 'market value' of land.

In light of this marginalisation, the 'actor' based approach of TLT explored further below, provides a strong moral justification for examining public and private legal mechanisms and pursuing legal enquiries which promote affected third parties as recognised actors in the

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[52] *Mayanga (Sumo) Awas Tingi Community v Nicaragua*, judgement of 31 August 2001 (Inter-Am. Ct. H. R. (Ser. C) no. 79) (2001)) [144].
[53] See for example *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA) and *Delgamuukw v British Colombia* [1997] 3 SCR [190] supporting he cultural foundation of Aboriginal title acknowledging 'it is based on the continued occupation and use of the land as part of the Aboriginal peoples' traditional way of life, which makes it a *sui generis* interest.
[54] Professor Mick Dodson, Barrister, Academic and member of the Yawuru people. <www.Aboriginalartonline.com/culture/land.php>accessed on 15 November 2016.
[55] S Wiessner, 'The cultural rights of Indigenous peoples: achievement and continuing challenges' (2011) 22 (1) EJIL 121.
[56] IFC World Bank Group, Guidance Note 7, Indigenous Peoples, January 1 2012 [1].

law-making process. Moreover, the above review of literature builds a strong foundation upon which this thesis's actor based model might be theoretically built.

Given the thesis's inclusion of private actors in the law-making process, it logically favours a legal approach that explores legal *norms* within plural public and private 'transnational' sources. For example, empirical evidence of rights to land is drawn from multiple jurisdictions such as Canada, Australia, Mongolia and the Chagos Islands and involving multiple public and private non-state actors demonstrates this globalised approach. Moreover, some studies are physically transnational in the sense that they have spatially crossed jurisdictional boundaries, as is the case with the Chagossian deportations and the use of international policy on resettlement developed in Western IOs but applied in Mongolia.

Furthermore, the legal frameworks in chapters 7 and 8 provide archetypal examples of transnational legal process containing plural state and non-state actors. The Pilbara project in chapter 7 extends an empirical example of the increasing involvement of private actors in issues of public policy and human rights through direct private governance contracts. Similarly, in chapter 8, the legal framework of the Oyu Tolgoi copper and gold mine[57] in Mongolia involves public and private actors in the law-making process. Private investors Turquoise Hill Resources (owning 66 per cent, of which Rio Tinto[58] (RT) owns 51 per cent) and the Government of Mongolia (GoM)[59] jointly own the project company Oyu Tolgoi. It is project financed through an abstract amalgam of plural relations involving a syndicate of private and hybrid public/private export credit financiers[60], commercial banks, IFIs (the International Finance Corporation[61] and the European Bank for Reconstruction and Development (EBRD)), benefits from a political risk guarantee by World Bank member MIGA[62]. The project includes the GoM as shareholder and it has direct social and effects on land rights of nomadic pastoralists living within the project area.

[57] Oyu Tolgoi project is a $12 billion investment to develop a copper and gold mine at Oyu Tolgoi in the Southern Gobi region, Mongolia approximately 550 kilometres south of the capital, Ulaanbaatar and 80 kilometres north of the Mongolia-China border.
[58] Since 2010, Rio Tinto has also been the manager of the OT Project with responsibility for implementing resettlement related activities resulting in herders claims of land related human rights violations against private entity RT.
[59] The GoM is a minority shareholder in the project with 34 per cent of shares.
[60] For example, Export Development Canada, which is the Government of Canada's export credit agency.
[61] A Loan for IFC's account of up to a US$400 million direct 'A' loan together with an indirect ' B' Loan of up to $1 billion to be syndicated to international commercial banks.
[62] The Multilateral Investment Guarantee Agency, a member of the World Bank Group and makes political risk guarantees available for political events such as expropriation, war and civil disturbance, and breach of contract for a parallel debt tranche of up to US$1 billion.

The common denominator of the 'transnational' public and private studies is their focus on affected Indigenous actors, regardless of whether they are formally recognised as Indigenous, in law. Chapter 4 brings to the fore *Aboriginal groups* legally recognised under the Australian Native Title Act 1993[63] (NTA) and Section 35 of the Canadian Constitution Act. Chapter 5 focuses on *displaced Indigenous and non-Indigenous communities* recognised under international human rights law. Chapter 6 identifies and evaluates the land rights of *displaced Chagossian communities* who do not enjoy formal legal recognition yet strongly assert Indigenous actor status. Chapter 7 identifies '*Traditional Owners'* in the Pilbara Project who are legally recognised under the state made Native Title Act and private legal norms in the Participation Agreement. Finally, chapter 8 identifies and evaluates the land rights of two of groups who do not status: and *pastoralist herder*s in Mongolia who, like the Chagossians do not enjoy formal legal recognition yet assert Indigenous actor status.

In sum, based on a review of literature, this section argues that a transnational legal approach focusing on non-state actors, which in this thesis refers to Indigenous and private corporate entities and IOs, is an appropriate analytical legal lens through which to explore the studies in this thesis.

Norms

Continuing this non-state conformist perspective, TLT supports the view that available 'sources' of legal *norms* are not necessarily bounded to the state and its actors as the primary subjects of international law. The practical result of this approach is that a purely 'black letter' positivist approach to legal sources would not thoroughly capture modern processes of globalisation and its effects on rights and remedies.

Debates over the sources of international law often cite article 38[64] of the Statute of the International Court of Justice (ICJ) as the ultimate source.[65] Yet, debate continues over whether article 38 is an exhaustive list of the sources of international law with debates dividing around the position that article 38 *recognises non-Charter* norms and that the

[63] As amended in 1988.

[64] Article 38(1) of the Statute of the ICJ defines the sources of international law:
The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law (c) the general principles of law recognized by civilized nations; and (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Section (2) notes that this provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

[65] See J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523.

Charter provision *is* the norm giving binding force.[66] Attitudes ultimately diverge between whether an individual takes a positivist or purposive approach to legal sources.

David Ong applies a purposive approach to legal sources speaking directly with TLT. Ong notes how Koh's description of the evolution of 'transnational law' (as the outcome of an iterative process leading to the embedding of agreed substantive norms), is similar to the role of state practice in the formation of international law.[67] For TLT distinctions between formal and informal legal method carry less importance in today's globalisation context. Leading international law scholars such as Shelton present a strong case for including non-binding norms ('soft' law) as sources of international law, in addition to traditional state made law. This is even though the exact legal nature of voluntary soft law regulations is ambiguous.[68]

This has not stopped socio-legal scholars interested in identifying and understanding these non-legally binding norms as a part of the law-making process. Shamir identifies examples of these non-legal regulations or sources within the Equator Principles[69] calling them soft law voluntary 'governance' norms resembling 'meta regulations.[70] Kingsbury identifies specific empirical examples of these norms in World Bank social and environmental safeguard policies for development projects, including them as sources of international law within the auspices of the Max Planck encyclopaedia.[71]

The salient point is that whatever the legal terminology, these non-legally binding norms are part of modern law-making processes. Much of Shelton's justification for their inclusion converses with TLT in that it revolves around processes of globalisation in which the ongoing relationships between states and other actors, deepening and changing with globalisation, create a climate that may diminish the need to include all expectations between states in formal legal instruments. As Shelton notes, in practice, much of the modern

[66] Ibid 541 for an excellent appraisal of the diverging legal opinion of article 38 as authoritative or iterative sources of international law. His conclusion is that 'in the end, it all depends on the view one has with regard to the theory of sources'.
[67] S Leader & DM Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011) 100.
[68] J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009) 187; J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523. The later discusses the fragmentation and uncertainty in identifying international law's formal legal sources, what amount of legal practice is required for crystallisation into customary law and the ultimate lack of an international enforcement framework that arguably also throws the status of international law into the waters of ambiguity.
[69] R Shamir, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.
[70] Ibid 382.
[71] B Kingsbury, 'Indigenous Peoples', *Max Planck Encyclopaedia of Public International Law* [27].

standard setting takes place within IOs, do not have the power to adopt binding texts.[72] Non-binding norms and informal social norms can be effective and offer a flexible and efficient way to order responses to common problems…and may represent a maturing of the international system'.[73] Thus, soft law provisions might have a large impact on the development of international law as possible sources of international law resulting from their eventual codification or 'hardening' and the possibility that compliance with nonbinding norms leads to the formation of customary international law.[74] Non-binding [non-state centred] instruments might also be faster to adopt, easier to change and more useful for technical matters that may need faster adoption, repeated revisions and avoid domestic political battles as they do not need ratification.[75] This has obvious advantage when placed against the substantial time taken by international courts to clarify legal rules and then, for states to comply with those formal international norms at the domestic level, evidenced in chapter 5.

For Kingsbury, inclusion of these types of policies is vital in their potential to set international market standard setting guidelines for investors, who, anxious to reduce risk and secure support from a high status body with special privileges such as the World Bank, have 'piggy backed' of its policy to develop similar guidelines[76] on land and Indigenous peoples. The growth of these land and Indigenous related Policies[77] which are fast proliferating within international, multilateral and bilateral institutions such as the EBRD, IFC and the Equator Principles targeted at private banks justifies and evidences the importance of a critical investigation of these policies as important bodies of emerging normative practice.[78]

Applying this purposive 'transnational' approach to legal sources, this thesis finds evidence of the availability of a legal right to land in the following transnational legal sources.

[72] D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 321-322 noting that non-state actors can as a result of soft law mechanisms, sign on, participate and be targets of transnational regulation making.
[73] D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 322.
[74] Ibid 321.
[75] Ibid 322.
[76] Kingsbury B, 'Indigenous Peoples', *Max Planck Encyclopaedia of Public International Law* 27.
[77] The policies analysed in this study are the International Financial Corporation's 2012 and the European Bank of Reconstruction and Development's 2014 risk management safeguard policy 5 on land and involuntary resettlement policy and safeguard policy 7 on Indigenous peoples.
[78] The proliferation of operational environmental and social policies of international organisations such as the World Bank and its private sector arm: the IFC, the EBRD and others such as the African Development Bank and Asian Development Bank typically involve safeguard policies on a range of topics of public importance: environmental assessments, cultural diversity, biodiversity, supply chain issues, involuntary resettlement and Indigenous peoples.

In chapter 3, rights are sourced within an international legal practice of shaping Indigenous rights as 'use and occupation' rights during the historical colonial era. Chapter 4 finds legal sources within domestic constitutional and statutory examples of Aboriginal title common law rights to land in Australia's NTA and Canada's Constitution Act and case law interpreting those rights. Chapter 5 examines contemporary legal practice of generating 'collateral' rights to land through legal violations to property, possessions, privacy and family life, food and an adequate standard of living found in legal instruments and elaborated under international human rights jurisprudence on 'displacement'. Chapter 6 finds land rights and remedies in the application of the international legal definition of 'Indigenous', within domestic unwritten constitutional[79] Magna Carta based legal 'rights to abode' and the European Court of Human Rights (ECtHR) application of international human rights to the issue of land and property rights. Chapter 7 evidences legal rights and related land access and compensation remedies within private governance arrangements between RT and Aboriginal Traditional Owner groups in Pilbara, Australia. Finally, chapter 8 sources land rights and compensation remedies within the potential application of the international legal definition of 'Indigenous' and soft law 'international policy 'standards' on land resettlement and Indigenous persons to resettled Mongolian pastoralist herders.

Having identified the transnational legal norms relevant to this thesis, the next obvious question is that of how to order and thus understand these transnational legal norms. An obvious problem to a transnational approach involving multiple actors and sources of law is the growing proliferation of norms and complexity brought about by including multiple transnational domestic, international, legal and non-legal 'sources' of law. Complications arise over how to order and make sense of these norms and thus speak to a worrisome fragmentation[80] of the international legal system caused by a transnational approach to law.

[79] Given the lack of a clear written constitution, the question as to whether specific rights for example those under the Human Rights Act and the Magna Carta have special fundamental legal status is still moot. *R (HS2) Action Alliance Ltd) v. Secretary of State for Transport* [2014] UKSC 3 debating the possibility that all constitutional legislation might *not* be equal and that there might be an ordering of constitutional norms and statutes. As noted in that case, 'The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation'.

[80] OK Fauchald & A Nollkaemper, *The Practice of International and National Courts and the (De)Fragmentation of International Law* (Hart 2012).

Questions of hierarchy of norms and legal sources in *international* law focus on two primary areas. First, on the question of whether the issue of international law includes soft law norms, the position taken herein concurs with the affirmative approach of Shelton and Kingsbury discussed above. Second, is the question of whether there exist superior or peremptory norms overriding all other norms and binding on all states including objecting states.

Attempts to establish any kind of legal order within this disparate landscape is challenging. Systems of law usually establish a hierarchy of norms based on the particular source from which the norms derive[81]. For example, in *national* legal systems, it is commonplace that fundamental values of society are given constitutional status and afforded precedence in the event of a conflict with norms enacted by legislation or regulations, while written laws usually take precedence over unwritten laws and legal norms prevail over non-legal (political or moral rules).[82] Where the national system grants constitutional protection it offers rights seekers a valuable tool through which to challenge state activity that may for example, seek to amend or repeal rights under statute in accordance with domestic legal procedures. Constitutional protection is also considered a reliable method of protecting *jus cogens* norms of international law within domestic law. Such explicit recognition can serve as an 'emergency break' aimed at securing respect for core international obligations at all times.[83] This leads to the next question of what fundamental rights exist in international law.

The relevance of any peremptory or 'higher' international norms is directly relevant for domestic law as evidence of any higher status can be argued as a reason for harmonising domestic law such that it aligns with those norms. In principle, this is a useful argument to use against states that do not have domestic recognition of Indigenous rights. In many common law countries, incorporated treaties and customary international law have a status equivalent to that of ordinary national legislation[84]. The state can therefore set aside international law by enacting inconsistent domestic legislation, though the state remains responsible in international law in accordance with principles of state responsibility.[85] Furthermore, justification for examining the issue of international fundamental rights is the argument that they provide evidence of a legal acknowledgement that certain rules exist on

[81] D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 322.
[82] Ibid.
[83] See E De Wet, 'Jus Cogens and Obligations Erga Omnes' in D Shelton (ed), *The Oxford Handbook on Human Rights* (OUP 2013) 559.
[84] Ibid.
[85] Ibid.

the basis of a cosmopolitan Kantian natural law founded within a 'common humanity' which is independent of the will of states and law makers and applies to all transnational actors. Finding legal evidence of any transnational emerging basic or *de minimis* legal norm that might directly relate to or support actors who claim special rights to land is thus vital in fulfilling the actor and justice based objectives of the thesis.

A good starting point to approaching the question of normative hierarchy is a confirming legal practice that recognises a hierarchy of norms and, by implication, also recognises fundamental human rights in the international legal system itself. The *Barcelona Traction*[86] case stressed the ordering of rights with the dictum that 'basic rights of the human person create obligations *erga omnes*'. The International Law Commission later interpreted this to mean that there is 'a number albeit a small one, of international obligations which, by reason of the importance of their subject matter for the internal community as a while, are unlike the others, obligations in whose fulfilment all States have a legal interest'.[87] Since *Barcelona Traction,*[88] racial discrimination constitutes a fundamental and non-derogable principle of international law with obiter statements within that case suggesting that racial discrimination can take plural forms when socially and historically seen in the context of colonisation.[89] Article 53 of the Vienna Convention on the Law of Treaties later codified the idea of peremptory norms of general international law as norms accepted and recognised by the international community of States from which no derogation is permissible. Criteria for establishing peremptory norms are stringent with the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (ILC Draft Articles) stating that relatively few peremptory norms are recognised[90] but that the list of peremptory norms is not exhaustive and thus open to development.[91] Peremptory norms that are clearly accepted and recognised include the prohibitions of aggression,

[86] *Barcelona Traction Light and Power Company, Limited*, Judgment ICJ 1966 [7] in which obiter comments gave traction to the idea of an ordering of rights with the dictum that 'basic rights of the human person *(droits fondamentaux de la personne humaine)* create obligations *erga omnes*'.
[87] Yearbook of International Law Commission, 1976, Part Two, 99 para 10 UN Doc A/CN.4/SER.A/1976/Add.1.
[88] *Barcelona Traction Light and Power Company, Limited*, Judgment ICJ 1966.
[89] Ibid, see judgement of Judge Ammoun [18] who shines light on how racial discrimination can take plural forms when socially and historically contextualised. He states that: 'in the imposing mass of legal norms which make up the modern structure of international law, a number of rules have crept in which owe their origins to duress or illegality; in particular those rules—often enshrined in solemn treaties justifying racial discrimination, slavery, and, until the middle of the twentieth century, conquest, annexation and colonization in all its forms: colonies of exploitation or of settlement, suzerainty, protectorates, mandates or trusteeships the two latter forms disguising, by means of a verbal fiction, a colonialist practice and doctrine, the unlawfulness of which has been stigmatized at the United Nations and condemned by that body'.
[90] See ILC Draft Articles, Article 26(5).
[91] Under Article 40 (6) the ILC Draft Articles stress that the examples given above may not be exhaustive… and that the examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53 of the Vienna Convention.

genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[92] At present, legal evidence of discrimination is limited to racial discrimination in the specific context of cumulative and systemic apartheid policies.[93]

Further, academic debates emerge within human rights narrative through which a 'quest for a normative order'[94] is often told through the terminology of hierarchical 'generations'[95] of rights. For Meron, only 'a small number (irreducible core) of rights are deemed non-derogable under the Political Covenant and that the European and American Conventions constitute fundamental…norms[96] such as slavery and racial discrimination thus leaving the vast majority of rights in a vulnerable position, 'relegated to inferior, second class, status[97]'. Authors comment on a general 'neglect of ESC rights in the practice of the human rights community[98]' attributable to the usage of vague legal and operational terms[99]. These include requirements to ensure 'minimum' essential levels of each of the rights in the covenants[100] and the ambiguity in measuring subjective difficult legal concepts of 'availability and accessibility'[101] with no internal map on how states can practically achieve those minimum requirements. Commentators are also critical of the choice of 'minimum' and 'maximum' standards[102] as unhelpful in fostering a dynamic spirit of promoting improvements in economic and social welfare. For many authors these structural deficits are suggestive of the

[92] Ibid, Article 26(5). D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 319 confirming that the ICJ's case law confirms that pre-emptory norms are elaborated through consistent legal practice to include the outlaw aggression, genocide, protection from slavery and racial discrimination as pre-emptory norms of international law.

[93] ILC Draft Articles, Article 15 (4), article 40 (4) stating the special case of apartheid due to its *cumulative character* of conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

[94] Meron T, On a Hierarchy of International Human Rights AJIL (1986) 80 (1) 11.

[95] Uvin P, *Human Rights and Development* (Kumarian Press Inc. 1962) at page 14 noting that 'the 1966 separation of economic, social and cultural rights from civil and political rights, combined with the West's almost exclusive focus on the latter, has created a sense that there are two levels (often called generations) of human rights'.

[96] Meron stating 'That irreducible core comprises four rights only: the right to life and the prohibitions of slavery, torture and retroactive penal measures.' Meron T, On a Hierarchy of International Human Rights AJIL (1986) 80 (1) 11.

[97] Ibid 12.

[98] Uvin P, *Human Rights and Development* (Kumarian Press Inc. 1962).

[99] Jerve's framework noting how the lack of 'practical operational standards, translating abstract legal norms into minimum core obligations makes it methodologically very difficult for states to assess their own performance, in Jerve A, Social Consequences of Development in a Human Rights Perspective: Lessons from the World Bank, Hum. Rts. Dev. Y.B (1998) 35, 42.

[100] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, UN Doc: E/1991/23 para 10.

[101] The theme of accessibility occurs for example, in relation to the core content of the right to water as Committee on Economic, Social and Cultural Rights, General Comment 15, the right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), paragraph 37 refers to 'states ensuring access to the minimum essential amount of water'. It also requires state ensure 'the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalised groups'.

[102] Commentators critical of the human rights framework have pointed to, amongst other features, the failure of human rights to promote 'maximum' rather than 'minimum' standards. A Edwards, C Ferstman, 'Humanising non-citizens: the convergence of human rights and security', in Edwards A, Ferstman C, *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP 2010) 36; Salomon ME, 'Why should it matter that others have more? Poverty, Inequality, and the Potential of International Human Rights Law' (2011) 37 Rev Int Stud 2137.

way in which such standards have not been embedded in international law.[103] The purely 'aspirational' nature of such policy goals is reflected in the weak social, political and economic rights they propound and an inconsistent approach to legal practice.[104]

Drawing on these hierarchical debates, chapter 5 explores whether and to what extent there is evidence of an international legal practice recognising displaced Indigenous and non-Indigenous people's rights to land or any 'collateral' rights to food or property for example along a legal continuum which conceptualises rights as follows. A *fundamental* non-derogable racial non-discrimination norm, an ownership right to land comparable to fee simple rights or as derogable 'collateral' rights to food, property and family life and if so, the robustness of those international legal rights to protect displaced actors.

Processes and Barriers

Having identified this thesis' approach to actors and norms, this section applies a transnational legal approach testing the efficacy of those rights within the context of specific *barriers or processes* applicable to the actors and norms identified within each chapter. The legal premise runs that an understanding of these transnational governance processes and their exploration evidenced through the case studies might provide insights on the availability and effectiveness of the legal rights and remedies identified herein.

To clarify research focus, the scope of processes or barriers has been carefully limited to a context of political and economic 'governance' processes identified in chapter 3. Informed by a transnational approach that includes the examination of rights within political, economic, historical and cultural context[105], chapter 3 divides the governance framework relating to Indigenous rights into two public and private processes.

First, it identifies processes of judicial interpretation used by public legal officials such as judges who in common law jurisdictions, typically interpret case law to produce general legal principles. Second, through a review of economically focused literature on private actors and public policy, it identifies processes used by private actors such as IOs and commercial entities to deal with rights or issues of public policy. The objective is to explore

[103] L Minkler, *The State of Economic and Social Human Rights: A Global Overview*, (CUP 2013) arguing the undeveloped and inchoate nature of any economic and social rights doctrine, for example the lack of an internal map that can specifically explicate institutional reform to provide expansive social justice.
[104] Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 187.
[105] P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50, 77.

what, if any, historical governance paradigms have been attached to the understanding and current implementation of rights to land at a transnational level. The review of transnational legal literature in chapter 3 identifies a common governance thread applicable to state and private actors.

Chapter 3 considers the evidence, if any, of historical political and economic thinking on Indigenous land rights, what that thinking includes and excludes and how that ideology has shaped legal rights to land for IPs. In doing so, the chapter identifies specific governance paradigms and considers what, if any context they have attached to the understanding and implementation of rights to land at a transnational level. This in turn aids in understanding those historical public and private governance processes and at the same time identifies any common legal or policy themes emerging from those governance processes. Consequently, the thesis examines what effects, if any, those transnational themes or governance paradigms might continue to have on the rights and remedies of Indigenous actors in each of the studies and what implications they might have for fairness.

In brief, the first 'thread' or transnational governance paradigm used by state actors historically emanates from the colonial roots of state sovereignty and control over territory. More specifically, it refers to the agricultural argument prioritising economic, settled, exclusive privately owned land within a historic situation of European colonial encounter and cultural superiority. The tentative suggestion is that the core of this paradigm is illustrated within biased judicial interpretation of rights to land harmonising with the agricultural argument which continues as evidenced within the studies of Aboriginal title, international law and in the Chagos case.

The second 'thread' or transnational governance paradigm explored in chapters 7 and 8 is concerned with how new forms of *non-state* sovereignty possess similar concerns as state sovereignty on control and the prioritisation of private and settled land rights. The two studies suggest that the core of the colonial control and private land paradigm continues within transnational legal contexts. The continuation of those processes typically occur through 'contracting out' or privatisation techniques, project finance structures[106] and a new

[106] S Leader & DM Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011) explore the effects of specific project finance lending used by private actors on human rights and environmental norms. Informed by this approach chapter 8 explores what if any, effects project finance structures have on the availability and efficacy for herders in Mongolia of the land Policies identified in that study.

public management (NPM) or functional 'tick box' certainty orientated approach to corporate governance of public policy issues.

The fundamental concept linking these two public and private governance paradigms is that of transnational Imperialism. This approach borrows from legal scholars advancing third world approaches to international law (TWAIL) arguing that international law's traditional colonial preoccupation of gathering territory is not dead but subsumed and overtaken by neoliberal thinking. For Anghie neoliberal policies constitute new forms of sovereignty, empire and control[107] in their standard neoliberal policy prescriptions aimed at opening up the market to business with policies such as decreased state intervention to give the market free reign, trade liberalisation and privatisation[108], of which mega development projects are a key part. This Imperialist thinking replaces the state's colonial concern over territory and by implication, economic accumulation and cultural subjugation, with the concerns of private actors such as IOs aimed at prioritising market functions, business certainty and motivation to 'get things done[109]' which have to some extent, but not completely (as suggested in the Chagos case), overtaken the historical colonial state motivation of acquiring territory.

It is therefore possible under TWAIL scholarship to link colonial mechanisms of sovereignty, empire and control directly with neoliberalism and privatisation under a broad umbrella of transnational Imperialism. In this way, the study argues that TWAIL is a part of 'transnational' legal theories in that as a legal theory, it includes public and private actors and contextualises legal rights and remedies through a lens of useful and highly relevant political and economic paradigms on culture, land and private property rights more fully explored in chapter 3.

Each of the chapters tentatively suggests that the two transnational legal processes discussed in chapter 3 compromises the effectiveness of the rights to land identified in each of the studies in the following specific ways.

[107] A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007 246.
[108] L Minkler, *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 63.
[109] R Shamir, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.

Chapters 4, 5 and 6 finds continuing legal evidence of the first 'thread' or transnational governance paradigm used by state actors which historically emanates from the colonial roots of state sovereignty and control over territory.

Chapter 4 suggests that the parochial legal parameters and narratives through which Aboriginal title rights in Canada and Australia are judicially interpreted echo Imperialist thinking within the judiciary. This thinking continues the Euro-centric superiority of settled and cultivated land within contemporary case law and has constrained the effective application, development and availability of Aboriginal title rights thus structurally denying legal remedy and access to justice for Indigenous actors.

Chapter 5 provides evidence within judicial interpretation of rights relating to displaced persons and more generally, the structures of international law relating to those rights, of legal support to the international continuation and prioritisation of modern economic and settled land relations that echo the historical agricultural argument and Imperialist thinking.

Chapter 6 provides evidence in the Chagos case of executive and supporting judicial narrative within English and European courts of a post-colonial legal narrative framing the availability and effectiveness of Chagossians' rights to land. Arguably, this narrative extends evidence of a transnational governance paradigm of Imperialist thinking and a post-colonial legal narrative resonating within the executive and judiciary as more fully explored in that study.

Chapters 7 and 8 provide examples of the second 'thread' or transnational governance paradigm explored in chapters 7 and 8 is concerned with how new forms of *non-state* sovereignty possess similar concerns as state sovereignty on control and the prioritisation of private and settled land rights. The two studies suggest that the core of the colonial control and private land paradigm continues within transnational legal contexts through new concerns over functionality and business certainty, which replace colonial concerns over territory. Those studies fully explore evidence of a number of specific legal, economic and political processes through which the core of the colonial *private land* paradigm continues within transnational legal contexts. The studies explore how those processes might advance the primacy of economic land relations and in others, be used as a lever to promote Indigenous land relations.

To conclude, through an examination of pertinent literature this chapter has made the case that a theoretical approach in TLT and its methodological focus on actors, norms and processes is a suitable theoretical lens through which to approach and contextualise the thesis.

The next chapter discusses the methodological approach of the thesis, the choices the author has made in terms of empirical sources, limitations in methodological approach and how those sources advance the thesis's theoretical approach in TLT.

CHAPTER 2: A METHODOLOGICAL APPROACH IN TRANSNATIONAL THEORY

This chapter identifies and discusses the empirical sources used in this thesis and explores how they complement and advance the thesis's theoretical focus in transnational legal theory (TLT). The first part of this chapter will briefly recap the core tenants of TLT and explain how the theory informs and justifies the thesis's approach towards using specific primary and secondary data sources to understand, test and verify the thesis's 'transnational' approach to Indigenous land rights focusing on actors, norms and processes explained in the previous chapter. Given the substantial number of primary and secondary empirical sources involved in the thesis's theoretical, empirical and policy orientated approach relating to actors, norms and processes and rights to land, the chapter explains how these sources have been organised and selected.

The chapter then explains the rationale behind the deliberate choice of primary and secondary legal sources (including the use of empirical case studies). At the same time, it outlines the specific challenges encountered in the collection of suitable empirical sources, how these challenges were addressed and explains salient qualifications and assumptions in the study. Finally, it presents the thesis's methodological approach to the idea of 'Fairness' and 'Justice' through a discussion of the salient secondary sources from which the thesis's 'actor' and non-state centric focused idea of 'Fairness' and 'Justice' has been shaped. This idea of 'Fairness' and the methodological sources from which it derives are used in this thesis as a 'benchmark' against which the rights to land identified in the individual chapters and the processes through which they are interpreted, are repeatedly tested and verified.

The thesis prioritises literature that speaks directly to the core aim of identifying Indigenous rights to land from the perspective of transnational *actors, norms and processes.* As discussed in the previous chapter, a transnational legal approach to law-making has its building blocks in public and private 'actors' and 'norms' in a 'globalised' state and non-state centric perspective[1] and examines rights within political, economic, historical and

[1] HH Koh, 'Transnational legal processes' (1996) 75 Nebraska Law Review 181 referring to transnational legal processes as comprised of public and private actors - nation- States, international organisations multinational enterprises, non-governmental organisations and private individuals...who…interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalise rules of transnational law.

cultural context and processes.[2] The following chapter 3 discusses in detail, the idea of specific transnational economic and political 'processes' that might affect the implementation of legal rights to land, with legal repercussions for actors. When put together such a 'plural' theoretical approach legitimately merits a complementary approach to data gathering from which evidence can be collated in order to from 'plural' empirical sources in order to understand, test and verify the thesis's theoretical 'transnational' approach to Indigenous land rights focusing on actors, norms and processes.

Prior to collecting data from these plural studies, a short' pilot' study was conducted in which the senior land policy advisor at the Department for International Development was asked about the value of examining Indigenous land rights issues in a globalised perspective. Her response was favourable to such a study justified on the general lack of research and understanding on the topic combining a legal, economic and political perspective.

The focus on transnational 'actors' shaped the decision to select *case studies* which involve plural types of actors who are legally recognised such as Aboriginal groups in Canada and Australia and those that lack formal legal recognition such as the Mongolian herders and the Chagos community. Those studies engage with plural forms of transnational legal instruments: soft law policy rights, private agreements and legal norms in international and domestic laws. Previous successful studies in transnational law, such as that by Leader and Ong[3] have also used mixed methods including case studies, relevant transnational legal instruments and interviews with key stakeholders. Moreover, those studies engage with specific financing processes to understand how transnational processes might in sum, affect the human rights of affected communities.

The decision to examine case studies of different geographical social 'sites' was directly supported by the 'transnational' approach of the thesis. Transnational legal theorists promote the use of legal and non-legal case studies as a central methodological device to explore the nature, scope and function of governance…in a global context[4]. Case studies are

[2] Transnational approaches require a combination of diversified rules in areas such as corporate, labour, constitutional, environmental and contract law. P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50, 77. During the course of this research, conversations related to issues of anthropology, history, sociology, development and economy were encountered which spoke towards and justified a transnational approach.

[3] S Leader & DM Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011).

[4] P Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 Indiana Journal of Global Legal Studies 29.

employed as a means of exploring issues of legal regulation, rights and remedies in a transnational context today.

The use of case studies also provides practical empirical examples of current legal 'problems' and how they might impact upon this thesis' concerns with advancing a 'thick' and cosmopolitan/transnational rule of law rule of law. Studies were deliberately selected from 'classical' and 'international' state centred legal sources and 'transnational' case studies which sit 'on the edge' of traditional state centred approaches to state centric law. Spatio-legal methodologies on spatial 'nomospheres'[5] which take an unbounded state approach to law by focusing on project spaces, informed the choice to use different development sites in order to see more clearly, through comparison, what 'happens' to law in plural spaces. This type of methodological approach might shed light on the uneven application of law and policies in different settings and thus raise questions about the advancement of fairness and substantive equality to Indigenous groups in different settings. For example, chapters 7 and 8 examine whether and if so, *how* plural private economic rights to land might be practically accommodated with traditional Indigenous rights to land as a shared space[6] regardless of whether traditional rights to land are given formal domestic recognition as they are in the Pilbara project or denied national recognition as in the OT Project. Furthermore, those chapters take a spatio-legal approach by examining two social spaces in the Pilbara project space and the OT Project that are comparable as they involve the same non-state actor as responsible for implementation of Indigenous rights. The objective of the comparative approach is to understand whether corporate policy on the common issue of Indigenous land rights differs depending on the project setting.

This thesis' empirical sources are referred to and discussed in chapters 1 and 3. However, to broadly summarise, the complex array of empirical sources constituted of *primary* state centred 'hard' legal sources such as case law, legislation, soft legal norms such as policies and regulations and *secondary* literature such as policy and research reports, peer-reviewed

[5] D Delaney D, *The Spatial, the Legal and the Pragmatics of World Making: Nomospheric Investigations* (Routledge 2010). Applying legal geography's 'bottom up' approach moves beyond state bounded legal relation to instead foreground spaces in which plural types of legal relations. The objective is to flush out broader complexities weighing on the law, for example, competing ideologies that can lead to gaps, slippages and the uneven application of law in different spatial settings. D Delaney, 'Legal geography I' (2015) 39 Progress in Human Geography 96.

[6] P McAuslan, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003) 10, McAuslan's shared approach to land reform is entrenched within principles of universal equity, which recognises different land relations regardless of formal state recognition, and thus resonate Kantian ideas in cosmopolitanism and natural law between individuals.

academic literature and interviews which formed the basis of the case studies and legal examples, was organised as follows.

Collated evidence was categorised into three plural types of 'transnational' legal sources from which evidence of a right to land is identified: domestic *state* centric sources, *international* legal sources and *policy-orientated* sources.

First, a review was conducted of the main primary and secondary evidentiary literature relating to TLT within 'classical' state centred legal pluralism. This type of state recognised pluralism incorporates the simple idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one 'law' or legal system[7]. In this thesis classic pluralism takes the form of state made constitutional provisions for groups in Canada and statutory provisions for groups in Australia. Searching for evidence of international or regional bodies of law speaking directly to Indigenous land rights was limited to the corpus of common law Aboriginal title. This is the only body of law directly relating to rights to land of Indigenous persons (IPs) from which to gather evidence. This limited the jurisdictional examples to a few common law countries, amongst which Canada and Australia have the most legal information available enabling selection of legal sources from those jurisdictions. Fortunately, legal recognition in these countries also takes different legal forms: statutory and constitutional, which provided another good reason for selection. As we shall see, the thesis's methodological approach of a 'thick'[8] understanding of the rule of law[9] concerned with whether formal 'rules in the book' capture and enforce moral rights[10] and substantive justice, informed the choice to examine one jurisdiction with constitutional recognition and another with statutory recognition of Aboriginal rights. The objective was to ascertain whether the legal method through which rights are written 'in the book' so to speak, has any implication for 'stronger' legal protection. It is widely understood that constitutional protection of rights provides stronger legal protection than statutory rights.

[7] M Davies, 'Legal Pluralism' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012) 805; SE Merry, 'Legal Pluralism' (1988) 22 (5) Law & Society Review 811. This starts with the general understanding of legal pluralism as a situation in which two or more legal systems co-exist in the same social field. This is classically understood within the rubric of colonial encounters and the interaction of European law with traditional law, the subject matter of which has been undoubtedly technical and formalistic in that it focuses upon the doctrinal and procedural interaction between different areas of law.

[8] T Bingham, *The Rule of Law* (Penguin 2010) 66.

[9] Bingham describes these fundamental principles that lie at the core of the existing principle of the rule of law as follows: that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'. For Bingham this principle is not comprehensive or universally applicable and to it he adds eight suggested principles or ingredients to produce a more thorough, robust and contemporary concept. *The Rule of Law* (Penguin 2010) 37.

[10] R Dworkin, *A Matter of Principle* (Harvard UP 1985) 11-12.

Chapter 4 explores whether the form of rights has had any bearing on how common law judges interpret Aboriginal rights and thus inferences are tentatively drawn over whether legal form matters for substantive protection and the advancement of substantive equality.

The second form of legal pluralism from which evidence is gathered is international in scope, and draws on legal cases relating to displaced communities decided by international courts (chapter 5). Drawing on legal methodology of international human rights case law on displacement of Indigenous and non-Indigenous communities, that chapter asks what, if any fundamental or collateral rights to land emerge from international jurisprudence and explores the quality of those rights for example through an examination of how rights violations are conceptualised. The Chagos case straddles both the state and international methodological approach to legal pluralist sources as it explores rights to land within English domestic law arising from the Magna Carta's right to abode and under the international law definition of Indigenous as it is applied in this case. Both types of legal pluralism are however state centric.

The third type of legal right, demonstrable in the Mongolian and Australian Pilbara studies involves private actors and thus conceives of 'law' not only as state laws conceived in a positivist sense[11] and includes law as voluntary but influential policies and regulations formed in the 'shadows' of state-centric law by private actors and organisations. Evidence of a right to land for Indigenous groups is located in the form of soft law policy tools and private governance arrangements explored in chapter 7 and 8.

Given TLT's problem and actor focus approach, preference was given to finding ongoing and practical case studies, if possible. Special consideration was given to the availability of cases with secondary materials such as formal complaints and related ombudsman reports providing information on land related complaints lodged by Indigenous actors evidencing these transnational conflicts and their possible effect on the rule of law. The ombudsman panels of the World Bank, International Finance Corporation (IFC) and European Bank for Reconstruction and Development (EBRD) contain numerous historic cases lodged by communities relating to human rights violations. At the time of writing, only one (the OT Project) had publically available information on the legal and social effects of financial

[11] M Davies, 'Legal Pluralism' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012) 824.

policies on land and Indigenous people on communities claiming a special relationship to land.

Given the 'transnational' approach guiding the choices of case studies, it was necessary to speak with persons within international organisations[12] (IOs) and private corporations charged with drafting and implementing the identified rights to land. However, obtaining information from private actors involved in development projects on Indigenous legal rights and remedies proved challenging. The banks approached for formal interview were initially limited to those that apply resettlement and Indigenous policies within the OT Project such as the IFC. As few requests for interview were responded to, the net was caste wider to include the World Bank and Standard Chartered Bank (who at the time of writing this thesis was the Chair of the Equator Principles).

As detailed in the Mongolian study, numerous interview requests were made to financial institutions yet none were ready to discuss their land and Indigenous policies and the implementation of policies within projects. Coincidentally, during the three years within which this thesis was undertaken, the World Bank was undertaking a multi-stakeholder consultation process aimed at revising its social and environmental standards (including land and Indigenous people) to ensure the goals are clearer, stronger and support the bank's goals of ending poverty and promoting shared prosperity. Despite this effort, representatives of the bank in London and Washington declined interviews. This is surprising given the 'good governance[13]', accountability and transparency approach within the bank and IOs[14] which are pertinent to the public policy related operational policies (such as those discussed in chapter 8).[15] The contradictory approach evidenced by the communications with IOs during

[12] International organisations in this study means international finance institutions such as the European Bank for Reconstruction and Development and the International Finance Corporation.

[13] Which in the words of the World Bank itself includes both 'hard' and 'soft' dimensions: the former includes a strong rule of law, property rights, internal rules and systems, an independent judiciary, and soft measures such as voice, accountability, transparent decision making, equity and participation. The latter is particularly important to this study as it requires that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources, Taken from the website of the World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/EXTMNAREGTOPGOVERNANCE/0,,contentMDK:20513159~pagePK:34004173~piPK:34003707~theSitePK:497024,00.html#_ftnref1> accessed 15 November 2016.

[14] Like other multilateral development banks, the IFC and EBRD have undergone significant governance reforms in the areas of social and environmental concerns, recognising that development is not purely an economic paradigm to include development as including social and economic factors, observance of human rights, improved welfare and poverty reduction: the human face of development.

[15] See Cisse H, Bradlow D, Kingsbury B, 'World Bank Legal Review: International Financial Institutions and Global Legal Governance' (2011) Law, Justice, and Development Series and World Bank webinar with which this research engaged, which took place on February 26 2015 at 3:00 pm on the subject of 'The Evolution of Safeguards: The Proposed Environmental and Social Framework'. World Bank participants were Stefan Koeberle (Director of Operations Risk Management), Agi Kiss (Regional Safeguards Advisor for Europe and Central Asia), Una Meades (World Bank Senior Legal Counsel) and Glenn Morgan (Safeguards Advisor).

the course of this thesis has consequences for methodology in availability of data upon which to draw. Those challenges were overcome through participation in some informal conversations with IOs, reading of secondary sources and participation in a public 'webchat[16]' with the World Bank.

On balance, the above practice infers an institutional malaise and ambivalence when asked to make good on disclosure policies in practice. It is acknowledged that it is difficult to ask institutions to open their doors to comment on their own policies, this institutional attitude sits uncomfortably alongside the policies these organisations have on public disclosure[17] and 'good governance' which includes transparency. Yet the IFC[18] and EBRD have, in their attempt at transparency and good governance entered into specific disclosure policies[19] relating to their investments that are available to the public, project stakeholders and affected communities. This thesis has thus, been informed by a perplexing policy of dis-engagement which emerged from repeated attempts in contacting the legal and environmental and social departments and civil society engagement units of numerous IFIs who produce policies such as those explored in chapter 8.[20]

Another limiting factor was the severe transparency and confidentiality limitations relating to the gathering of information on what 'private' law policy and private contractual governance methods exist to accommodate traditional land rights. The time taken to liaise with Rio Tinto (RT) to gain access to empirical evidence of the Participation Agreement[21]

[16] World Bank webinar with which this research engaged, which took place on February 26 2015 at 3:00 pm on the subject of 'The Evolution of Safeguards: The Proposed Environmental and Social Framework'. World Bank participants comprised of Stefan Koeberle (Director of Operations Risk Management), Agi Kiss (Regional Safeguards Advisor for Europe and Central Asia), Una Meades (World Bank Senior Legal Counsel) and Glenn Morgan (Safeguards Advisor)

[17] See for example paragraph 29 of 2012 IFC Performance Standard 1 stating its disclosure policy requiring the disclosure of relevant project information helps Affected Communities and other stakeholders understand the risks, impacts and opportunities of the project. The client will provide Affected Communities with access to relevant information and documents, more specifically the client's environmental and social policy and any supplemental measures and actions defined as a result of independent due diligence conducted by financiers.

[18] See 2012 IFC Access to Information Policy: available at <www.ifc.org/wps/wcm/connect/98d8ae004997936f9b7bffb2b4b33c15/IFCPolicyDisclosureInformation.pdf?MOD=AJPERES> accessed 15 November 2016.

[19] So the IFC 2012 Performance Standards on Environmental and Social Sustainability stating that IFC's Access to Information Policy reflects IFC's commitment to transparency and good governance on its operations, at para 1.

[20] Research was undertaken over the summer of 2015. During this time, numerous attempts were made to contact the legal, environmental and social departments and civil society engagement units of numerous policy developing international finance institutions. Those formally contacted but either formally refused or simply failed to response were the African Development Bank, the World Bank, the IFC and Standard Chartered Bank who are currently chair the Equator Principles Association: note European Bank for Reconstruction and Development agreed to speak informally. The World Bank's refusal to speak was especially interesting given that the bank was in the middle of a comprehensive review of its environmental and social safeguards and according to its website is welcoming to broad stakeholder input. Notwithstanding this refusal, engagement took place in a public 'web chat' set up as part of the review process with senior members of the World Bank in which questions were asked relating to policy implementation used in this study.

[21] 'Participation Agreement' or 'PAs' mean the claim wide private governance arrangements relating to amongst other things, traditional land access and compensation between the Aboriginal traditional owners (TOs) and Rio Tinto in the Pilbara region of Western Australia discussed in chapter 7 and subject to confidentiality arrangements.

(PA) in the Pilbara project (up to one year) restricted the ability to identify and gain access to other private agreements. However, in that specific case, RT have been forthcoming and provided timely access to information upon which findings in chapter 7 are built.

Language issues were also a consideration in the legal examples and case studies deployed in the thesis. For example, a dam project involving tribal groups in South America was considered during the selection process, however the non-availability of complainants and English speaking interlocutors hampered the usefulness of that study. The Mongolian study was found to be more useful, through it is worth noting that it was also limited by some language issues and required the formal engagement of a Mongolian translator to assist with interviews with a resettled herder directly impacted by mining operations. Whilst interviews were organised the time and cost involved in that process was a limiting factor to the number of interviews with resettled herders. The author had been in contact with the Sustainable Mining Institute at the University of Queensland who had provided contact with local Mongolian NGO OT Watch. That NGO kindly facilitated Skype contact with a researcher from the Netherlands conducting research at the OT Project site who had connections with a resettled herder and translator. On balance and in light of these facilitating factors the decision was made to choose the OT Project over others.

Similarly, the Chagos case was given preference as during the term of this thesis, the case continues to be, an ongoing legal and political dispute over land rights and resettlement remedy. The author's decision to include this study was also encouraged by the legal interest in the case demonstrated by socio-legal conference held at the well-attended 2015 University of Greenwich. Moreover, the author's own role as Co Vice-Chair of the UK Chagos Support Association and ability to speak French facilitated formal interviews with resettled English and French speaking Chagossian communities in South London for face-to-face interview. Finally, contact with legal counsel for RT on the PA facilitated through the author's supervisor following which the author maintained contact with counsel who directed me to interlocutors within RT, Australia. The availability of English speaking contacts was a strong factor in using this case.

Having discussed data collection (and its challenges) relating to actors, norms and case studies, the following section explains the choice of data shaping what transnational legal 'processes' to consider. Early in the thesis a decision was made to conduct interviews in

order to advance the empirical and policy orientated approach to the thesis. The decision to use semi-structured interviews rather than structured questionnaires was made to encourage an open and fluid dialogue over complex and nuanced topics of concern to this thesis such as the rule of law, fairness and processes or barriers in implementation of rights to land.

During the course of these conversations which were conducted in parallel with a review of existing literature on TLT and land rights discussed in chapter 1 and 3, a decision was taken to prioritise 'governance' debates to political and economic matters, which might affect legal rights and remedies. In other words, unfolding from these conversation and readings were important 'signifiers' or 'clues' of the types of processes that *might* be affecting implementation of rights and availability of remedies in each case study. The decision to limit transnational legal processes to largely political, economic and social considerations was further confirmed through conversations with Yamatji Marlpa Aboriginal Corporation (YMAC) legal counsel[22]. For example, counsel framed commercial agreement negotiation within spheres of plural economies and interests. These plural economies include a sensitive colonial history of political and economic exclusion and a charged rights movement[23], an Australian economy dependent on land accumulation and natural resources and the continued devaluing of Aboriginal culture through the rise of new forms of 'welfare racism'[24]. This thinking continues the fundamental misunderstanding of the special relationship groups have with land and related to this, the very serious ceremonial obligations that Aboriginal traditional owners have to their country and land, which in their eyes constitute jobs of equal importance to those undertaken for financial gain[25]. Meegan notes that it is the failure to recognise and respect these histories, differing relations over land and the plural and often competing economies within which these relations co-exist within land management practices causes laws and policies to fail[26]. Meegan's approach echoes that of legal reform expert Patrick McAuslan's plural concept of land drawing on geographical thinking which recognises land as consisting of numerous 'circuits in shared

[22] Yamatji Marlpa Aboriginal Corporation, the native title representative body for the Traditional Owners of the Pilbara, Murchison and Gascoyne regions of Western Australia.
[23] For a detailed history of the social and political context leading up to the Mabo case and the enactment of the NTA, see P McHugh, *Aboriginal Title, The Modern Jurisprudence of Tribal Land Rights* (OUP 2011).
[24] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015). Meegan refers to 'welfare racism' as emanating from those with a liberal welfare state philosophy who question the provision of special measures to people who 'chose' to live a different and remote lifestyle.
[25] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).
[26] P McAuslan, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003)

space[27]'. This methodological understanding applies when evaluating the private land rights in chapter 7.

In sum, it was this type of political and economic perspective (numerous other examples of unfold from literature described in chapters 1 and 3) from which emerged a common parameter of political and economic 'processes' as a lens through which the applicability and effectiveness of the transnational legal norms identified in each of the chapters is directly relevant.

Care was taken to mitigate any ethical considerations around researching vulnerable groups. In the PA, the compensation quantum has been deliberately anonymised to maintain client confidentiality. To avoid any ethical problems, interviews and informal discussions were only undertaken with the following types of individuals. These included IP's formal legal representatives who have given formal consent, commercial 'sophisticated' interlocutors and project stakeholders who have given formal consent and for the Chagos and Mongolia study, interviews were conducted with resettled individuals who do not enjoy formal legal Indigenous status but claim the same. All interviewees gave formal consent and are over 18 years of age.

Having explored the methodological approach to the thesis and its link with TLT, this section describes important legal qualifications and assumptions to the thesis relating to matters of legal scope, corporate liability and self-determination claims.

It would be impossible for reasons of time, cost and methodology, to present a comprehensive exploration of all relevant transnational legal actors, norms and processes relating to Indigenous persons globally. Given these practical limitations, a decision was made to qualify analysis to a snap shot of varied legal and social contexts in which affected Indigenous 'actors' are the common denominator. The assumption behind this approach was to abstract results and make comparisons from which greater 'transnational' or global results and conclusions might be drawn. For example, a comparative approach was favoured which sought to compare whether constitutional protection of rights provides stronger legal protection than statutory rights. In this way, indicative conclusions are made about the value of legal protection of rights in two different legal forms.

[27] P McAuslan, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003) adapted from Brazilian geographer Milton Santos formulation of two circuits of the urban economy in his book *The Shared Space*.

Similarly, in order to draw general conclusions about the global legal practice surrounding the use and application of the legal definition of Indigenous, a decision was made to undertake a comparative example of different social contexts such as Mongolia and the Chagos islands to identify themes or trends in the definition's practical application. It is hoped that comparative empirical observations on how the legal definition is transposed into different social settings involving the same corporate actor is a good methodological lens through which to inform this thesis' core objective of finding the barriers to advancing fairness for groups. For example, both the Mongolia and Pilbara case involve the same corporate actor RT, but in the former RT denies Indigenous status and in the later Indigenous status is recognised and enhanced through private arrangements. Through this type of comparative analysis, the application of the same legal provisions in different spatial contexts might shine light on implications for the rule of law in terms of equal application of the law to all save to the extent that objective differences justify differentiation.[28]

Whilst the theoretical legal framework of this thesis is 'transnational' and includes private corporate entities, for the sake of focus it does not cover legal issues of corporate liability of non-state actors for human rights violations which lies more within a 'business and human rights' approach. So, it does not deal with ways in which corporates might be held directly and independently accountable from states for any human rights abuses in either civil or criminal matters, which take place in the context of resettlement pertaining to traditional land. When considering the important question of what remedies Indigenous actors might have for human rights violations, the thesis focuses instead on what legal avenues, if any, are available for groups to hold *states accountable* for the any human rights violations flowing from non-state entities.

Moreover, the thesis does not deal with possible 'sources' of Indigenous rights to land within environmental law and private arbitration disputes as in Krepchev[29]'s study, although in the conclusion it does posit the findings of this research within a context of the limited arbitration investment disputes mentioning IPs. Krepchev's recent study deals with IP land rights from an environmental and arbitration perspective far more fully and suggests that accommodation of rights might be better satisfied through private contractual means. The transnational 'actor' based approach to this work does not extend as far as claims in self-

[28] T Bingham, *The Rule of Law* (Penguin 2010) 55 in which he postulates eight sub-rules underpinning the rule of law, one of which is equality before the law.

[29] M Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) Journal of International Dispute Settlement.

determination. From a state based perspective arguably, international law narrates Indigenous rights as constantly in battle and competition with states. For example, international law currently defines self-determination as revolving around ultimate separation and difference through the requirement of a state to have a 'defined territory'.[30]

In contrast, this thesis takes a nuanced approach. It does not start with the basic assumption that all Indigenous groups are a threat to state integrity in that they desire complete separation from the state, unless, and this is key, Indigenous groups desire separation. Advising groups to entirely 'turn away' from engaging with the discourses and structures of settler-colonial power[31] as Coulthard argues, denies the plurality of contemporary Indigenous society who, just like non-Indigenous groups, are diverse and comprised of members of different ages whose interests and personal desires diverge and change over time. Arguably, Coulthard's approach falls into the trap laid by the state within modern political economy which reinforces unidimensional understandings of community'.[32] In contrast, Sanders socio-legal studies of numerous tribal groups concludes 'most of these groups do not seek to secede from the territories of the states in which they reside, but rather to wield greater control over matters such as natural resources…education, use of language and bureaucratic administration in order to ensure their group's cultural preservation'[33]. The central message then is one of inclusion, fairness, active participation and increased control over matters related to their land, natural resources and culture. As the Asia Indigenous Peoples Pact[34] note in their letter to the UN 'we are not against development, we are in fact the embodiment of sustainable development, but we are threatened by development targets

[30] Article 1 of the Montevideo Convention on the Rights of Duties of Man 1933 defines a state as a person of international law which should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.
[31] GS Coulthard, *Red Skin, White Masks* (University of Minnesota Press 2014) 45.
[32] Referring to the work of James Scott, Creed notes that states can only administer effectively by simplifying and homogenizing the local context so as to make it legible to the state. To the extent that community is promoted by modern statecraft, then, it is likely to be a problematic idea of community as uniform and homogenous. Communities that do not fit such images are abandoned by the state and discredited as anti-modern: G Creed, *The Seductions of Community, Reconsidering Community*, (School of American Research Press 2008) 6.
[33] D Sanders, 'UN Working Group on Indigenous Populations' (1989) 11 (3), Human Rights Quarterly 429 where Sanders states 'generally self-determination for Indigenous populations is assumed to mean a degree of autonomy involving cultural, economic and political rights within the structures of recognised states. He draws on various examples, for example, submission to the working group by the Karen advocating a federal union for Burma with a separate Karen state. Moreover, tribal representatives from India argued for a separate state composed of tribal areas in the existing states of West Bengal, Bihar, Orissa and Madhya Pradesh. Also see Corntassel J and Primeau T, 'Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination', (1995) 17, Human Rights Quarterly, who follow Sander's approach
[34] Letter from Joan Carling Asia Indigenous Peoples Pact (AIPP) Interactive Dialogue 5: Building effective, accountable and inclusive institutions available at Sustainable Development Policy and Practice: http://sd.iisd.org/news/civil-society-speakers-selected-for-sustainable-development-summit/ (date unknown)

– such as those on energy and climate change solutions – if our human rights are not protected'.

In line with the transnational actor and fairness perspective of this work, such a plural approach admits the practical reality that like communities with non-traditional land connections, IPs can also be divided over what, if any role they would like within development initiatives. The 'continuum' of development and involvement in projects is therefore, more nuanced and dynamic than a binary 'yes' or 'no' approach. This is exactly the situation discussed in the Pilbara Project in which there are differences within communities over what level of involvement groups want in development projects. These conflicts resonate around whether groups seek a mixture of keeping their traditional livelihoods and protection under domestic law and at the same time inclusion in project affecting their traditional rights through private access and enhanced compensation means.

In light of these debates, this thesis provides a transnational approach mapping basic legal rights that groups might be informed by, use and advocate around regardless of whether they seek legal protection within the confines of the state, through special private measures or a combination of the two. This mixed public and private approach contributes to the methodological approach taken by other contemporary legal studies. For example Krepchev[35] argues that even though Indigenous rights to land take root in fragmented areas of public law such as human rights and environmental protection, protection of land rights can be more practically and timely accommodated through the sphere of private law and special private mechanisms. Similarly, Patrick McAuslan's legal and geographical approach to land as consisting of overlapping 'circuits in shared space[36]' emanating from formal and informal rights and relations to land held by public and private actors over the same space echoes the 'transnational' public and private methodological approach of this thesis. The Pilbara project extends an example of this in practice. That study explores whether and how a legal right to land can emerge from specific contractual provisions which sit on top of and incorporate domestic native title rights to land and also include specific

[35] Krepchev M, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) Journal of International Dispute Settlement.

[36] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003) 6-7 which states that land 'circuits' include customary land and its regulation via traditional processes – its place is principally but not exclusively in rural society. Circuits also include an unofficial market in land regulated by custom and practice – its place is principally urban and peri-urban but it is growing in the rural society and the modern official land market regulated by statutory codes of law interpreted and applied by professional and state officials – its space is both urban and rural. Using Santos' terms it could be said that the modern official land market is the upper circuit in both rural and urban sectors, customary land is the lower circuit in the rural, and unofficial markets the lower circuit in the urban sector and where customary and unofficial markets exist in the same space both are lower to the upper modern circuit.

access to land provisions, benefits advocating holistic social, cultural and economic empowerment[37], consultation rights and benefit sharing rights . Each of these legal methods conflate the best of both public and private spheres to provide a more fruitful 'collective response'[38] for groups, should they chose to be involved in development projects. So, an established state based national legal framework on which groups can claim minimum rights and procedures of consultation provides the building blocks for groups in asserting power and leverage upon which they can negotiate enhanced protections and benefits[39], should groups wish to engage.[40]

This pluralist approach is also similar to that of John Borrows' study of Aboriginal rights in Canada in which both traditional and non-traditional norms can speak to each other as possible learning tools for a cooperative venture easing the increasing tension between Indigenous and non-Indigenous legal systems. Through anecdotes involving the fictional Indigenous character Nanabush,[41] Borrows reveals the inherent biases within the domestic legal system but at the same time admits the practical reality that these systems are here to stay and as such need to be worked with and transformed[42]. At the same time, other chapters reveal the deficits, for example in implementation processes, in domestic and international norms which evidence a right to land with the objective of possible amendment and

[37] In this study empowerment is multidimensional relating to a combination of special economic, political, cultural and human measures/processes which for Aboriginal persons would necessitate for example a focus on Indigenous rights to land and cultural norms (in combination with economic measures for example) as an entry point. An emphasis on empowerment as a process and an outcome leads focuses on organisational capacity building. An increase in participation of previously excluded groups in the design, management and evaluation of development activities whilst an emphasis on outcomes leads to a focus on economic enhancement and increasing access to economic resources: see Luttrell C and Quiroz S, with Claire Scrutton and Kate Bird, 'Understanding and Operationalising Empowerment', Overseas Development Institute Working Paper 308 1-5. The roots of thinking on empowerment lie in feminist theory and popular education, which stressed the personal and inner dimensions of power. Since the 1980s the theme of empowerment is a serious and central concern to the work of many development organisations. A detailed analysis of the concept of empowerment is beyond the scope of this study but for a discussion of the concept and its history. see Luttrell C et al working paper.

[38] See Transforming our World: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, UN Doc: A/RES/70/1 numerous references to collectively in the preamble, para 4 and 18

[39] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015). Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).

[40] Practitioners working in the field of Aboriginal rights whilst remaining critical of the weakness of the structures under the NTA share the opinion that this framework and crucial jurisprudence such as the Mabo case are a vital basis for recognising different socio-cultural-economic relations in land. Without such a framework, which recognises TOs commercial entities will simply not recognise Indigenous groups and engage with them, making it even harder to fight for recognition and rights. Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015). Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).

[41] For example, his justification for the formal recognition and implementation of Indigenous law as a source of law in Canada is grounded firmly within arguments familiar to modern rule of law scholars: principles of institutional morality, inequality and the rule of law and specifically, the fact that Canadian courts have remained entirely uncritical of the continued underlying assumption of Crown title and sovereignty despite the presence of an unextinguished prior and continuing legal order and the effects this approach has had on communities. Borrows J, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002) 112.

[42] M Mutua & A Anghie, 'What Is TWAIL?' (2000) 94 ASIL Proceedings 31.

interventions in those norms and processes to benefit Indigenous actors and advance Fairness for groups, to which we now turn.

The final part of this chapter explains the methodological 'roots' for the use of the terms 'Fairness' or 'Justice' in this thesis. In brief, when used herein the terms 'Fairness' or 'Justice' includes the following characteristics, which derive from legal narratives on fairness understood as substantive legal equality and a 'thick' rule of law.

A good starting point for understanding why a legal approach based in substantive equality is so important for IPs is to contextualise Fairness within philosophical moorings and the ideas of Immanuel Kant. His philosophical approach to natural law was based on fairness, hospitality and common humanity[43]'. In the *Groundwork*[44], he states that we find legal personality wherever we find humanity (because we find it wherever we find rationality). Kant's ideal of a 'cosmopolitan condition'[45] and cosmopolitan legal rights shaping the relationship between all individuals was founded on the idea of a common humanity entrenched in a belief that all 'races' are human, belonging to one family[46] and the idea that humans have universal duties to all members of the earth[47], which are fundamental to natural law. In other words, his idea of a common humanity places the *individual actor* as the starting point of the creation of legal relation. Remarkably, his approach cuts directly through the European model[48], which understood natural law as enjoyed only between the

[43] Kant I, *Toward Perpetual Peace*, 8, page 358, explicitly prohibits the colonial conquest of foreign lands:
If one compares with this [viz the idea of cosmopolitan right] the inhospitable behaviour of the civilized states in our part of the world, especially the commercial ones, the injustice that the latter show when visiting foreign lands and peoples (which to them is one and the same as conquering those lands and peoples) takes on terrifying proportions. America, the negro countries, the Spice Islands, the Cape, etc., were at the time of their discovery lands that they regarded as belonging to no one, for the native inhabitants counted as nothing to them, referred to in Kleingeld P, 'Kant's second thoughts on race' (2007) 57 Philosophical Quarterly 573.

[44] Kleingeld P, 'Kant's second thoughts on race' (2007) 57 Philosophical Quarterly 573, page 583 referring to the Groundwork for the Metaphysics of Morals, Vol 4, page 428, in which Kant introduces the idea of beings that are ends in themselves by stating 'rational beings ... are designated 'persons' because their nature indicates that they are ends in themselves.... Now I say, a human being, and in general every rational being, exists as an end in itself and not merely as means to be arbitrarily used by this or that will'.

[45] Kant, Toward Perpetual Peace (8: 358) which explicitly prohibits the colonial conquest of foreign lands. Kant states that ''if one compares with this [viz the idea of cosmopolitan right] the inhospitable behaviour of the civilized states in our part of the world, especially the commercial ones, the injustice that the latter show when visiting foreign lands and peoples (which to them is one and the same as conquering those lands and peoples) takes on terrifying proportions'

[46] Kant I, *Of the Different Races*, in which Kant states that 'human beings belong not merely to one and the same genus, but also to one family', page 9. His human universal morality, cosmopolitanism and reputation as a moral philosopher sits uncomfortably with Kant's writings on race as a social construct and his hierarchical scientific chart of the superior to inferior hues of the skin categorised as follows:
Stem Genus: white brunette First race, very blond (northern Europe), of damp cold. Second race, Copper-Red (America), of dry cold. Third race, Black (Senegambia), of dry heat. Fourth race, Olive-Yellow (Indians), of dry heat: these contradictions are referred to in Kleingeld P, 'Kant's second thoughts on race' (2007) 57 Philosophical Quarterly 573.

[47] GW Brown and D Held, *The Cosmopolitanism Reader* (Polity 2010) 251.

[48] H Williams, 'Natural right in Hobbes and Kant' (2012) 25 Hobbes Studies 66, 88.

reciprocal relations between 'civilised' states[49]. It also laid a groundwork for future developments of an 'international' rule of law applicable to state and non-state actors. Those two reasons sit well within this thesis' actor, justice and transnational focus.

Modern legal narratives on justice largely coalesce around Raz's[50] famous bifurcation of the rule of law as a 'morally' thin[51], limited *procedural* rulebook understanding of law as a form or function to prevent the arbitrary exercise of power conceptualised by Dicey[52]. In contrast, a 'thick'[53] understanding of the rule of law, (favoured by scholars such as Bingham[54]), ask whether part of the ideal of law is that the rules in the book capture and enforce moral rights[55] and substantive justice which looks into the content and quality of the law: its 'inner morality'[56]. A 'thick' rule of law would include Magna Carta rights such as those discussed in the Chagos study (which for Bingham is 'the rule of law in embryo[57]') and international human rights[58] as fundamental rights which cannot be downgraded by a legitimate rule of law permitting certain rights to automatically trump others.[59]

Whilst not rejecting principles of justice[60] a morally 'thin' approach rather removes them from the sphere of law. Such an approach necessarily places less, if any, emphasis on

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[49] 'The Rule of Law Today' in Jowell and Olivier (eds), *The Changing Constitution* (Oxford University Press, 2000), chap 1 and codification of the state centric focus of international law in article 38 of the Statute of the International Court of Justice referring to sources of international law as general principles of law recognized by *civilized nations.*

[50] As Raz writes a non-democratic legal system, based on the denial of human rights, on extensive poverty, racial segregation, sexual inequalities and religious persecution may…conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law…The law may institute slavery without violating the rule of law'. J Raz, 'The Rule of Law and its Virtue', in Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 211, 221; T Bingham, *The Rule of Law* (Penguin 2010).

[51] J Finnis J, *Natural Law and Natural Rights* (OUP 1980) 270 in which Finnis described the rule of law to be 'the name commonly given to the state of affairs in which a legal system is legally in good shape', which includes procedural rules but says nothing about the content of the law itself.

[52] Dicey, *An Introduction to the Study of the Law of the Constitution* (London 1885) who provided three specific components of the rule of law: the absence of arbitrary power, equality before the law and that the unwritten constitution in the UK could be said to be pervaded by the rule of law because rights to personal liberty, or public meeting resulted from judicial decisions, whereas under many foreign constitutions such rights flowed from a written constitution.

[53] T Bingham, *The Rule of Law* (Penguin 2010) 66.

[54] Bingham describes these fundamental principles lying at the core of the existing principle of the rule of law as follows: that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'. For Bingham this principle is not comprehensive or universally applicable and to it he adds eight suggested principles or ingredients to produce a more thorough, robust and contemporary concept: T Bingham, *The Rule of Law* (Penguin 2010) 37.

[55] Dworkin R, *A Matter of Principle* (Harvard UP 1985) 11-12.

[56] Fuller L, *The Morality of Law* (Yale UP 1969) noting how Aristotle observed the inner morality of the law when he stated 'the rule of law is preferable to personal rule because law better distributes and combines moral virtue and important legal customs to make the members of a state just and good (nomos).

[57] T Bingham, *The Rule of Law* (Penguin 2010) 12-13.

[58] T Bingham, *The Rule of Law* (Penguin 2010).

[59] Franck TM, *Fairness in International Law and Institutions* (Clarendon 1998).

[60] Therefore, scholars such as Dicey, Finnis and Raz would describe the rule of law to be 'the name commonly given to the state of affairs in which a legal system is legally in good shape'. This would include procedural rules but say nothing about the content of the law itself. Classically understood the state of affairs refers to procedural or rule book criteria such as the determination of legal right and liability by application of the law and not discretion and equality before the law. It

interpreting laws in a morally thick manner preferring to keep the rule of law bounded to a rulebook rather than to issues of justice. At its most extreme, the 'thin' vision may, as Bingham notes, institute slavery without violating the rule of law[61]…which ….whilst logically forceful, cannot be regarded as observing the rule of law.[62] The logical upshot of the 'thick' argument is that the content of positivist rules is available for 'testing' against Kantian considerations of fairness, equality and morality to all individuals in order to judge the validity of that law rather a 'lighter' test of ability to advance relations between states.

Thus, a 'thick' approach to the rule of law permits questions of common good, universal morality and equality to be part of the debate over what constitutes law, both positivist and natural[63] and squares directly with contemporary legal debates reacting against the assumption that procedural standards themselves are enough to being fairness into the law.[64]

Another vital component of a 'thick' approach to the rule of law relates to the transnational focus of this thesis, is its applicability beyond 'the Law of Nations'[65], to include what Bingham calls the global inter-connectivity of relations[66] and thus legitimately transnationally to private entities. Indeed, 'international' references and commitments to the rule of law are increasing.[67] The 2012 UN Declaration on the rule of law[68] promotes the advancement of the rule of law at national and international levels as essential for… the eradication of poverty, hunger and the full realization of all human rights thus showcasing the importance of the rule of law as to the success of the SDGs. As General Assembly resolutions, the SDGs are not legally binding[69] but nonetheless provide persuasive statements for member states who are bound to give it due consideration in good faith.

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was understood that *the virtues* provided by adherence to these procedural standards brings fairness and morality into the law, without having to look at the content of the law itself: T Bingham, *The Rule of Law* (Penguin 2010) 3-9.

[61] T Bingham, *The Rule of Law* (Penguin 2010) 66 citing Raz.

[62] Ibid 67.

[63] H Williams H, 'Natural Right in Hobbes and Kant' (2012) 25 Hobbes Studies 66, 70-72.

[64] T Bingham, *The Rule of Law* (Penguin 2010) 3-9 in which he stated that this thin idea of the law understood that these procedural standards brings fairness into the law, without having to look at the content of the law itself.

[65] T Bingham, *The Rule of Law* (Penguin 2010) 117 stating that the world of 'proud and equal sovereigns, declining to bow the knee to one another', which is…is an expression that is now, if not actually pernicious, is better avoided. Indeed, as Bingham notes, international law is a field in which individual claimants feature very prominently, giving the lie to the old belief that the purview of international law is confined to the regulation of inter-state relations.

[66] Referring to the reducing power of the state implies that problems can no longer be effectively regulated on a national basis and suggests the plurality **and** inter-connectivity of legal relations in modern times. The legal implication is that issues of human rights may arise in diverse and unfamiliar fields such as commercial, aviation, employment and human rights law. See T Bingham, *The Rule of Law* (Penguin 2010) 117.

[67] See McCorquodale R, 'Defining the international rule of law: Defying gravity? ' (2016) 65 ICLQ 277 for a thorough record of international statements relating to the rule of law.

[68] Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels dated 30 November 2012: UN Doc: A/RES/67/1, para 7.

[69] See *South-West Africa Cases; Advisory Opinion Concerning the Voting Procedure on Questions Relating to Reports and Petitions*, ICJ Reports, 7 June 1955, separate opinion of Judge Lauterpacht when discussing General Assembly

By incorporating the rule of law into the SDGs and the UN declaration, crucially, the concept has taken on a 'transnational[70]' and 'substantive' scope. On the former, the post 2015-development agenda includes the transnational engagement of all states, international organisations and all persons and entities, public and private in a Kantian spirit of collective action and international cooperation. Indeed, both the IFC and the EBRD have given their express support to the goals[71].

On the latter, the declaration takes a decidedly 'thick' and substantive approach to advancing the rule of law, which requires the recognition of the remnants of colonial domination on human development, expressly includes the advancement of economic growth, human welfare and all human rights[72]. This 'thick' or 'substantive' rule of law would therefore require paying sufficient attention to groups of individuals who suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations[73] as well as political and economic structures that 'brake' application of a thick rule of law. Those prejudicial structures maybe economic and a thick rule of law seeking to address these structures might link with later Rawlsian[74] ideas of economic redistribution to correct economic inequalities and thus advance justice, as opposed to classical neoliberal thinking on efficiency and property rights as the sole precursor to justice.

In law, the Human Rights Commission (HRC) has recognised the special relationship of IPs with their land resources as requiring 'positive legal measures'[75] or special measures[76] as necessary for delivering substantive equality and require more than just a 'light[77]' procedural touch of removing discriminatory provisions in national laws, constitutions and

resolutions stated that a resolution recommending a specific course of actions 'creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation…the state in question, while not bound to accept the recommendations, is bound to give it due consideration in good faith' 55-56.

[70] One might argue that the very formulation of documents such as the SDGs is itself recognition of the inability of states and positivist international law to cope with today's transnational problems.

[71] See <//www.ebrd.com/news/2015/ifis-back-new-global-development-agenda-.html> accessed 15 November 2016.

[72] Resolution adopted by the General Assembly on 25 September 2015, Transforming our World: the 2030 Agenda for Sustainable Development, A/RES/70/1 [35].

[73] See Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009) 8(b).

[74] J Rawls, *A Theory of Justice* (Belknap Press 2005) containing Rawls' influential critique of prevailing neoliberal thinking on justice this view directly challenges neoliberal thinking on equality arguing that individual efficiency protected through for example modern property rights alone cannot serve as a foundation for justice and economic redistribution might be required.

[75] Human Rights Committee, General Comment No. 23: The rights of minorities (Art 27): 04/08/1994 CCPR/C/21/Rev. 1/Add.5, General Comment No. 23 at para 7.

[76] *Saramaka v Suriname* Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)) at 85 in which the court noted how 'this Court has previously held, based on Article 1(1) of the Convention, that members of Indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival'.

[77] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009), para 8(b).

policies. Substantive equality for IPs would mean identifying whether and how current issues of economic and political inequality intersect directly with groups' long history of discrimination in relation to their land rights. For example, legal commentators[78] argue that IPs diminished legal rights and status derives from the doctrine of discovery, which retains valuable currency in international legal discourse today. Thus, substantive equality also requires identification and critical engagement with any underlying structures of legal control that repeat prejudice. International courts and treaty bodies understand the important connection between land access and 'collateral' socio-economic rights such as food and clean water[79], with access to land and food viewed as a 'continuum' through which wider issues of global fairness, social justice, poverty eradication and satisfaction of all human rights[80] takes place.

Special legal measures might also include the type of direct contractual arrangements evidenced in chapter 7. As we will see, the provisions of those arrangements hold the potential to advance substantive equality in the form of enhanced private over land for Aboriginal groups relating to land access and compensation provisions which, at least, begin to satisfy principles of redistribution. On the other hand, these types of legal remedies run the risk of fragmenting the legal framework and preventing the development of uniform legal provisions by the state through measures that place legal responsibility into the hands of private entities to deal with, on a case-by-case basis. In accepting these types of project specific packages, an interesting question is raised of the responsibility Indigenous actors take in legal fragmentation. This type of question is however, untenable given the substantial inequality of arms groups' face which severely undermines the seminal legal principle of equality before the law. As we will see in later chapters, Indigenous actors face enormous legal challenges relating to important issues of evidence on occupation, burdens of proof and legal aid, which make accessing justice difficult and often unsurmountable. In light of these legal processes groups cannot be blamed for accepting the type of private arrangements

[78] Williams R.A, 'Columbus's legacy: law as an instrument of racial discrimination against Indigenous peoples' rights of self-determination', 8 Ariz. J. Int'l & Comp. L. 51 (1991) 54.
[79] *Yakye Axa Indigenous Community v Paraguay* [2005] The Judgement of 17 June 2005 (Inter-Am Ct. H. R. (Ser. C) no. 124 (2005)) at 167 stating 'for Indigenous groups access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water'. CESCR General Comment 12: the right to adequate food (Art. 11 of the Covenant), 12 May 1999, U.N. Doc. E/C.12/1999/5, at para 13, stating 'particular importance of rights to food and accessibility to food of priority and special consideration to states with vulnerable Indigenous population groups whose access to their ancestral lands are threatened'.
[80] CESCR General Comment 12: the right to adequate food (Art. 11 of the Covenant), 12 May 1999, U.N. Doc. E/C.12/1999/5 [13].

evidenced in chapter 7 and any collateral legal fragmentation occurring as a result of state or private policy practice encouraging these arrangements.

Sitting in the shadows of legal debates on positive legal measures are serious political barriers. Lawyers working in the field of Indigenous and minority rights remark on the problems they encounter with this liberal vision of equality and liberty based on individual freedom and societal stability with the resultant suspicion and 'accommodation' of 'different' group rights.[81] In contrast, policy of development agencies[82] espouse liberal ideas on sameness through an approach towards Indigenous people in which development on land would require the free prior and informed consent[83] of all affected communities, not only Indigenous persons, thus embracing the liberal principle of universality and sameness, regardless of egregious historic injustices based on special relationship to land. The problem with this approach is that it essentially 'erases' the different and plural worldview that Indigenous groups have and the social value of those relations in terms of common humanity. There is therefore a tension between a legal position seeking to deliver special measures based on fundamental difference and policy measures which seek to homogenise all communities as Indigenous, thus erasing their special identity.

This legal and policy tension echoes a deeper theoretical problem within liberalism emanating from the European post-World War climate. Following Nazi oppression of minority groups, principles of equality, non-discrimination and the universal 'sameness' of all human beings attempted to level the playing field and prevent future oppressive group action.[84] As Kymlicka notes, the universality of human rights and the hallowed idea that each person matters equally lay at the heart of all plausible (modern) political theories[85]. This liberal principle of universality along with the primary importance of the individual and the consequential 'moral necessity of preserving individual freedom and autonomy' works to 'trump' the power of groups[86] and a hidden bias towards a majority that makes the rules[87].

[81] Interview with Lucy Claridge, Head of Law, Minority Rights Group (London, UK, 17 June 2015).
[82] Interview with Iris Krebber, Senior Land Policy Lead, DFID (By telephone 18 February 2015).
[83] An emerging international legal right elaborated under the United Nations Declaration on the Rights of Indigenous Peoples requiring their free, prior and informed consent over developments on traditional land.
[84] JE Oestreich JE, 'Liberal Theory and Minority Group Rights' (1999) 21 Human Rights Quarterly 116.
[85] Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995) 5.
[86] JE Oestreich JE, 'Liberal Theory and Minority Group Rights' (1999) 21 Human Rights Quarterly 116.
[87] Ibid 118.

In the context of IPs, the African Commission on Human and Peoples' Rights (African Commission) notes that this ideological legacy of attaching groups to state subversion and fragmentation continues in the mind-set of governments who see the granting of special Indigenous rights as anti-democratic and as encouraging tribalism, conflict and state disintegration.[88] Legal evidence of political resistance against difference carries through into the very different implications in international law of classification as either minority or Indigenous.[89] The UN observes that the underlying assumption behind minority rights are that minorities will eventually assimilate into national life and legal formulation of minority rights shapes rights as those of individuals to preserve[90] and develop their separate group identity within the process of integration[91] into the wider social order. In contrast, the underlying assumption for Indigenous people is that their predominantly Indigenous identity and unique relationship to land means they participate less in the common domain. They are essentially different, theoretically able to make a case for territorial separateness and self-determination as a distinct 'peoples' which may hold rights: a position which appears inherently anti-liberal, anti-democratic and national cohesion and the post war belief that international peace was bound to a creation of common memories, common language and common dwelling.[92] In this political context, legal attempts to justify the grant of 'special' rights to certain groups become particularly challenging.[93]

For Indigenous persons, the language of preference and speciality detracts from examining the key issues of historical inequality and structural discrimination, which lie at the heart of Indigenous claims. As the African Commission notes, IPs do not use the term to deny all other Africans their legitimate claim to belong to Africa and identify as such but rather to recognise their particular historic suffering and seek protection under international human rights law and moral standards.[94] To the extent groups desire special treatment it is in the form of recognition that they have a unique relationship to land, that it has been the subject

[88] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities 2005, page 88-89.
[89] Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, UN Doc E/CN.4/Sub.2/2000/10, 19 July 2000 [43].
[90] Ibid. Pogany argues that the European minority rights regimes, in large measure, are concerned with the preservation of cultural, linguistic, religious or other features of minority populations and satisfying the special needs arising from those characteristics, see I Pogany I, 'Minority Rights and the Roma of Central and Eastern Europe' Human Rights Law Review, 2006, Vol. 6, No.1 13.
[91] Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, UN Doc E/CN.4/Sub.2/2000/10, 19 July 2000 [23].
[92] For a succinct history of liberal views on national minorities see W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995) ch 3.
[93] Interview with Lucy Claridge, Head of Law, Minority Rights Group (London, UK,, 17 June 2015); interview with Clive Baldwin, Clive Baldwin, Senior Legal Advisor, Human Rights Watch (London, UK, 19 June 2015).
[94] Report of the African Commission Working Group of Experts on Indigenous Populations/Communities (2005) 88.

of historic discrimination and that their traditional land rights are equal to conventional Lockean forms of individual property.[95] Indigenous claims are no more than a right to autonomy, exercised individually or collectively, not to be discriminated against due to special land connection and to integrate should groups choose or to combine elements of traditional and non-traditional: an approach which conforms with all plausible (modern) political and legal theories relating to 'universality' and equality.[96]

In sum, this section has discussed methodological source underpinning the thesis's idea of 'Fairness' and 'Justice'. The idea of the thick rule of law emphasised herein is philosophically grounded in Kantian ideas of natural law based on common humanity and fairness between all humans. This approach resonates a 'thick' approach to the rule of law positing that laws are judged on their basis to deliver substantive equality to all persons and consequently applies equally to state and private actors. Each of the following studies tests the rights to land and remedies as well as the governance processes through which they are applied and interpreted against this idea of Fairness. The objective is to draw conclusions, of relevance to law and policy, on the current ability of those rights to deliver Fairness for groups.

To conclude, this chapter has identified and discussed the empirical sources used in this thesis and explores how they complement and advance the thesis's theoretical focus in TLT. It explains how the theory informs and justifies the thesis's approach towards using specific primary and secondary data sources to understand, test and verify the thesis's 'transnational' approach to Indigenous land rights focusing on actors, norms and processes and explains how they have been organised. The chapter explains the rationale behind the deliberate choice of primary and secondary legal sources (including empirical case data). At the same time, it has outlined the specific challenges relating to transparency and access to information encountered in the collection of empirical sources, how these challenges have been addressed and explains salient qualifications and assumptions to the thesis. Finally, it presents the thesis's methodological approach to the idea of 'Fairness' and 'Justice' through a discussion of the salient secondary sources from which the thesis's 'actor' and non-state

[95] There has been a wave of recognition from the Latin American and African Courts, which have recognised communal forms of Indigenous property. *Mayanga (Sumo) Awas Tingi Community v Nicaragua* [2001], Yakye Axa Indigenous Community v Paraguay [2005] and Sawhoyamaxa Indigenous Community v Paraguay [2006] and *Saramaka People v Suriname* [2007] in which the Inter-American Commission on Human Rights read the right to property to include not only individual forms of property but also those based on traditional communal claims, as well as cases in Belize such as *Maya Indigenous community of the Toledo District v Belize* [2004].

[96] W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995) 5.

centric focused idea of ‘Fairness’ and ‘Justice’ has been shaped. This is crucial, as it is against this benchmark of Fairness that the rights to land identified in the individual chapters and the governance processes or paradigms through which they are interpreted, are repeatedly tested and verified.

The following chapter identifies specific historical public and private ‘transnational’ governance processes or paradigms relating to Indigenous land rights. It is argued that the processes run as a ‘golden thread’ throughout the thesis, from which might unfold legal and policy paradigms that continue to effect the rights and remedies of Indigenous actors in each of the studies, with implications for Fairness, of interest to current research and policy.

CHAPTER 3: IDENTIFYING TRANSNATIONAL GOVERNANCE PARADIGMS ON INIDGENOUS LAND RIGHTS

This chapter explores and identifies what evidence there is of 'transnational' state and private 'governance' processes relating to Indigenous land rights. Informed by a transnational legal theory approach to actors, norms and processes discussed in chapter 1, this chapter divides the governance framework relating to Indigenous rights into processes used within international law broadly, related legal institutions and by public officials such as judges and second, within private entities such as international organisations[1] (IOs) and commercial actors. This in turn aids in understanding those historical public and private governance processes, any legal or policy paradigms which have emerged from those practices, what, if any effects they might continue to have on the rights and remedies of Indigenous actors in each of the studies and examples and what implications they might have for Fairness.

The objective of this chapter is to explore what, if any, *historical* governance paradigms have been attached to the understanding and implementation of rights to land at an overarching transnational level. It therefore defines and delineates the specific parameters and processes applying to the actors and norms examined in this thesis. At the same time, the literature referred to herein justifies the selection and focus on those specific parameters.

The next section focuses on evidence of any governance paradigms found through a brief examination of the historical treatment of Indigenous Persons (IPs) within the structure of international law.

Transnational Governance Paradigms of International Law

This section discusses the political and economic discourse within the colonial period and suggests how those discourses might relate to legal rights on Indigenous land.

Post-colonial legal scholarship (or TWAIL[2] theory) provide a valuable 'transnational' legal approach focusing on historic, political and economic insights into how to contextualise and make sense of international law in the context of globalisation. TWAIL scholars' suggest

[1] International organisations in this study means international finance institutions such as the European Bank for Reconstruction and Development and the International Finance Corporation.
[2] Referring to the broad dialectic of opposition to international law referred to as Third World Approaches to International Law. M Mutua & A Anghie, 'What Is TWAIL?' (2000) 94 ASIL Proceedings 31.

that international law is illegitimate: a predatory system that legitimises reproduces and sustains the plunder and subordination of the Third World by the West[3]. Synthesising many of the arguments on politics and economy evidenced below, TWAIL scholars argue that international law's claim to universality, and global order and stability is betrayed through a historical examination of a close association with doctrines promoting cultural subjugation and accumulation of territory[4]. At the heart of international law and its fundamental premise of promoting the rule of law is yet another tool in the furtherance of imperialist hegemonic development[5] and the subjugation of Third World interests, similar to ideas of promoting civilisation during colonialism and later, the advancement of development and growing trends in globalisation.[6] For Anghie, neoliberal policies constitute new forms of sovereignty, empire and control[7] in that policy prescriptions aim at opening up the market to business through policies promoting decreased state intervention to give the market free reign, trade liberalisation and privatisation[8], of which mega development projects are a key part. In this way, TWAIL scholars include public and private actors and the political and economic processes within which they exist to inform the availability and effectiveness of legal rights.

Post-colonial legal perspectives have been influenced by socio-political studies on Aboriginal rights through narratives on economy and culture, pertinent to this study. For sociologist Wolfe, the invasion and dispossession of Indigenous land is a 'structure not an event[9]' with its overriding motive being territorial acquisition[10]. In '*Red Skin, White Masks*' political scholar Glen Coulthard[11] also approaches the Indigenous experience of settler colonialism as a form of ongoing 'structured dispossession': of resurging power embedded within an institutional system characterised by a 'double process' of economic accumulation (through the dispossession of native populations) and cultural subjugation (through the

[3] Ibid 31.
[4] Ibid 31.
[5] A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007 267; P Prabhat, 'A Left Approach to Development' (2010), Economic & Political Weekly, vol xlv (30).
[6] There is no universally accepted definition or theory of globalisation. Instead, there is a preference in understanding globalisation as an abstract concept or process characterised as the growth of increasingly connected global processes such as trade, commerce and travel. As it relates to law, globalisation refers to a shift away from the paradigm that has dominated social and legal thought over the last two hundred years being methodological paradigm of the Westphalian Model. This is the idea that the state presents the ultimate point of reference for both domestic and international law and instead focuses on global legal convergence between laws (both formal and informal) and understandings of globalisation. This inter-connectivity sheds light on the power imbalances between powerful and less powerful countries in the context of colonialism and neoliberal ideologies and consequently develop critiques of law as neutral and objective: such as post-colonial globalism scholarship.
[7] A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007) 246.
[8] L Minkler, *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 63.
[9] P Wolfe, 'Settler colonialism and the elimination of the native' (2006) 8 Journal of Genocide Research 388.
[10] P Wolfe, 'After the Frontier: Separation and Absorption in US Indian Policy', (2011) Settler Colonial Studies, Vol1, no. 1 32.
[11] GS Coulthard, *Red Skin, White Masks* (University of Minnesota Press 2014).

egregious labelling as 'uncivilised'[12]). With respect to IPs, Coultard's study argues that the interests of the state, courts, corporates and policy makers that have all limited and constrained the capacity of modern liberal discourse to recognise Indigenous societies preserving colonial structures of power.[13] Resonating Wolfe's concept of colonialism being an ongoing 'structure' and not a single episode or event, is the position of post-colonial legal scholars who assert that implicit within liberalism is the reproduction and internationalisation of imperialist thinking: essentially market forces have replaced colonialism in restraining the development of the global south.[14]

Drawing on this 'continuum' approach, this section explores what, if any, governance paradigms can be located within international case law, leading commentary and surrounding political and economic narratives that might support a TWAIL approach to the understanding of public and private 'transnational' legal *processes* bearing on Indigenous land rights. A good starting point for this legal enquiry might actually be an analysis of language and the use of the word 'culture' and its derivation 'agriculture' in historical governance parlance.

Raymond Williams' work maps early uses of 'culture' in 15th, 17th and 18th century France and England, when the word was primarily associated with husbandry and the tending of crops and animals and then then *stretched* to processes of human development and ideas of knowledge, civility and religion[15]. By the 18th century in England, the process of cultivation acquired a modern sense of 'governance' in its understanding as a general social process as a definite stage of development relating to a specific way of life and civilisation dependent on cultivation. German philosopher and student of Kant, Herder[16] attacked the assumption that the development of humanity as a unilinear process comprised of European culture and process from barbarianism to civilisation, stating that 'the very thought of a superior culture is a blatant insult to the majesty of Nature[17]'. Herder encouraged a decisive change writing that 'Cultur: nothing is more indeterminate than this word, and nothing more deceptive than

[12] Ibid 33 referencing Fanon's *Black Skin, White Masks* (Penguin 1991).
[13] Ibid 40.
[14] Sharma and Patrick, 'Between North and South: The World Bank and the New Institutional Economic Order' (2015) 6 Humanity, International Journal of Human Rights, Humanitarianism and Development 189.
[15] Ibid 87-91 in which he traces the historical development of the word 'culture' in several European languages demonstrates how culture is one of the two or three most complicated words in the English language, given its multifarious use in several distinct and incompatible systems of thought, for example its use in history and cultural studies primarily to symbolic systems thus demonstrating the complex use of the word in multiples disciplines.
[16] JG Herder, Letters for the Advancement of Humanity (1793-7), XIII, 4.
[17] Ibid.

its application to all nations and periods[18] to distinguish between 'human' and 'material' development.

This short linguistic evolution of the word 'culture' arguably evidences and sets the scene for what might be seen as the primary means and objective of governance within the colonial period: land acquisition. It demonstrates that economics and cultivation of land have always been at the beating heart of mainstream thinking on culture, development and ideas on 'governance' which the following legal evidence suggests is reflected within international law's treatment of IPs.

The 15th century colonial policy of discovery or the finding of unknown land overseas by European maritime powers was an important element in the process of the expansion of territorial sovereignties[19] enabling the expropriation of Indigenous land by colonial agents. At one stage a papal grant alone was powerful enough to confer territorial sovereignty[20] to the discovering state. In *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*[21], Miller *et al* note how the 1455 bull of Pope Nicholas authorised Portugal 'to invade, search out, capture, vanquish and subdue all Saracens and pagans and to place them into perpetual slavery and to take their property'.[22]

The 'School of Salamanca' initiated by Alexander VI's legal advisor, Francisco de Vitoria circa 1536, provided legal opinions on the legitimacy of papal authority over Indigenous lands. The introduction to Vitoria's *De India et de Ivre Belli* notes that 'the Mexicans and Peruvians…were barbarians…while possessing a material basis sufficient to support a low degree of civilisation, their habits of thought and life remained essentially savage'.[23] Remarkably, Vitoria then states that this is no grounds for denying them their legal rights as the Indigenous populations were in peaceful possession of both their public and private

[18] Herder's unfinished Ideas on the Philosophy of the History of Mankind (1784-1791) referred to in Williams R, *Keywords: A Vocabulary of Culture and Society* (Fontana 2000) 89.
[19] Kohen M, Hebie M, 'Territory, Discovery', *Max Planck Encyclopaedia of Public International Law,* para A
[20] Ibid. Perhaps the most famous bill was Pope Alexander VI's 1493 *Inter caetera divinia* confirming title to the land Columbus had discovered.
[21] Miller R, Ruru J, Behrendt L, Linberg T, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies,* (OUP, 2012).
[22] Gardiner D, European Treaties bearing on the History of the United States and its Dependencies to 1648, (Washington DC: Carnegie Institute of Washington, 1917) 20-26.
[23] Nys E, *De Vitoria F, De India et de Ivre Belli : Reflectiones:1557,* (Washington DC: Gibson Brothers, 1971) 88.

property, and consequently their territories could not be considered as being *terra nullius*[24] or vacant and thus open to occupation by colonial powers'.[25]

Up until the middle of the sixteenth century, physical discovery constituted a valid title to territorial sovereignty. However, with the expansion of the colonial presence overseas and growing European competition, the need for the establishment of territorial sovereignty also increased and the mere sighting of a territory was not enough for the conferral of power and sovereignty. Later on economic arguments relating to, *effective occupation* of the territory, rather than physical discovery was required in order to acquire territorial sovereignty over vacant land.[26] The litmus test for *effective occupation* was the cultivation and agricultural production of land. Central to the *agricultural argument*[27] was the premise that 'only cultivation of land can be regarded as a 'proper' or 'effective' occupation of land, and only agriculture can be regarded as a basis of a real land tenure system'.[28]

In sum, we see that the 'cultivation argument' serves two purposes: one of economic accumulation for private purposes and of the cultural subjugation of native groups. Drawing on a review of the following legal literature, the first suggestion is that 'cultivation' and 'agricultural' political and economic governance based arguments were important for legal rights in that governance paradigms were harmonised into legal writing and crystallised into legal rules, with serious implications for the legal elaboration of Indigenous land rights both historically and today.

In England, the drive toward productivity was one of the key rationales for the sixteenth century enclosure movements, which involved the enclosure, and encroachment of common or grazing land[29]. Moore describes how 'landlords, incentivised by increased profits to be made by leasing their lands found a variety of legal and semi legal methods of depriving

[24] Kohen M, Hebie M, 'Territory, Discovery', *Max Planck Encyclopaedia of Public International Law,* para B. The rights and interests of Indigenous inhabitants in land were treated as non-existent under this legal doctrine. Racial discrimination was used to overturn the colonial concept of 'terra nullius' or 'vacant' land as a discriminatory 'fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent'.

[25] Nys E, *De Vitoria F, De India et de Ivre Belli: Reflectiones: 1557,* (Washington DC: Gibson Brothers, 1971), First Section, 'the barbarians in question cannot be barred from being true owners, alike in public and private law, by reason for the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands', at point 19.

[26] Kohen M, Hebie M, 'Territory, Discovery', *Max Planck Encyclopaedia of Public International Law,* para E, 14.

[27] T Flannagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science 589, 590; J Gilbert, 'Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.

[28] J Gilbert, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 687.

[29] For an excellent detailed history of the enclosure movements which lasted for about half a century see B Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World* (Penguin 1967) 9.

peasants of their rights to use the common for pasture of their cattle or the collection of wood for fuel'[30].

This was in essence a form of transition from nomadism to settled agriculture with the seventeenth century writings of John Locke influenced by the enclosures and defined the Western paradigm on land that posits individualist approaches to property front and centre[31].

Locke's *1690 Second Treatise of Government* contains the 'agricultural' or 'cultivation' argument according to which land was a common property resource, waiting to be enclosed for cultivation[32] and bounds cultivation to the individual.

> 'As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common'[33].

For Locke, 'labour' puts a distinction between them and common. It 'adds something to them more than nature, the common mother of all… and so they became his private right'[34]. from which divisions over public and private rights. Labour was also able to provide an absolute, certain or exclusive title to cultivated land. Locke implies this when he states 'we see how labour could make men distinct titles to several parcels of it, for their private uses; wherein there could be no doubt of right, no room for quarrel'[35]. Uncultivated land constituted vacant land which was not possessed enough to constitute true property[36] and was thus relegated behind cultivated, private property. The French colonisers in Africa also had their own labour argument known as *mise en valuer*[37], which promoted a system of 'voluntary' labour in which the French would instruct Africans in the cultivation of their own lands.[38]

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[30] B Moore B, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*, (Penguin 1967) 9.
[31] M Davies, *Property, Meanings, Histories, Theories* (Cavendish 2010) 7.
[32] T Flannagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science 589, 590; J Gilbert, 'Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.
[33] Locke J, *Second Treatise of Government*, (London, 1690) Chapter, V (Of Property), Section 32.
[34] Ibid Section 28.
[35] Ibid Section 39.
[36]Locke J, *Second Treatise of Government*, (London, 1690) Chapter V (Of Property) at Section 38 he states in relation to land that 'if either the grass of his enclosure rotted on the ground, or the fruit of his planting perished without gathering and laying up, this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other'.
[37] It should be noted that legal protection of land rights may be conditioned to 'productive potential' such as is the case in articles 45 and 47 Mali's 2000 Land Code (*Code Domanial et Foncier*) which requires 'evident and permanent' productive use as a condition for the registration of customary rights: clearly this can be damaging for Indigenous land tenure security
[38] Prasad P, Colonialism, *Race and the French Romantic Imagination*, (Routledge 2009) 12.

Legal jurist Vattel wrote the *Law of Nations* in 1760 shortly before Cook's first voyage to Western Australia. He accepted Locke's cultivation argument stating, 'of all the arts, tillage, or agriculture, is doubtless the most useful and necessary, as being the source whence the nation derives its subsistence'.[39] The sovereign 'ought not to allow either communities or private persons to acquire large tracts of land, and leave them uncultivated'.[40] As Indigenous groups did not improve the soil by cultivating it, 'they did not assert exclusivity; therefore, ... their rights were so negligibly thin as to disintegrate automatically wherever the European invader set literal or constructive foot'.[41]

For Vattel the wandering tribes 'uncertain occupancy of these vast regions cannot be held as a real and lawful taking of possession'[42]. These cultivation arguments justified the colonial encounter upon discovery with commentators noting how the unsettled and inconsistent uses of land by nomadic groups promoted the superiority of colonial settled legal systems thus supporting the doctrine of discovery on the basis that territories inhabited by nomadic peoples were open to conquest.[43] Like Vitoria earlier, Locke does not completely deny rights to natives as he acknowledges that the wild Indian who knows no inclosure is still a tenant in common'[44] albeit with no private right to land, ostensibly demonstrating his more 'just' approach to land-connected persons.

At the same time, historical social sedentarisation policies played a key role in the economic exploitation and cultural subjugation of native groups. Examples include George Washington's 'savage as the Wolf' federal policy for native Indians[45] which run into the present day in the now defunct 'Prawer Plan' policies of the Israeli government towards Negev Bedouins focused on sedentarisation techniques including the forced movement of Negev into settled housing, to turn them into more 'civilised' and orderly 'productive' citizens.[46]

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[39] Vattel E, *The Law of Nations* (1758), Chapter VII, Section 77.
[40] Ibid, Section 78.
[41] Bell, D.G Forum on R. Marshall, 'Was Amerindian Dispossession Lawful? The Response of 19th Century Maritime Intellectuals', (2000) 23 Dalhousie Law Journal 168 179.
[42] Vattel E, *The Law of Nations* (1758) Chapter VIII, Section 209.
[43] Anaya notes that 'Vattel accepted the view that cultivating land established a greater right to the land than did hunting or gathering', see Anaya J, *Indigenous Peoples in International Law* (2nd edn, Oxford: OUP, 2004), page 23.
[44] Locke J, *Second Treatise of Government*, (London, 1690), Chapter V (Of Property), Section 26.
[45] Referring to the highly influential letter George Washington wrote to Congress on September 7, 1783 in which he referred to native Indians as 'the Wild Beasts of the Forest' being 'beasts of prey tho' they differ in shape' and advising Congress that the United States need not fight with Indian tribes to acquire Indian lands and that the United States should save taxes and bloodshed by just waiting for the natural superiority of American citizens to triumph over the natives' letter available at < http://founders.archives.gov/documents/Washington/99-01-02-11798>.
[46] Pogany I, Minority Rights and the Roma of Central and Eastern Europe, Human Rights Law Review (2006) 6 (1) 13 refers to communist policies on assimilation, for example in the Hungarian policy of the Political Committee of the

Therefore, John Locke, credited as the founding father of liberalism, established that private property is essential for liberty: 'every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his'.[47] He continues: 'The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property[48].' Locke therefore posited property rights as the fundamental institution with which humans could achieve justice, freedom and participate in civil society.

Whilst there are numerous varieties of liberalism[49], it is widely held that its core value is individual freedom.[50] This freedom is, in a Lockean worldview, fundamentally premised on the ability of private property to lift people out of the state of nature so that they can operate within the efficient and free hand of the market for maximum self-gain and individual freedom.

In parallel with defining 'freedom' based on property, Locke added an egregious component to the Western recognition of Indigenous identity which assumed that Indigenous land usage patterns were always inefficient and non-exclusive land usage making Indigenous relations 'underserving' of legal protection. Land use was both economically and culturally inferior to Western paradigms of enclosed and private land essentially relegating traditional rights to land to the backwaters of development. A 'suitable' system of law was shaped to accommodate Lockean prioritisation of cultivated land, private rights and exclusion. As Lyons notes, it is no coincidence that the rise of the Hobbesian legal positivism in the form of sovereign laws accompanied the rise of colonialism although the point is frequently overlooked.[51] For example, arguably the colonial discovery policy was given valid legal title in the seminal case of was its ability to ground valid legal title to land continued as illustrated by the seminal case of *Johnson v Mc'Intosh*[52]. That case provided legal cognisance to the doctrine stating how 'discovery gave an exclusive right to extinguish the Indian title of

Communist Party of June 1961, calling for the assimilation of the country's disparate Romani communities within Hungarian society.

[47] Locke J, *Second Treatise of Government*', (London, 1690), Chapter V (Of Property), Section 27.

[48] Locke J, *Second Treatise of Government*', (London, 1690), Chapter IX (Of the ends of political society and government), Section 124.

[49] Such as the multicultural version proposed by Kymlicka and the, arguably, more morally grounded version extended by Kant.

[50] Liberalism here refers to the ideological political counterpart to economic liberalism in which the core value is one of individual freedom. As elucidated by Adam Smith, the freedom to produce and consume goods and services was an 'obvious and simple system of natural liberty'; Sally R, *Classical Liberalism and International Economic Order: studies in theory and intellectual history*, (Routledge 2002) 17.

[51] Lyons D, *Ethics and the Rule of Law* (CUP 1984) 63.

[52] [1823] 21 US (8 Wheat).

occupancy either by purchase or by conquest'[53]. Although demonstrating the potential to offer a 'fundamental' or stand-alone right to land, upon closer inspection this right was severely limited. It was less than the absolute and exclusive title held by the Crown with courts noting that 'all our institutions recognise the absolute and exclusive title of the Crown'[54] but in parallel the courts carved out a place for Indigenous rights as the Crown right was 'subject only to the Indian right of occupancy[55]'. This occupancy right was severely diminished as it was 'subject to the absolute title of the Crown to extinguish that right' making the Indian right 'incompatible with an absolute and complete title in the Indians'.[56]

The interconnection made by Locke and Smith which prioritised private property, the market and individual liberty also work to justify the hegemony of the market economy and as some legal authors have noted[57], shape understandings of 'rights' as largely individual and economy focused. Later, Adam Smith linked economy with freedom elucidating that the freedom to produce and consume goods and services without trade restrictions, was an 'obvious and simple system of natural liberty'[58]. Therefore, this interconnection made by Locke and Smith between private property, the market and individual liberty worked to justify the hegemony of the market economy.

The liberal principle of universality along with the primary importance of the individual, rather than communal group rights, and the consequential 'moral necessity of preserving individual freedom and autonomy' works to 'trump' the power of groups[59] and a hidden bias towards a majority that makes the rules[60]. This arguably sets the foundation for the political and legal exclusion of people who understand rights communally, in relation to a group. For example, the structural prioritisation of private, property market focused rights over traditional land relations echoes the formative property writings of Sir William Blackstone in which he describes the nature of land and property as one, which exists 'in total exclusion of the right of any other individual in the universe'.[61]

[53] Ibid 587.
[54] Ibid 588.
[55] Ibid.
[56] Ibid 588.
[57] See O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 532.
[58] See Smith A, The Wealth of Nations *Nations* (Methuen & Co., Ltd 1776) IV, Chapter IX, p. 687 51.
[59] Oestreich JE, 'Liberal Theory and Minority Group Rights' (1999) 21 Human Rights Quarterly 116.
[60] Ibid 118,
[61] Blackstone W, *Commentaries on the Laws of England* (London, 1766), Book 2, Chapter 1, 1766 1.

What followed was a string of national cases re-affirming the subversion of native land rights to Crown rights. The continuity of limited Aboriginal *occupation and usage* rights upon colonisation was affirmed in *St Catherine's Milling and Lumber Co. v the Queen*[62] which recognised pre-existing native property rights as a burden upon the Crown's radical title but always inferior to the Crown's exclusive capacity to extinguish that burden by securing sale from the native owners. Similarly, in *Re Southern Rhodesia* Lord Sumner held 'it is to be presumed, in the absence of express confiscation or of subsequent expropriation legislation, that the conqueror has respected [pre-existing Aboriginal rights] and forborne to diminish or modify them'[63] and later reaffirmed by Lord Denning in *Oyekan v Adele* [64].

Concomitant with domestic case law relating to use and occupation rights, was the emergence by 1905, of an explicit legal principle of international law[65] called the 'standard of civilisation' that took 'an increasingly 'juridical character'[66] that linked legal capacity to cultural and land use requirements. Gong notes that the 'orthodox stipulation was that civilised states alone qualified as international legal personalities and that the benefits of international law were primarily intended for the civilised subjects and not for those which were made its objects, as the 'barbarian' were'[67]. States were divided into civilised and uncivilised with a hallmark of civilisation as an existing organised political bureaucracy[68] constituting the test for civilisation. Nomadic peoples were regarded to be in a sort of Lockean 'commons' or pre-political/ uncivilised[69] state of nature with no proper laws and institutions dealing with property in land, evidenced by their *ineffective occupation* of the vast tracts of land encountered upon by Europeans. This imposed standard accounted for

[62] [1888] 14 App Cas 46 (PC).
[63] [1919] A.C. 211, 233.
[64] [1957] 2 All E.R. 785-788 'in inquiring . . . what rights are recognised, there is one guiding principle. It is this: the courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law'.
[65] Gong G, *The Standard of Civilisation in International Society*, (Oxford: Clarendon Press, 1984) 24; Schwarzenberger G, 'The Standard of Civilisation in International Law', (1955) Current Legal Probs 212 who states that 'the nexus between Civilisation and International Law is a basic question of International Law'; Article 38(1) of the Statue of the International Court of Justice which lists the authoritative sources of international law as those deriving from, inter alia, 'the general principles of law recognised by civilised nations'.
[66] Gong G, *The Standard of Civilisation in International Society* (Clarendon Press 1984) 5, which remain in the statute of the International Court of Justice when it refers to sources of law being those emanating from 'civilised states'.
[67] Ibid 58-59.
[68] Ibid 14.
[69] Contemporary critiques continue the civilisation theme with Anghie stating that the grand project of international law was a 'civilising mission' that justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilisation of Europe. His argument is that the civilising mission was animated entirely by 'cultural differences which divided European and non-European worlds by characterising non-European societies as backward and primitive; A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007) 3-4.

their lack of sovereignty and inability to assert legal personality and thus justified the assertion of the Crown's absolute title over Indigenous land. Legal evidence of international law's harmonisation of Gong's 'civilisation' standard can be read into disputes such as *Las Palmas*[70] and *Eastern Greenland*[71] between colonial powers over land acquisition. Those territorial disputes between competing colonial powers laid down legal norms requiring that colonial powers claiming valid legal title over disputed territory provide evidence of state possession through '*effective occupation'*[72] regardless of the land rights of traditional inhabitants.[73]

Moreover, a potential legal consequence of this turn to individual and exclusive rights might aid understanding of why the jurisprudence around Indigenous rights to land reflects this narrative of 'difference' and a vocabulary of different, special or '*sui generis*' rights to be superficially 'accommodated' within the legal framework. For example within a narrative

[70] *Island of Palmas case* (Netherlands, USA), Reports of International Arbitral Wards, 4 April 1928, Volume II page 829-871.

[71] *Case Concerning the Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

[72] In the Palmas case, Max Huber laid a heavy stress on the importance of the 'continuous and peaceful display of state functions' being as good as title, highlighting the importance of taking a flexible approach to the criteria of what constitutes continuous display, given that the extent of effective occupation 'differs according to the conditions of time and place'. Certain factors might be taken to evidence occupation for example, evidence of the exercise, to the exclusion of any other state, of the functions of a state and the converse position that absence of contestation or protest by the contesting colonial power against the exercise of territorial rights by another state is evidence against sovereignty of the contesting power and thus legitimate acquisition by the other; *Island of Palmas case* (Netherlands, USA) (1928) 2, Reports of International Arbitral Wards, at 839-840.

[73] For example, in the Palmas case, the court expressly acknowledges that the area was inhabited by natives' but does not take evidence of these pre-existing land relations into consideration when determining land title under international law' at 867 demonstrating how legal title is evidenced to the exclusion of pre-existing indigenous rights. In the Eastern Greenland case the court established that effective control required evidence of the 'intention and will to act as Sovereign, and some actual exercise or display of such authority', at 45-46. In that case the court relied on evidence of commercial treaties and internal acts of the Danish state such as the grant of mining concessions and acts of maritime control and administration linking up Danish colonies on the east and west coasts of Greenland, to assert Danish sovereignty at the 'critical date' of Norwegian occupation on 10 July 1931. Remarkably this legal evidence was to the exclusion of existing rights of the indigenous Eskimo communities. In sum, the principle of effective occupation tends to reduce the content of the principle to requirements that demonstrate 'possession' such as the acts discussed above to the detriment of traditional pre-existing Indigenous land relations. The principle of possession was re-affirmed in the *Clipperton Island Case (France v. Mexico) (1931)* which stated that the actual and not nominal taking of possession is a necessary condition of occupation. The arbitrator stated that 'this taking of possession…consists in the act, or series of acts, by which the occupying State reduces to its possession the territory in question and takes steps to exercise authority there'. See *Clipperton Island Case (France v. Mexico) (1931) 2 Reports of International Arbitral Awards, 1105* at 393. In the post-colonial era, see *Case Concerning Sovereignty over Pulua Ligitan and Pulau Sipadan* (Indonesia v Malaysia) (Ligitan Sipadan case), Advisory Opinion, Judgment, ICJ Reports 2002 625 and *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore) (Pedra Branca case), Advisory Opinion, Judgement, ICJ Reports 2008 12. Those later two cases recalled the negation of Western Sahara as *terra nullius* in *Western Sahara*, Advisory Opinion, Judgement, ICJ Reports 1975, and clarified the concept of 'original title' as an emerging means of establishing territory. The problem with these cases and the test of original title is that the legal foundation of proving legal title still coalesces around proof of *effective control* of territory used to establish statehood in the colonial era (*Eastern Greenland* case relating to evidence of exclusionary practices for example as evidence of effective control in Case Concerning the Legal Status of Eastern Greenland (Den. v. Nor.),1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5). For Indigenous groups this type of exclusionary and possessory behaviour constitutes an irrational legal test.

of 'special' procedural rights such as constitutionally entrenched rights as in Canada[74], statutory protections as in Australia[75] and specific case law[76] discussed in this thesis.

Modern transnational legal processes relating to land also continue to reflect the historical policy of prioritising settled agriculture as more effective than traditional land relations. For example, the terms eminent domain,[77] compulsory purchase or expropriation[78] are used for the right and act of the government or statutory authority to take private property for public use. It is suggested that being a governmental power, eminent domain is of its very nature, a *political* concept[79] yet, it has been successfully translated into legal practice and policy. For example, in 2002 the United Kingdom government noted that 'compulsory purchase powers provide a powerful tool for assembling the land required for major projects, including…infrastructure, and for the regeneration of towns and cities'.[80]

Internationally, in Kenya, article 4(5) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) requests states to 'protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests'. Boone's[81] socio-political study of land tenure regimes in Kenya[82] maps the plural economic, social and political context of pastoral land claims in the Kenyan rift valley. She concludes that state centred formal land tenure regimes continually work to place the land claims of those claiming ancestral land rights at the bottom of the hierarchy of completing claims essentially extinguishing over time through state sponsored in-migration programmes aimed at opening up new lands to private

[74] Section 35 of the Canadian Constitution Act 1982.
[75] Native Title Act 1993.
[76] For example, the Australian case of *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA).
[77] For a comprehensive review of the history of eminent domain see the Australian Public Administration and Finance Committee, 7th Report, Chapter 3 'The Acquisition of Land by the State: Concept and History' which, interestingly traces back the concept of eminent domain to Article 52 of the Magna Carta 1215 which states that 'To any man whom we have deprived or dispossed of lands, castles, liberties or rights, without the lawful judgment of his equals, we will at once restore these', although no provision for compensation was made.
[78] The Fifth Amendment to United States Constitution recognises the power to take private property for public use 'nor shall private property be taken for public use, without just compensation.' In the United Kingdom, the Acquisition of Land Act 1981 provides for the compulsory purchase of land subject to the payment of compensation. A number of other jurisdictions provide for the compulsory purchase of land upon the payment of compensation for example, Section 4 of the Expropriation Act 1985 in Canada and Australia has compulsory land acquisition statutes at Commonwealth and state level in the Land Acquisitions Act 1989 and Land Acquisition and Compensation Act 1986 (VIC) and also see sections 66 and 40 of the Constitution of Kenya 2010.
[79] Longo J, 'The Concept of Property and the Concept of Compensation on Compulsory Acquisition of Land', University of Tasmania Law Review, page 282.
[80] Office of the Deputy Prime Minister (UK), Compulsory Purchase Powers, Procedures and Compensation: the way forward, July 18 2002, page 1.
[81] Boone C, Property and Political Order in Africa, Land Rights and the Structure of Politics, (Cambridge, CUP, 2014)
[82] Ibid 40, 139-157.

smallholder farming. In legal terms, these political and economic processes of relegation are achieved through legal provisions on eminent domain evidenced in the Kampala Convention, provide a veneer of formal legal recognition of traditional and customary rights to land, but immediately structurally relegates them behind more intensive land use rights, typically Lockean 'earned' economic rights of private property.

The legal prioritisation of private land and property also reaches into the space of Indigenous land rights. In *Narmada Bachao Andolan v Union of India*[83] the Supreme Court of India justified the relocation of tribal people to allow for the Sardar Sarovar private dam project in Gujarat. The removal of such groups was not in contravention of article 12(1) of the Indigenous and Tribal Populations Convention No. 107 1957[84], stating that that 'populations shall not be removed without their free consent from their habitual territories…except in accordance with national laws…or in the interest of national economic development'. Even, if they were the judges noted that the gradual assimilation in the mainstream of society will lead to betterment and progress…..and would not result in the violation of their fundamental or other rights'[85]. Similarly, the legal position in Canada is by default, a position favouring modern land use such as agriculture, forestry, mining such that Indigenous land rights are always vulnerable to extinguishment for the purpose of valid legislative objectives with no Indigenous veto right over development on traditional land[86]. At best, groups can enjoy legal rights to have their interests accommodated through consultation with respect to the development of the affected territory and the payment of fair compensation[87].

Legal processes of land registration also work to prioritise formalised relations over land and property within legal systems. The underlying governance assumption that directly relate to the 'cultivation argument' is that private rights are a necessary precursor to the dual forces of efficiency and equity: accumulation, economic growth. Supported internationally by the World Bank, which as Trubek and Santos[88] note advocated with the support of Hernando de Soto, the formalisation of property through land titling registration systems

[83] (Unreported), October 18, 2000) (Sup Ct (Ind)).

[84] The Indigenous and Tribal Populations Convention (No. 107) 1957 was the first attempt to codify international legal obligations towards Indigenous and tribal people and was replaced by ILO Conventions No. 169, 1989.

[85] *Narmada Bachao Andolan v Union of India* (Unreported), October 18, 2000) (Sup Ct (Ind)) 26.

[86] Noting that the 1993 Native Title Act does not contain any form of veto right and recalling *Delgamuukw v British Colombia* [1997] 3 SCR stating that Government regulation can infringe upon Aboriginal rights if it meets the test of justification under section 35, highlighting the non-absolute nature of these minority rights.

[87] Recalling *Delgamuukw v British Colombia* [1997] 3 SCR per La Forest and L'Heureux-Dubé JJ.

[88] Santos A, The World Bank's Use of the 'Rule of Law' Promise in Economic Development in Trubek D, Santos A, *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 287-290.

such that it could be used as security for productive uses and economic growth within the formal sector.

Commentators suggest that it is a lack of political will[89] preventing the expansive development of rights into binding legal mechanisms, effectively 'compromising' legal rights to land to the larger political economy. Moreover, legal scholars apply economic rationale choice theory prioritising self-interest and incentives to the ratification and implementation of treaties argue that states comply with international law solely to further their own political and economic interests[90]. As Posner notes, these prioritisation processes are typical with development projects, may forgo compliance with international law if compliance comes at the cost of economic growth[91]. Legal advisors to minority and Indigenous groups interviewed for this thesis corroborated the 'problem' encountered in the legal protection of Indigenous land issues which, for them, remain largely unrecognised and unenforced by states which are typically apathetic towards Indigenous land issues for political and economic reasons[92].

The above evidence harmonises with an emerging trend of legal work focusing on the political and economic effects of neoliberalism on human rights. Specific legal studies on the effects of neoliberalism for example on socio-economic human rights provide empirical examples of how TWAIL scholarship's premise on continued neoliberalism continues in legal judgements. As legal scholars note, at the core of neoliberalism is the presumption that markets and market principles are the appropriate basis for organising most areas of economic and social life regardless of the cultural, ethical, human rights and distributional

[89] See for example Chaudry noting that in the case of development -induced displacement 'the lack of political will to adopt and implement the UN Guiding Principles on Internal Displacement poses one of the greatest obstacles' in Chaudry S, *Development Induced Displacement and Forced Evictions*, Studies in Transnational Legal Policy, No. 41 (Washington DC: American Society of International Law and the Brookings Institution, 2010) 616 and see Juma L, 'An Overview of Normative Frameworks for the Protection of Development Induced IDPs in Kenya', (2013) 6 Afr. J. Legal Studies 29 stating that the codification and drafting process of the Kampala Convention was hamstrung by the usual sovereignty cleavages, poor organisation of the preparatory meetings and the overall reluctance of some governments to readily commit to a binding and expanded regime for the protection of IDPs beyond the existing soft law arrangements.

[90] Goldsmith J, Posner E, *The Limits of International Law* (OUP 2005) in which the authors use rationale choice theory to show that states comply with international law purely to maximise their own interests. This approach debunks the traditional doctrinal assumption that states comply with international law through a sense of legal obligation and that the rules of treaties must be obeyed. Skogly also notes how 'states make choices as to whether to invest in vulnerable groups with potential to contribute to society or whether to focus on elites', showing how compliance with rights is no longer a matter of legal obligation but one in which states balance competing interests to maximise its own in interests, see Skogly S, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?', Human Rights Law Review (2012) 12(3) 8.

[91] Goldsmith J, Posner E, '*The Limits of International Law*', (OUP 2005) 117.

[92] Interview with Lucy Claridge, Head of Law, Minority Rights Group (London, UK,, 17 June 2015); interview with Clive Baldwin, Clive Baldwin, Senior Legal Advisor, Human Rights Watch (London, UK, 19 June 2015).

consequences[93]. For O'Connell[94] evidence of the effects of globalisation is located in an interpretative judicial turn, which carries with it very definite understandings of which rights merit respect in a market utopia. Those rights are fundamentally negative rights[95] such as the non-intervention in property rights and sanctity of private property as a means to achieving liberty and freedom. His work maps a judicial turn in which socio-economic rights are undermined by a judicial movement involving the discursive and material negation of the value of such rights despite formal recognition and even constitutional entrenchment[96].

Drawing on precedents from India, Ireland, Canada and South Africa, O'Connell maps a trend in the judicial acceptance of neo-liberal orthodoxy evidenced by a dilution of socio-economic rights into market friendly and non-threatening norms read as 'purely formal, procedural guarantees rather than substantive entitlements to equality and fairness[97]'. His argument based on case study evidence, is that there is an expectation that national courts should 'harmonise' domestic constitutional provisions with the imperatives of neo-liberal principles[98]. Legal studies on displacement, housing rights and human rights more generally in the United States, India and South Africa[99] also evidence how the main principles under lying questions of land and displacement of communities are always based on neoliberal economic principles of how to derive the greatest value from a piece of land.

Other legal studies explore neoliberalism more specifically through its tendency towards encouraging states to privatise or contract out public policy issues to the private sector. The new 'neoliberal' legal order discussed above labels states oppressive, inefficient and in dire need of restraint[100]. It consequently incentivises states through an economically and market motivated so called 'development strategy[101]' to dilute their powers and delegate legal responsibilities to international organisation in a bid to increase the share of surplus value in the hands of domestic and foreign companies. In this economic process, social and cultural rights are 'thinned' into procedural guarantees not substantive entitlements or entirely

[93] L Minkler, *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 63.
[94] O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR.
[95] Ibid 537.
[96] Ibid 533.
[97] That is not to say that the recognition of formal entitlements are not a welcome advancement, but it is only that: a start to a process of redistribution and the correction of injustices but not the end.
[98] O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 533, 538.
[99] Albia C, Scott B and Tissington K 'Demolishing Housing Rights in the Name of Market Fundamentalism: The Dynamics of Displacement in the US, India and South Africa', Chapter 4 in L Minkler, *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013).
[100] O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 535.
[101] Prabhat P, A Left Approach to Development (2010), Economic & Political Weekly, July 24, 2010 vol xlv no 30 page 34.

vacated and importantly for lawyers focusing on socio-economic rights as procedural guarantees misses the larger point requiring international law to engage with the deeper relational issue. The point is that inequality is not just an accidental deviation from neo-liberal capitalism, but rather a deliberate product of the international political economy[102] and encroaching neoliberalism[103]. Thus, taking socio economic and cultural rights seriously necessitates a modern transnational approach to law, which must include the full range of human rights and, as O' Connell states, not just those negative civil and political rights typically favoured by Western states[104], which work to promote neoliberal policies with their focus on markets and state relegation.

All of the legal processes explored above demonstrate what Patrick McAuslan calls the hierarchical bias in today's society toward recognition of the modern and formally recognised 'circuit' which sees land as a 'purely monetary asset[105]': a position which positivist statute law has been used to give official sanction to[106] and evidences the continuation of the agricultural argument in legal practice.

In sum, this section has identified a political and economic land governance paradigm called the 'agricultural argument' used by state actors. This emanates from a colonial history in which European Lockean value bestowed prioritisation of private, settled, exclusive land rights, which are by implication, better organised, culturally superior and a far more civilised way for societal development. In this specific historical context, relations with IPs are only understood within a specific geographical context of European settler colonial encounter.

It is suggested that those agricultural governance paradigms were given legal 'teeth' through evidence of specific historical legal rules. Under these legal policies, European states were granted sovereignty and legal recognition based on so called hallmarks or tests for civilisation such as the ability of inhabitants to effectively occupy land cultivate land and, related to this, the existence of an organised political bureaucracy[107]. Examples of supporting legal policy include the discovery principle, *terra nullius* and, by 1905, the emergence of a 'standard of civilisation' as an explicit legal principle of international law

[102] Salomon ME, 'Why should it Matter that others have More? Poverty, inequality, and the potential of international human rights law' (2011) 37 Rev Int Stud 2137 54.
[103] Ibid.
[104] P O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 MLR and L Minkler, *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013).
[105] P McAuslan, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003).
[106] Ibid 7.
[107] Gong G, *The Standard of Civilisation in International Society*, (Oxford: Clarendon Press, 1984), page 14.

explored above, confirming national case law shaping limited 'use and occupation' rights, international law on 'effective occupation' and modern legal practices of eminent domain.

As Anaya notes, it was these cultivation or 'agricultural arguments' that justified the colonial encounter upon discovery so that the unsettled and inconsistent uses of land by nomadic groups promoted the superiority of colonial settled legal systems such that the cultivation of land justified a greater right to land than less intensive hunting, fishing or gathering rights[108]. This supported the doctrine of discovery on the basis that territories inhabited by nomadic peoples were ineffectively occupied thus vacant, terra nullius and this open to conquest[109]. Forthcoming chapters suggest that traces of those political and economic historical governance paradigms continue to reflect within current legal narrative.

Drawing on the 'linking' premise of TWAIL scholars identified in the start of this chapter[110], the following section explores evidence to suggest that that modern governance paradigms on Indigenous land rights have through globalisation processes, been fragmented and continue into private spheres. More specifically what evidence there is of Indigenous land related governance paradigms within the operations of private actors who in this thesis are specifically limited to IOs and corporate companies engaged in commercial development projects.

Transnational Governance Paradigms of Private Actors

This section explores what, if any, evidence exists of any governance paradigms used by private actors, which specifically relate to IPs and if so, how those processes might aid understanding of the implementation of the rights to land and related compensation, access and resettlement related remedies identified in each study.

Transnational legal theory engages with the effect of economic processes and paradigms of neoclassical economics on human rights. Sandra Fredman refers to the refashioning of the nature of the state by the private sector in the vision of free markets through privatisation practices and contracting out[111] as considered the best way under neoliberal ideology to advance human welfare. This contracting out in which the private sector entities undertake

[108] Anaya notes that 'Vattel accepted the view that cultivating land established a greater right to the land than did hunting or gathering'; Anaya J, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 23.
[109] See Kohen M, Hebie M, 'Territory, Discovery', *Max Planck Encyclopaedia of Public International Law,* para E, 14.
[110] To summarise, the TWAIL premise is that that international law's traditional colonial preoccupation of control and gathering of territory evidenced by the above colonial encounters is subsumed and overtaken by large private entities and IOs as new forms of non-state sovereignty.
[111] S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 31.

state functions hollows out and erodes the capacity of the state to fulfil its social obligations in the face of neoliberal interests.[112]

Chapters 7 and 8 extends empirical examples of current types of informal contracting out and the legal and social impact of transnational globalisation processes of[113] 'contracting out' relating to Indigenous rights to land. In those studies, implementation processes are carried out by private entities which reflects the features of this conceptual turn away from state apparatus to non-state actors[114]. As Shamir notes, implementation of resettlement processes by non-state actors reflects the features of this conceptual turn away from state apparatus to non-state actors[115] in transnational legal processes.

In this thesis, 'governance' of IPs land rights are conceived and implemented by corporate entities such as Rio Tinto (RT) and by IOs such as the IFC and EBRD using methods of non-legal 'contracting out'. These governance arrangements are identified as non-legal or informal given international law's inability to hold states directly accountable for these specific types of acts in which private entities are, through methods of direct private contracting or policy standards, conducting resettlement related activities.

In chapters 7 and 8, IOs and RT have because of the transnational structure of the project, assumed responsibility for resettling herder groups from traditional land. In the Pilbara study, RT has entered into direct contractual arrangements which not in those contracts termed 'resettlement' contain processes through which Aboriginal Traditional Owners agree to negotiate with RT rights to land relating to land access and compensation for native land. These include issues of resettlement, determination of Indigenous status and access to traditional land which typically fall within the responsibility of the state but are now, as a result of globalisation processes, fragmented down into the control of private actors.

These complex legal relations do not attach any responsibility under international law to the state for example in relation to delegation of authority; they do however, produce social effects resulting in new transnational assertions of human rights violations towards the state

[112] Drawing broadly from arguments in S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 31-61.
[113] The resettlement processes and private arrangements discussed in this thesis are referred to as 'informal' as given their primary commercial functions they do not invoke issues of formal *state responsibility* under international law as explained in chapter 5. There is for example, no express agreement under which the state delegates resettlement related tasks to the private entity. This does not detract from the important private duties and obligations between for example the Traditional Owners and Rio Tinto under the Participation Agreements discussed in chapter 7.
[114] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.
[115] Ibid.

and international organisations conducting state related activities[116]. It is therefore not legally correct to call the resettlement processes 'privatisation' processes as no formal state delegation has occurred yet there is still the practical reality of a private entity managing issues of public policy and potential human rights.

In a corporate context these types of informal contracting out arrangements, see power exercised by the ultimate owners of the company: the shareholders and a board of directors. As Klakegg notes this type of corporate and project governance is necessarily about enhancing shareholder value to formal legal owners and distributing risks away from the project[117]. Contemporary corporate approaches attempt to align owner responsibilities to 'consider' wider communities impacted by project operations. An example of this is found in the changes to the directors' duties provisions of the amended Companies Act (2006) which in addition to describing the basic obligations of a director to promote the success of the company now not only prescribes this basic duty but how the director must discharge that duty. Section 172 (1) (a) to (f) legally requires directors to have regard to specific stakeholder issues one of which is 'the impact of the company's operations on the community[118]' thus providing a more enlightened approach to directors' duties. Ostensibly plural, the approach aims to reconnect the wealth creation purpose of the corporate vehicle with the society within which it operates. It may improve the quality of corporate decision-making although equally, in practice these codified private law ethical standards aimed at the market's moralisation, continue the instrumental logic of top-down coordination. These type of transnational governance processes aimed at business certainty and functionality bear on the transnational processes discussed in chapters 7 and 8.

In the context of IOs, for IPs, Rawlsian type good governance outcomes such as voice, accountability, participation and benefit sharing are, in theory, operationalised through the specific policy prescriptions of the World Bank and financial institutions. In this thesis, those governance policies include the scope and implementation of the EBRD and IFC's Policies[119] on land acquisition and resettlement and on Indigenous peoples. They are

[116] OK Fauchald & A Nollkaemper, *The Practice of International and National Courts and the (De)Fragmentation of International Law* (Hart 2012) 218.
[117] OJ Klakegg, 'Governance of Major Public Investment Projects: In Pursuit of Relevance and Sustainability' (PhD thesis, Norwegian University of Science and Technology, 2010) in which he notes that the same theoretical framework is applicable to private projects or public-private ventures.
[118] Section 172(d) requires directors to have due regard to the impact of the company's operations on the community and the environment.
[119] The policies analysed in this study are the International Financial Corporation's 2012 and the European Bank of Reconstruction and Development's 2014 risk management safeguard policy 5 on land and involuntary resettlement policy and safeguard policy 7 on Indigenous peoples.

developed and drafted within IOs and are implemented by project developer(s) leading to further fragmentation of those policies from socio-moral considerations. The expansion of risk management techniques and policies over the last 20 years has provided a new form of governmentality with which to manage exceptional risks. As Shamir notes, the implementation of these policies by private bodies leads to a unique, nuanced and public/private hybrid form of regulation in which commercial entities assume the task of socio-moral regulator, grounding them in utilitarian and neo-liberal thinking to produce a business- case approach to social policy issues.[120]

The Policies are a hybrid of what Frederickson[121] calls public nongovernmental governance and third party governance characterised by policymaking and implementation by nongovernmental institutions or actors, with effects on the interests or well-being of citizens similar to the effects of state actions. In this scenario, some functions of the state extend to third parties for policy implementation usually through specific concessions and contracts or voluntary 'soft law' regulation standards. The critical point of these Policies is that they provide an example of public governance as existing beyond the state and operationalised through fragmented networks of third parties and, applied to policies, by nongovernmental institutions.[122] The proliferation or as Cernea notes the 'ripple effect'[123] of Indigenous protection policy tools amongst IFIs is no exception. The primary tools for governing Indigenous interests to land in development projects are through risk management techniques, more specifically, in chapter 8, as homogenous sets of 'performance standards' or 'performance requirements' implemented by technocratic senior managers.

These ostensibly justice and fairness based governance paradigms are a late addition to transnational governance 'social' paradigms. Neoliberal economic thinking and those private entities dispensing such economic thinking have had a belated reaction to the incorporation of informal social and cultural institutions into economic analysis. The key characteristic of economic liberalism is to set limits on and control government power[124], rolling it back in order to make way for a highly technical utilitarian analysis, privileging

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[120] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.
[121] Ferlie E, Lynn LE and Pollitt C, *The Oxford Handbook of Public Management* (Oxford University Press 2005) 294.
[122] Ibid 295.
[123] Cernea M, 'The 'Ripple Effect' in Social Policy and its Political Content: A Debate on Social Standards in Public and Private Development Projects', in Likosky M, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (M. Nijhoff Publishers 2005).
[124] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.

economic interests and ignoring social or economic relations that may compete with the rational self-interested model of human behaviour. Functional rational choice theories explain behaviour largely in term of an inherent tendency to maximise material self- interest regardless of people having any egalitarian Rawlsian preferences making social issues challenging to place within economic analysis.

Salomon & Arnott note that it has been difficult to practically translate or model human rights and principles of redistribution into the principles and assumptions that guide neoclassical economics[125]. Whilst it is beyond the scope of this thesis to discuss all the reasons why it has been so difficult to translate rights and redistribution principles into economic thinking[126], the next section will offer a few broad conceptual reasons from within the transnational governance literature identifying what processes or barriers exist that might break the advancement of Indigenous land rights. Chapters 7 and 8 explore the practical application of these processes within the empirical case studies.

A large body of literature emanating from IOs such as the World Bank speaks across state centred legal actors to consider social and public policy issues relating to for example communities affected by development as a valid part of modern governance and, by implication, transnational legal norms on governance. The World Bank defines governance as the traditions and institutions by which authority is exercised[127] with the basic assumption being that governance matters a great deal for economic outcomes[128]. Identifying good quality governance involves the presence of specific traits or hallmarks. Characteristics of good governance include both 'hard' and 'soft' dimensions: the former includes a strong rule of law, property rights, internal rules and systems, an independent judiciary, and soft measures such as voice, accountability, transparent decision making, equity and participation. The later incorporates 'social' issues requiring that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources and thus speaks directly to this thesis[129]. Overall, the spirit of good governance

[125] Salomon ME and Arnott C, 'Better Development Decision-making: Applying International Human Rights Law to Neoclassical Economics' (2014) 32 Nordic Journal of Human Rights 44, 47.
[126] Of course, there is some deficit in technical knowledge of how these two social and market spheres interact and the effects, both direct and indirect, that contractual relations, project structures and instruments can have on land-connected communities, an area which this thesis attempts to connect.
[127] Kaufman et al, Governance Matters, Policy Research Working Paper 2196, The World Bank.
Development Research Group, Macroeconomics and Growth and World Bank Institute Governance, Regulation and Finance, 1999.
[128] Ibid, Page 18.
[129] World
Bank<web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/EXTMNAREGTOPGOVERNANCE/0,,co

goes further than 'box ticking' and proposes that governance is equated with specific outcomes – in a Rawlsian sense of assuring that everyone, irrespective of social or economic status, has a voice in governing and receives just, fair, equitable treatment.

Within this economic framework, justice will eventually 'trickle-down' to the poor through the quality of certain private institutions: the metaphor that the rising water lifts all boats. The core premise of trickle-down theory is as follows. The effect of free markets and privatisation of property whilst in the short-term creating disadvantages such as dispossession from land, will in the end work as land will be allocated via the market to the best use. In turn overall increases in gross domestic product and income will grow and wealth will eventually trickle down to create long-term benefits for all thus creating the eventual state of equality or 'Pareto Optimality' characterised by increased jobs and income for all. This neatly fuses concepts of efficiency and equity and separate economic and social power vectors in the neoliberal mind.

For Indigenous groups' trickle-down theory is seriously flawed. Pareto efficiency requires that no one is made worse off. This premise forbids arrangements, redistribution or specific measures that will improve the situation of the poor at the expense of the rich[130]. These economic restrictions make it challenging for economic governance paradigms to deal effectively with issues relating to historic and ongoing Indigenous discrimination requiring redistribution or special provisions.

In his mapping of income levels over the last thirty years, Stiglitz denies this image of overall prosperity. Policies focused solely on income growth as benchmarks for development and which cut the taxes of the rich[131] and guaranteed the wealth of the richest for example through measures to save the banks after the 2008-09 financial crisis[132] increasingly failed to lift all boats. This overwhelming understanding of development as within the domain of

ntentMDK:20513159~pagePK:34004173~piPK:34003707~theSitePK:497024,00.html#_ftnref1>accessed 17 November 2016.

[130] Salomon ME and Arnott C, 'Better Development Decision-making: Applying International Human Rights Law to Neoclassical Economics' (2014) 32 Nordic Journal of Human Rights 44, page 62.

[131] For Stiglitz the rise in inequality over the last 30 years is a general international trend and can be directly attributed to the failure of trickle down thinking and is easily exemplified in his charting of wages, income and average incomes in which we see substantial rises of income for the richest does not trickle down to those on median incomes with their incomes actually shrinking and any increases being due to increase in hours worked: see Stiglitz J, Inequality and Economic Growth<www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Inequality%20and%20Economic%20Growth.pdf, >accessed 16 November 2016.

[132] Ibid, pages 1-2.

the private sector and income based presents a fundamental impediment to the recognition and accommodation of non-economic Indigenous rights to land.

Growing resistance to trickle down thinking and the ubiquitous association of property rights to what McAuslan calls the 'modern circuit[133] surged from within the neoclassical camp causing ideological tensions between the social and economic. Chenery's *Redistribution with Growth[134]* demolished trickle-down theory and aimed to make distributional objectives an integral part of development strategy. His work laid foundations for the World Bank's pursuit of poverty reduction through redistribution rather than the pursuit of growth with notable legal[135] and economic[136] thinkers such as Stiglitz weighing in against trickle down.

Neoclassical resistance to the homogenous recognition of land as a purely formal De Soto registrable asset to be found within the 'modern circuit' was provided by leading economists Douglas North and Elinor Ostrom recognise the value of the informal sector and social co-operation which does not require clear property rights and formal enforcement methods. Ostrom's[137] work on the communal governance of common pool resources such as fishing, water and pastures provided expression to alternative systems of functioning economies to show how informal practices undertaken by ordinary people can create informal rules and institutions that allow for the sustainable and equitable management of shared resources. Axelrod[138] broadened the analysis of institutions and economic growth to include a basic belief in a counter party's trust as an important lubricant in social and economic relations. Trust in these situations, can be created through repeated interactions to build a reputation of co-operation, even where incentives for shirking responsibility, such as the lack of a legal framework, maybe strong, as is usually the case in mega-projects. Acemoglu and Robinson[139] conclude that inclusive and plural social and political institutions are required for stability and sustained economic growth.

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[133] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003).
[134] Chenery HB, *Redistribution with Growth: Policies to Improve Income Distribution in Developing Countries in the Context of Economic Growth* (OUP1974).
[135] See McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003) in which he states that trickle-down economics is a theoretical rather than an actual scenario.
[136] Stiglitz J, 'The Price of Inequality' (2013) 30 New Perspectives Quarterly 52.
[137] See Ostrom E, 'Governing the Commons: The Evolution of Institutions for Collective Action (Political Economy of Institutions and Decisions), (CUP 1990).
[138] Axelrod RM, *The Evolution of Cooperation*, (Basic Books 1984).
[139] Acemoglu D & Robinson J, Why Nations Fail: The Origins of Power, Prosperity, and Poverty, (Crown Publishers 2012).

Economic thinking did eventually take a view on institutions permitting the consideration of the quality of certain private institutions, such as property rights, into the analysis of economic performance. Neoclassical approaches to institutions were defined parochially to include private property rights, private litigation and regulation and as the World Bank emphasised orderly 'institutions for nurturing entrepreneurship[140]'. Any deviation from this view of institutions was associated with social costs of disorder and worse still, underdevelopment. As Ugur et al[141] note, the choice was seen as between social disorder and orderly market freedom.

Within this growing resistance to homogenous ideas of development came a movement towards a more nuanced narrative of 'development'. Miles away from existing 'trickle down' traditional income based measures of development the new narrative was based on measuring development by incorporating issues such as equality and social welfare: the so called 'human face' to development. Entrenched into a series of Human Development Reports (HDRs) produced by the Bank with its seminal 1990 report opening with the statement of how 'people are the real wealth of nation[142]' and an ostensibly new approach to the concept of development. The HDR notes that human development encompasses a broader range of capabilities including political freedoms, human rights and promoting principles such as equity and sustainability[143]. Picking up specifically on Indigenous groups, the 2014 report notes that 'persistent vulnerability such as the marginalisation felt by Indigenous groups reflects deep deficiencies in public policies and institutions and societal norms as well as ongoing discrimination against groups based on ethnicity, religion, gender and other identities[144]'. Human development is also about combatting *processes* that impoverish people, which in the light of this research would include an understanding of incumbent governance structures that can work to impoverish and worsen existing vulnerabilities.

Sen's seminal *Development as Freedom* brought a social dimension of human rights and fairness into ideas of growth and development. His central contribution was the pluralistic idea that market and governmental outcomes should be judged in terms of human needs and

[140] Human Development Report 2000 (OUP 2000).
[141] Ugur M and Sunderland D, *Does economic governance matter? governance institutions and outcomes* (Cheltenham, UK; Northampton, MA: Edward Elgar 2011), page 22.
[142] Human Development Report, 1990, (OUP 1990), page 9.
[143] Ibid 1.
[144] Human Development Report, Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience 2014, page 10.

the delivery of enhanced 'capabilities' so that 'people can choose a life that they themselves have reason to value[145]'. This provided a watershed alternative to the prevailing model under which growth and income were the central tools by which development could be measured[146]. Arguably, his writings were influential in the creation of a number of concrete outcomes within the World Bank such as annual HDRs, environmental and social policies for development projects and the community based approach to development. The community-based approach for example provides that the World Bank actively promote that its clients engage with affected communities. Consequently, the last 10 years has seen a proliferation of generic 'tool kits' and guidance notes on community engagement[147] produced by the World Bank, its private sector arm and other 'think tank' organisations. Whilst engagement with affected communities is of course a welcome step, the problem with this approach lies in its understanding of communities as homogenous and stable groups. This almost romantic image denies that IPs, like any others, are heterogeneous groups whose attitudes to development and involvement with development processes may conflict and change over time.

Sarfaty's detailed empirical study on how as a result of globalisation and contracting out processes, IOs such as the World Bank are now charged with implementing environmental and social policies on human rights and Indigenous land rights. For post-colonial legal scholars, these new types of international governance established by private institutions such as the World Bank remind us that there are institutionally developed rules and regulations which wield hierarchical power on public and private entities and are in all likelihood, the primary means by which we govern[148], and consequently, require interrogation. Her study attempts to understand the internal 'ethnography' of institutions[149] and its effects on the shaping and implementation of human rights within those private institutions. For example, Sarfaty's own empirical studies of the World Bank conclude how 'the Bank's support for human rights has been selective, varying with the rights, the sector and the country where

[145] Sen A, *Development as Freedom* (OUP 2001).
[146] Ibid.
[147] See for example the comprehensive Community Development Toolkit produced by the International Council on Mining and Metals which draws upon and synthesises approximately 10 good practice handbooks, tool kits, guidance notes and risk management strategies – the ICMM toolkit is available <www.icmm.com/document/4080> accessed 15 November 2016.
[148] Ferlie E, Lynn LE and Pollitt C, *The Oxford Handbook of Public Management* (OUP 2005).
[149] GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012) provides a remarkable ethnographic study of the operationalisation of human rights within the World Bank. Also see a similar study of the World Bank as it relates to Indigenous rights norms in Sarfaty GA, 'The World Bank and the Internalization of Indigenous Rights Norms' (2005) 114 The Yale Law Journal 1791.

the Bank is lending money[150]' and is generally motivated by a desire to get deals done and mitigate risk. With respect to Indigenous issues, she observes how preparation of an Indigenous Peoples Development Plan, general resettlement planning and or public consultations are frequently held hostage to internal time pressures. Moreover, the economic and internal political pressure for project completion and loan repayment lends itself to a culture in which risk assessment tools are implemented too late, if at all and are often considered in light of the financial rewards for project managers in getting the most money out of the door and thus the project approved[151]. Other transnational scholarship explores the impact of globalisation and corporate activities on consumer rights in plural national for example German, European and global contexts[152].

These empirical observations are demonstrative of an increasing trend in including risk management techniques as part of good governance. Some authors are critical of this new ethical approach to business that sees an inversion whereby the mechanisms for protection become, through implementation, inverted to and decoupled from purely ethical concerns to become tools of stakeholder management[153]. Huber and Schyett[154] argue that the concept of risk management has become so powerful that it, like security, development and civilisation before it, makes a strong case for an Agamben like permanent state of exception that manifests through extreme forms of control in the form of standardised risk management policies[155]. Indeed scholars ask whether the increased proliferation of risk management tools such as international MIGA[156] insurance products and the proliferation of risk mitigation techniques work to promote risk with perverse human rights effects[157]. Policies designed to protect vulnerable groups do not focus on the welfare of people but on business style

[150] GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012) 47.
[151] Sarfaty's study of the World Bank refers to its 'approvals culture' which disincentives engagement with social policies, which can slow down project approval, GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012) 86-87.
[152] See Calliess GP and Zumbansen P, *Rough Consensus and Running Code: a Theory of Transnational Private Law* (Hart 2010) and Zumbansen P and Calliess GP, *Law, Economics and Evolutionary Theory* (Edward Elgar 2011).
[153] Banerjee SB, 'Corporate Social Responsibility: The Good, the Bad and the Ugly' (2008) 34 Critical Sociology 51-79.
[154] Huber C and Scheytt T, 'The Dispositif of Risk Management: Reconstructing Risk Management after the Financial Crisis' (2013) 24 Management Accounting Research 88.
[155] Ibid 89.
[156] The Multilateral Investment Guarantee Agency, a member of the World Bank Group and makes political risk guarantees available for political events such as expropriation, war and civil disturbance, and breach of contract for a parallel debt tranche of up to US$1 billion.
[157] Od Schutter JFM Swinnen & J Wouters, Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements (Routledge 2013) 202, discussing the impacts of export credit agencies and investment insurance on human development and rights.

management, measures and results, action plans, indicators, controlled delegation and performance designed to protect a company's exposure to external risk.

Financing structures can also have adverse effects on human rights. Leader and Fernandez[158] analyse the structural features of project finance that can make it inherently incapable of satisfying international policy requirements. In their study, the authors point out specific structural features of project finance that might hinder the inclusion of public policy issues or present serious internal conflicts and dilemmas for IOs and project shareholders, which typically include the state in a minority capacity. For example, time pressures for debt repayment and the release of dividends to shareholders mean that issues of public policy become subject to timing priorities that run the risk of holding up a project due to their complexity or financial outlay.

Literature on *economic governance* and social outcomes consists of two distinct strands: that of neoliberal development policy in the global South usually revolving around the social effects of structural adjustment policies, and the mostly overlooked growth and implementation of the new public management (NPM) approach to governance of public policy issues. The Mongolian study explores the theoretical underpinnings of NPM and its practical translation into technocratic 'governance tools' used in the implementation of involuntary resettlement and Indigenous land policy issues. The Mongolian study thus provides an empirical example of Sarfaty's narrative of convergence of human rights with economic globalisation that imbues rights with a technocratic rationality through a process of de-legalisation and de-politicisation[159].

For Ugur[160] and Hood[161] NPM saw the export of rational market thinking to public policy welfare considerations making the public sector business like. Theoretical concepts of governance reflect core neoliberal values, wrapping together anti-bureaucratic and anti-governmental sentiments and privileging markets. Harrow notes how NPMs emphasise on the self-interested behaviour of bureaucrats means that conflicts of interests in task

[158] S Leader & DM Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011), 10, 107 – 141.
[159] GA Sarfaty, *Values in the Culture of the World Bank* (Stanford UP 2012) 13.*Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012) 13.
[160] Ugur M and Sunderland D, *Does Economic Governance Matter? Governance Institutions and Outcomes* (Edward Elgar 2011).
[161] Hood C, 'The 'New Public Management' in the 1980s: Variations on a Theme' (1995) 20 Accounting, Organizations and Society 93.

performance are a given[162]. Where concerns and tensions about public good and equity arise they present themselves in a market 'cost-benefit' analysis and a 'trade off' solution. The business case approach also provides a clever marketing strategy essentially stipulate that corporations have their own self-induced commercial incentives to behave morally. Consequently, the amount to be invested in social policies and their implementation will be determined voluntarily by the business and will be dependent on the financial dynamics of the project, a point noted within interviews[163] and discussed within the studies.

NPM introduces many of the same ways of thinking and designing systems in the public sector traditionally used in the private sector[164], which can lead to anti-social effects. Critical literature remarks that NPM does not fully take into account the specific public and social context leaving issues of public policy increasingly organised through contracts and the creation of special entities[165]. Whilst these maybe useful as tools for shedding light on the social dimension of projects, they are demonstrative of the typical neoliberal view that the public sector is to be contained, controlled and managed. In some organisations public policy becomes a risk management 'box ticking' exercise[166] and a method of distancing and managing groups, keeping them at 'arms' length', increasingly dis-engaged from senior managers. From the perspective of affected groups and in the absence of information, it would be difficult for communities to understand who is conducting operations and to whom they have legal recourse, if any.

In conclusion, this chapter has explored what evidence there is of state and private 'governance' processes relating to Indigenous land rights. Informed by a transnational legal theory approach to actors, norms and processes discussed in chapter 1, this chapter identifies two specific governance frameworks *processes* which aid in understanding and implementation of Indigenous right to land in transnational legal contexts. It is suggested that in order to understand the positivist black letter law on the topic of Indigenous rights to land in the context of globalisation an understanding of the political, economic and historic context within which those rights are implemented is required. As Lyons notes against a backdrop of historical, political and economic thinking based on the prioritisation of

[162] In McLaughlin K, Osborne SP and Ferlie E, *New Public Management: Current Trends and Future Prospects* (Routledge 2002), page 142.
[163] Reference to an informal interview with an international finance institution.
[164] Ferlie E, Lynn LE and Pollitt C, *The Oxford Handbook of Public Management* (OUP 2005) chp 28.
[165] Ibid 293.
[166] Soin K and Collier P, *Risk and risk management in management accounting and control* (2013), page 83.

individual private property came the creation of positive law, which was 'rooted in human history and institutions'[167].

The first 'thread' or transnational governance paradigm used by state actors emanates historically from the colonial roots of state sovereignty and control as understood primarily through the agricultural argument that prioritised economic, settled, exclusive privately owned land within a historic situation of European colonial encounter and cultural superiority. Further chapters discuss what effects, if any, those governance paradigms might have on Indigenous rights to land and access to remedies. For example, through evidence identified within the studies on judicial interpretation of rights to land under Aboriginal title, international law and in the Chagos case. Arguably, the continuation of these transnational governance processes compromise Fairness, the thick rule of law and advancement of redistributive practices for IPs.

The second 'thread' or transnational governance paradigm explored in chapters 7 and 8 provides evidence of how resettlement processes and methods of implementation are, through fragmented processes of contracting out, translated into specific private arrangements and resettlement Policies, driven primarily by functionality and certainty that work to consolidate the prioritisation of private settled land rights. The empirical studies explore how new fragmented forms of non-state sovereignty possessing similar concerns as state sovereignty on control and cultivation continue to prioritise economic, private and settled land rights such as private mining rights over non-economic land relations. The prioritisation of private rights to land is justified through new concerns on economic *functionality and certainty* that subsume and continue colonial agricultural arguments. The Mongolian and Pilbara studies explore how modern governance paradigms might work to vacate development spaces of Indigenous land rights and in some specific situations might possibly enhance state law on Indigenous land rights.

The fundamental concept linking these two public and private governance paradigms is that of transnational Imperialism. This approach borrows from post-colonial legal scholars arguing that international law's traditional colonial preoccupation of gathering territory has not died but is subsumed and overtaken by neoliberal thinking. For Anghie neoliberal policies constitute new forms of sovereignty, empire and control[168] in their standard

[167] Lyons D, *Ethics and the Rule of Law* (CUP 1984) 63.
[168] A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007) 246.

neoliberal policy prescriptions aimed at opening up the market to business with policies such as decreased state intervention to give the market free reign, trade liberalisation and privatisation[169], of which mega development projects are a key part. This Imperialist thinking simply replaces the state's colonial concern over territorial and by implication, economic accumulation with the concerns of private actors such as IOs aimed at prioritising market functions and business certainty.

The premise suggested by this literature is that Indigenous people have never met the bar for being part of the 'cooperative venture[170]' of the social contract and consequently have never enjoyed a minimum Kantian inspired common denominator of natural law based on common humanity. The rule of law is consistently conceptualised 'thinly' as rights to land have been conceptualised by public and private actors through a lens that prioritises economic relations to land. Each study considers what, if any implications these historically biased and increasingly distanced and fragmented transnational governance paradigms might bear on the rights and remedies of Indigenous actors in the studies and their ability to promote a thick rule of law.

Having contextualised the thesis in a transnational theory and methodological approach, chapters 4 through 8 constitute various empirical studies of Indigenous land rights in a number of transnational state and non-state centric legal contexts. The next chapter identifies rights to land for legally recognised Aboriginal *actors* in Australia and Canada pursuant to liberal equality measures under formal *state made* statutory and constitutional *norms*.

[169] L Minkler, *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 63.
[170] Rawls J, *A Theory of Justice* (Belknap Press 2005).

CHAPTER 4: ABORIGINAL RIGHTS TO LAND: LEGAL EXAMPLES FROM CANADA AND AUSTRALIA

This chapter explores two typical 'liberal' sources of constitutional and statutory law found in common law Aboriginal Title from Canada and Australia, aimed at providing 'positive legal measures'[1] for Aboriginal rights to land. The objectives of this chapter are as follows. First, to examine what legal evidence there is, if any, of an independent or fundamental ownership right to land or 'collateral' socio-economic rights to land for Indigenous persons or a legal practice which is moving towards that conclusion. Having identified evidence of a right to land in Canada and Australia, those rights are then 'tested' through a typical method of legal interpretation used in common law jurisdictions: judicial interpretation. The chapter explores how judges interpret those rights, a process which involves exploring what evidence there might be of continuing political and economic transnational governance paradigms relating to international identified in chapter 3.

Based on that evidence and analysis the chapter consider how those methods of judicial interpretation might compromise the effectiveness and application of the rights to land identified here and ultimately 'brake' international legal and developmental narrative on fairness for Indigenous actors and this thesis' specific transnational approach to Fairness identified in chapter 2[2]. This actor-focused perspective to the examination of law applies an approach in transnational legal theory[3] that as an alternative to state bound approaches to

[1] Human Rights Committee, General Comment No. 23: The rights of minorities (Art 27): 04/08/1994 CCPR/C/21/Rev. 1/Add.5, General Comment No. 23 at para 7 noting a number of procedural and structural measures such as the removal of discriminatory provisions in national laws, constitutions and policies. The committee also discusses the removal of structural inequalities for example in the examination of existing assumptions and policies that continue to frame land rights, as explored in this chapter. On the later point see Williams R.A, 'Columbus's legacy: law as an instrument of racial discrimination against Indigenous peoples' rights of self-determination', 8 Ariz. J. Int'l & Comp. L. 51 (1991) page 54 arguing that indigenous persons' diminished legal rights and status derives from the doctrine of discovery, which retains valuable currency in international legal discourse today. This is echoed by the Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009), para 8(b). It notes that substantive equality for groups would mean identifying whether and how current issues of inequality intersect directly with groups' long history of discrimination in relation to their land rights. For the general legal principle on special measures for indigenous groups see *Saramaka v Suriname* Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)) at 85 in which the court noted how 'this Court has previously held, based on Article 1(1) of the Convention, that members of Indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival'; for the general legal principle on special measures for indigenous groups

[2] In brief, the idea of Fairness used in this study is transnational in that it enjoys a minimum common denominator of being based in Kantian inspired ideas of natural law based on common humanity and fairness between all humans. This approach resonates a 'thick' approach to the rule of law that applies equally to states, individual actors and private entities and private and crucially, requires for laws to be judged on their ability to deliver substantive fairness to all persons and thus advance the current developmental narrative on fairness and common humanity in the SDGs.

[3] Transnational legal theories as it specifically speaks to law depart from Hart's idea of law that have come to frame dominant methodological paradigm of the Westphalian state-ordered model. That model presents the state as the ultimate point of reference for both domestic and international law and places law's ultimate identity and unity in its ability to be 'recognised' by legal officials and dispensed by the state (HLA Hart, *The Concept of Law* (2nd edn, Oxford Clarendon Press 1994). It includes the examination of non-state centric legal processes emerging from modern globalised contexts

law, places Indigenous actors, their special relationship to land and the legal, economic and political context and related processes that might compromise the special relationship, at the focus of legal analysis.[4]

The chapter offers insights into the more general question of whether the form of domestic legal protection: constitutional or statute makes any difference for actors in terms of quality of legal protection. This is an important consideration as literature in the field of *jus cogens* norms opines that a reliable method of protecting *jus cogens* norms of international law within domestic law is provision of constitutional recognition. Explicit constitutional recognition can serve as an 'emergency break' aimed at securing respect for core international obligations at all times[5] for example in the context of any conflict between international and national law resulting in a state setting aside international law by enacting inconsistent domestic legislation[6]. In the light of the following chapter's examination of the generally deficient international legal framework relating to displaced Indigenous and non-Indigenous persons, it follows that where national legal systems allow, there is, in principle at least, a strong case for legal advocacy advancing *constitutional* legalisation. The concluding remarks of this chapter offer some insight, albeit limited to two jurisdictions only, of whether legal form really matters for Fairness.

In Canada, the Royal Proclamation of 1763[7] sets out the country's legal relationship to native land rights. The proclamation is the foundational document in the relationship between First Nations and the Crown, laying the basis for the Constitution Act 1982. The recognition of native rights and protection is contingent upon satisfaction of 'parameters' such as colonial 'Interest' and the 'Security of our Colonies'…so that 'only those territories that have not been ceded or purchased are 'reserved to them or any of them, as their Hunting Grounds'.

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such as development projects and examines how globalisation processes might influence and contest with legal norms. Transnational approaches combine rules in areas such as corporate, labour, constitutional, environmental and contract law. On this connectivity, see P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50, 77. During the course of this research, conversations related to issues of anthropology, history, sociology, development and economy were encountered which spoke towards and justified a transnational approach.

[4] HH Koh, 'Transnational legal processes' (1996) 75 Nebraska Law Review 181. Koh provides a synopsis of TLT a study of 'transnational legal processes' involving the theory and practice of how 'public and private actors, nation states, international organisations multinational enterprises, non-governmental organisations and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalise rules of transnational law'.

[5] See De Wet, Erika, Jus Cogens and Obligations Erga Omnes (January 15, 2013) in Shelton D (Ed), The Oxford Handbook on Human Rights (OUP 2013) 559.

[6] Ibid page 559, although obviously the state remains responsible on the international law plane in accordance with principles of state responsibility.

[7] In *The King v Lady McMaster* [1926] ExCR the 1763 Royal Proclamation was confirmed as having the legislative effect of a treaty and has never been repealed.

By 1846, the growth of private land rights such as mining tenements and licences meant that the Canadian Crown Lands Department were increasingly required to accommodate traditional land rights against mining licenses. The first licence issued to the English organised Montreal Mining Company[8] required tribes to agree not to 'prevent persons from exploring for minerals'…nor to 'sell, lease or otherwise dispose of any portion of their reservations without the prior consent of the Superintendent General of Indian Affairs'.

Later legal treaties such as the 1850 Robinson Treaty between the Ojibewa Indians of Lake Superior and the Crown[9] conveyed land to the community with the caveat that governmental acquisition took priority over native rights. For example, paragraph 3 of the treaty confirmed retention of occupancy rights so that chiefs and their tribes enjoyed 'the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters...as they have….been in the habit of doing'. Those rights were however, however subverted to the 'superior' rights of sale and lease to individual, companies and Provincial Government.[10]

This early historical evidence of licences and treaty rights demonstrates two interesting trends. First, an emerging legal practice of framing rights as rather 'thin' use and occupation rights to hunt and fish for example and related to this arguably dilution of rights a subversion of native rights to private rights such as mining licenses.

Critical legal accounts of these types of legal practices expose how common law systems speak to and resonate the historic system of nineteenth century processes of '*explosive colonisation*'[11] which saw substantial land loss and displacement within traditional land usage areas and the bringing of land into private ownership. This emerging legal practice of entering into treaty rights with groups in Canada is, arguably authoritative of the nascent transnational governance paradigm of the colonial period which premised that that 'only cultivation of land can be regarded as a 'proper' or 'effective' occupation of land, and only agriculture can be regarded as a basis of a real land tenure syste*m*[12].

[8] McHugh PG, *Aboriginal Title, The Modern Jurisprudence of Tribal Land Rights* (OUP 2011) 29.
[9] Aboriginal Affairs and Northern Development Canada, Government of Canada, The Robinson Treaties (1850) <www.aadnc-aandc.gc.ca/eng/1100100028974/1100100028976> accessed 15 November 2016.
[10] Ibid. Paragraph 3 of the 1850 Robinson Treaty between the Ojibewa Indians of Lake Superior and the Crown stating 'Saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government'.
[11] McHugh PG, *Aboriginal Title, The Modern Jurisprudence of Tribal Land Rights* (OUP 2011) 29: this is the term utilised by McHugh to refer to the land dispossession process of settler communities throughout the nineteenth century
[12] T Flannagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science 589, 590; J Gilbert, 'Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 687.

In Canada, the modern law of Aboriginal rights was codified in Section 35 of the 1982 Constitution Act laying out the general broad-brush legal principle that existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed[13]. In Australia, rights are legalised under section 223 of the Australian Native Title Act 1993[14] (NTA) with the precise scope of those rights elaborated in judicial decisions.

The seminal cases of *Calder et al v Attorney-General of British Colombia*[15] and *Mabo v Queensland (No. 2)*[16] recognised Aboriginal rights as a form of property right. In Australia previous attempts to recognise native rights in the *Gove Land Rights Case* failed with Judge Blackburn concluding that 'the doctrine of communal native title had never formed part of the common law of Australia'[17]. Those seminal cases marked a watershed in legal practice which, arguably, sought to distance the law on Indigenous rights from the discovery period's discriminatory *terra nullius* doctrine which gave legal currency to the colonial practice that land was not owned prior to European colonial encounter.[18]

Building on *Western Sahara*[19], *Mabo v Queensland (No. 2)*[20] held that tribal groups could enjoy land rights 'where a clan or group has continued to acknowledge the laws….observe the customs based on the traditions of that clan or group' such that 'a traditional connexion with the land has been substantially maintained'.[21] Importantly 'the common law can, by reference to the traditional laws and customs of an Indigenous people, identify and protect the native rights and interests to which they give rise… both communally and individually'[22].

Perhaps the clearest legal elaboration of a right to land is found in dicta from a 1997 Supreme Court of Canada (SCC) decision holding that native title is 'the right to the land itself'[23] and is defined in common law as 'the right to exclusive use and occupation of land'[24]. That usage and occupation language is in itself informative. In principle, it appears that little, if

[13] Section 35 (1) states that 'the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed' and 'treaty rights' are further defined in section 35(3) as including rights that 'now exist by way of land claims agreements or may be so acquired'.
[14] As amended in 1988.
[15] [1973] SCR 313.
[16] [1992] 175 CLR 1 (HCA).
[17] *Milirrpum v Nabalco Pty Ltd* [1971] 17 FLR 141 at 141.
[18] This was the doctrine that no one owned the land prior to European assertion of sovereignty: see *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257 at 69.
[19] Advisory Opinion, Judgement, ICJ Reports 1975.
[20] [1992] 175 CLR 1 (HCA).
[21] *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA) at 66.
[22] Ibid.
[23] *Delgamuukw v. British Colombia* [1997] 3 SCR at 138.
[24] Ibid at 155.

any, legal progress has been made since the eighteenth century evidence on treaty rights, of 'fleshing out' the scope of Aboriginal rights to land. The tentative suggestion is that despite a period of over 100 years, the potential for wide judicial interpretation of native rights in the shape of a fundamental or ownership right has not been fully realised.

Through a more detailed analysis of leading case law, the rest of this chapter tests this preliminary observation of a startling judicial ambivalence towards the development of Aboriginal rights. The objective is to determine what if any, clues or signifiers those cases might provide of a domestic legal practice or *processes* through which judges interpret rights.

A good starting point for this analysis is to compare Aboriginal rights to 'mainstream' Western property rights. Whilst there is no absolute form of ownership 'an estate in fee simple approaches as near to absolute or fundamental ownership as the system of tenure will allow'[25]. The concept of the fee simple has its roots in early common law within Littleton's 1481 *Treatise on Tenures* that consolidated the English law on land and property. Section 11 states that 'a man cannot have a larger or greater estate of inheritance than fee simple'. Section 1 of the Law of Property Act 1925[26] entrenches fee simple as comprised of a 'bundle of rights' and being an estate with infinite duration providing the owner with the right to exclusively possess, use and sell the land and to sell it to a third party of choice. The 'owner of the fee simple is, in general, unrestricted as to what he can do with the land'[27]. Therefore, such an owner 'may exercise over the land acts of ownership of all kinds, including the commission of waste, such as the felling of trees, the opening of mines and the pulling of houses, unless in so doing he interferes with some right created either by law or contract, or infringes the provisions of some statute[28]. Other rights include the complete power to transfer it…with any right to restrict alienation being generally void'[29]. However, an owner's rights to use land and even of possession may be subject to statutory restrictions in the public interest[30]. In sum, the only kind of proprietary rights that are stronger than a fee simple absolute estate are those reserved for governments, for example compulsory

[25] Halsbury's Laws of England: Real Property and Registration (2012) 5th edn, 87 (2012) 66.
[26] Section 1 of the Law of Property Act 1925 states that 'only estates in land which are capable of subsisting or of being conveyed or created at law are (a) an estate in fee simple absolute in possession and (b) a term of years' absolute.
[27] Thompson M, *Modern Land Law*, 5thedn, (OUP 2012) 26.
[28] *A-G v. Duke of Marlborough* [1818] 3 Madd 498, *Wilson v Waddell* [1876] 2 App Cas 95, HL, *Jervis v Bruton* [1691] 2 Vern 251, *Giles v Walker* [1890] 24 QBD 656, DC.
[29] Halsbury's Laws of England: Real Property and Registration (2012) 5th edn, 87 (2012) 243.
[30] Ibid, para 69.

acquisition of land for public purposes such as the provision of transport facilities or other services such as water, energy and telecommunications. [31]

In contrast, Aboriginal title is weaker than fee simple and does not amount to an estate in fee simple absolute[32]. Whilst groups may themselves view their land as a 'fee simple' with unrestricted rights to land ownership, those rights are seriously constrained. First, even though fee simple and Aboriginal title are subject to the government's power to expropriate upon payment of fair compensation, the key feature differentiating the two and contributes to the *sui generis* nature of native title is its inalienability other than to the Crown as noted in *Guerin v The Queen*[33]. McHugh notes how 'theorists of property rights usually characterise alienability as a key attribute. By removing this from the bundle, Aboriginal/native title rights were from the outset constrained'[34]. Moreover, that legal lacuna erodes the possibility of those rights being fundamental in terms of unrestricted rights to land, on par with the fee simple.

Second, like fee simple, Aboriginal rights are subject to the government's power to expropriate upon payment of fair compensation. For example, the SCC clarified that 'both Aboriginal title and Aboriginal rights are not absolute. The federal and provincial governments may infringe those rights. However, Section 35 (1) [of the Constitution Act] requires that infringements are justified'[35]. In *Delgammuukw* the judges agreed that 'the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment…and building of infrastructure' comprise 'compelling and substantial legislative objectives'.[36] These 'legislative objectives' are however, subject to accommodation of the Aboriginal peoples' interests. One aspect of accommodation of 'Aboriginal title' entails notifying and consulting Aboriginal peoples with respect to the development of the affected territory.

[31] Ibid, para 308.
[32] *Delgamuukw v British Colombia* [1997] 3 SCR per La Forest J 'this sui generis interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. It is personal in that it is generally inalienable except to the Crown.'
[33] [1984] 2 SCR which noted that 'the nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered' at 382.
[34] McHugh PG, *Aboriginal Title, The Modern Jurisprudence of Tribal Land Rights* (OUP 2011) 334.
[35] *Delgamuukw v British Colombia* [1997] 3 SCR at 160.
[36] Ibid.

Another aspect is fair compensation'.[37] In practice Aboriginal right holders are, in law, at best, left with notification, consultation and compensation rights.[38]

Native title rights are thus continually subverted to state power with holders having no option to develop and manage traditional lands as they desire, other than in relation to the Crown. For example, in Australia, the financing the development of native title land remains problematic. Section 56 of the NTA provides that 'native title rights and interests are not able to be assigned, seized, sold or made subject to any charge or interest as a result of any debt or liability obligation'. So, native title cannot be pledged as security, for example, for a loan, making the commercial development of native title by holders extremely limited[39] thus restricting methods through which owners of traditional land might wish to develop land and the capacity of traditional owners to choose how they would like to develop traditional land. Given the special relationship groups have to land, this lack of any fundamental ownership based right to land places a substantive 'brake' on the ability of groups to advance Justice through this specific common law framework.

Having compared the general scope of Aboriginal rights *vis a vis* Western property rights, the following section explores the more specific issue of how common law courts have legally constructed Indigenous rights. The aim is to identify any legal practice on the conceptualisation and construction of rights.

First, legal construction of native rights coalesces around their *different* nature. In *Delgamuukw v British Colombia* [40] the SCC proclaimed the distinctive difference of native title as having its origins in 'the traditional customs observed by the Indigenous inhabitants of a territory', based on the 'continued occupation[41]' …making it a *sui generis* interest[42]. This special position resonates that of the Australian courts, where, in the *Mabo* case Bremman J stated that 'the nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs'[43]. The following section appraises how

[37] Ibid per La Forest J and L'Heureux-Dubé J.

[38] For example, in *Delgamuukw v British Colombia* [1997] Lamer CJ noted that even in rare cases of minor infringement, 'when the minimum acceptable standard of consultation at 168.

[39] The argument for the inclusion of Section 56 of the NTA is that prohibiting the sale of freehold native title prevents native title holders from further land dispossession, however, arguably, this should be the informed choice of native title holders.

[40] *Delgamuukw v British Colombia* [1997] 3 SCR at 190.

[41] Ibid.

[42] Ibid.

[43] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (HCA) at 64 per Brennan J.

Aboriginal rights within the Canadian and Australian common law frameworks have developed.

The first noteworthy point is that legal frameworks appear to lack uniformity. For example, Canada has made a strong distinction between Aboriginal title and Aboriginal rights whilst Australia has only recognised 'rights'. In Canada, *Delgamuukw v British Colombia*[44] recognises rights through the lens of a 'continuum' or 'spectrum' of rights dependent on the degree of evidenced land connection and usage. At one end of the spectrum are Aboriginal rights 'which are practices, customs and traditions integral to the distinctive Aboriginal culture of the group, claiming the right', but fall short of intensive land use evidence of which is required to ground Aboriginal title. In the middle are activities which 'might be intimately related to a particular piece of land', for example a 'site-specific right to engage in a particular activity' but again, do not constitute sufficient use to demonstrate Aboriginal title. Finally, at the 'other end of the spectrum is Aboriginal title itself which confers more than the right to engage in site-specific activities'.[45]

Whilst the distinction between title and rights is largely irrelevant for this research as neither are absolute, of general interest is the *non-uniform treatment of rights* amongst comparable common law jurisdictions.

Despite Canada's seemingly more generous scope for 'title' and 'rights' courts have demonstrated an ambivalence to recognise the more generous spectrum of title: a position which only changed in the 2014 decision of *Tsilqot'in Nation*[46]. In that case whilst the SCC granted Aboriginal title, its legal argumentation continued to place itself in the unenviable position of repeating the fiction of *terra nullius*.

Historical reference to a 'time of assertion of European sovereignty' explain how, in legal terms, at this time, Crown title became conceptually 'burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival'[47]. As Borrows argues, this demonstrates subsisting originalist legal 'fiction', created to allow the Crown to acquire 'radical or underlying title to all the land' and against which native rights required qualification'. This legal argumentation of European encounter and burdened rights

[44][1997] 3 SCR.
[45] [1997] 3 SCR.
[46] *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257.
[47] *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257 at 12 and 18.

in which the Crown recognises and 'grants' Aboriginal rights upon European sovereignty continues a fictitious legal landscape upon which European encounters and related land rights have come out 'first' through legal representation as radical or underlying title. This is even though, as Borrows says, it is almost certainly the case that, before the Crown asserted sovereignty, the *Tsilhqot'in* people would have possessed underlying title[48].

So, 'if land was owned by Indigenous peoples prior to the assertion of European sovereignty, it seems impossible to assert that the Crown acquired title in that same land without a version of *terra nullius* being deployed[49]. Yet this is what has been done[50] even though the SCC has been clear in *Tsilqot'on* that the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) as confirmed by the Royal Proclamation of 1763, never applied in Canada, as it had in Australia until *Mabo v Queensland (No. 2)*[51]. Therefore, in 2016 the legal record suggests that Canada's highest court continues to churn out judicial ideas resonating strong ideas of *terra nullius* and the doctrine of discovery.

Next, a holistic appraisal of Canadian and Australian case law suggests that rights to land are recognised as comprised of separate non-exclusive[52] and site-specific rights to land. These are typically understood as a range of specific *use and occupation* rights, and thus mimics the historic trend of characterising Indigenous rights as solely usury: a legal trend evidenced in chapter 3 and in the start of this chapter. The scope of these rights is recognised in a cautious step by step manner within a framework of 'site-specific' rights to engage in as stated in particular activities'.[53]

For example, in Canada, *R v Isaac*[54] recognised a usufructory right of groups on reserve land 'to hunt on that land'[55] which had not been expressly surrendered or extinguished by the Crown. *R v Sparrow*[56] recognised the traditional right to fish of the Aboriginal Musqueam band. Describing the precise *sui generis* nature of the right it noted that 'fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with

[48] Borrows J, *Freedom and Indigenous constitutionalism* (University of Toronto Press 2016) 142; J Borrows, 'Aboriginal Title in Tsilhqot'in v. British Columbia [2014] SCC 44' (2014) (2014) Maori Law Review.
[49] Ibid.
[50] Ibid and *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257 at 69.
[51] *Delgamuukw v British Colombia* [1992] 175 CLR 1 (HCA).
[52] In *Delgamuukw v British Colombia* [1997] 3 SCR it was noted when discussing Aboriginal rights that 'shared, non-exclusive Aboriginal rights short of Aboriginal title but tied to the land and permitting a number of uses can be established if exclusivity cannot be proved'.
[53] [1997] 3 SCR.
[54] [1975], 13 NSR.
[55] Ibid at 18 per MacKeigan J.
[56] [1990] 1 SCR 1075.

the culture and existence of that group'[57]and noted that 'while it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake'[58]. The case of *R v Powley*[59] recognised the communal Aboriginal hunting rights of the Métis people under section 35 of the Constitution Act 1985 and *R v Sappier and R. Gray*[60] affirmed the Aboriginal right of Indians to harvest wood on Crown lands for domestic uses. This case law suggests obsession with 'specificity' in which rights are in a systematic manner, ordered and parcelled into community specific fishing and hunting rights rather than a broad elaboration of rights.

A similar trend is demonstrable in Australia. The practical effect of *Mabo v Queensland (No. 2)*[61] was the enactment of the NTA[62] with Section 10 of the NTA recognising and protecting Aboriginal native title. By codifying the *Mabo* definition of native title, the NTA represents statutory recognition of rights in land and water, which arise in some way other than by Crown grant[63]. Section 223 defines native title rights and interests as 'communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters' which are 'possessed under the traditional laws and customs' observed by those peoples, have a 'connection with the land or waters' and are 'recognised by the common law of Australia'.

Section 223 frames traditional rights in terms of specific 'rights and interests' with sub-section 223(2) stating that rights and interests include hunting, gathering or fishing rights and interests, ceremonial rights and access rights. The key points are that rendering Aboriginal rights as various 'sticks' of individual 'site specific' rights within a conceptual bundle of Aboriginal title curiously resonates the Westerns disaggregated and individualistic concept of land unobserved in First societies and might also work to render rights weak and vulnerable to acquisition. Understanding why legal rights are conceptualised in this manner arguably necessitates an analytical 'turn' towards transnational legal governance processes identified in chapter 3.

[57] Ibid at 10.
[58] Ibid.
[59] [2003] 2 SCR 207, 2003 SCC 43.
[60] [2006] SCC 54 and [2006] 2 SCR 686 respectively.
[61] *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA).
[62] Amended by the Native Title Amendment Act 1998.
[63] Secher U, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart 2014) 138.

Characterisation of rights as site specific might continue a well-trodden legal policy of ordering land, which are indicative of how the law draws lines, constructs insides and outsides, assigns legal meanings to lines and attaches legal consequences to crossing them[64]. Social and historical processes of ordering land suggest an overriding objective of enclosing and excluding. These processes are traceable through evidence of international law's rich discovery rituals of settlers which included drawing boundary lines, planting coins and lead plates, painting signs, planting flags and crosses to claim possession of specific areas of land[65]. Later political acts of fencing the land during the Enclosure movements found legal currency within the conceptual primacy of 'exclusivity' which defined the nature of land and property as one that exists 'in total exclusion of the right of any other individual in the universe'[66]. Those ordering processes in which rights are disaggregated into 'sticks' for example to hunt and fish might also serve economic ends as exclusivity and bounded private ownership became the gateway for the later Lockean commodification and sale of land, as discussed in chapter 3.

As chapter 3 argues, historical cultivation or *agricultural argument*[67] was grounded on the premise that 'only cultivation of land can be regarded as a 'proper' or 'effective' occupation of land, and only agriculture can be regarded as a basis of a real land tenure system'[68]. This economic and political ideology supported the doctrine of discovery on the basis that territories inhabited by nomadic peoples were ineffectively occupied thus vacant, terra nullius and open to conquest[69]. In this scenario, cultivation of vast tracts of land for example justified a greater right to land than less intensive hunting, fishing or gathering rights[70] ultimately subverting unsettled and inconsistent uses of land to the superiority of colonial settled legal systems.

Canadian political philosopher Klymicka comments on the common commercial strategies of settlers behind the legal 'unbundling' and breaking open of Indigenous lands…to replace traditional communal ownership with individualised title. Once land is divided and alienable

[64] Delaney D, 'Legal geography I' (2015) 39 Progress in Human Geography 96, 99.
[65] Miller RJ, *Discovering Indigenous Lands: the Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press 2011).
[66] Blackstone W, *Commentaries on the Laws of England* (London, 1766), Book 2, 1.
[67] T Flannagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science 589, 590; J Gilbert, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.
[68] J Gilbert, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.
[69] Kohen M, Hebie M, 'Territory, Discovery', *Max Planck Encyclopaedia of Public International Law,* para E, 14.
[70] Anaya notes that 'Vattel accepted the view that cultivating land established a greater right to the land than did hunting or gathering', see Anaya J, *Indigenous Peoples in International Law* (2nd edn, Oxford: OUP, 2004), page 23

it is then possible for wealthier members of nations to buy land and other resources and for governments to expropriate land'[71]. Therefore, the desire to fragment rights into individual parcels to be sold individually for greater return than the whole, made the economic exploitation of those rights far easier and efficient. This type of strategy creates exclusive private rights and thus feeds into the Western superiority of private, cultivated and state registered land residing within what McAuslan would call the modern economic 'circuit[72]'. Modern examples of this can be seen in the drive for increased land titling and registration in developing countries such as Kenya (the first colony to initiate a nationwide effort to register land, known as the 1954 Swynnerton plan) and other governments that have attempted private titling including the Ivory Coast, Malawi, Sierra Leone and Ghana.[73]

From the perspective of Fairness this bundle and boundary line approach to legal rights arguably facilitates a degeneration of native title rights into a 'mere list of activities…thereby exposing it to easier diminution or disappearance by force of conflict with other rights over the land later grated by the Crown'[74]. Moreover, the legal practice of articulating rights as essentially different or '*sui generis*' to modern Lockean Western ideas of property rights arguably works to cement a broader governance practice of labelling rights as *other*, essentially and continually in contest and competition with Western freehold land. Curiously, at the same time, common law structures have sought to conceptually mirror Indigenous rights in its own image of Western freehold rights, through for example the bundling, and boundary line approach which parcels out traditional rights into specific parcels of usage rights. Making sense of these contradictory approaches is perhaps futile and at best, one might conclude that common law has simply not been able to cope with Aboriginal rights.

Continuing this chapter's empirical analysis of case law, the following section discusses how Western ideas of 'occupation' can be identified within case law and what, if any effect

[71] Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995) 43. Klymicka makes the interesting point that a by-product of placing Indigenous groups into reserved land was that the community have less ability to borrow money since they have no alienable property to use as collateral.
[72] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003).
[73] Ensminger J, Changing Property Rights: Reconciling Formal and Informal Rights to Land in Africa, page 176 in Drobak J, Nye J, *The Frontiers of the New Institutional Economics*, (San Diego Academic Press 1997). Ensminger notes 'the goals of the Swynnerton plan were to promote cash-crop agriculture by consolidating scattered strips into units of 'economic' size, securing titles so as to encourage investment in land, facilitate the extension of credit by use of title deeds to secure loans, reduce land disputes and ease transfer. It was understood that this would create a landless class who were expected to labour on the larger farms. The intention was that once consolidation and registration were complete, land would no longer be subject to customary law and would resemble English freehold title'. This makes the purpose of land titling fit clearly within the Lockean framework of enclosing land such that private owners can exclusively cultivate it. Essentially, land titling protects and preserves exclusive private land rights.
[74] McHugh PG, *Aboriginal Title, The Modern Jurisprudence of Tribal Land Rights* (OUP 2011) 159.

those legal narratives might have on the effectiveness and availability of common law rights for Aboriginal groups.

In *Delgamuukw*, Lamer CJ states that the critical concern regarding the source and proof of Aboriginal title is one single variable: the legal burden on Aboriginal people to establish occupation of lands in question at the time when the Crown asserted sovereignty over those lands. This required proof of continuity between present and pre-sovereignty occupation and 'proof of 'exclusive' occupation.[75]

The Canadian test for title requires proof of exclusive use and occupation at the time of Crown sovereignty or what is described as a 'sufficiently significant connection'.[76] This is even though occupancy itself maybe practically impossible for transient Aboriginal and nomadic groups[77]. Typically, proof needed for establishing occupation requires two sources: both common law and Aboriginal perspectives of occupancy. 'At common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources'[78].

Noting the confusion and difficulty in proving Aboriginal title given the reference to two sources of Aboriginal title, Secher identifies the legal uncertainty arising from reconciling two mutually exclusive sources of Aboriginal title: an approach to proof of occupancy (and its exclusivity) which considers both the common law and the Aboriginal perspective[79]. SCC judges also acknowledge that the 'debate over the proof of occupancy reflects two conflicting views of the source of Aboriginal title: the common law approach requiring the 'physical reality' of occupation through cultivation and enclosure of fields to regular use of definite tracts of land and the position that 'should reflect the pattern of land holding under Aboriginal law'[80]. Demonstrable in the following cases is evidence that judicial interpretations around occupancy are still unable to resolve this conflict causing serious problems for groups in creating a legal basis upon which to claim any right to land.

[75] *Delgamuukw v British Colombia* [1997] 3 SCR.
[76] Ibid.
[77] *Delgamuukw v British Colombia* [1997] 3 SCR 155.
[78] Ibid.
[79] Secher U, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart 2014) 395.
[80] *Delgamuukw v British Colombia* [1997] 3 SCR.

Ultimately, these two competing sources may mean the actual finding of Aboriginal title highly strained and illusive.

The leading Canadian case of *Delgamuukw*[81] necessitates that physical occupation can be established by 'the enclosure of fields and regular use of definite tracts of land for hunting, fishing or exploiting resources. Less intensive uses may give rise to different rights'[82]. *R v Marshall*, a 2005 case involving native fishing and selling rights, asserted that notwithstanding the semi-nomadic culture or lifestyle of the Mi'kmaq community, occasional visits to an area did not establish title; there must be 'evidence of capacity to retain exclusive control[83]' over the land claimed. This was despite strong dissenting opinions that those occupation tests were too strict and that it was sufficient to prove occasional entry and acts from which an intention to occupy the land could be inferred which would be consistent with the semi-nomadic culture or lifestyle of the community[84]. Remarkably, the need for continuous occupation stretches to nomadic and semi-nomadic communities[85]: the obvious conundrum of which is not lost on the courts who note that Eurocentric conceptions of property rights may prove to be fundamentally incompatible with a nomadic or semi-nomadic lifestyle[86] proving fatal to successful claims in Aboriginal title.

This strict legal position has not changed. In the 2014 decision of *Tsilhqot'in Nation v. British Columbia*[87], a semi nomadic grouping of six bands were granted Aboriginal title but were still required in that case to demonstrate occupation in the sense of regular and exclusive use of land[88]. To ground Aboriginal title 'occupation' must be sufficient, continuous (where present occupation is relied on) and exclusive[89]. So, in *Tsilhqot'in Nation*[90], the SCC 'found' original common law understandings of occupation grounded in regularity and international legal ideas on jurisdictional effective control over territories[91]

[81] Ibid.
[82] *Delgamuukw v British Colombia* [1997] 3 SCR 149.
[83] *R v Bernard* [2003] para 110 referred to on appeal in *R. v. Marshall; R. v. Bernard* [2005] 2 S.C.R 74.
[84] *R. v. Marshall; R. v. Bernard* [2005] 2 S.C.R 74.
[85] See Ibid at 70 stating that 'these principles [of exclusive possession established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources as elaborated in Degamuukw], apply to nomadic and semi-nomadic Aboriginal groups; the right in each case depends on what the evidence establishes.
[86] R. *v.* Marshall; R. *v.* Bernard [2005] 2 S.C.R 126.
[87] [2014] 2 SCR 257
[88] [2014] 2 SCR 257 2.
[89] Ibid at 63.
[90] [2014] 2 SCR 257.
[91] A principle which is typically used for the purposes of establishing territorial and jurisdictional integration between territories: see for example the principle of effective control discussed in *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011 concerning the extension of the UK Government's human rights obligations to situations in which British officials exercise 'control and authority' over foreign nationals: a principle which seems factually disconnected from application to a situation for grounding Aboriginal occupation.

and transplanted them into an Aboriginal context. Consequently requiring groups to prove effective control at the time of assertion of European sovereignty[92] over land that was regularly used for hunting, fishing or otherwise exploiting resources in order to ground Aboriginal title. In *Tsilhqot'in*, the band were able to meet the legal threshold of regularity and control, however the continued legal application of Eurocentric ideas around occupation within the landscape of Indigenous rights is itself potentially damaging for other rights claims in which groups may struggle to meet these parochial legal tests. The problem with the occupation principle lies in the highly specific context of the term, as understood in international law between states. Since colonial times, legal narratives on territorial acquisition and occupation continue to be phrased in ideas around continued land use and 'effective occupation[93]'.

The physical reality of occupation through occupation, cultivation, enclosure and clearly defined land, typically through boundary lines, imparts ill-suited Euro-centric ordering requirements applicable to states such as requirements of a 'defined territory'[94] into Indigenous land claims. Indeed, processes of occupation, possession, registration, exclusion and boundary drawing all work to ground legal title in land as evidenced in the nineteenth century adoption of former colonial boundaries at independence drawing arbitrary lines of demarcation dividing Indigenous communities[95]. Translating these type of legal assumptions into Indigenous land claims might result in groups unable to gain legal access to Aboriginal rights, thus denying equality of arms.

Second, occupation requirements contain larger assumptions over how land is to be effectively occupied and thus recognised as a valid form of land tenure that have already

[92] *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257 50.

[93] Post-colonial jurisprudence of *Case Concerning Sovereignty over Pulua Ligitan and Pulau Sipadan (Indonesia v Malaysia) (Ligitan Sipadan case)*, Advisory Opinion, Judgment, ICJ Reports 2002 625; *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Pedra Branca case)*, Advisory Opinion, Judgement, ICJ Reports 2008 12. Recalling the negation of Western Sahara as *terra nullius*, those cases clarified the concept of 'original title' as a means of establishing territory. The latter test aimed to dislocate the concept of original title from the colonial context of *terra nullius*, by for example, expanding the idea of 'original title'. So, in the Pedra Branca case, the ties of loyalty of the indigenous Orang Laut 'people of the sea' to the Malaysian Sultan of Johor was used as valuable evidence towards the legal finding that Malaysia has original title to the Pedra Branca islands, rather than Singapore. However, the problem with these cases and the test of original title is that the legal foundation of proving the later still coalesces around proof of *effective control* of territory used to establish statehood in the colonial era (*Eastern Greenland* case relating to evidence of exclusionary practices as evidence of effective control *in Case Concerning the Legal Status of Eastern Greenland* (Den. v. Nor.),1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5), which when applied into the context of an Indigenous land claim makes for an irrational legal hurdle.

[94] Article 1 of the Montevideo Convention on the Rights of Duties of Man 1933 defines a state as a person of international law which should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

[95] Summarising the specific African socio-historical context taken from the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities 2005.

been discussed in the context of the agricultural argument. Socio-legal accounts argue that the nomadic subalternity to wander and use land 'ineffectively' is a deviance that modern law cannot but attempt to either correct or abolish, thus the legal 'solution' to nomadism is assimilation and enforced sedentarisation[96]. In the context of Aboriginal groups, it could be argued that social sedentarisation policies take on 'legal teeth' as inflexible legal requirements for strict and effective occupation discussed above. Those parochial requirements deny that 'occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources[97]'.

What is remarkable is that these Western assumptions on occupation continue to be applied to Indigenous persons (IPs) typically unable to display evidence of exclusive and intensive use and despite legal recognition since *Western Sahara*[98] of the seasonal nomadic way of life. Perhaps the nomadic incredulous wandering defies legal order and so needs to be settled and assimilated to conform to orderly land use practices.

Occupation requirements also have serious implications for Aboriginal identity and legal status as occupation requires proof of first or 'prior' occupation. The legal foundation of native title is based on the finding of a moment of pre-sovereignty historic land occupation. The position is summarised by Judson J. in *Calder v. Attorney-General of British Columbia*[99] with 'the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.[100]' The leading case of *R v Van Der Peet*[101] captured Aboriginal rights as arising from the prior occupation of land[102] and went onto define the moment for recognising, affirming that prior occupation as being those Aboriginal rights which existed immediately prior to contact with Europeans. The legal justification was that 'the rights

[96] Shamir R, 'Suspended in Space: Bedouins under the Law of Israel' (1996) 30 Law & Society Review 231.
[97] *Delgamuukw v British Colombia* [1997] 3 SCR 149.
[98] See for example *Western Sahara*, Advisory Opinion, Judgement, ICJ Reports 1975 at 152 in which the ICJ recognised that nomadic tribes 'possessed rights, including some rights relating to the lands through which they migrated.
[99] [1973] SCR 313 328.
[100] See also *R v Van der Peet* [1996] 2 SCR 507 30 where Lamer CJ wrote for the majority, that 'the doctrine of Aboriginal rights (one aspect of which is 'Aboriginal title') arises from 'one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries' (emphasis in original)'.
[101] *R v Van der Peet* [1996] 2 SCR 507.
[102] Ibid.

recognised and affirmed by S 35(1) must be temporally rooted in the historical presence – the ancestry – of Aboriginal peoples in North America.[103]

Justice Lamer concludes that Aboriginal rights possess 'original' rights because Aboriginal people are 'Aboriginal[104]', thus capturing the essence of being Aboriginal and the rights flowing from that status within a framework of historical originality. Like the label 'Indian', a term used so frequently within narratives of barbarism and savagery and a low degree of civilisation'[105], the term Aboriginal is a fabricated construct which as the following section explains has not freed itself from the discursive narrative of civilisation. As dissenting Justice McLachlin notes 'history is important. A practice, however, need not be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact[106]'. As later studies evidence, this characterisation of Indigenous status as 'from long ago' or since 'time immemorial' continues to have troublingly limiting consequences for IPs. The legal effect is that groups are unable to access the canon of international law on Indigenous rights due to the implicit legal association of Indigenous status as bounded to a specific European experience of original and prior Aboriginality[107] and settler colonialism.

Looking back on this line of Canadian constitutional recognition and case law is evidence of an inconsistent legal approach in which rights are in some cases, regressed and in others expanded, depending on judicial interpretation. That ambiguous and inconsistent legal approach is, perhaps, representative of the international legal position taken by Canada in its 2010 endorsement of the UNDRIP after initially voting against it [108] and its adamant denial in the *Grand Rivers* investment arbitration, that Indigenous consultation rights do not

[103] Ibid 32.
[104] Noting that Aboriginal rights arise from the fact that Aboriginal people are Aboriginal and that, as academic commentators have noted, Aboriginal rights 'inhere in the very meaning of Aboriginality' *R v Van der Peet* [1996] 2 SCR 507 19.
[105] Nys E, De *Vitoria F, De India et de Ivre Belli : Reflectiones: 1557 (*Gibson Brothers, 1971) 88.
[106] *R v Van der Peet* [1996] 2 SCR 507.
[107] UN Sub-Commission on the Promotion and Protection of Human Rights, Prevention of discrimination against and the protection of minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, 19 July 2000, E/CN.4/Sub.2/2000/10. Paragraph 4 notes how blue/salt water concept of Indigenous hold that that Indigenous people consist of those beyond Europe who lived in a territory before European colonization and settlement and who now form a non-dominant and culturally separate group in the territories settled primarily by Europeans and their descendants. It is profoundly relational to European settlement
[108] See Gover K, 'Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples', (2015), 26, 2, EJIL 345-373 providing an interesting as to why those states voted against the UNDRIP and the liberal fear that rights in the declaration offers communities enhanced legal rights involving redistribution of land and public goods that are not easily reconciled with mainstream liberal interpretations of human rights principles of non-discrimination and equality.

form part of customary international law[109]. This is despite its own supreme court's affirmative decision on consultation rights in *Delgamuukw*[110].

Having discussed how judges have interpreted Aboriginal rights relating to proof of title and identity, the following section explores what, if any, legal tests exist for *proving* Aboriginal rights to land in Canada and Australia, how they are interpreted and whether that interpretation might impact on Fairness for Indigenous persons claiming rights to land.

A precursor to the establishment of rights and interests is gathering of evidence attempting to link the continued observance of traditional laws and customs by a particular society to the modern day.

In Canada, key signifiers of Aboriginality and Aboriginal rights require that rights are only legitimate if they are based on 'practices, customs and traditions that are rooted in the pre-contact societies[111]', a position which appears to force parties into an originalist framework assigned to historic first contact. Along this continuum of 'originality' the *Van der Peet* case went onto meet out anthropological requirements that rights must demonstrate in order to gain legal protection. For example requirements that rights be 'integral to the distinctive culture' of the group[112], the function of which is 'to identify the crucial elements of the distinctive Aboriginal societies[113]' or 'the nature of the right being claimed to determine whether the claim meets the test of being integral to the distinctive culture of the group claiming the right'[114]. Similarly, in the Australian case of *Risk v. Northern Territory of Australia* a type of 'linking' test was elaborated as a legal requirement that the laws and customs have 'continued substantially uninterrupted by each generation since sovereignty'[115].

Common to both tests is an idea of unbroken observance of traditional customs which have resonated in tests relating to interruption and continuity. In Australia, the term 'substantial interruption' derives from the *Yorta Yorta* case[116]. In *Yorta Yorta* the High Court held that a

[109] Grand River Enterprises Six Nations Ltd et al v United States of America, NAFTA (UNCITRAL) Award (12 January 2011) 210.
[110] *Delgamuukw v British Colombia* [1997] 3 SCR 160.
[111] See *R v Van der Peet* [1996] 2 SCR 507 62.
[112] Generally following the approach in *R v Sparrow* [1990] 1 S.C.R. 1075 in which the Musqueaum right to fish for food was based upon anthropological evidence that salmon fishery has always constituted an integral part of their distinctive culture.
[113] *R v Van der Peet* [1996] 2 SCR 507 45.
[114] Ibid 5.
[115] See *Risk v Northern Territory of Australia* [2006] FCA 404 at 97(c) per Mansfield J; supported on appeal in *Risk v Northern Territory* [2007] 240 ALR 75 at 78-79.
[116] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

native title claim over an area of land and waters in northern Victoria and southern New South Wales had 'failed without positive proof of continuous acknowledgment and observance of the traditional laws and customs'[117]. In this case, the courts required evidence of a 'high degree of continuity' which involves 'intergenerational transmission, acknowledgment and observance[118]'. Requirements for rights to be substantially uninterrupted since the time of the acquisition of sovereignty by the Crown pose heavy burdens for Aboriginal groups. The Australian Law Reform Commission[119] notes how *Yorta Yorta* has produced 'a discernible hardening of the arteries of the Native Title Act' and has noted the comments of the Australian Human Rights Commission[120]. It concluded that the 'continuous observance' standard and burden of proof required [by the Yorta Yorta case] to establish the elements of the statutory definition of native title under s223 (1)(a) NTA are so high that many Indigenous groups are unable to obtain recognition of the relationship they continue to have with their traditional land.

In *Risk v. Northern Territory*[121] the court held that a native title claim failed as substantial interruption was demonstrated by a lack of evidence about the passing on of knowledge of the traditional laws and customs from generation to generation during much of the twentieth century. This evidence demonstrated that there had been a substantial interruption in the 'practice[122]' of the traditional laws and customs. This was despite a finding by the trial judge that 'the Larrakia community of today is a vibrant, dynamic society, which embraces its history and traditions... demonstrating 'its strength as a community to re-animate its traditions and customs[123]'.

The possibility of an inequitable interpretation of the substantial interruption test has led the Australian Law Reform Commission to consider methods of reform for the test which includes 'the empowerment of courts to disregard substantial interruption…where it is in the interests of justice to do so'[124].

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[117]Ibid 28.
[118] Ibid 186.
[119] Australian Law Reform Commission, Issue Paper 'Substantial Interruption' 179-180 in Review of the Native Title Act 1993 (IP 45) (2014).
[120] Australian Human Rights Commission, Information concerning Australia and the International Convention on the Elimination of All Forms of Racial Discrimination, Submission by the Australian Human Rights and Equal Opportunity Commission, 2005.
[121] *Risk v Northern Territory [2006] FCA 404 (29 August 2006).*
[122] Ibid at 835 and 839.
[123] Ibid at 530.
[124] Australian Law Reform Commission, Issue Paper 'Substantial Interruption', para 179-180 in Review of the Native Title Act 1993 (IP 45), 2014.

Whilst positive legal results can be found, they are still weighed down by requirements for traditional authenticity: tests that present repressive obstacles to recognition. In *Banjima People v Western Australia (No 2)* a case concerning a claim over land and waters in the east Pilbara region of Western Australia, the Federal Court stated how evidence showed no substantial interruption of the Banjima with their country. The legal decision was based on strong evidence displaying the continued and authentic observance of customs for example, ability to speak their own language, inculcation of children and grandchildren in the traditional ways of the Banjima and continued practice of the ritual and ceremonial laws'[125].

Similarly, in *Western Australia v Graham and others (on behalf of the Ngadju People)*[126] evidence of the Ngadju tribe's traditional claim over the land around the Lake Johnston and Peak Charles area in Western Australia was not satisfied by lines or points on a map but by various examples of Indigenous knowledge. This included specific changes in vegetation for example how the scrub became thicker with gum and pugarn trees as they travelled along it, which for groups demarked that they were in a different territory[127]. Furthermore, the Ngadu's identification of art sites around Lake Johnston was used as evidence to identify hunting sites and consequently, typical ways of life associated with land use. Ngadju dreaming stories evidenced the connection such as a goanna and snake that travelled to Lake Johnston and Peak Charles and a parrot that crash-dived out near Lake Johnston, with the court concluding that this is all evidence of connection in the general vicinity of the trial area to the west of the red line[128].

Whilst the court's consideration and receipt of plural types of evidence is clearly, welcome the harsh evidential requirements remains problematic in its need for clear evidence of continuing traditional authenticity. John Borrows argues that this narrative exposes a retrospective perspective which can be steeped in questionable North American cultural images which has 'the potential to reinforce troubling stereotypes about Indians'[129] by opening up narratives which engage in post-colonial tropes over standards of civilisation[130]. This retrospective lens which focuses on the continuation of pre-contact practices is a

<www.alrc.gov.au/publications/issues-paper/%E2%80%98substantial-interruption%E2%80%99-0#_ftn226> accessed 17 November 2016.

[125] [2013] FCA 868 868.

[126] [2013] FCAFC 143.

[127] Ibid at 464.

[128] Ibid.

[129] Borrows J, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002) 60.

[130] Gong G, *The Standard of Civilisation in International Society*, (Clarendon Press 1984) 24, Schwarzenberger G, 'The Standard of Civilisation in International Law', (1955) Current Legal Probs 212; A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007).

method through which rights are constrained within an Original 'magic moment' of European contact which has the potential to compromise the access to legal rights to land for those claiming Indigenous status.

In sum, we are left with judicial interpretations which will only extend legal recognition to groups to the extent they have observed traditional customs thus only extending recognition and legal protection backwards. By implication and as evidenced below this denies groups the ability to access legal protection for the continuation of traditional rights within the context in light of the modern day and their own social, economic and cultural development needs.

For example, *R v Van der Peet*[131] involved a claim by First Nation's for constitutional protection of the right to sell salmon. The defendant was a member of the Stó:lō band in British Colombia and was charged with selling salmon caught under a food-fishing licence that permitted Aboriginal people to fish solely for sustenance and ceremonial purposes and prohibited the sale of fish to non-Aboriginal people for commercial purposes. The SCC ruled that trade in salmon for money did not amount to an Aboriginal right as the Stó:lō did not have a pre-contact trading system in place they could not claim a commercial right to sell fish[132]. To qualify as an Aboriginal right trade had to be a 'defining feature of [pre-contact] Stó:lō society'[133]. According to Justice McLachlin, 'livelihood rights have limits and there is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource[134]'. She notes how the 'Aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities….beyond this, Aboriginal fishers have no priority over non-Aboriginal commercial or sports fishers'[135].

Similarly, *Lax Kw`alaams Indian Band v Canada*[136] involved the unsuccessful claim of the *Lax Kw'alaams* and other First Nations to the commercial harvesting and sale of 'all species of fish' within their traditional waters. It was held that the 'transformation of the pre-contact eulachon grease trade into a modern commercial fishery would not be 'evolution' but the

[131] [1996] 2 SCR 507.
[132] Ibid 88.
[133] Ibid and further stating 'the practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact', 59.
[134] Ibid 279.
[135] Ibid.
[136] [2011] 3 SCR 535.

creation of a different right'[137]. The group also claimed lesser rights such as a right to sufficient fish which, when converted to money, would enable them to develop and maintain a prosperous economy and achieve food security. The courts accepted that Aboriginal rights can evolve but 'when it comes to 'evolving' the *subject matter* of the Aboriginal right, the situation is more complex. So, a 'gathering right' to berries based on pre-contact times would not, for example, 'evolve' into a right to 'gather' natural gas within the traditional territory. The surface gathering of copper from the Coppermine River in the Northwest Territories in pre-contact times would not…support an 'Aboriginal right' to exploit deep shaft diamond mining in the same territory[138].

While courts have recognised that Aboriginal rights must be allowed to evolve such evolution is limited. A pre-sovereignty Aboriginal practice cannot be transformed into a different modern right'[139]. In *R v NTC Smokehouse* [140] the courts rejected an application for the recognition of an Aboriginal right to exchange fish for commercial purposes as the appellant failed to demonstrate to the court that its specific tribe had a historic and distinctive cultural right to exchange fish for money. These arguably parochial judicial interpretations are concerning to legal and development scholars arguing for the continuous development of socio-economic rights for example to food and an adequate standard of living as fundamental human rights[141].

In a decision of the same year, R *v Gladstone*[142] the courts recognised an Aboriginal commercial right to fish for the first time[143], as, 'for the Heiltsuk Band trading in herring spawn on kelp was <u>in itself</u>, a central and significant feature of Heiltsuk society and an integral part of their distinctive culture prior to contact[144]'.

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[137] Ibid 59.
[138] Ibid 51.
[139] *Lax Kw`alaams Indian Band v Canada* [2011] 3 SCR 535 51.
[140] [1996] 2 SCR 672.
[141] See approaches taken to socio-economic rights as 'real rights' in M Salomon A Tostensen A & W Vandenhole, *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007); O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 532; L Minkler, *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013).
[142] [1996] 2 SCR 723.
[143] Ibid. Per Lamer CJ, Sopinka J, Gonthier J, Cory J, Iacobucci J and Major J at para 3 held that 'to merit constitutional protection, a practice, custom or tradition which is integral to the Aboriginal community must be shown to have continuity with the practices, customs or traditions which existed prior to contact. The evidence satisfied this requirement. The commercial trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact and was not incidental to social or ceremonial activities. An Aboriginal right to trade herring spawn on kelp on a commercial basis was established.'
[144] The SCC elaborated that 'the significant difference between the situation of the appellants in this case, and the appellants in *Van der Peet* and *NTC Smokehouse*' lies in the fact that for the Heiltsuk Band trading in herring spawn on kelp was not an activity taking place as an incident to the social and ceremonial activities of the community; rather, trading in herring

It is thus clear that commercial rights are afforded legal currency if there is evidence of those rights existing upon colonial encounter: a process, which freezes Aboriginal rights by reference to pre-contact practices, denying them the right to adapt, as all peoples must, to the changes in the society in which they live[145]. This position appears to stifle the development of rights to land framed as developmental and thus socio-economic rights and needs.

Through these substantive and temporal requirements, Aboriginal groups are trapped in a western legal definition of authenticity to gain formal title to their ancestral lands[146]. Wolfe[147] describes this within his powerful notion of '*repressive authenticity*' in which a claimant's entitlement to land requires conformity to an idealised authenticity as if untouched by colonial history. In some of the worst cases, judicial interpretation severely limits the development of socio-economic rights containing rights to those serving basic sustenance and minimum basic requirements for food security and housing. This may provide evidence of O'Connell's judicial turn[148], which in this case works to subvert and thus prevent Indigenous rights from coming into direct economic competition with economic rights over land. The cumulative effect of this legal landscape is as Borrows notes, to relegate Aboriginal peoples to the backwaters of social development, deprives them of protection for practices that grow through intercultural exchange and minimises the impact of Aboriginal rights on non-Aboriginal people[149].

Worse still, the legal burden of proof rests on Aboriginal people to prove the existence of those rights even though Aboriginal groups may often be the least equipped in terms of financial assistance and technical knowledge of the common law system[150]. Whilst McNeil explains the legal rationale for placing the burden of proof on Aboriginal people on the general evidentiary rule that in civil actions the plaintiff bears the onus of proving the facts

spawn on kelp was, in itself, a central and significant feature of Heiltsuk society and an integral part of their distinctive culture prior to contact' R *v Gladstone* [1996] 2 SCR 723.

[145] Referring to the dissenting opinion in Van der Peet of McLachlin J 632.

[146] Sawyer S, Gomez E, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State*, (Palgrave Macmillan 2012) 52.

[147] Wolfe P, *Settler Colonialism and the Transformation of Anthropology*, (Cassell 1999) 202.

[148] See P O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 MLR 533. He argues that there has been judicial turn in the era of neo-liberal globalisation in which socio-economic rights are being fundamentally undermined by a judicial movement involving both the discursive and material negation of the value of such rights, despite progress in their formal recognition and even constitutional entrenchment. For O'Connell, neoliberalism, of necessity, carries with it very definite understandings of which rights merit respect in a market utopia and they are, fundamentally negative rights.

[149] Borrows J, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002) 61.

[150] See *Delgamuukw v British Colombia* [1997] 3 SCR Lamer CJ stated that 'In order to establish a claim to Aboriginal title, the Aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title' 144.

on which their claim depends[151], the inequity of such a legal position which based on the above evidence, denies equality of arms is strong. Thus, one might question such a strict approach given the obvious inequity of placing the burden of proof on a community with little or no experience of speaking to Western legal systems. These legal requirements do not appear to harmonise with the ostensibly generous policy positions behind modern Aboriginal title recognition which in Canada speaks to just settlement for Aboriginal groups[152] and in Australia, a political approach which in the spirit of Keating's 1992 *Redfern speech*[153] stated 'there would be ungrudging and unambiguous recognition and protection of native title'. As an example of state made pluralism, the Australian system of native title is, ostensibly at least, undeniably grounded in the basic principle of equality of all before the law and a 'thick' rule of law in its effort to rectify the consequences of historic injustices to Aboriginal and Torres Strait Islanders[154].

Let us not forget that in the 1984 case of *Guerin v The Queen*[155], the SCC directly affirmed and imported the historical moment of discovery and with it, legal processes of explosive colonisation, into legal jurisprudence in its observance 'the principle of discovery gave ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished[156]'. Remarkably this legal dicta resonates the past discriminatory treatment of native populations in the leading 1823 colonial era case of *Johnson v McIntosh*[157], in which Chief Justice Marshall affirmed how 'on the discovery of this immense continent'….the 'superior genius of Europe might claim an ascendancy' and 'appropriate to themselves as much of it as they could acquire[158]'.

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[151] McNeil K, *The Onus of Proof of Aboriginal Title*, Osgoode Hall Law School, Toronto, 1999 at 8 and see Tapper C, *Cross and Tapper on Evidence* (12th edn, OUP 2010) 129 'the proponent of a claim has an evidential burden which will not normally be shifted to the defence at common law even in cases where strong evidence will be required for the defence to succeed on that issue'.

[152] *R v Sparrow* [1990] 1 SCR. 1075.

[153] Redfern Speech (Year for the World's Indigenous People) delivered in Redfern Park by Prime Minister Paul Keating 10 December 1992.

[154] Which intends to rectify the consequences of past injustices by the special measures contained in the NTA and ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire

[155] [1984] 2 SCR which noted that 'the nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered' 382.

[156] [1984] 2 SCR 378.

[157] [1823] 21 US (8 Wheat).

[158] See *Johnson v McIntosh* [1823] 21 US (8 Wheat) at 21 ''On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves as much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants offered an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy', per Chief Justice Marshall.

This historical reference point to discovery in *Guerin v The Queen*[159] provides important clues or 'signifiers' within current legal narrative of the transnational governance assumptions of European cultural superiority and the primacy of settled cultivated land upon which legal construction of rights takes place. As Borrows suggests, the common law is entirely complicit in the continuation of this civilising mission through legal. For Borrows, these types of 'signifiers' are not coincidental: they provide informative evidence through which the SCC has picked an 'original' moment to guide their interpretations and which are repeatedly used in legal construction to elucidate this moment (which the court has itself fabricated)[160]. Skilfully mapping the legal terrain his work demonstrates how 'originalist' method of interpretation shape the development of Aboriginal rights in Canada to essentially stunt and exclude the growth of Indigenous rights[161] which are not connected to founding original intentions and events. The legal effect of this construction is to 'freeze' Indigenous rights, freedoms and values in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs[162].

Through the Indigenous character of Nanabush[163] he reveals the inherent biases within the domestic legal system to reveal the legal effects of the confusing, contradictory, severely limiting and hidden cultural (dis) order[164] of Canadian Aboriginal rights jurisprudence. This chapter suggests some of those legal methods aiming to 'correct' and 'understand' the wandering deviance of Nanabush for example through Western occupation requirements and need for site-specific rights. This approach is similar to Shamir's[165] study on the socio-legal effects of conceptualising the Negev Bedouin as wandering and rootless nomads who are heading nowhere perpetually within Locke's state of nature waiting for 'civilisation'.

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[159] [1984] 2 SCR which noted that 'the nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered' 382.

[160] Borrows J, *Freedom and Indigenous constitutionalism* (University of Toronto Press, 2016) 139.

[161] Ibid 158.

[162] *British Colombia Motor Vehicle Act* [1985] 2 SCR 486 at 509 stating that this historic method of interpretation results in the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs…if the newly planted 'living tree' which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials…do not stunt its growth, and more generally see Borrows J, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016) chapter 4.

[163] For example, his justification for the formal recognition and implementation of Indigenous law as a source of law in Canada is grounded firmly within arguments familiar to modern rule of law scholars: principles of institutional morality, inequality and the rule of law and specifically, the fact that Canadian courts have remained entirely uncritical of the continued underlying assumption of Crown title and sovereignty despite the presence of an unextinguished prior and continuing legal order and the effects this approach has had on communities, see Borrows J, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002) 112.

[164] Borrows J, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002) 57.

[165] Shamir R, 'Suspended in Space: Bedouins under the Law of Israel' (1996) 30 Law & Society Review 231.

Borrowing from case law on Aboriginal land rights from Canada and Australia this chapter has demonstrated how a tide of regressive judicial originalism has swept through Canadian and Australian jurisprudence. This has carried with it a legal experience for Aboriginal people of post colonialism, separation, fragmentation, containment, homogenisation and general ambivalence to the development of Indigenous rights to land.

This evidence of narrow and seemingly biased judicial interpretation is quite remarkable when read in context with the founding legal principle of non-discrimination, which gave birth to the leading Indigenous case of *Mabo v Queensland (No. 2).* In that case, racial discrimination was used to overturn the colonial concept of '*terra nullius*' or 'vacant' land as a discriminatory 'fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent[166]'. The Australian Supreme Court reached this landmark decision by positing its inconsistency with the Australian Racial Discrimination Act 1975 and more specifically, article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination[167]. Noting how article 5 specifically protects the right to own property alone or with others, the court concluded that extinguishment of traditional title of the Meriam people without compensation would offend applicable racial discrimination laws[168]:

There is therefore, an identifiable, if measurably slim piece of domestic case law which ostensibly frames Indigenous land rights directly in conversation with international racial discrimination provisions. However, this type of discrimination is not akin to the type of non-derogable peremptory legal norm recognised under the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, as racial discrimination, discussed in chapter 1. Criteria for establishing peremptory norms are stringent with the articles noting that relatively few peremptory norms are recognised[169]. Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against

[166] *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA) with the judges noting how 'a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration' 42.
[167] Article 5 requires that 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights', with sub-section (v) referring to 'the right to own property alone as well as in association with others'.
[168] See *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA) at 127 'if the traditional title of the Meriam people may be extinguished without compensation, they do not enjoy a right that is enjoyed by other titleholders in Queensland or, at the least, they enjoy a right to a more limited extent. A law which purported to achieve such a result would offend section 10(1) of the Racial Discrimination Act and in turn be inconsistent with the Act within the meaning of s.109 of the Constitution…and the proposed law would be invalid to the extent of the inconsistency'.
[169] See ILC Draft Articles, Article 26(5).

humanity and torture, and the right to self-determination[170]. At present racial discrimination as a pre-emptory legal norm is only recognised in the specific context of apartheid policies[171] and thus evidence of a cumulative legal and social policy of racial segregation. Moreover, as this chapter has sought to argue, the trajectory of judicial interpretation discussed herein has eroded for Aboriginal groups any substantive application of non-discrimination rights as a means to access legal rights and protection to traditional land and property.

In sum, the case law displays a number of themes relating to what leading legal scholar in Indigenous rights, John Borrows calls legal 'originalism[172]': being a judicial philosophy that roots constitutional rights and principles in historic argumentation. For Borrows, whilst non-discriminatory understandings of history are an important guide to constitutional interpretations, the SCC's current approach to Aboriginal rights and 'Aboriginalism' overemphasises the past by restricting the constitution's meaning to specific foundational historic moments. The SCC has in *Ontario Hydro v Ontario (Labour Relations Board)*[173], explicitly rejected the practice of originalism in favour of the now dominant purposive and dynamic 'living tree' approach to constitutional interpretation in Canada[174]. Yet Borrows opines that 'the Supreme Court and other constitutional participants might be surprised to discover that originalism is flourishing under our noses, because the practice does not quite go by this name in Canada; in this country, it goes by the name 'Aboriginalism' and specifically, judicial interpretation of Aboriginal rights under section 35(1) of the Canadian constitution[175].

This chapter has identified two typical 'liberal' sources of accommodating positive measures relating to Aboriginal rights to land in Canada and Australia emanating from constitutional and statutory legal sources. In accordance with common law tradition these rights are interpreted through judge made law. It has argued that the legal parameters and narratives

[170] Ibid, Article 26(5).
[171] Ibid, Article 15 (4), article 40 (4) stating the special case of apartheid due to its *cumulative character* of conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.
[172] See Borrows J, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016) 130 stating that judicial originalism coalesces around an idea that the law has a specific historical meaning to which judges and politicians must defer thus privileging a 'settled view' of a particular moment in the past. Originalism generally places weight on formative historical understandings and meanings whereas other forms of interpretation draw guidance from history but give historical context lesser weight.
[173] [1993] 3 SCR 327 stating that 'this court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution'.
[174] Borrows J, *Freedom and Indigenous constitutionalism* (University of Toronto Press 2016) 133 referring to a long line of Canadian decisions including *Reference re Same-Sex Marriage* [2004] 3 SCR 698 *Re BC Motor Vehicle Act* [1985] 2 SCR 486 and others to justify this approach.
[175] Borrows J, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016) 158.

through which rights are developed and implemented are characterised by fragmentation through for example, the shaping of rights as unbundled and 'site specific' rights to specific land. The chapter evidences how the jurisprudence around Indigenous rights to land reflects this narrative of 'difference' and a vocabulary of different, special or '*sui generis*' rights to be accommodated within the liberal political framework. Moreover, rights are only recognised through satisfaction of onerous legal requirements steeped in judicial Originalism. Evidence of this parochial 'Originalist' judicial construction can be found in the European narrative on 'prior occupation', legal evidence of ongoing 'authentic' connection to traditional culture and judicial blockage when groups attempt to confront this legal originalism to request the adaption of traditional rights to modern commercial equivalents of those same rights. This type of 'originalist' legal construction work to 'freeze' the living tree of Aboriginal rights to land. Characterised by fragmentation and legal construction which over emphasises the importance of authenticity and Originalist legal thinking., it is suggested that those legal processes have worked to continue a restrictive canon of rights as comprised of historically limited 'use and occupation' which have not developed much further than colonial times.

Those parochial and Euro-centric legal processes of interpretation have, it is argued worked to continue the continuum starting from the days of Vattel through which Imperialist thinking has limited Indigenous rights to 'use and occupation'. In sum, those legal requirements might resonate and continue the political and economic governance policies and processes discussed in chapter 2, specifically those relating to the agricultural argument positing the superiority of settled European cultivation. When put together those legal and political economy governance processes result in weakened, fragmented and limited rights which have compromised the accessibility, effectiveness and development of Aboriginal title rights in Canada and Australia to provide a uniform fundamental or collateral right to land for groups. In light of the above, it is difficult to see how current judicial interpretation of Aboriginal land rights might advance a 'thick' rule of law[176] and developmental narratives

[176] An approach also favoured by English constitutional law scholars such as T Bingham, The Rule of Law (Penguin 2010) 60 whose understanding of the rule of law requires laws to be judged by their morality and fairness. In his seminal book he postulates eight sub-rules underpinning the rule of law. Paraphrased these are accessibility of the law, questions of legal right and liability to be decided by law and not discretion, equality before the law, the exercise of ministerial powers in good faith, fairly, reasonably and for the purpose for which the powers were conferred, adequate protection of fundamental human rights, means for resolving bona fide civil disputes, a fair trial and compliance by the state with its obligations in international law as in national law and See Allan TRS, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 2, in which he conceptualises the rule of law as a 'rule of reason' whereby the legality of a person's treatment depends on its being justified and shown to serve a defensible view of the common good (broadly understood to mean for the good of a community whose members are accorded equal respect and dignity, according to a rational account of their collective well- being).

of ‘fairness’ in the 2015 Sustainable Development Goals. Although basic recognition of traditional rights in law is valuable, drawing on the above analysis the interpretative quality given to those rights to land as a form of property right appears fragile. These empirical observations inform a general insight, albeit limited to only two jurisdictions, that the legal form of rights as constitutional or statutory for example, is of secondary importance to the more important issue of promoting the purposive judicial interpretation of those constitutional or statutory rights as a legal tool through which to advance Fairness for Aboriginal groups.

In the next chapter, we move along the continuum *of state centred law*, to examine evidence of a right to land for legally recognised ‘displaced’ Indigenous and non-Indigenous actors under *international human rights norms*.

CHAPTER 5: 'COLLATERAL' RIGHTS TO LAND. EXAMPLES FROM INTERNATIONAL LAW ON DISPLACEMENT

This chapter examines what evidence there is of a legal 'right to land' for *displaced*[1] Indigenous and non-Indigenous communities[2] under international human rights case law and legal instruments and, the effectiveness of legal practice in providing protection for evicted persons. It discusses how case law and international instruments translate the social experience[3] of *land displacement* into violations of human rights norms to property and possessions[4], privacy and family life[5], freedom of movement[6], non-discrimination[7], an

[1] As the following chapter evidences, for Indigenous and non-Indigenous groups, international case law in the context of 'eviction' from land or property generally considers human rights violations as matters of 'displacement'.

[2] Given that the objective of this study is to identify and examine general international legal norms relating to a right to land, a decision was made to assess case law relating to displacement regardless of Indigenous status to determine what, if any, legal trends might be ascertained.

[3] Sociologists have long understood the impoverishing impact of forced displacement and development displacement from land. Cernea's seminal research provides a framework in which he enumerates the main impoverishment risks of displacement as landlessness, joblessness, homelessness, marginalisation and food insecurity, loss of access to common property resources, increased morbidity and community dislocation. Cernea M, 'African Involuntary Population Resettlement in a Global Context' (1997) 045 World Bank Environment Department Papers Social Assessment Series 19.

[4] The right to own property is contained in article 17 of the UDHR, article 5(d) (v) of the ICERD and, article 21 of the American Convention. Also see article 14 of the ACHPR and article 1 of the ECHR, which frames property in the context of the right to the peaceful enjoyment of possessions. International humanitarian law also establishes a customary international humanitarian norm requiring states to protect the property rights of displaced persons. Henckaerts JM and Doswald B, *Customary International Humanitarian Law*, Volume 1: Rules (CUP 2005) rule 133 (Property Rights of Displaced People).

[5] The right to private life and home is widely disseminated in article 17 ICCPR, article 10 ICESCR, article 8 ECHR, article 11 American Convention, article 18 ACHPR, article 16 of the Convention on the Rights of the Child and article 16 of the European Social Charter.

[6] Freedom of movement is contained in article 13 of the UDHR, article 12 of the ICCPPR, article 5 of the ICERD, article 2 of protocol 4 of the ECHR and in regional treaties including article 22 of the American Convention and article 12 of the ACHPR.

[7] ICERD article 5 stating 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights', with sub-section (v) referring to 'the right to own property alone as well as in association with others'.

adequate standard of living[8] including food[9] and, culture[10]. Those rights emanate from a range of legal sources, including, the Universal Declaration of Human Rights ('UDHR'), the International Convention on the Elimination of all forms of Racial Discrimination ('ICERD'), the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). Regional sources include the American Convention on Human Rights ('American Convention'), the African Charter on Human and Peoples' Rights ('ACHPR') and the European Convention on Human Rights ('ECHR'). Through an analysis of legal rights in the context of case law on 'displacement', this chapter attempts to identify any generic legal 'trends' or 'practices' which suggest legal recognition of a fundamental 'ownership' right or, any secondary collateral rights to property, food, culture, for example, which might support the development of a clear and legally binding right to land. In this way, the chapter seeks to identify any hierarchically superior[11] principles of international law that might speak directly to national legal systems as evidence of any higher international legal norm, thus bolstering legal support for harmonising domestic law with any such norm.

Finding legal evidence of any such emerging basic or *de minimis* legal norm which might directly relate to or support actors claiming special rights to land is, therefore, vital in fulfilling the actor and Fairness based objective of this thesis. This actor-focused perspective

[8] The right to an adequate standard of living is contained in a number of treaties including article 25 of the UDHR, article 11(1) and (2) (the later containing the right to be free from hunger) of the ICESCR, article 24 (2) and 27 of the Conventions on the Rights of the Child and article 16 of the ACHPR. Article 18 of the Guiding Principles and article 21 and 24 of the UNDRIP add specific rights to housing, sanitation and health and paragraph 52 of the Basic Principles and Guidelines on Development Based Evictions and Displacement specifically refers to displaced persons right to food, water, shelter, livelihood sources, clothing and access to common property resources. The Committee on Economic, Social and Cultural Rights, twenty-fifth session, Geneva, 23 April-11 May 2001, UN Doc E/C.12/2001/10 states that the current international human rights regime addresses issues of inequality, poverty and justice through the system of social, cultural and economic rights: rights to work, food, housing, health and adequate standard of living and culture, thus providing the clearest legal elaboration of a cosmopolitan legal approach.

[9] The Committee on Economic, Social and Cultural Rights, General Comment 12: the right to adequate food (Art. 11 of the Covenant), 12 May 1999, U.N. Doc. E/C.12/1999/5 6, states that the right to adequate food will have to be realised progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters. The Committee states that it considers that the core content of the right to adequate food implies: the *availability* of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture and the *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

[10] Cultural rights are protected under article 27 of the UDHR, article 27 of the ICCPR, article 15 of the ICESCR, article 5e(vi) of the ICERD, article 30 of the Convention on the Rights of the Child and article 30 of the Convention on the Rights of Persons with Disabilities. At the regional level cultural rights are entrenched in article 17(2) and (3) of the ACHPR and article 14 of the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights. Special note is made of the first legally binding international instrument dealing with the protection of national minorities, the 1995 European Framework Convention for the Protection of National Minorities specifically designed to protect the growing number of culturally, linguistic and ethnically diverse communities emerging in the ex-Yugoslavia region. Even though the convention centres on linguistic and education rights and not land, it can be viewed as an example of a legally binding instrument which protects cultural and ethnic minorities.

[11] See generally, the excellent piece: D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291.

to the examination of law applies an approach in transnational legal theory[12] that as an alternative to state bound approaches to law, places Indigenous actors, their special relationship to land and the legal, economic and political context and related processes that might compromise the special relationship to land, at the focus of legal analysis.[13]

Having brought affected actors into the law-making processes, this chapter explores what affect the specific political and economic transnational legal processes identified in chapter 3 might have on the efficacy and availability of the rights identified herein. For example, whether and how, those transnational legal processes evidence the continuation of the specific governance paradigms discussed in chapter 3. If so, whether those paradigms might strengthen or compromise the effectiveness and application of the any fundamental or collateral right to land identified here, with consequences for the subversion or advancement of Fairness for displaced persons.

First, the following two general observations on property rights and Indigenous land rights are made. The right to own property is not found in the ICCPR[14] or the ICESCR: being the two salient legal instruments directly speaking to social and economic rights. In contrast, it is incorporated into a number of regional human rights instruments[15] and article 17 of the UDHR[16] that frames the right in a 'negative' formulation not to be arbitrarily deprived of property. This altogether deficient approach to property within the primary international and regional legal instruments is problematic for groups with a special connection to land and

[12] Transnational legal theories as it specifically speaks to law depart from Hart's idea of law that have come to frame dominant methodological paradigm of the Westphalian state-ordered model. That model presents the state as the ultimate point of reference for both domestic and international law and places law's ultimate identity and unity in its ability to be 'recognised' by legal officials and dispensed by the state (HLA Hart, *The Concept of Law* (2nd edn, Oxford Clarendon Press 1994). It includes the examination of non-state centric legal processes emerging from modern globalised contexts such as development projects and examines how globalisation processes might influence and contest with legal norms. Transnational approaches combine rules in areas such as corporate, labour, constitutional, environmental and contract law. On this connectivity, P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50, 77. During the course of this research, conversations related to issues of anthropology, history, sociology, development and economy were encountered which spoke towards and justified a transnational approach.

[13] HH Koh, 'Transnational legal processes' (1996) 75 Nebraska Law Review 181. Koh provides a synopsis of TLT a study of 'transnational legal processes' involving the theory and practice of how 'public and private actors, nation states, international organisations multinational enterprises, non-governmental organisations and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalise rules of transnational law'.

[14] *O.J. [name deleted] v Finland*, Communication No. 419/1990, U.N. Doc. CCPR/C/40/D/419/1990 (1990) 3.2.

[15] For example, article 5(d) (v) of the International Convention on all forms of Racial Discrimination ('ICRD'), article 21 of the American Convention on Human Rights ('American Convention'), article 14 of the African Charter on Human and Peoples' Rights ('ACHPR') and article 1 of the European Convention on Human Rights ('ECHR'), which frames property in the context of the right to the peaceful enjoyment of possessions.

[16] Article 17 states that (1) Everyone has the right to own property alone as well as in association with others and (2) No one shall be arbitrarily deprived of his property.

for whom experiences of displacement can have much deeper social, economic and cultural effects stretching beyond disturbances to tangible property, privacy and family life.

Second, within international jurisprudence, the recognition of non-Western forms of land relations is relatively recent. In the 1975 case of *Western Sahara* [17], the International Court of Justice (ICJ) recognised the customary ties to land of the Bilad Shinguitti's traditional customs 'concerning the use of water-holes, grazing lands and agricultural lands'[18]. In a dam dispute case between Hungary and Slovakia[19], Judge Weeramantry debated how methods for promoting sustainable environmental development might benefit from conversations with differing traditional legal systems such as Tanzanian irrigation systems used by tribes[20] and from which he elaborated the modern legal concept of sustainable development. Those cases do show some evidence of an emerging legal practice recognising traditional rights to land. However, those rights are typically peripheral in that in the latter case they are located within a *minority* legal opinion and the former case does not pay close attention to the practical weight or quality of those land relations in comparison to non-traditional forms of land rights.

The general rule in international law appears to be one of translating issues of land relations and land or property loss as specific violations of property rights through an economic narrative of possessions, economic livelihoods and financial compensation.[21] Indeed, legal practice evidences a preference for framing land itself and relations around it, whether formal or customary, as 'economic' property. Therefore, legal property can include land, crops and livestock used for livelihood creation such as rice growing.[22] Property includes home and occupancy rights,[23] loss of income, alternative accommodation[24] and economic resources deriving from land used for traditional activities such as grazing and forestry from which beneficiaries earn their living[25].

[17] *Western Sahara*, Advisory Opinion, Judgement, ICJ Reports 1975.
[18] Ibid 136.
[19] *Case concerning the Gabicikovo-Nagymaros Project Hungary/Slovakia*, 25 September 1997, ICJ Reports.
[20] Ibid, noting that Western countries could learn from the sustainable practices of aquifer development in Sri Lanka and the construction of irrigation furrows by Tanzanian tribes to collect, and transfer water to demonstrate how communities there supplied water through a sustainable irrigation system.
[21] Specific examples of the violation of the right occurring because of the long term threat of expropriation from property for a proposed social redevelopment scheme (see *Sporrong & Lonnroth v Sweden*, no. 7151/75; 7152/75, ECHR 1982 and *Zubani v Italy*, no. 14025/88 ECHR 1996-IV.
[22] *Akkus v Turkey*, no. 19263/92, 45, ECHR 1997 categorising land used for growing rice as property
[23] *Mara Turundzic & Smijika Francic v the Federation of Bosnia and Herzegovina*, Commission on Human Rights, Case No: CH/00/6143 and 6150 [2001] and *the Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 [2001].
[24] *Akdivar and Others v Turkey*, no. 21893/93, ECHR 1996.
[25] *Dogan and Others v Turkey*, no. 8803 – 8811 1/02, 8813/02 and 8815-8819/02, ECHR 2004-VI.

For Indigenous Persons (IPs), courts have slowly begun to recognise that the concept of 'home' includes both moveable physical dwellings and more pertinently, traditionally occupied land to which they have a special spiritual and cultural attachment[26]. A small handful of legal cases evidence this approach. In *Centre on Housing Rights and Evictions (COHRE) v Sudan*[27], the African Commission on Human and Peoples' Rights (African Commission), drawing on European jurisprudence[28] held that the forced eviction of the Fur, Marsalit and Zaghawa tribes was a breach of property rights. The commission took care to confirm that informal rights were not a bar to legal protection and that the latter hinged on loss of livelihood potential from land rather than the presence of formal title[29]. In the same year, the commission read property rights to include the unique cultural rights of the Indigenous Endorois pastoralist families evicted from ancestral land in the Kenyan Rift Valley to permit ruby mining and a tourist game reserve.[30]

Specific cases dealing with the continued denial of access to land such as *Loizdou v Turkey*[31] and inadequate compensation for land expropriated to construct a hydroelectric dam,[32] were deemed property violations. The burning and destruction of homes by Mauritanian[33] and Nigerian[34] state authorities and upon the forced expulsion of aliens and nationals from Angola[35] and Mauritania[36] resulted in violations of property rights. *Dogan v Turkey*[37] protected the customary and communal land usage of communities' 'unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land'[38], as possessions including overall economic resources and revenue derived from the

[26] In *276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Humans and Peoples' Rights, 46th Ordinary Session, 25 November 2009, the commission noted that the ancestral land around Lake Bogoria was the spiritual and ancestral home of the Endorois people 166.
[27] African Commission on Human and Peoples' Rights, Communication No. 279/03-296/05 (2009).
[28] Specifically, *Akdivar & Others v Turkey* [1996]; *Dogan v Turkey* [2004].
[29] *COHRE v Sudan* African Commission on Human and Peoples' Rights, Communication No. 279/03-296/05 [2009] at 205 stating 'it doesn't matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property'.
[30] *276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Humans and Peoples' Rights, 46th Ordinary Session, 25 November [2009].
[31] No. 15318/89, ECHR, 1996.
[32] *Akkus v Turkey*, no. 19263/92 ECHR 1997, see also *Zwierzynski v Poland*, no, 34049/96, ECHR 2001 relating to the expropriation of property without justifiable public interest.
[33] *Malawi African Association and Others v Mauritania*, African Commission on Human and Peoples' Rights Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 [2000].
[34] *Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights Comm No. 155/96 (2001).
[35] *Union Inter Africaine des Droits de L'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v Angola*, African Commission on Human and Peoples' Rights, Comm. No. 159/96 [1997].
[36] *Bah Ould Rabah v Mauritania*, African Commission on Human and Peoples' Rights, Comm. No. 197/97 [2004].
[37] *Dogan and Others v Turkey*, no. 8803 – 8811 1/02, 8813/02 and 8815-8819/02, ECHR 2004-VI.
[38] Ibid 156.

communities from which 'they earned their living from stockbreeding and tree-felling'[39]. The court chose to frame displacement as proprietary violations of 'economic resources'[40] even when it acknowledged the conditions of extreme poverty….inadequate heating, sanitation and infrastructure'[41] the applicants have lived in because of displacement.

Jurisprudence on IPs emanating from the Inter-American Court of Human Rights (IACtHR) presents an interesting body of regional international case law extending a multicultural interpretation of what constitutes property rights under article 21 of the American Convention[42]. The IACtHR applies a purposive and communitarian interpretation of the right to property as inclusive of 'the fundamental basis to develop their culture, their spiritual life, their integrity and their economic survival'[43], thus reading 'property' and proprietary interests under article 21 to include unique Indigenous cultural heritage and providing groups with equal recognition to economic relations to land. In *Mayanga (Sumo) Awas Tingi Community v Nicaragua*, IACtHR noted, for the first time, that article 21 of the Convention protects the right to property in a sense which, through an evolutionary interpretation, includes the rights of members of the Indigenous communities within the framework of communal property[44]. It noted that the state's grant of logging concessions in Mayanga territory without consulting with the community constituted a violation of article 21. Interpreting Indigenous property rights as equal to conventional forms of property rights, it held 'the non-recognition of the equality of property rights based on Indigenous tradition as contrary to the principle of non-discrimination[45] of the American Convention[46].

Similar communitarian approaches to property ownership were applied in Belize, when the Inter-American Commission on Human Rights in *Maya Indigenous community of the Toledo*

[39] Ibid 139.
[40] Ibid, the court opined 'all these economic resources and the revenue that the applicants derived from them may qualify as 'possessions' for the purposes of Article 1' 153.
[41] Ibid 153.
[42] Article 21 states that 'everyone has the right to use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society'.
[43] *Sawhoyamaxa Indigenous Community v Paraguay* Judgement of 29 March 2006 (Inter-Am Ct. H. R. (Ser. C) no. 146 (2006)) 133.
[44] See Judgment of 31 August 2001 (Inter-Am. Ct. H. R. (Ser. C) no. 79) (2001)) at 148, noting that 'through an evolutionary interpretation of international instruments for the protection of human rights…which precludes a restrictive interpretation of rights... article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the Indigenous communities within the framework of communal property'.
[45] Article 1(1) of the American Convention on Human Rights states 'the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'
[46]Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007) judgment of 31 August 2001 (Inter-Am. Ct. H. R. (Ser. C) no. 79) (2001)) at 140 (b).

District v Belize,[47] observed the 'communitarian tradition' of property rights and legally acknowledging that ownership of land can be centred on the group rather than an individual.[48] In *Sawhoyamaxa Indigenous Community v Paraguay*[49] the IACtHR noted that Indigenous 'notion of ownership and possession of land do not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention'. Disregard for a 'specific version of use and enjoyment of property springing from the culture… and beliefs….would render protection under article 21…. illusory for millions of persons[50].'

This jurisprudential discussion surrounding collective Indigenous rights as equal to Western ideas of outright ownership is novel. They depart from historical transnational governance narratives discussed in chapters 3 and 4 that limit traditional rights to use and occupation rights rather than ownership rights, thus limiting IPs ability to manage traditional lands in accordance with their developmental priorities and needs. Under those usage and occupation rights land is always subject to the government's power to expropriate upon payment of fair compensation[51] and are inherently limited by a typical characteristic which removes alienability from the bundle of property rights such that rights are only alienable to the Crown[52]. Novel at it is, purposive legal practice is not consistent.

Yet, in the same year as the *Sawhoyamaxa* case, the same court in *Saramaka People v Suriname*[53], a case involving a post colonisation tribal group displaced from their ancestral land for the construction of the Afobaka dam, reverted to the more restrictive language granting groups a parochial legal right to 'use and enjoy' their traditionally owned lands[54]. This position contrasts with previous cases positing Indigenous land ownership as, at least, equal to traditional Western property rights, thus demonstrating a legally inconsistent approach to the issue.

International courts have frequently evoked displacement as violating rights to private (and family) life and home, thus guaranteeing protection against all arbitrary or unlawful

[47] Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 [2004]
[48] Ibid at 116 (a) in which the court stated that '[a]mong Indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community'.
[49] Judgement of 29 March 2006 (Inter-Am Ct. H. R. (Ser. C) no. 146 (2006)).
[50] Judgement of 29 March 2006 (Inter-Am Ct. H. R. (Ser. C) no. 146 (2006)) at 120.
[51] For example, *Delgamuukw v British Colombia* [1997] 3 SCR at 160.
[52] McHugh PG, *Aboriginal Title, the Modern Jurisprudence of Tribal Land Rights* (OUP 2011) 334.
[53] Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)).
[54] It was noted that 'the State seems to recognize that resources related to the subsistence of the Saramaka people include those related to agricultural, hunting and fishing activities' Ibid at 126.

interference.[55] The UN Committee on Civil and Political Rights defines the concept of 'family' and 'home' broadly to mean the 'place where a person resides or carries out his usual occupation[56]'. Although not directly concerning IPs, the African Commission held that forced expulsions of populations have an adverse effect on the right to family life contained in article 18 of the ACHPR[57].

The European court has stated that displacement of Greek-Cypriot families by Turkish forces in *Cyprus v Turkey*[58] constitute a violation of the right to family life under article 8. It noted 'the restrictions which beset the daily lives of the enclaved Greek Cypriots create a feeling among them of being compelled to live in a hostile environment in which it is hardly possible to lead a normal private and family life[59]'. In *Dogan and Others v Turkey*[60], refusal of access to the applicants' homes and livelihood, in addition to giving rise to a violation of Article 1 of Protocol No. 1, constitutes….a serious and unjustified interference with the right to respect for family lives and homes'[61]. Similar article 8 violations were found in *Akdivar and Others v Turkey, Mentes and Others v Turkey, Selçuk and Asker v Turkey, Bilgin v Turkey, Dulas v Turkey, Orhan v Turkey, Ayder and Others v Turkey and Yoyler v Turkey*[62]. In *Legal Consequences of the Construction of a Wall*[63], the displacement of families caused by Israel's construction of the wall in the Occupied Palestinian Territory was a violation of the right to privacy, family and home under article 17 of the ICCPR.

Finally, cases on displacement have also been characterised as breaches in freedom of movement. The right to freedom of movement is enshrined in a number of human rights instruments stating that everyone lawfully within the territory of a state has the right to liberty of movement and freedom to choose his residence[64]. The Human Rights Commission

[55] CCPR General Comment No. 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation at 1, UN Doc: HRI/GEN/1/Rev.9 (Vol. I), 1988.
[56] Ibid at 5.
[57] *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola*, African Commission on Human and Peoples' Rights, Comm. No. 159/96 (1997) relating to the Angolan government for its expulsion of West African nationals; *Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, Comm No. 155/96, African Commission on Human and Peoples Rights (2001) relating to the Nigerian government's expulsion of the Ogoni community.
[58] No. 25781/94, ECHR 2001.
[59] *Cyprus v Turkey* no. 25781/94, ECHR 2001 at para 300.
[60] No 8803 – 8811 1/02, 8813/02 and 8815-8819/02, ECHR 2004-VI at 159
[61] *Dogan and Others v Turkey*, no 8803 – 8811 1/02, 8813/02 and 8815-8819/02, ECHR 2004-VI para 159
[62] *Akdivar and Others v Turkey* no. 21893/93, ECHR 1996, *Mentes and Others v Turkey*, no. 23186/94, ECHR 1998, *Selçuk and Asker v Turkey*, no. 23184/94, 23185/94, ECHR 1998-II, *Bilgin v Turkey*, no. 23819/94, ECHR 2001, *Dulas v Turkey*, no. 25801/94 ECHR 2001, *Orhan v Turkey*, no. 25656/94, ECHR 2003, *Yoyler v Turkey*, no. 26973/95, ECHR 2003 and *Ayder and others v Turkey*, no. 23656/94, ECHR 2004.
[63] Advisory Opinion, ICJ Reports, 2004.
[64] At the international level freedom of movement provisions are contained in article 13 of the UDHR, article 12 of the ICCPPR article 5 of the ICERD, article 2 of protocol 4 of the ECHR and in a number of regional treaties including article 22 of the American Convention on Human Rights and article 12 of the African Charter on Human and Peoples' Rights.

(HRC) has interpreted freedom of movement as the right to reside in a place of one's choice to include protection against all forms of forced internal displacement[65]. Numerous cases characterise violations in land displacement in this manner. Examples include *Malawi African Association and Others v Mauritania*[66], *DR Congo v. Burundi, Rwanda and Uganda*[67] *and Legal Consequences of the Construction of a Wall.*[68]

In contrast to the large quantity of cases discussed above asserting civil and political violations, relatively few violations of socio-economic rights such as the right to food, in the context of displacement. In the *Ogoni case*[69] Nigerian security forces' intentional destruction of the land and homes of Ogoni communities in the Niger Delta violated the minimum core of the right to food. This is defined as an obligation to ensure the availability and accessibility of food, through for example, the destruction of food sources creating significant obstacles to Ogoni communities trying to feed themselves[70]. In *Legal Consequences of the Construction of a Wall*[71], the ICJ found violations of the right to an adequate standard of living (including food)[72] in Israel's relocation of Palestinians from fertile agricultural land, olive trees, wells, citrus grows and hothouses required for economic survival, as well as violations under the ICESCR of the rights to health and to education. *COHRE v Sudan*[73] held that the displacement of Darfur children interfered with their right to education under article 17 (1) of the ACHPR[74] and that the state's destruction of houses, livestock, farms, poisoning of water resources causing mass displacement violated article 16 of the ACHPR protecting the right to the best attainable physical and mental health.

Also emerging is a steady growth of international law-making relating to the right to culture. Article 27 of the ICCPR confers rights of persons belonging to minorities to enjoy their own

[65] Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9.
[66] African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000) involving the eviction of black Mauritanians by the Moor community between 1986 and 1992 constituted a violation of their right to liberty of movement.
[67] African Commission on Human and Peoples' Rights, Communication No. 227/99 (2003) the mass transfer **o**f persons to camps in Rwanda was a breach of the right to freedom of movement.
[68] Advisory Opinion, Judgment, ICJ Reports, 2004 in which Israel's' construction of the wall of in resulted in violations of Palestinian's freedom of movement under article 12 of the ICCPR.
[69]*Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, Comm no. 155/96 (2001).
[70] *Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, Comm no. 155/96 (2001) 66.
[71] Advisory Opinion, ICJ Reports, 2004.
[72] Article 11(2) establishes the right of everyone to be free from hunger (see The Committee on Economic, Social and Cultural Rights, General Comment 12: the right to adequate food (Art. 11 of the Covenant), 12 May 1999, U.N. Doc. E/C.12/1999/5 at para 5).
[73] African Commission on Human and Peoples' Rights, Communication No. 279/03-296/05 (2009).
[74] Article 17 (1) states that 'every individual shall have the right to education'.

culture[75] was applied flexibly to protect the plural ways in which culture might manifest. For example, the HRC envisages that the 'particular way of life associated with the use of land resources, especially in the case of Indigenous people…such as fishing or hunting…. may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them'.[76]

Article 27 can be used by groups as well as individuals[77], thus opening the door for groups' claims under article 27: a logical requirement for a provision aimed at protecting minority groups. In *Chief Bernard Ominayak and Lubicon Lake Band v Canada*[78] members of the Lubicon community successfully argued that private exploitation of oil and timber concessions had destroyed traditional hunting and trapping activities within ancestral territories. The HRC recognised that 'the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong'[79]. It went onto find that recent developments threaten the way of life and culture of the *Lubicon Lake Band* and constitute a violation of article 27'.[80] In the case of *Länsman et al. v Finland,*[81] the HRC took a narrow approach deciding that the state's decision to quarry stone on traditional Sami herding territory did not constitute a denial of the Sami's rights under article 27. It noted that the 'the right to enjoy one's culture cannot be determined in abstracto but has to be placed in context'.[82] In other words, traditional rights are not absolute and 'not every interference can be regarded as a denial of rights within the meaning of article 27', however, restrictions must have 'a reasonable and objective justification and be consistent with the other provisions of the Covenant'[83]. This position appears to give strong legal support to 'economic' land usage over alternative cultural relations over land.

[75] Article 27 of the ICCPR states that 'in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.
[76] Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27): 04/08/1994 CCPR/C/21/Rev.1/Add.5, General Comment No. 23: (General Comments) at 7.
[77] Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27): 04/08/1994 CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments) at 6.2 observing, 'although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion'.
[78] CCPR/C/38/D/167/1984, UN Human Rights Committee, 26 March 1990.
[79] *Chief Bernard Ominayak and Lubicon Lake Band v Canada* CCPR/C/38/D/167/1984, UN Human Rights Committee, 26 March 1990 at 32.2.
[80] Ibid.
[81] Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).
[82] Ibid at 9.3.
[83] Ibid at 7.9.

Similarly, in *Jouni E. Länsman et al. v Finland*[84] (a further case initiated by other members of the same Indigenous community as in the *Länsman* case), the HRC held that planned logging activities on traditional Sami territory did not constitute a violation of article 27 of the ICCPR. Whilst it did not dispute that the Sami constituted a minority community who have the right to have their cultural activities protected under article 27 its decisions clearly shows that article 27 rights are by no means absolute rights. The evidence suggests that in the context of Indigenous rights, the HRC reads article 27 rights as 'thin' procedural requirement for the state to 'consider' community interests regardless of the social and cultural effects of development. Therefore, as long as the state went through procedural safeguards, for example a 'process of weighing the authors' interests and the general economic interests in the area',[85] the logging plans did not amount to a 'denial of the authors' rights under article 27. This is the case even if the consultation process was unsatisfactory to the Sami.[86]

When placed in parallel to regional jurisprudence on the right to culture in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*[87], the international legal framework appears fragmented and inconsistent. In that case, the commission found Kenya's eviction of the Indigenous Endorois community from their ancestral lands around Lake Bogoria to make way for a game reserve and ruby mine was a violation of the essence of the Endorois' right to culture. It recognised how Indigenous groups 'have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and large-scale development initiatives that tend to destroy their lives and cultures rather than improve their situation'.[88] The commission's purposive socio-economic and cultural approach to land[89] held that the restriction on the Endorois' cultural rights is not proportionate to the public interest in creating a game reserve. This was because the 'cultural activities of the Endorois community pose no harm to the ecosystem of the game reserve

[84] Communication N. 671/1995, UN Doc. CCPR/C/58/D/671/1995, opinion approved on 30 October 1996.
[85] See *Jouni E. Länsman et al. v Finland*, Communication N. 671/1995, UN Doc. CCPR/C/58/D/671/1995 at 10.5 'so that the domestic courts *considered* specifically whether the proposed activities constituted a denial of article 27 rights (emphasis added)'.
[86] Ibid at 10.5 with the HRC stating that this consultation process was unsatisfactory to the authors and was capable of greater interaction but that does not alter the Committee's assessment.
[87] *276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Humans and Peoples' Rights, 46th Ordinary Session, 25 November [2009].
[88] Report of the African Commission's Working Group on Indigenous Populations/Communities (2005) 20.
[89] For example, the court held that Kenya's failure to secure the Endorois *access* to Lake Bogoria constituted 'a denial to an integrated system of beliefs, values, norms, mores, traditions and artefacts closely linked to access to the Lake, Ibid at 250.

and the restriction of cultural rights could not be justified, especially as no alternative was given to the community'[90]. This approach appears to square directly with that of the IACtHR in that it gives substantive recognition to the cultural relations over land of pastoralists as equal to and in this unique case, prioritised over, the private rights of developers. These cases are the exception to a general legal rule evidenced in this chapter that articulates rights as economic and political rights to property and family life rather than socio-economic and cultural ones. In the event of conflict, the legal position appears to prioritise economic rights to land over alternative non-economic 'cultural' ties to land.

National cases involving the invocation of article 27 have also had mixed success. In *Kdsivarsi Reindeer Herders' Coop. v Ministry of Trade and Industry*[91] and in the *Selbu* case[92], the Norwegian Supreme Court ruled in favour of the Sami people to graze reindeer on private land by reference to article 27 of the ICCPR. The Supreme Court of Finland held that the minority rights perspective of article 27 imposes constraints on government economic development policy. However, in a Japanese case[93] arguing the expropriation by the Japanese government of land from the Indigenous Ainu[94] people to build the Nibutani dam on the Saru River violated the rights of the Ainu under article 27 of the ICCPR, the regional court upheld the political decision. The legal basis was that construction was justified based on overriding public interest, thus seemingly 'harmonising' the legal decision with political expediency

Common to each of the rights discussed in this chapter is their derogable nature. For example, a state's duty to protect family life typically is not absolute such that interferences to family life are justified if it is done *inter alia*, 'in accordance with the law and is necessary in a democratic society[95]'. Similarly, the right to freedom of movement contained in the ECHR and the American Convention[96] can be qualified by 'public interest' considerations.

[90]Ibid at 24.
[91] File No. 1447, Supreme Administrative Court of Finland, May 15, 1996.
[92]*Jon Inge Sirum and others v Essand Reindeer District and another*, 21 June 2001, serial number 4B/2001.
[93] *Kayano et al. v Hokkaido Expropriation Committee (the Nibutani dam decision)* 27 March 1997, 38 *ILM* 394 (1999)
[94] The term 'ainu' means human. At present, the Ainu people are primarily concentrated in the northern Hokkaido region of Japan.
[95] Article 8(2) of the ECHR states that 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.
[96] Article 2(4) of the ECHR, Protocol No. 4 states that 'the rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society' and similarly article 22 (4) of the American Convention permits restriction 'by law in designated zones for reasons of public interest'.

Arguably the trend towards the characterisation of certain rights as hierarchically superior[97] signifies the fragmented and divisible nature of human rights, denying its universal, absolute and indivisible cosmopolitan roots[98]. In the specific context of international case law on displacement, one might deduce, to coin Meron's phrase a 'normative order' of rights which categorises rights to land as firstly, derogable civil and political, then socio-economic rights. This normative order might work to keep intact the primacy of private land usage and thus continues to deny land's plurality: as a public good[99]' beyond its financial value[100] and in a manner which speaks to IPs.

Having discussed international case law, the following identifies and evaluates international instruments relating to displacement. In general, international legal instruments on displacement for both Indigenous and non-Indigenous groups typically find legal form within non-legally binding 'soft law' instruments. The UN Guiding Principles on Internal Displacement (Guiding Principles) is an attempt by the international community to codify the rights relating to displaced persons. The principles specifically bring the notion of internal displacement caused by large-scale development projects into international law. The Guiding Principles are incorporated into regional conventions and domestic law that is regionally implemented into the legally binding African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) that came into force on 6 December 2012[101] and has been influential in the development of European legal practice.[102]

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[97] Meron T, On a Hierarchy of International Human Rights AJIL (1986) 80 (1) 11.

[98] 1993 World Human Rights Conference, in the first operative paragraph of the Vienna Declaration and Programme of Action asserting that 'the universal nature of these rights and freedoms is beyond question'. Authors also note the wide ratification of the UDHR ICCPR and the ICESCR as testament to universality. For debates surrounding absolute and relative nature of human rights see Donnelly J, The Relative Universality of Human Rights, Human Rights Quarterly, Volume 29, Number 2, May 2007 281-306.

[99] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, 7 January 2001, UN Doc: A/HRC/16/42/Add.4, para 10.

[100] EU Task Force on Land Tenure, EU Land Policy Guidelines: Guidelines for support to land policy design and land policy reform processes in developing countries, November 2004, at 2 states that 'land constitutes an asset and a source of wealth for families and individuals as well as for communities, with strong links to cultural and spiritual values…. The interrelated social, institutional and political factors involved in land make it an asset different from all others. Land is never just a commodity. It combines being a factor of production, with its role as family or community, a capital asset and a source of identity'.

[101] Other regional initiatives include the 2006 Protocol on the Protection and Assistance to Internally Displaced Persons (the Great Lakes Protocol) and the Protocol on the Property Rights of Returning Persons that form schedules to the 2006 Pact on Security, Stability and Development of the Great Lakes Region that came into force in 2008 after ratification by 11 member states. The 2006 Pact was formulated after the 1994 Rwandan genocide that resulted in mass displacement across the Great Lakes region.

[102] *Dogan and other v Turkey*, no 8803 – 8811 1/02, 8813/02 and 8815-8819/02, ECHR 2004-VI at 154. Also see Kalin W, 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool', (2005), 24(3) Refugee Study Quarterly, 27-36 referring to acknowledgement of the principles within the Organisation for Security and Cooperation in Europe, the African Union, the Economic Community of West African States and the International Authority on Development.

References to 'development displaces' have also percolated into article 3 (1) of the International Law Association's Declaration of International Law Principles on Internally Displaced Persons 2000. These specifically includes development displaces within its definition of IDPs and states that 'internally displaced persons are entitled to all the rights conferred by international human rights law including, whenever applicable, those rights secured for aliens as refugees and stateless persons'. Both instruments provide displaced persons with minimum human rights, for example, to property and possessions, an adequate standard of living, privacy and home. They both require states to provide special protection against the displacement of Indigenous peoples, minorities, pastoralists and other groups with a special dependency on their lands[103]. Moreover, article 11 of the Basic Principles and Guidelines on Development Based Evictions and Displacement (UN Basic Principles) acknowledges the 'transnational' applicability of international law to private actors stating that a variety of private stakeholders such as corporates and international financial institutions may carry out, sanction, propose, initiate or acquiesce to forced evictions[104] with serious human rights consequences.

Of direct relevance to Indigenous groups is the ILO Convention[105] protecting the 'traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering', recognising them 'as important factors in the maintenance of their cultures'… 'economic self-reliance and development[106].' It was not until 2007, that ideas of property and land as subsistence rights defined by reference to non-economic paradigms such as cultural, spiritual and ceremonial relations to land, for example to culture[107], were taken seriously within the international community through the elaboration of the United Nations

[103] Principle 9 of the Guiding Principles and Article 7, 38 and 55(h) of the Basic Principles and Guidelines on Development Based Evictions and Displacement.

[104] Article 11 of the UN Basic Principles states 'While a variety of distinct actors may carry out, sanction, demand, propose, initiate, condone or acquiesce to forced evictions, States bear the principal obligation for applying human rights and humanitarian norms, in order to ensure respect for the rights enshrined in binding treaties and general principles of international public law, as reflected in the present guidelines. This does not, however, absolve other parties, including project managers and personnel, international financial and other institutions or organizations, transnational and other corporations, and individual parties, including private landlords and landowners, of all responsibility'.

[105] Referring to the ILO Convention No. 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries.

[106] ILO Convention article 23 states 'Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted'.

[107] For example, article 8 protects the right not to be subjected to forced assimilation or destruction of culture. Article 11 contains the right to practise and revitalise cultural traditions and customs including the right to manifest, practise, develop, and teach spiritual and religious traditions, customs, and ceremonies, as well as the restitution and repatriation of ceremonial objects and human remains under article 12. Article 13 guarantees Indigenous peoples the right to 'revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies' and obligates states to 'take effective measures to ensure that this right is protected'.

Declaration on the Rights of Indigenous Peoples (UNDRIP). The unique cultural base of the UNDRIP is supported by the binding treaty provision of ICCPR article 27.

Referred to as 'a milestone of Indigenous empowerment'[108], the UNDRIP directly provides IPs with a fundamental ownership right to land[109] and collateral right to protection of Indigenous culture[110] and economic, social development of their land[111]. It brings to the forefront the key role rights to land play for Indigenous persons through a thoughtful elaboration of land rights as part of a set of 'minimum'[112] standards necessary for the survival, dignity and well-being of Indigenous peoples. Noteworthy is the protection of rights to land beyond that of mere 'use and occupation' to entrench rights of ownership[113], protection against forcible removal without free, prior and informed consent with an option to return and provide for the development: 'maintaining and strengthening' of traditional use and occupation rights. Despite voices[114] to the contrary, the efficacy of UNDRIP is, it is argued, fundamentally undermined as it does not create legally binding obligations given that United Nations

On the issue of displacement generally, the UN Commission[115] acknowledges that forced evictions intensify social conflict and inequality affecting the most vulnerable sectors of society. Similar international, regional and leading academic legal narratives relating to IPs make the connection between land relations and the importance of 'collateral' socio-economic rights with the IACtHR stating, 'for Indigenous groups access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked

[108] Anaya J and Wiessner S, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', JURIST Forum, 2007 < http://www.jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php> accessed 15 November 2016.
[109] For example, see article 26 stating that Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
[110] Weissner S, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', (2011) EJIL 22 (1) noting how 'the effective protection of Indigenous culture is key to its understanding'.
[111] See article 32 stating that Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources and general rights to development under article 3 stating that pursue their economic, social and cultural development.
[112] See Article 43 stating that the rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world.
[113] See for example article 26 (2) stating Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquire.
[114] Weissner S, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', (2011) EJIL 22 (1) noting how a declaration may be or become binding to the extent that its various provisions are backed up by conforming state practice and a sense of state obligation or *opinio juris*. Also Barelli M, The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) ICLQ 58 957 arguing the non-binding nature of UNDRIP does not fundamentally undermine its value and that it can generate reasonable expectations of conforming behaviour.
[115] UN Commission on Human Rights Resolution 1993/77: Forced Evictions (10 March 1993).

to obtaining food and access to clean water'[116] . The UN Committee on Economic Social and Cultural Rights has singled out the particular importance of the right to food to states with Indigenous groups[117], connecting the right to food with the fulfilment of all human rights enshrined in the International Bill of Human Rights as well as wider social concerns over justice and the eradication of poverty[118]'. As Weissner notes, for Indigenous groups the continued discrimination of Indigenous people in nearly all aspects of society, one of their claims is the quest for social and economic rights such as food, healthcare, and shelter'[119].

Despite this international legal commentary, 'hard' legally binding practice evidenced in this chapter, fails to support the special relationship to land in two fundamental ways.

First, the availability of any non-derogable or peremptory right to own land is challenging. A distinguishing feature of national and international case law on Indigenous land rights is that of equality and non-discrimination. At its core, the Indigenous struggle concerns equal 'recognition' and non-discrimination against the relationship they have with land and flowing from that struggle, recognition of Indigenous property rights as equal to conventional Lockean forms of individual property[120].

Since the 1970s *race* has become a defining legal category with which to analyse Indigenous and nomadic land claims. For IPs, problems arise when equality claims are grounded in racial discrimination that is conflated with equal recognition of communal and socio-cultural relation to land as property. For example, in the leading Indigenous case of *Mabo v Queensland (No. 2)* racial discrimination was used to overturn the colonial concept of '*terra nullius*' or 'vacant' land as a discriminatory 'fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent[121]'. The Australian Supreme Court reached this seminal decision by positing its inconsistency with the Australian Racial

[116] *Yakye Axa Indigenous Community v Paraguay* [2005] The Judgement of 17 June 2005 (Inter-Am Ct. H. R. (Ser. C) no. 124 (2005)) at 167.
[117] The Committee on Economic, Social and Cultural Rights, General Comment 12: the right to adequate food (Art. 11 of the Covenant), 12 May 1999, U.N. Doc E/C.12/1999/5 13.
[118] Ibid, 4.
[119] Weissner S, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', (2011) EJIL 22 (1) 127.
[120] This plural recognition of property has been widely acknowledged by the Latin American and African Courts to include communal forms of Indigenous property: see *Mayanga (Sumo) Awas Tingi Community v Nicaragua* [2001], Yakye Axa Indigenous Community v Paraguay [2005] and Sawhoyamaxa Indigenous Community v Paraguay [2006] and *Saramaka People v Suriname* [2007] as well as cases in Belize such as *Maya Indigenous community of the Toledo District v Belize* [2004] in which the Inter-American Commission on Human Rights read the right to property to include not only individual forms of property but also those based on traditional communal claims.
[121] *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA) with the judges noting how 'a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration' 42.

Discrimination Act 1975 and more specifically, article 5 of the ICERD[122]. Noting how article 5 specifically protects the right to own property alone or with others, the court concluded that extinguishment of traditional title of the Meriam people without compensation would offend applicable racial discrimination laws[123].

There is therefore, an identifiable, if measurably slim, piece of domestic case law, which frames Indigenous land rights directly in conversation with international racial discrimination provisions. However, this type of discrimination is not akin to the type of non-derogable peremptory legal norm recognised under the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, (ILC Draft Articles) as racial discrimination. Criteria for establishing peremptory norms are stringent with the ILC Draft Articles stating that relatively few peremptory norms have been recognised[124]. Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination[125]. At present racial discrimination as a pre-emptory legal norm is only recognised in the specific context of apartheid policies[126] and thus evidence of a cumulative legal and social policy of racial segregation. In sum, there currently is no internationally recognised pre-emptory legal norm protecting Indigenous groups from land related discrimination.

Second, the categorisation of displacement violations shows a growing legal practice of protection through 'collateral' and derogable human rights norms. Judges conceptualise those legal norms as mainly civil and political rights to property, possessions, privacy, family life and freedom of movement. Given the special socio-economic and cultural relationship, Indigenous people have to traditional land; there is a worrisome lack of international case law which reflects the socio-economic and cultural effects of displacement

[122] Article 5 requires that 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights', with sub-section (v) referring to 'the right to own property alone as well as in association with others'.
[123] See *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA) at 127 'if the traditional title of the Meriam people may be extinguished without compensation, they do not enjoy a right that is enjoyed by other titleholders in Queensland or, at the least, they enjoy a right to a more limited extent. A law which purported to achieve such a result would offend section 10(1) of the Racial Discrimination Act and in turn be inconsistent with the Act within the meaning of s.109 of the Constitution…and the proposed law would be invalid to the extent of the inconsistency'.
[124] See ILC Draft Articles, Article 26(5).
[125] Ibid, Article 26(5).
[126] Ibid, Article 15 (4), article 40 (4) stating the special case of apartheid due to its *cumulative character* of conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

for Indigenous groups. When socio-economic rights are recognised, legal evidence shows a tendency to read those rights 'thinly' such that the land activities of traditional communities are matters of 'consideration' in the face of developmental activity on traditional land. This was the case in the two cases of *Länsman et al. v Finland*[127] and *Jouni E. Länsman et al. v Finland*[128] discussed above.

This 'thin' legal characterisation of rights restricts the recognition of socio-economic and cultural relations over land. Judicial interpretation might limit the availability and efficacy of any collateral rights that might emerge into a right to land for Indigenous groups and any related legal remedies of compensation for example.

When put into conversation with literature on human rights in the context of transnational globalisation processes, the above case law suggests further evidence of O'Connell's judicial turn[129] in the era of neo-liberal globalisation in which socio-economic rights are fundamentally undermined by a judicial movement involving the discursive and material negation of the value of such rights. Equally, this judicial categorisation might simply reflect an inherent structural bias within international law that views property rights as the domain of market forces: economic rights that necessitate no state interference rather than rights that require special legal protection due to their socio-economic 'survival' quality, as is the case with IPs. The look at the availability and non-availability of property rights within the international legal framework at the start of this chapter might reveal something about this paradox.

Other transnational legal processes which might affect the efficacy and availability of the rights identified in this chapter include the judicial mechanisms through which rights and related remedies are claimed. The human rights treaty bodies discussed in the above context of violations can be characterised into two broad categories. First, judicial bodies such as the European court, the IACtHR and the African Court on Human and Peoples' Rights and second, quasi-judicial bodies that issue non-binding recommendations or views such as the

[127] Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).
[128] Communication N. 671/1995, UN Doc. CCPR/C/58/D/671/1995, opinion approved on 30 October 1996.
[129] O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 Modern Law Review, p 533. He argues that there has been judicial turn in the era of neo-liberal globalisation in which socio-economic rights are being fundamentally undermined by a judicial movement involving both the discursive and material negation of the value of such rights, despite progress in their formal recognition and even constitutional entrenchment. For O Connell, neoliberalism, of necessity, carries with it very definite understandings of which rights merit respect in a market utopia and they are, fundamentally negative rights.

United Nations Treaty bodies, typically committees[130] for example the African Commission, the HRC and ICERD. The findings of the UN Committee on the Elimination of Racial Discrimination (CERD) are not legally binding on states: its opinions are recommendations to the concerned. Empirical studies on compliance find correlations in the increased rate of compliance with judicial decisions compared to those emanating from commissions and committees[131]. More generally, legal scholars specialising in application of economic rationale choice theory to law observe how lack of an effective coercive enforcement mechanism, sanctions and committee recommendations bearing no legal force also means that states suffer no real loss in failing to comply, further diluting incentives to comply.[132]

On the issue of access to justice for Indigenous actors, the CERD has given special attention to the plight of Indigenous people confirming 'discrimination against Indigenous people falls under the scope of the ICERD and that all appropriate means must be taken to combat and eliminate such discrimination[133]'. Article 14 of the ICERD[134] permits applications from groups of individuals who claim that any of the rights contained in the ICERD have been violated to submit written communications to the CERD for consideration, subject to exhaustion of domestic remedies. Yet, to date, no Indigenous group has advanced a claim through the article 14 procedure. Writers[135] comment on the 'disappointing statistical record' and weakness of the petition system highlighted by its slow internal mechanism[136] and the modest number of communications received and the overall major impediment of the sheer lack of publicity and knowledge about the existence of article 14 as a possible recourse mechanism. Drawing on this, chapter 8 extends a further example of the lack of knowledge of complaints mechanisms under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the legal effects of that knowledge deficit on legal recourse for resettled pastoralist herders in Mongolia.

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[130] These include the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on Economic Social and Cultural Rights.

[131] Shelton D, Remedies in International Law, 2nd edn, (OUP 2005), page 388.

[132] These observations are derived from Goldsmith J, Posner E, *The Limits of International Law* (OUP, 2005) chp 4, 120-128.

[133] Committee on the Elimination of all Forms of Racial Discrimination General Recommendation No. 23: Indigenous Peoples: 08/18/1997, para 1.

[134] Article 14 states that 'a State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention'.

[135] See generally Van Boven T, 'The Petition System under the ICERD: An Unfulfilled Promise', in Alfredsson et al (eds.), International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller (2nd edn., Martinus Nijhoff Publishers, Leiden 2009 and Bisaz C, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*, (Martinus Nijhoff Publishers 2012).

[136] Article 14(9) states that at least ten state parties to the convention have made the declaration in accordance with paragraph 1 of article 1 of the convention.

A further example is the European Committee on Social Rights remaining a largely unknown mechanism and labelled as an 'orphan'[137] because of its undeveloped nature, institutional lack of progressive development, lack of use of the complaints and monitoring mechanisms and general lack of progressive development of this organ[138]. This perhaps suggests a systemic ambivalence and neglect to promote structural mechanisms for protecting socio-economic rights. Studies of the African Commission demonstrate similar evidence of a general neglect or ambivalence within international law in funding, developing and publicising the availability of its monitoring mechanisms, suggesting a legal practice of creating a legal space within which states can exert neoliberal political and economic motivations to ignore and subvert socio-economic claims over land by Indigenous groups.[139]

Moreover, when those treaty bodies do invoke violations of economic, social and cultural rights grave concerns dominate the enforcement of those rights. As Shelton notes, the development and adoption of international legal norms within formal sources of international law suffers from time constraints[140]. For example, in *Cambodia v Thailand*[141] the ICJ took forty-one years to provide clarification of its original 1962 decision regarding a dispute over which country had sovereignty over a contested area of land housing the Preah Vihar temple. Implementation and enforcement of formal international legal norms at state level is also challenging. The continued failure of Turkey to comply with the court's principal judgment in *Cyprus v Turkey*[142] led the court in its 2014 general 'stock-taking'[143] of continuing violations to condemn ongoing article 8 violations in Turkey's refusal to allow the return of Greek-Cypriot displaced persons to Cyprus. The report also condemned

[137] De Schutter and Sant'Ana M, The European Committee of Social Rights (the ECSR) 71 in De Beco G, Human Rights Monitoring Mechanisms of the Council of Europe, (Routledge 2012).
[138] Ibid 98.
[139] For example, Bekker's thorough review of jurisprudence from the African Commission highlights inter alia, a serious lack of enforcement and follow-up in relation to is decisions. This 'severely undermines its credibility' and in which he points to a lack of political will on the part of many African countries to take human rights seriously that have translated into a complete disregard by states to implement the Commission's recommendations. Bekker G, The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations, Human Rights Law Review, 2013, Vol 13, No. 3, page 524. For example, an appraisal of the submission of state reports reveals an astounding disregard for implementation with 7 out of the total number of 54 states never submitting a report and over half of all states being overdue with 2 or more reports and Kenya has 4 overdue reports. Figures taken from the website of the African Commission for Human and Peoples' Rights <http://www.achpr.org/states/> accessed 18 November 2016.
[140] Shelton D, 'Normative Hierarchy in International Law' (2006) 100 The American Journal of International Law 291, page 322.
[141] Advisory Opinion, Judgement, ICJ Reports 2013.
[142] No. 25781/94, ECHR 2001.
[143] General stock-taking concerning the violations established by the Court in the case Cyprus against Turkey and analysis of the impact of the judgment of 12May 2014 on the just satisfaction, H/Exec (2014) 8 of 25 November 2014.

Turkey's continued denial of access to, control, use and enjoyment of their property and compensation[144].

Legal practice of enforcement in the specific case of Indigenous rights when placed in contest with state backed development projects is particularly worrisome. Similar to the staggering twenty years in the 2006 *Sawhoyamaxa*[145] case, the Kenyan government continually fails to implement a number of recommendations in the *Endorois*[146] case which had recommended the restitution of Indigenous lands, the payment of compensation and the development of agreements for the sharing of benefits from existing tourism and mining activities. This failure prompted the commission to call a special workshop the main objective of which 'was to forge dialogue and strategies with the Government and civil society on the status of implementation of the *Endorois* decision and the ways forward'[147]. To date only one of the commissions' recommendations has been implemented. This is the requirement for the state to register a body to represent an Indigenous community, clearly the least onerous and politically charged of its recommendations. It remains to be seen how long it will take for the full decision to be implemented, if ever. Finally, the generic lack of a legal aid scheme within the United Nations makes accessing quasi-judicial bodies such as the Human Rights Committee challenging for vulnerable groups[148] seeking to assert socio-economic rights. The HRC has, in a few cases such as *Vladimir Petrovich Lapesvich v Belarus* required states to compensate the legal costs of the victim[149], however other than these *ad hoc* recommendations the lack of an established legal aid pool is unfortunate and perhaps demonstrative of a shrinking human rights policy space.

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[144] Human Rights Watch, 'Unjust, Restrictive, and Inconsistent: The Impact of Turkey's Compensation Law with Respect to Internally Displaced People', 20 December 2006, < http://www.refworld.org/docid/45a4dffd2.html> accessed 18 November 2016.

[145] *Sawhoyamaxa Indigenous Community v Paraguay* Judgement of 29 March 2006 (Inter-Am Ct. H. R. (Ser. C) no. 146 (2006)).

[146] *276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Humans and Peoples' Rights, 46th Ordinary Session, 25 November [2009].

[147] Final Communique of the Workshop on the Status of the Implementation of the Endorois Decision of the African Commission on Human and Peoples' Rights, 23 September 2013, <http://www.achpr.org/news/2013/10/d96> accessed 18 November 2016.

[148] Scheinin M, Access to Justice before International Human Rights Bodies' in Francioni F, *Access to Justice as a Human Right*, (OUP 2007) page 149.

[149] Communication No. 780/1997, U.N. Doc. CCPR/C/68/D/780/1997 (2000)., page 10 in which the committee held that 'the State party is under an obligation to provide Mr. Laptsevich with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author'. Other cases with similar compensatory legal aid provisions include *Mr. Vladimir Velichkin v. Belarus*, Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005); *Patrick Coleman v. Australia*, Communication No. 1157/2003, U.N. Doc. CCPR/C/87/D/1157/2003 (2006); *Vladimir Viktorovich Shchetko v. Belarus*, Communication No. 1009/2001, U.N. Doc. CCPR/C/87/D/1009/2001 (2006); *Mr. Zeljko Bodrožić v. Serbia and Montenegro*, Communication No. 1180/2003, U.N. Doc. CCPR/C/85/D/1180/2003 (2006).

This final section explores the availability of rights to land and related remedies for IPs against states in the growing transnational legal context of privatising or contracting out of public policy related functions to private actors. In the specific context of evictions and displacement the UN Basic Principles acknowledge that processes of globalisation have led to a variety of public and private stakeholders such as project managers, personnel, corporations and international financial institutions carrying out processes which involve, sanction, propose, initiate or acquiesce to evictions and displacement with human rights consequences for communities.[150]

This thesis evidences specific examples of land access and land resettlement related activities regarding Indigenous land relations, which have been 'contracted out' to private entities. In chapter 8, private entity developers such as Rio Tinto (RT) and international organisations[151] (IOs) in the OT Project, have because of the transnational structure of the project, assumed responsibility for resettling herder groups from traditional land. In the Pilbara chapter, RT has entered into direct contractual arrangements which whilst not termed in those contracts as 'resettlement' contain processes through which Traditional Owners (TOs) agree to negotiate with RT rights to land relating to land access and compensation for native land. This fragmentation of public policy processes or operations to private actors arguably promotes a legal lacuna or dis-connects the ability of communities to hold states directly liable under international law for any acts committed by private entities, which have human rights consequences for communities.

The international law of state responsibility has developed two bodies of state responsibility for internationally wrongful acts loosely divided between positive acts and negative omissions of states. This body of law is often overlooked in favour of efforts within the business and human rights community to deal directly with corporate accountability for rights violations[152]. Flowing from the *Velásquez-Rodríguez*[153] case, this body of indirect legal accountability is based on omission or failure *of the state* to act to conduct 'due

[150] See the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 2011, UN Doc: A/HRC/17/31.
[151] International organisations in this study means international finance institutions such as the European Bank for Reconstruction and Development and the International Finance Corporation.
[152] See generally A Clapham, *Human Rights in the Private Sphere* (OUP 1996); A Clapham & MG Rubio, 'The Obligation of States in the Context of the Right to Health, Health and Human Rights' (2002) Working Paper Series No 3, Graduate Institute of International Studies.
[153] *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988 (Merits), Inter-American Court of Human Rights.

diligence[154]' to prevent, ensure, investigate or punish certain human rights abuses committed by private persons resulting in a finding that the state has failed in its international human rights obligations.

The core of the negative obligation to act has been applied to an important decision of the African Commission relating to the activities of multinational corporation Shell in its exploitation of oil reserves in Ogoniland. In the *Ogoni case*[155] the commission found violations of the African Charter in regard to the obligations of states with specific regards to private actors in the context of the people's rights to natural resources and the right to food. The commission found that the Nigerian Government 'facilitated the destruction of the Ogoniland' and that 'its practice falls short of the minimum conduct expected of governments'. With respect to the right to food it found that the minimum core of the right to food was defined as an obligation to ensure the availability and accessibility of food[156], which requires at a minimum that the Nigerian Government should not destroy or contaminate food sources[157].

For the commission, legal evidence of the government's 'duty to ensure' compliance with the spirit of the African Charter necessitated 'ordering or at least permitting independent scientific monitoring of threatened environments…..publicising environmental and social impact studies prior to any major industrial development and …providing meaningful opportunities for individuals….to participate in the development decisions affecting their communities[158]'. Remarkably, the commission stated that this was tantamount to a *minimum standard* in the sense that this standard of conduct lies in addition to the rights of the Nigerian government, through the state oil company NNPC, to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerian[159]'. This suggests that the international duty is entirely separate from and in addition to any socio-economic benefits supported by general narratives of 'trickle-down' economic theory discussed in chapter 3.

In principle, there is for example, no reason why a similar argument of state liability could not be made relating to specific socio-economic food and livelihood rights violations

[154] Ibid [172], the court explained the legal principle as flowing from '[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.
[155] *Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, Comm no. 155/96 (2001).
[156] Ibid 66.
[157] Ibid 65.
[158] Ibid 53.
[159] Ibid 54.

claimed by resettled Indigenous herders in chapter 8. Such a claim in state responsibility would however, be subjected to legal evidence that the Government of Mongolia (GoM) has permitted social impact studies prior to major development and has provided meaningful opportunities for individuals to be heard and participate in decisions affected them. Given the amount of social and environmental impact assessment conducted for the project which included land use and displacement issues[160], legal evidence upon which state liability might be predicated is, in all likelihood, unavailable as the minimum state duty to ensure human rights compliance through impact assessment has been met. A similar conclusion would be reached in relation to the Pilbara project in which RT has gone beyond domestic and international law as evidenced through the land rights extended in the Participation Agreement[161] (PA) explored in chapter 7.

The second international legal body of state responsibility is comprised of a set of positive obligations obliging states to act to protect individuals from private actors in two separate contexts: of empowered corporations and entities under state control. Neither of these legal situations would capture the activities undertaken by the type of private entities undertaking developmental activities and ancillary resettlement or land access processes discussed in this thesis for the following reasons.

Article 5 of the ILC Draft Articles sets out the general principle of state 'empowerment' holding that a person or entity 'empowered'[162] by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law. Article 5 contains two cumulative tests requiring first, the entity to be empowered under a specific piece of domestic law and second that the conduct concerned 'governmental activity and not other private or commercial activity in which the entity may engage[163]'. Commentary to the ILC Draft Articles clearly states that the scope of article 5 intends to capture very specific and increasingly common phenomenon of *parastatal* entities, which, for example, exercise elements of governmental authority in place of State organs, as well

[160] The Oyu Tolgoi Environmental and Social Impact Assessment dated August 2012 is available at Oyu Tolgoi's website: <http://ot.mn/environmental-social-impact-assessment> accessed 16 November 2016.
[161] 'Participation Agreement' or 'PAs' mean the claim wide private governance arrangements relating to amongst other things, traditional land access and compensation between the Aboriginal traditional owners (TOs) and Rio Tinto in the Pilbara region of Western Australia discussed in chapter 7 and subject to confidentiality arrangements.
[162] Article 5 states that 'the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.
[163] See ILC Draft Articles, Article 5 (5).

as situations where former State corporations have been privatised but retain certain public or regulatory functions[164].

The justification for attributing legal responsibility to the State under international law for the conduct of 'parastatal' entities lies in the fact that the internal law of the State has expressly conferred on the entity in question the exercise of certain elements of the governmental authority. For example, the German government has given strong support for the attribution to the State of the conduct of autonomous private bodies exercising public functions of an administrative or legislative character such as a private railway company permitted to maintain a police force[165]. Given the primary commercial activity of development projects such as those explored in chapters 7 and 8 and the lack of any enabling domestic legislation between the state and the private entity, the provisions of article 5 are not designed to capture the types of commercially motivated private entities examined in this thesis.

Article 8 of the ILC Draft Articles offers another avenue of potential state responsibility where a state instructs, controls or directs[166] a private company to act in a specific way. A good starting point for examining the applicability of article 8 to the private stakeholders[167] in this thesis is to recall the general position held in the *Barcelona Traction*[168] case confirming that international law acknowledges the general separateness of corporate entities at the national level. This is except in those cases where the 'corporate veil' is a mere device or a vehicle for fraud or evasion[169]. The ILC Draft Articles reflect this default assumption of separateness for corporate entities[170], unless they are exercising elements of governmental authority within the meaning of article 5.

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[164] Ibid, Article 5(1).
[165] Ibid, Article 5 (4): this was the example provided by the German government.
[166] Article 8 states that 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.
[167] The provisions of article 8 might also apply to a factual situation in which the criminal acts of private individuals are attributed to the state, for example in the leading case of *Prosecutor v. Duško Tadic*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999). For the purposes of this specific legal analysis of state liability in the context of privatisation this section deals with the discussion as it relates to issues of corporate entities rather than international criminal or humanitarian law.
[168] *Barcelona Traction Light and Power Company, Limited*, Judgment ICJ 1966, paras 56-59.
[169] See Salomon v A Salomon and Co Ltd [1897] AC 22, where the legal separation between a company and its shareholders was established thus allowing separate legal personality and limited liability of shareholders. The primacy of the separation between personal and corporate liabilities can only be overcome in the case of fraud and typically as a matter of last resort: see *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34 (at [27] and [34]).
[170] Article 8 states that 'since the corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State…'

Examining these control requirements in the context of private entities leads to a logical conclusion that it would be difficult to attribute any liability for human rights violations caused by private actors undertaking private commercial activities ancillary to which might attach resettlement related functions. It follows then that the baseline position in the *Barcelona Traction*[171] case would apply. So, absent any fraudulent or sham corporate arrangements, the next relevant question is whether the state owns or controls the corporate entities and if not, whether the specific private activities involve the exercise of governmental authority.

On the first point, both RT entities party to the PA and the Oyu Tolgoi project company are separate legal entities organised and registered in accordance with relevant project requirements. Furthermore, in the OT Project, the GoM is only a minority shareholder in the project with a thirty-four per cent of total shares and in the Pilbara project the Australian government is not a legal party to the PA, making it exceedingly difficult to provide factual evidence confirming state ownership or control in either case.

The next possibility is evidence that the private entity is exercising elements of governmental authority within the meaning of article 5 which requires 'governmental activity and not other private or commercial activity in which the entity may engage[172]'. Given the overriding purpose and degree of commercial activity of the Pilbara and OT Projects and the general recognition of corporate separateness in international law, it is difficult to see how this branch of international law relating to state liability for the acts of private entities would apply in these specific cases. It is for this reason that the two types of private 'contracting out' arrangements examined in chapters 7 and 8 are identified as 'non-legal' although this does not detract from the legal duties and obligations arising under private contract law under the PA.

This 'binary' public/private position under international law is unfortunate given that the Policies[173] identified in chapter 8 on land and IPs contain provisions, entitled 'private sector responsibilities[174] where government is responsible for managing Indigenous peoples' issues' or private sector responsibilities where the government is responsible for land

[171] *Barcelona Traction Light and Power Company, Limited*, Judgment ICJ 1966, paras 56-59.
[172] See ILC Draft Articles, Article 5 (5).
[173] The policies analysed in this study are the International Financial Corporation's 2012 and the European Bank of Reconstruction and Development's 2014 risk management safeguard policy 5 on land and involuntary resettlement policy and safeguard policy 7 on Indigenous peoples.
[174] IFC Performance Standards 5 and 7, paragraphs 30 and 21 respectively.

acquisition and resettlement. Under those clauses, the International Finance Corporation (IFC) requires its clients to agree to play a defined role in the management of project resettlement issues and to collaborate with the responsible government agency, to the extent feasible and permitted by the agency, to achieve outcomes that are consistent with the objectives of the relevant Policy standards. Moreover, where government capacity is limited, the IFC requires its clients to play an active role during planning, implementation, and monitoring of activities to the extent permitted by the agency for example producing supplemental resettlement plans that bring government resettlement measures up to the requirements contained in the Policies. The policy wording clearly envisage a legal situation in which a private entity would be conducting governmental responsibilities yet in the light of the above analysis it is unlikely these types of actions could invoke state responsibility under the ILC Draft Articles given the project's overriding commercial nature, leaving a large legal lacuna in state responsibility.

Out of the two bodies of legal responsibility, that relating to negative omissions of states might offer more opportunities for affected communities. As Clapham observes there are reasons to believe that the African Commission will continue to develop….an approach demanding that human rights are protected, not only from the state but also from the activities of corporations and other non-state actors in the private sphere[175]. Conceptually, the duty to ensure might offer better scope to provide 'transnational' legal solutions as it has not evolved from a legal perspective of binary state and non-state actors. Instead it is based on a 'duty to ensure' which cuts across state centric binaries of state and non-state actors and crucially, have already been applied to the private commercial entity of Royal Dutch Shell in the Ogoni case.

Perhaps unsurprising for legal scholars is the conclusion that there is yet, no legal evidence of international case law or instruments that recognises Indigenous rights to land in the context of a legally binding absolute right to ownership and protects those rights within the parameters of *fundamental and non-derogable* rights under international law. As Meron notes, this leaves the vast majority of rights in a vulnerable position, 'relegated to inferior, second class, status[176]'. In international law, discrimination is one such fundamental norm but it is limited to a specific type of racial discrimination measures such as systematic

[175] Clapham A & Rubio MG, The Obligation of States in the Context of the Right to Health, Health and Human Rights Working Paper Series No 3, Graduate Institute of International Studies, Geneva 2002.
[176] Meron T, On a Hierarchy of International Human Rights AJIL (1986) 80 (1) 11, 12.

apartheid policies which at present cannot be 'stretched' to accommodate Indigenous rights to property and land. The non-availability of discrimination as a fundamental norm works to deny the special socio-economic and cultural relationship Indigenous people have to traditional land at a fundamental level of Fairness. This is compounded by a worrisome lack of international case law which reflects the socio-economic and cultural effects for displacement for Indigenous groups and what appears from the evidence to be a judicial policy to instead categorise rights as derogable civil and political. Within international case law, the closest legal practice to what might be termed fundamental non-derogable rights can be found in the legal narrative of the IACtHR examined in chapter 5, however that practice is not as that chapter explores, consistent and uniform.

On balance, there is evidence of a growing international legal practice in which the rights to land and property of displaced persons is given legal protection through a body of 'collateral' civil, political and to some extent socio-economic human rights norms.

That international legal practice is, however, relatively recent as demonstrated by the 2007 UNDRIP which deal directly with the rights to land and property of Indigenous people. An analysis of *legal instruments* evidences that rights are typically characterised through a structurally piecemeal, fragmented and soft 'voluntary' legal approach. The efficacy of the ILO Convention is questionable given the low number of ratifications[177]. The Guiding Principles are not a legally binding document, which can be signed by states. Moreover, lack of a clear legal definition of 'development induced displacement' has denied visibility for a legally recognised group of development related 'displaced persons'[178] as subjects of international law resulting in commentators[179] valuing soft law instruments solely in terms of their 'thin' inspirational quality. Whilst there is precedent demonstrating how international soft law norms can trickle down into legally binding regional standards on displacement such as the Kampala Convention, this appears an exception rather than the rule and in any event was designed to deal with resettlement in an entirely different post-conflict situation. The fragmented and soft law nature of these legal instruments might compromise

[177] Currently, only twenty-two countries have ratified the convention.
[178] The Guiding Principles define displaced persons as those 'who have been forced or obliged to flee or to leave their homes of habitual residence in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters and who have not crossed an internationally recognised state border'. Principle 6(2)(c) states that 'large scale development projects which are not justified by compelling and overriding public interests' but which result in displacements are prohibited.
[179] Juma L, 'An Overview of Normative Frameworks for the Protection of Development Induced IDPs in Kenya', (2013) 6 Afr. J. Legal Studies 26.

the practical use and application by actors or their legal representatives' efforts to protect rights to land.

In the few cases in which socio-economic rights violations are declared, the international legal system handles and implements those cases through non-judicial forums which rely on weak reporting and non-binding legal monitoring mechanisms. No supporting legal aid scheme facilitating access to UN bodies such as the HRC by vulnerable groups seeking to assert socio-economic rights is available making access to justice particularly challenging. More generally, the structural dichotomy of the *human rights treaty bodies* into judicial mechanisms charged with protecting civil and political rights such as the ECHR and non-judicial mechanisms such as the HRC charged with implementing socio-economic rights is perhaps indicative of a wider structural bias within the human rights system towards civil and political rights.

Access to justice for displaced groups appears compromised by evidence of significant time barriers in the implementation and enforcement of international law judgements. Furthermore, there is a structural block on the ability of Indigenous actors to seek legal recourse under international law against the state, obtain access to judicial rather than non-judicial redress mechanisms and obtain financial aid to facilitate access to those mechanisms.

Other than a nascent emerging body of international law in which states might be held liable for omissions of private entities to ensure protection of human rights, there is a substantial structural inability for international law to hold states responsible for the acts of commercial entities. This is even if those entities are undertaking public policy related functions such as land resettlement through processes echoing 'contracting out' or 'privatisation' techniques. This structural inability might result from the historical Westphalian state centric public and private lines blocking the ability of affected actors to seek redress from states for the acts of private entities. Use of private sector governance tools in development projects also reflects externalisation and distancing of the state that is pushed further into the shadows of the law and legal accountability. Legally, this fragmented arm's length process means that affected communities sit in the shadow of the law leaving them with little legal visibility unable to hold states to account through structures of international law.

Put together, this structural impasse equates to a weak and ambiguous international legal governance framework on this specific topic. For example, with reference to the UNDRIP

and an IO's Policies on land and resettlement, one senior informal interlocutor[180] observed how attributing blame for the social costs of development processes does not only lie with eroding market processes but is also a direct result of the omissions and inability of the international law system itself. For example, through the increasing development, pluralism and proliferation of international legal declarations and instruments and a related systemic inability to provide binding legal instruments and mechanisms which can close legal governance gaps by providing corresponding channels and networks through which communities can exercise rights and have direct recourse to those committing harms[181]. It is however difficult to see how those structural failures can be a direct cause of adverse social impacts unlike poor project planning and governance.

Each of the deficits discussed here suggest evidence of fundamental structural and procedural problems for displaced persons due to the quality of the legal instruments available, ability to set international legal precedent to shape rights to land as meaningful socio-economic rights and to enjoy the timely enforcement and implementation of positive legal judgements.

Based on this evidence, it is tentatively suggested that the above legal barriers resonate harmonisation with Imperialist thinking within the judiciary which through interpretation, prioritises the superiority of settled and private modern economic relations over land. The judicial tendency to frame rights in terms of property and possessions for example, suggests a judicial subversion of socio-economic rights to more market friendly human rights. This parochial legal approach indicates a legal neglect or general ambivalence to the topic and perhaps advances that political and economic transnational governance paradigm on settled and private land relations within the law. The barriers relating to time, cost, liability and legal redress suggest more concerning structural barriers. These barriers might create a legal space in which states work to impress and prioritise neoliberal political and economic motivations to the detriment of socio-economic relations over land. This arguably demonstrates legal support to a continuing transnational legal governance paradigm

[180] Reference is made to informal conversations conducted in 2015 with senior members of an IO's environmental and social safeguards team which remains confidential referring specifically to the UN Declaration on the Rights of Indigenous People

[181] This approach misses the larger issue of power and the law's ability to create these channels of legal redress in the face of hegemonic economic power as scholars interested in third world approaches to international law assert, that international law has always been involved with processes of economic dominations from colonial times. A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007).

discussed in chapter 3, which resonates the agricultural argument, and with it, the prioritisation of private, settled and land relations that are vulnerable to market forces.

Finally, a legal approach, which does not translate the full social, political cultural and economic relations to land of Indigenous groups, discriminates against plural non-economic relations. Each of the legal processes evidenced above work to 'brake' the ability of international law to advance a legal narrative on Fairness understood as a thick rule of law with related implications for promoting the developmental narrative on Fairness contained in the 2015 Sustainable Development Goals.

The next chapter extends an empirical study of a community exiled from their traditional land and denied formal legal status as Indigenous under international law. Those communities claim legal recognition as Indigenous actors, a legal right to abode in their traditional land and the remedy of return under a variety of state-centric legal sources: English domestic law, international law and European laws. We not turn to the Chagos case.

CHAPTER 6: THE CHAGOS CASE STUDY

Throughout their decades in exile and despite the strong merits of their case, the Chagossian people continue their struggle for legal recognition of their traditional land rights in the Chagos islands. In this case the legal methods relating to land rights and remedies of return are identified in the application of the international legal definition of 'Indigenous', the English Magna Carta right to abode and related legal remedy to return[1] and the European Court of Human Rights application of international human rights to land and property rights.

At the time of finalising this chapter, the 2016 decision of the Supreme Court[2] to dismiss the Chagossian appeal for return has ended the legal debate on the issue for now. The rationale for the continued denial is the subject of ongoing debate amongst practitioners and academics.[3] This study proposes a re-reading of the case in light of transnational legal theory[4], which as an alternative to state centralised approaches to law, places *actors* claiming a special relationship to land and the legal, economic and political context and related processes that might compromise the special relationship, at the focus of legal analysis.[5]

Having brought affected actors into the law-making processes, this chapter then takes a transnational approach by exploring what affect specific political and economic transnational legal *processes* identified in chapter 3 might have on the efficacy and availability of the rights to land identified in this study. For example, whether and how, those

[1] The arguments made in this study are based on a number of interviews conducted between June and September 2015 with Chagossians living in Crawley and Croydon, interviews with legal advisors to Chagossians and from attendance at the October 2015 All Party Parliamentary Group (APPG) debate on the Chagos Islands in Westminster.

[2] See *R (on the application of Bancoult (No 2)) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2016] UKSC 35.

[3] Reasons extended include the unfortunate judicial headcount in the case between the lower courts and judges sitting in the House of Lords.

[4] Transnational legal processes as it specifically speaks to law depart from Hart's idea of law that have come to frame dominant methodological paradigm of the Westphalian state-ordered model. That model presents the state as the ultimate point of reference for both domestic and international law and places law's ultimate identity and unity in its ability to be 'recognised' by legal officials and dispensed by the state (HLA Hart, *The Concept of Law* (2nd edn, Oxford Clarendon Press 1994). It includes the examination of non-state centric legal processes emerging from modern globalised contexts such as development projects and examines how globalisation processes might influence and contest with legal norms. Transnational approaches combine rules in areas such as corporate, labour, constitutional, environmental and contract law. On this connectivity, see P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50, 77. During the course of this research, conversations related to issues of anthropology, history, sociology, development and economy were encountered which spoke towards and justified a transnational approach.

[5] HH Koh, 'Transnational legal processes' (1996) 75 Nebraska Law Review 181. Koh provides a synopsis of TLT a study of 'transnational legal processes' involving the theory and practice of how 'public and private actors, nation states, international organisations multinational enterprises, non-governmental organisations and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalise rules of transnational law'.

transnational legal processes evidence the continuation of the specific governance paradigms discussed in chapter 3. In common law jurisdictions such as the UK, the interpretation of rights typically passes through a prism of judicial interpretation. This chapter analyses the political and economic processes that might affect the judicial implementation of the norms in this study through post-colonial legal scholarship, or TWAIL[6] theory supported by comparative empirical methods. Finally, the chapter considers whether those transnational processes might compromise the effectiveness and application of any fundamental or collateral right to land identified here, which might subvert the advancement of a legal narrative furthering a 'thick' rule of law and development narrative on 'Fairness' advanced in this study. Such a transnational analysis of the case may offer some clues as to why the law has failed to deliver Justice for Chagossian communities.

The chapter opens with a social and political history of the Chagos case with a special emphasis on the peoples' historic relationship to land. The study then identifies and through a transnational lens examines evidence on the legal applicability and implementation in this case of two legal principles relating to land rights. Those are the international law definition of 'Indigenous' and the public law Magna Carta right to abode.

To understand the sentiments behind current claims requires a conversation with the communities' socio-historic relationship with discrimination, rooted within the colonial era. Laura Jefferys' anthropological studies provide a fascinating history of the Chagos Archipelago in which she urges recognition of the particular history of settlement, slavery, ethnic division, marginalisation and displacement of Chagossians as crucial to understanding modern Chagossian cultural identity and claims[7].

Many of the smaller islands of the Indian Ocean – including the Chagos Archipelago, were unpopulated prior to European colonial expansion from the end of the fifteenth century onwards. During the colonial period the French, Dutch and British all tried to turn Mauritius and its surrounding islands into an economically viable colony through the cultivation of sugarcane and spices[8]. This method of cultivation reflects classical Lockean[9] land value

[6] Referring to the broad dialectic of opposition to international law referred to as Third World Approaches to International Law see M Mutua & A Anghie, 'What Is TWAIL?' (2000) 94 ASIL Proceedings 31.
[7] Jeffery L, *Chagos Islanders in Mauritius and the UK Forced Displacement and Onward Migration* (Manchester UP 2011) 23.
[8] Ibid.
[9] See Locke's 1690 Second Treatise of Government, (London, 1690) which contains the 'agricultural' or 'cultivation' argument with Locke proclaiming 'that labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right', Chapter V (Of Property), Section 28.

concepts of 'effectively cultivating' land through agriculture[10] and toil in order to transform land into ordered, exclusive and saleable private assets, was *de rigeur,* having wide colonial purchase. The French colonisers in Africa had their own labour argument known as *mise en valuer*[11] promoting a system of 'voluntary' labour in which the French would instruct Africans in the cultivation of their own lands[12]. From the late eighteenth century onwards, French and later British colonists brought enslaved and convict labourers from Africa and British India to work on the sugar plantations with many forming self-interest in the land through planting crops, fishing and raising animals. After emancipation, a large proportion of enslaved labourers accepted work contracts to remain on the plantations with people of African origin always in the majority in Chagos[13].

This unique relationship with the land continued until 1964 when, during the Cold War period, the US identified the Chagos Islands of strategic importance as a military base[14]. In 1965, the Harold Wilson administration issued, using simple executive law-making under royal prerogative powers, an order proclaiming a new 'separate colony which shall be known as the British Indian Ocean Territory (BIOT), consisting of the Chagos Islands, Aldabra, Farqhar and Desroches'[15]. In April 1971, the Commissioner of BIOT enacted an Ordinance (Ordinance No 1 of 1971) to clear the Chagos Islands of their 'extremely unsophisticated' inhabitants[16]. In exchange for what was in effect a US$14 million discount on the Polaris nuclear missile programme[17], the UK government agreed to depopulate the Chagos Archipelago and lease one of the islands, Diego Garcia, to the US government for a period of 50 years.

Prior to eviction British and UK officials deployed numerous egregious policies of dispossession documented by anthropologist David Vine[18]. Initially, government agents told those like Rita Bancoult who were away seeking medical treatment or vacationing in

[10] J Gilbert, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 687.
[11] It should be noted that legal protection of land rights may be conditioned to 'productive potential' such as is the case in articles 45 and 47 Mali's 2000 Land Code (*Code Domanial et Foncier*) which requires 'evident and permanent' productive use as a condition for the registration of customary rights: clearly this can be damaging for Indigenous land tenure security.
[12] Prasad P, *Colonialism, Race and the French Romantic Imagination* (Routledge 2009) 12.
[13] Jeffery L, *Chagos Islanders in Mauritius and the UK Forced Displacement and Onward Migration* (Manchester UP 2011) 23.
[14] *R (On the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 164.
[15] See British Indian Ocean Territory Order 1965 (Nov. 8, 1965), Statutory Instruments [1965] No. 1920 as amended in Statutory Instruments (1968) No. 111.
[16] *R (On The Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 138 per Lord Mance.
[17] Allen S, *The Chagos Islanders and International Law* (Hart 2014) 81.
[18] Vine D, *Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia* (Princeton UP 2009).

Mauritius that their islands had been closed and they could not go home[19]. Next, British officials began restricting food and medical supplies to the islands so more Chagossians left as supplies dwindled. Finally and just before the last deportations, British agents and US troops on Diego Garcia herded the Chagossians' pet dogs into sealed sheds to gas and burn them in front of their traumatised owners awaiting deportation[20]. In 1971, Diego Garcia was depopulated and Chagossians forcibly removed to Mauritius and the Seychelles. The British government paid compensation of circa £2,976[21] to each Chagossian exiled to Mauritius whilst those sent to the Seychelles received nothing, essentially left with no financial and social support from the British Government.

In 2000, the Chagossians' legal team won their judicial review of the 1971 BIOT Immigration Ordinance with the Divisional Court allowing the appeal[22]. The then Foreign Secretary Robin Cook announced that the government will not appeal the decision with the Government introducing a new BIOT Immigration Ordinance that theoretically permitted Chagos islanders to return to the outer islands[23], creating a clear legitimate expectation of return[24]. However, in 2004 the government used a new 'Orders in Council' through royal prerogative in which article 9 set the territory aside for 'defence purposes' stating that 'no person has the right of abode in the Territory[25]'. Following a successful appeal by the Chagossians to the High Court striking down the sections of the 2004 orders prohibiting resettlement, the FCO appealed to the House of Lords, which upheld the legality of the expulsion, and the 2004 Orders in Council[26].

Two centuries after Chagos was populated via slavery, the archipelago was similarly depopulated via forced removals and traumatic upheavals[27]. Throughout the colonial period, the Chagos Archipelago was a marginal dependency of Mauritius and its inhabitants were already marginalised prior to displacement. This marginality was compounded by displacement with islanders facing social discrimination from Mauritian residents who

[19] Ibid, page 1.
[20] Ibid.
[21] *Chagos Islanders v United Kingdom* [2012] No. 35622/04, ECHR 2012, para 12.
[22] *Bancoult, R (on the application of) v Secretary of State for Foreign & Commonwealth Office* [2001] QB 1067.
[23] *R (On The Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 140 per Lord Mance.
[24] *Ibid*, para 133.
[25] See British Indian Ocean Territory (Constitution) Order, dated 10 June 2004, article 9.
[26] *R (On the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 132 .
[27] Jeffery L, *Chagos Islanders in Mauritius and the UK Forced Displacement and Onward Migration* (Manchester UP 2011).

stereotyped African creoles as uncivilised and uneducated[28]. The aim of this brief historical account is to contextualise the legal case as one historically rooted in traditional land relations and discriminatory policies such as eviction that robbed communities of their traditional land relations. Consequently, it starts a conversation that through evidence extended in this chapter, throws cold water on Hoffman's view of the case as vexatious and 'like Bancoult 1, a step in a campaign to achieve a funded resettlement[29]'. Strikingly, his 2008 majority decision failed to engage in the proven social effects[30] of poverty, landlessness and marginalisation caused by the forcible removal of persons from land, property and livelihoods, a history which this study argues runs to the heart of the case. Instead his nonchalant approach remarks that 'when the Chagossians arrived in Mauritius they found themselves in a country with high unemployment and considerable poverty',[31] thus fudging the causal relationship between current claims and this sad history.

In conclusion, this historical social and political account demonstrates the Chagosians' embedded and ongoing socio-historical relationship with discrimination and its close association with land.

> 'I believe that Chagossian's are Indigenous: we have over 300 years of existence, an original language, different from Kreole. The issue of indigeneity has been hidden and a dossier discussing the right of return based on indigeneity was submitted to the UN Arbitral Tribunal in around 2012. No information has been heard about this dossier since delivery to the UN'[32].

Primary evidence such as the above quote gathered from interviews with communities demonstrates how Chagossians self-identify as Indigenous. As one interview stated:

> 'I would like to have again the right to fish on my motherland'.
>
> Could you please explain what he is referring to? The rights in the Lancaster House Undertakings?
>
> No, he is talking about his traditional fishing rights. These are derived from the deep cultural and historic significance of fish in Chagossian culture[33].

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[28] Ibid, page 32.
[29] *R (On The Application of Bancoult) V Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 55.
[30] Sociologist Michael Cernea has written widely on the social impacts of dispossession and resettlement on local communities, see Cernea M, 'African Involuntary Population Resettlement in a Global Context', (1997) 045 World Bank Environment Department Papers Social Assessment Series, 19.
[31] *R (On the Application of Bancoult) V Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 11.
[32] Interview with Bernard Nourice, first generation Chagossian deported aged 5 years (Croydon, UK 5 September 2015).
[33] Interview with Clifford Volfrin, first generation deported Chagossian (Croydon, UK 29th July 2015).

Legal advocates for minority and Indigenous actors, Minority Rights Group International corroborate the Indigenous status of communities. In 2008, the organisation opined that 'based on its 40 years of working with Indigenous communities worldwide, the Chagossians do indeed constitute an Indigenous people[34]'. Furthermore, anthropological studies[35] demonstrate that during 200 years of permanent settlement Chagossians have developed a unique range of culture pointing to specific historical cultural characteristics such as their sega music, song, dance, costume, food, vocabulary and accents all of which are separate from other Creole cultures[36]. Close anthropological studies find that Chagossian people self-identify as an uprooted population[37] in their removal which itself evidences a deep psychological connection to the islands**.** Moreover, interviewees affirmed self-identification as Indigenous by referring to their unique culture in which fish has a special significance[38] and by reference to the generations of cemeteries in the islands as a marker of their permanent connection.

However, as far as the British Government is concerned the Chagossians do not constitute an Indigenous people –demonstrable in its derogatory denial of the applicability of article 73 of the UN Charter. In a paragraph headed '*maintaining the fiction*', Foreign Office legal advisor, Mr Aust. advised the government to 'continue to argue that the local people are only a floating population[39]'. Advising that 'the longer that such a population remains, and perhaps increases, the greater the risk of our being accused of setting up a mini-colony about which we would have to report to the UN under Article 73 of the Charter. Therefore strict immigration legislation giving such labourers and their families very restricted rights of residence would bolster our arguments that the territory has no Indigenous population'[40]. Based on this legal advice, the Chagossian inhabitants and their families were characterised

[34] Submission from Minority Rights Group International, Select Committee on Foreign Affairs dated 6 July 2008, para 37.
[35] Jeffery L, *Chagos Islanders in Mauritius and the UK Forced Displacement and Onward Migration* (Manchester UP 2011).
[36] Ibid, p 77.
[37] Ibid, page 4.
[38] Jeffery L, *Chagos Islanders in Mauritius and the UK Forced Displacement and Onward Migration* (Manchester UP 2011) for a detailed anthropological account of Chagossian culture as it differentiates from other Kreole cultures in their specific characteristics of sega music, dance, costume, food and vocabulary.
[39] Bancoult, R (on the application of) v Secretary of State for Foreign & Commonwealth Office [2000] EWHC 413 (Admin) (3 November 2000), para 18.
[40] Ibid.

as a 'floating population', contract labourers rather than permanent residents[41] with no permanent use of the land[42] and even 'sea gypsies[43]'.

The justification for pursuing such a claim is that recognition could provide Chagossians with legal recognition and a possible remedy in full legal restitution under international law for breach of Article 73 of the UN Charter. Since the 1928 case of *Factory at Chorzow*[44], the provision of full restitution *in kind* for legal violations and expropriation of property has been a bedrock principle of international law[45]. In Chagos, wiping out all the consequences of an illegal act and re-establishing the situation that would have existed if that act had not been committed, would translate into a resettlement remedy. Moreover, if restitution is not possible, pursuant to the *Chorzow* case the alternative remedy is for payment of a sum corresponding to a value that restitution in kind would bear. Given current estimates for resettlement amount to a substantial sum potentially reaching up to half a billion pounds[46] and on top of which would include damages for loss of ancestral lands[47], making international legal recognition of traditional land rights appealing for Chagossians and their legal counsel.

The following section examines the legal landscape behind this politically tens issue of Indigenous status to examine what, if any clues that might offer into why Chagossians are

[41] See Bancoult, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs Rev 1 [2006] EWHC 1038 (Admin) (11 May 2006), para 22 per LJ Hooper referring to a May 1964 jointly agreed revised memorandum between the UK and American governments which referred to 'the exact status' of the Chagossians. If, in fact, they are only contract labourers rather than permanent residents, they would be evacuated with appropriate compensation and re-employment.
[42] Bancoult, R (on the application of) v Secretary of State for Foreign & Commonwealth Office [2000] EWHC 413 (Admin) (3 November 2000), para 7 per Laws LJ.
[43] See Wikileaks Cable 'HMG Floats proposal for Marine Reserve Covering the Chagos Archpelago (British Indian Ocean Territory) dated 2009 May 15, 07:00 (Friday), para 9.
[44] Merits, Judgement No. 13, 1928, PCIJ Series A, No. 17.
[45] Ibid, at para 47 in which the court states that reparations must, as far as possible, wipe out all the consequences of an illegal act and re-establish the situation, which would, in all probability, have existed if that act had not been committed. This can be achieved by restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.
[46] The 4th of August 2015 review of resettlement produced by the FCO estimates indicative total resettlement costs between £110.1 million and £462.4 million depending on the number of people to be resettled. See: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450997/BIOT_Policy_Review_of_Resettlement_Consultation_Document_Final.pdf.> accessed 18 November 2016.
[47] For example, in *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA) at 127 compensation is, in principle, payable for loss of traditional lands, in *Delgamuukw v British Colombia* [1997] 3 SCR compensation is payable for Aboriginal land rights and in *Yakye Axa Indigenous Community v Paraguay* [2005] Judgement of 17 June 2005 (Inter-Am Ct. H. R. (Ser. C) no. 124 (2005)) the court held that compensation granted must be guided primarily by the meaning of the land for the groups. In Australia, a compensation determination for Aboriginal groups was made (*De Rose v State of South Australia* [2013] FCA 988, however the final award of compensation in this matter was settled between the parties and the quantum kept confidential, limiting its use as a precedent for other claims. See 24 August 2016 Federal Court of Australia first ever assessment of compensation for the extinguishment or impairment of native title rights and interests in *Griffiths v Northern Territory of Australia* (No 3) [2016] FCA 900 (Timber Creek). The Court ordered the payment of approximately $3.3 million to the native titleholders, the Ngaliwurru and Nungali Peoples. $512,000 was awarded for economic loss, $1.488m in interest and $1.3m for solatium, or non-economic loss. This is however a federal decision only and subject to appeal. This case law demonstrates how issues of compensation quantum for Indigenous land are an evolving area of legal practice.

unable to claim Indigenous status and to understand how the legal landscape might have implications for advancing Fairness for Chagossians in terms of rights and remedies. What follows is an analysis of the current international law definition of Indigenous and its legal interpretation, application and non-application in different 'transnational' contexts further explained below.

UN texts contain three different approaches to the issue of who is Indigenous. Arguably, the most comprehensive and widely accepted attempt at a working definition is found in the 1983 report[48] of UN Special Rapporteur on the Prevention of Discrimination and Protection of Minorities, Martinez Cobo. Identified as people 'having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories'…and which 'consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them[49]', the definition prescribes how Indigenous Persons (IPs), form 'non-dominant sectors of society'. Furthermore, they are 'determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patters, social institutions and legal system[50]'.

Numerous other legal and policy[51] led definitions have been advanced. At least seven criteria of 'Indigenousness' can be distilled from all these definitions with it being understood that most communities will not be able to satisfy all criteria but creating a sliding scale for the purposes of assessing indigeneity[52]. These criteria or Delaney's[53] 'spatial signifiers' of control and containment as would call them, are a communal attachments to 'place', historical precedence, experience of severe disruption, dislocation and exploitation, historical continuity, ongoing oppression/exclusion by dominant societal groups, distinct ethical/cultural groups and self-identification as Indigenous people[54]. In 1989, the UN

[48] Martínez Cobo, José (1986/7) 'Study of the Problem of Discrimination against Indigenous Populations' UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4 < http://www.un.org/esa/socdev/unpfii/documents/MCS_xvii_en.pdf > accessed 18 November 2016.
[49] Ibid 2.
[50] Ibid.
[51] Indigenous peoples are also defined within the social policies of private actors such as international financial institutions like the EBRD, World Bank and the IFC, which include the key point that people do not lose their Indigenous status due to displacement. Chapter 8 examines how those private entities interpret these definitions in the context of resettled herder groups.
[52] Minority Rights Group International, Submission to the Select Committee on Foreign Affairs 6 July 2008 31.
[53] Delaney D, 'Legal geography I' (2015) 39 Progress in Human Geography, page 96 arguing that as a system of governance and control, international law leaves behind numerous signifiers or markers which expose its attempts to control and contain society .
[54] Allen S, 'Looking Beyond the Bancoult Cases: International Law and the Prospect of Resettling the Chagos Islands' (2007) 7 Human Rights Law Review 441.

adopted a more inclusive approach to indigeneity to include self-identification[55] concluding that whilst considerable thinking and debate has been given to the question of defining 'Indigenous people', no such definition has ever been adopted by any UN-system body.[56]

The prevailing view today is widely accepted as requiring no formal universal definition of the term thus favouring a dynamic contextual application. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by 143 member states (including the UK) contains arguably the best and most flexible approach in that it is utterly silent on the issue. States frequently challenge this 'open door' policy of self-identification based on the unsurprising view the special relationship with land as a threat to sovereignty and social cohesion. Scholarly arguments against self-identification include the dilution of the definition caused by setting it free from these categories such that anyone can claim indigeneity.[57]

Despite legal evidence of a growing movement towards a more purposive and open idea of definition based on self-identification, this chapter suggests evidence of the practical application of Indigenous status in different international contexts falls short of this approach.

In a 2000 Working Paper, the Economic and Social Council[58] identified that that the current international definition of Indigenous as modelled on the 'blue or salt water doctrine[59]'. The argument is that the legal definition only gives recognition to one type of 'transnational' historical context in which Indigenous people are those people beyond Europe who lived in the territory before European colonization and settlement[60]. The 2000 paper notes how the approach to the drafting of Indigenous rights has been influenced mainly by developments in the Americas and in the Pacific region making Indigenous identity profoundly America-centric. In practice, this means that the distinction is probably much less useful for standard-

[55] Through article 1(2) of the ILO Convention No. 169 which prioritises self-identification under article 1(2) which states that 'self-identification as Indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.
[56] UN Doc. E/CN.4/Sub.2/1983/7 and Add. 1-4, 1983,
<http://www.un.org/esa/socdev/unpfii/documents/MCS_xvii_en.pdf, >para 1 accessed 18 November 2016.
[57] Waldron J, 'Indigeneity? First Peoples and Last Occupancy' (2003) 1 New Zealand Journal of Public and International Law 55.
[58] UN Sub-Commission on the Promotion and Protection of Human Rights, Prevention of discrimination against and the protection of minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, 19 July 2000, E/CN.4/Sub.2/2000/10.
[59] Ibid 25.
[60] Ibid note 4 noting the blue/salt water concept hold that that Indigenous people consist of those beyond Europe who lived in a territory before European colonization and settlement and who now form a non-dominant and culturally separate group in the territories settled primarily by Europeans and their descendants. It is profoundly relational to European settlement.

setting concerning group accommodation in Asia and Africa[61], for example, where dominant as well as non-dominant groups within the State can all claim Aboriginality.

In addition to the dual requirements of Indigenous people living in a place or territory requiring, the act of crossing 'salt water' and experiencing an encounter with European colonisation is one more curious and arguably Euro-centric assumption, discussed below.

This requirement fixates over European conceptions of indigeneity that focus on restrictive ideas of 'original' Aboriginality or 'who came first' and persons belonging to a territory 'since time immemorial'. Chapter 4 discusses this type of Originality and its legal effects on Aboriginal actors in detail. In sum, the suggestion is that this attachment to the 'prior' is part of a larger Western concept favouring 'prior' power and Povinelli calls the 'governance of the prior[62]' and she argues forms settled law from the writings of Blackstone[63].

The problem with this type of assumption is that they are deeply exclusionary in social contexts, which do not fit this vision of European colonisation, yet in which groups claim Indigenous status. For example, Benedict Kingsbury has commented on the exclusionary effects of extending the definition to Asiatic contexts: contexts that share no settler colonial history, making legal application in those situations challenging. Based on his study he advises that the legal 'signifiers' discussed above should be indicators and not formal positivist requirements[64]. Kingsbury calls for a modern reconceptualization of the definition to recognise land connected communities in China, India, Bangladesh and Myanmar[65] who have either staved off Western colonialism or rid themselves of its most direct effects in their struggle for independence[66]. These countries, he notes, see efforts to impose the European 'saltwater' (or 'blue water', explained below) concept of Indigenous in the region as a form of neo-colonialism[67].

[61] Ibid 25 and 37.
[62] Povinelli E, 'The Governance of the Prior' (2011) 13 Interventions 13.
[63] Ibid at 17 notes that foundational texts such as William Blackstone's Commentaries of the Laws of England extended legitimacy to a wide range of seizures of property, persons and territory was decisively anchored in a way of thinking about the jurisdiction of laws pertaining to the rights of the prior. These, she notes, were all articulated through the still emergent notion that what held must hold until it is purchased (or gotten by treaty), forced to give way (through conquest or genocide) or characterized as never having actually existed (such as in the concept of terra nullius).
[64] Kingsbury B, 'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 AJIL 414.
[65] Ibid.
[66] Ibid, page 434.
[67] Ibid.

In the African context, fulfilling these requirements is as the African Commission on Human and Peoples' Rights (African Commission) notes, difficult and not very constructive[68]. The Working Group of the African Commission notes that in the African context limiting the term Indigenous to those local peoples still subject to the political domination of the descendants of colonial settlers makes it very difficult to employ the concept[69]. With the exception of a few communities that migrated from other continents or settlers from Europe, all Africans can claim to be Aboriginal people of the continent and nowhere else[70]. Within this common heritage of Aboriginality, African people have migrated for centuries from various parts of the continent: with wars of conquest shaping the character of nationalities. The nineteenth century adoption of former colonial boundaries at independence drew arbitrary lines of demarcation dividing Indigenous communities[71]. In this context, white settlers and colonialists have not exclusively practised domination and colonisation. In Africa, dominant groups have also repressed marginalized groups since independence, and it is this sort of present day internal repression within African states that the contemporary African Indigenous movement seeks to address[72] and by default, legal definitions of 'Indigenous' have the potential to exclude. The commission concludes that in the African context those applying the term Indigenous do so to address their particular human rights situation that cuts across various socio-economic systems to embrace hunter-gatherers, pastoralists and small-scale farmers[73]: the many diverse groups of pastoralists and hunter-gatherers that identify with the Indigenous movement yet have struggled for recognition of their basic human rights[74].

Given this unique socio-historic specificity, the African Commission has adopted a 'socio-psychological' understanding of indigeneity, setting out broad criteria but prioritising, (as in the UN system[75]), self-definition. Examples of hunter-gatherers claiming Indigenous legal status include the Ogiek of Kenya and the Hadzabe of Tanzania. Pastoralist communities include the Pokot of Kenya and Uganda, the Barabaig of Tanzania, the Maasai of Kenya and

[68] Except as the ACHPR notes, in certain very certain very clear cut cases like the San of Southern Africa and the pygmies of Central Africa, in the report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) 92.
[69] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) 92.
[70] Ibid, page 12.
[71] Ibid, summarising the specific African socio-historical context.
[72] Ibid.
[73] African Commission on Human and Peoples' Rights, 'Indigenous Peoples in Africa: The Forgotten Peoples?' (2006) p 10.
[74] Ibid, page 15.
[75] For example, article 1(2) of the ILO Convention No. 169 which prioritises self-identification.

Tanzania, the Ogoni (mainly farmers and fishermen) of Nigeria, the Berbers of North Africa and the Samburu, Turkana, Rendille, Orma and Borana of Kenya and Ethiopia.[76]

Similar to the Asian and African examples discussed above, the Chagossians are not a society that European powers had crossed over 'salt water' to encounter, settle and conquer. They are not a 'pre-invasion' society of 'first inhabitants' who assert historical precedence and consequently have 'encountered' mass European colonisation. Understood as a factual block to a legal claim in Indigenous status is the specific Chagossian history of descent from enslaved labourers from Africa and later, indentured labourers from the Indian sub-continent[77]. Such a repressive position however denies the unique connection to the islands with over 200 years of ancestral and cultural linkages.

The above comparative examples emanate from continents and countries typically not associated with IPs. It is suggested that this deficit in legal recognition and protection is a direct result of a legal definition which clings to a European culture such that it has an implicit bias towards recognition of people that have experienced Western colonisation by a Western power ruling a geographically and racially distinct territory somewhere beyond 'salt-water'. More worrisome, it detracts attention away from the common denominator shared by all actors claiming Indigenous status. Despite the social diversity of groups, the golden thread unifying them is their different way of life coalescing around a special affinity to land. It is this core characteristic of a particular way of life depending on access and rights to their traditional land and the natural resources thereon[78], which requires protecting. Based on interviews and literature this section argues that indigeneity is best determined on a case-by-case basis with its essence read as the effects of discrimination on a global movement of people[79] who share a special relationship with land.

There is, an overlooked yet nascent legal practice of recognising legal ties to land for Indigenous communities in non 'blue-water' contexts. In *Western Sahara,*[80] the International Court of Justice extended legal recognition to a tribal community based on its essentially different land related customs 'concerning the use of water-holes, grazing lands,

[76] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) 92.chp 2 providing a detailed synopsis of numerous pastoralists and hunter-gatherer groups in Africa.
[77] Jeffery L, *Chagos Islanders in Mauritius and the UK forced displacement and Onward Migration* (Manchester UP 2011) 19.
[78] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities 2005, page 89.
[79] Interview with Lucy Claridge, Head of Law, Minority Rights Group (London, UK,, 17 June 2015); African Commission on Human and Peoples' Rights, 'Indigenous Peoples in Africa: The Forgotten Peoples?' (2006) 11.
[80] *Western Sahara*, Advisory Opinion, Judgement, ICJ Reports 1975.

cultivated lands, burial grounds and agricultural lands...which were regulated by custom[81]'. In *Saramaka v Suriname*,[82] the Inter-American Court of Human Rights expanded access to the Indigenous canon of rights to postcolonial descendants of African slaves. The case recognises that post-colonial tribal groups can, even though not first occupants, share similar characteristics with Indigenous groups such as having social, cultural and economic traditions different from other sections of the national community and regulating themselves, at least partially, by their own norms, customs, and traditions[83]'. Similarly, in the *Endorois*[84] case the commission extended the concept of indigeneity into the post-colonial African context when it recognised the land rights of the pastoralist Endorois[85] communities' upon their eviction from the Kenyan Rift Valley. Crucially, these cases move towards an appreciation of Indigenous distinctive 'otherness' as removed from culture and ethnicity, concepts which can be so easily categorised and compartmentalised in the interests of those with greater power[86], manipulated or racialized[87] and might resonate colonial understandings of Indigenous people. Instead, those cases move towards an *otherness* based on a special relationship with the land that has been the subject of historic and ongoing coercion and force.

The Chagos case evidences how the Indigenous label might be racialized when connected to ethnicity and culture. Chagossians perceive that treatment as motivated by post-colonial racial thinking. When asked:

> Why do you think the Chagossians have been treated differently?
>
> [C] goes quiet, looks down and points to his skin..le peau..he says

Documents published by WikiLeaks reveal a policy of dispossession justified through echoes of colonial tropes labelling the Chagossians as backward races. Leaked cables disclosed a policy of dispossession based on thinking that there would be 'no human

[81] Ibid at 152.
[82] Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)).
[83] *Saramaka People v Suriname*, Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)) at para 79.
[84] 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Humans and Peoples' Rights, 46th Ordinary Session, 25 November [2009].
[85] The Endorois are a distinct Kalenjin speaking community and or centuries have been the traditional inhabitants of the Lake Bogoria areas in the rift valet consisting of 400 families and practicing pastoralism and a traditional way of life relating to animal husbandry and pastoralism.
[86] F Fanon, *The Wretched of the Earth* (Penguin 1967).
[87] Interview with Lucy Claridge, Head of Law, Minority Rights Group (London, UK, 17 June 2015).

footprints or Man Fridays on the BIOT's uninhabited islands[88]'. Subsequent language resonates the later when FCO official Mr Greenhill stated 'unfortunately along with the Birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius[89]'.

In the 2012 House of Lord's judgement, when commenting on the Chagossian's right to return, Lord Hoffman echoes the executive language of 'Man Friday' when he dismisses return based on his interpretation that Chagossians have shown no inclination to return to live Crusoe-like in poor and barren conditions of life[90]. He describes how 'each family had a house with a garden and some land to provide vegetables…they also did some fishing…and into this innocent world there intruded, in the 1960s, the brutal realities of global politics[91]' creates a type of nostalgia and false romanticism which works to divert attention away from framing Chagossian identity in terms of indigeneity.

Drawing on the imperial abstraction of the native, savage and backward persons, Jones & Motha note how the Friday referred to here is not the original Friday of Defoe's *Robinson Crusoe*. 'This Friday is a historically and geographically de-contextualized 'native': an abstraction, under imperialist rubrics of savagery, amenable to slavery. In this sense, the judgments work with a crude idea of an Aboriginal Friday[92]'. Like Wolfe's argument that acts of Indigenous dispossession itself work to make the Indigenous subject improper[93], the imagining of this fictional imagery of Chagossians as Men Friday has an improper, *othering* effect.

Socio-legal accounts of the social effects of this conceptualisation argue that the nomadic subalternity is a deviance that modern law cannot but attempt to either correct or abolish. This type of imagery recalls the colonial propensity to characterise Indigenous persons as impermanent 'others', wandering around and entirely disposable to dispossession at the

[88] See Wikileaks Cable 'HMG Floats proposal for Marine Reserve Covering the Chagos Archpelago (British Indian Ocean Territory) dated 2009 May 15, 07:00 (Friday), para 7 referring to a description by Colin Roberts, then Commissioner of BIOT.
[89] See UKNA, FCO 371/190790, DA Greenhill Foreign Office Deputy Under Secretary to P Gore-Booth Foreign Office Permanent Under Secretary 24 August 1966 and OT 423: Written Evidence from HE Mr Abhimanu Kundasamy, High Commissioner of Mauritius, <www.publications.parliament.uk/pa/cm200910/cmselect/cmfaff/memo/overseas/ucm42302.htm>accessed 16 November 2016.
[90] R (On the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, para 5 per Lord Hoffman.
[91] Ibid.
[92] Jones S and Motha S, 'A New Nomos Offshore and Bodies as their Own Signs' (2015) 27 Law & Literature 253, page 259.
[93] Wolfe P, 'Settler colonialism and the elimination of the native' (2006) 8 Journal of Genocide Research, p 388

hands of the state. Like the Bedouin Negev[94] definite legal consequences flow from the conceptualisation of the Negev as rootless, wandering nomads who are heading nowhere; perpetually in the state of nature waiting for civilisation, reinforcing their otherness and thus perpetuating state power. The Indigenous propensity to wander in a disorganised manner[95], not using land in an efficient and exclusionary manner used to justify the legal 'solution' to nomadism as either dispossession or an enforced policy of assimilation or sedentarisation[96].

Labelling the Chagossians as Men Friday and sea gypsies may have drawn them into a similarly dark colonial narrative. This narrative is based on classical Lockean premises which viewed that the 'proper' or 'effective' occupation of land can only be reached through private agriculture, which was the only basis for a real land tenure system'[97]. Thus, the non-settled, floating sea gypsies are automatically made 'improper' occupants, their eviction justified and the islands open for conquest and acquisition for more 'effective' means: in this case the furtherance of Imperialist thinking in the form of a US naval base. Stephanie Jones argues that in his 2000 decision Lord Justice Law's refers once, almost in passing, to the Chagossians as 'an Indigenous people[98]'. She notes how he prefers to use and re-use the indeterminate and general term 'belongers' to describe Chagossians: a term with no loaded legal meaning such as Indigenous. The effect of this is, she argues, significant for the granting of legal status[99] and as this section argues, has significant consequences for justifying dispossession. Later, Jones notes that within the 2006 High court appeal Lord Justice Hooper prefers not to use legal precedent to frame the issue but to rely on memoir and nostalgia[100], concluding that in the life of any individual, family, community or society, memory is of fundamental importance, it is the fabric of identity[101].

In conclusion, this section identifies a possible legal right to land for Chagossians through the application of the international legal definition of Indigenous. Generally, it can be concluded that highly fragmented amongst a number of international instruments and

[94] Shamir R, 'Suspended in Space: Bedouins under the Law of Israel' (1996) 30 Law & Society Review 231.
[95] Gong GW, *The standard of 'civilization' in international society* (Clarendon Press; Oxford University Press 1984)
[96] Shamir R, 'Suspended in Space: Bedouins under the Law of Israel' (1996) 30 Law & Society Review page 231
[97] T Flannagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science 589, 590; J Gilbert, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.
[98] Jones S, 'Colonial to Post Colonial Ethics: Indian Ocean 'Belongers', 1668–2008' (2009) 11 International Journal of Postcolonial Studies page 212.
[99] Ibid.
[100] Ibid
[101] Bancoult, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs Rev 1 [2006] EWHC 1038 (Admin) (11 May 2006) para 12.

statements, making the definitive discernment of a common and uniform legal approach to the issue of accessing legal status challenging.

Evidence suggests that inherent within the structure of the international legal definition of Indigenous are assumptions limiting recognition to a specific European historical situation. Those specific 'signifiers' require that IPs are only given legal recognition and protection if they have experienced a very specific encounter of settler colonialism in which Europeans have made a transnational crossing over salt or blue water in order to implement the agricultural argument in overseas territories. This evidence throws doubt on international law's applicability to elite Western states, despite its claims to universality[102].

The section discusses how application of the Indigenous definition is based on restrictive ideas of first in time 'prior governance' and white settler colonial contexts, work to control and police the boundaries of *who* is entitled to Indigenous status.in non-salt water and non-settler colonial contexts has been constrained by this inherent Euro-centric bias. The dis-application of legal status in non-conforming social contexts is demonstrated by a legal policy of non-application within domestic and European courts in the Chagos case as well as more general comparative studies of African and Asian contexts. Moreover, it echoes ongoing transnational governance processes of Imperialist thinking prioritising European culture identified in chapter 3. Based on the evidence, as currently applied the international legal definition of Indigenous is highly dispersed and Euro-centric, making it conceptually difficult for marginalised Indigenous actors to obtain legal recognition, access to the canon of Indigenous rights and protection under international law through a common legal standard. Evidence from the Chagos case and other comparative social contexts, reports and studies, suggest that the practical result of this legal fragmentation might create a space through which parochial and biased executive and legal interpretations of the definition dis-apply status to groups such as the Chagossians asserting Indigenous status but fail to satisfy racialized Euro-centric conditions. This reproduces patterns of exclusion and dispossession into an international space. The result is a 'brake' in Fairness for Chagossians and other groups who do not share a transnational and post-colonial experience of 'salt-water',

[102] Thus, shed light on the reality that international law always been involved in the promotion of political economy. The 'agricultural argument' discussed in this chapter best demonstrates this argument. A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007) 267; Prabhat P, A Left Approach to Development (2010), Economic & Political Weekly July 24, 2010 vol xlv (30); T Flannagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science 589, 590; J Gilbert, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.

European encounter and 'prior' occupation. Building on the findings in this study and the thesis more broadly, the concluding chapter recommends a transformation of the definition.

The following section identifies and examines the Magna Carta legal right to abode as an alternative collateral or ancillary right through which Chagossians might secure the right to return to their native land.

Chapter 29 of the 1215 Magna Carta reads that 'no freeman shall be taken, or imprisoned … or exiled, or any otherwise destroyed but by the lawful judgement of his peers, or by the law of the land'. These rights are legal rights to abode and to return to one's homeland. Contemporary legal practice, understands those rights as playing a formative and as Bingham notes, 'embryotic[103]' role in the development of English law, the rule of law and international human rights law. The Chagos case provides robust evidence of the importance of Magna Carta rights to modern English legal practice. For example, in an earlier, overturned Court of Appeal judgement[104], Sedley LJ observes how 'the two Orders in Council negate one of the most fundamental liberties known to human beings, the freedom to return to one's own homeland, however poor and barren the conditions of life'.[105]

For Bingham, 'the principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute[106]'. Citing authority of the European Court of Justice in *Van Duyn v Home Office,*[107] the judges held that 'it is a principle of international law . . . that a state is precluded from refusing its own nationals the right of entry or residence'.

Yet remarkably, despite repeated application to the case of authoritative legal opinion confirming the fundamental, constitutional and thus non-derogable nature of the right to abode, the Chagos case successfully dis-applied the right to British citizens. Indeed, a worrisome hallmark of the Chagos case is the repeated and overzealous use by the executive of a legitimate but extreme form of power: the royal prerogative. The defining characteristic of prerogative power is, as Poole notes, that its exercise does not require the approval of

[103] Bingham's discussions on the role of the Magna Carta in the development of a 'thick' rule of law and international human rights law in Bingham TH, *The Rule of Law* (Penguin 2010), 12-13, 110.
[104] *Secretary of State for the Foreign and Commonwealth Affairs v The Queen (on the Application of Bancoult)* [2007] ECWA Civ 498.
[105] Ibid, para 71.
[106] *R (On the Application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 70.
[107] *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, 378-379.

Parliament[108], thus far removed from the modern archetype of legitimate law-making[109], which in the British polity is the act of Parliament, with all its attendant procedural and formal rigors.

Many Chagossians are British citizens. As one interviewee stated:

> This is about fairness and equality. We have never had good or equal treatment with other British citizens. Why are tourists able to go there and we cannot? Why were we exiled and other inhabitants of overseas territories, like the Falklands, not?[110]

In Bancoult 2, Lord Bingham provides a modern statement on the royal prerogative an 'anachronistic'[111] legislative instrument which when implemented, necessitates a careful historical inquiry to ascertain whether there is any precedent for the exercise of the power in the given circumstances'.[112] Drawing on precedent, Lord Mance finds no historical precedent for a similar use of prerogative power to evict a population of persons remarking his 'surprise'[113] if any supporting precedent could be found for such a use.

Although the scope of the prerogative powers is difficult to determine[114], some highly specific situations envisage its use, including governance of the armed forces, an event of grave national emergency[115], powers to keep the peace where no emergency exists, to grant pardons and to authorise independent public inquiries[116]. In his House of Lords minority opinion, Bingham's 2008 dissent dismissed the government's appeal, stating that the denial of the right to abode in article 9 of the BIOT Constitution order was unlawful because it was irrational in the sense that there was, quite simply, no good reason for making it[117]. In his separate minority opinion, Mance notes that the Chagossians have legal rights of abode[118]. He recognises that the islands may have a special meaning to its inhabitants and that a right

[108] Poole T, 'United Kingdom: The royal prerogative' (2010) 8 International Journal of Constitutional Law 146.
[109] Ibid 147.
[110] Interview with Clifford Volfrin, first generation deported Chagossian (Croydon, UK 29th July 2015).
[111] *R (On the Application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61. para 69.
[112] Ibid.
[113] Ibid, para 150 Mance notes 'it would be surprising if any precedent could be found for such a provision [legitimising the use of the royal prerogative to introduce into a constitution for BIOT a provision that no Chagossian has a right of abode or a right to enter or be present on BIOT except as authorised by the constitution which does not allow it], and none has been shown'.
[114] 'The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report', Ministry of Justice, October 2009, para 27.
[115] See for example *Burma Oil Company (Burma Trading) Ltd v The Lord Advocate* [1965] AC 75 in which the House of Lords held that the prerogative permitted the Army to destroy private property to prevent it from falling into the hands of an advancing enemy.
[116] See 'The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report', Ministry of Justice, October 2009 which sets out a number of circumstances in which prerogative powers can be used.
[117] *R (On the Application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 72.
[118] Ibid, para 138.

to return may…be symbolic but that 'symbols can themselves be important, more so in some cultures than others'.[119]'

Mance's minority opinion (supported by Bingham) interprets the Magna Carta right to abode as fundamental[120] and constitutional[121]. Consequently the unfairness and irony that an executive command or 'a constitution which exiles a territory's inhabitants is a contradiction in terms[122]' is not lost on Mance. Justifying his position, Mance draws comparatively from other territorial disputes noting that the UK is currently embroiled in three separate territorial disputes over the Falklands, Gibraltar and the Chagos Islands and has treated all of them differently. Territories such as Gibraltar or Malta have been ceded or conquered for military purposes but as Mance notes 'never…has there been either an original purpose or a subsequent attempt compulsorily to exclude their natural inhabitants[123]' and to treat those territories as just bare land[124]. Yet, the UK has 'recognised the permanence of the populations in Gibraltar and the Falklands, extending a right to self-determination and permitting those citizens to be on the UN list of non-self-governing territories since 1946[125] and has extended to those citizens protection under the 'sacred- trust' of article 72 in the UN Charter[126]. This legal narrative suggests an uneven application of the law amongst different jurisdictions and as such raise questions about the advancement of Fairness and substantive equality to Indigenous groups in different spatial settings.

In contrast, delivering the majority view, Hoffman extends a legal analysis that deems executive application of prerogative powers in Chagos entirely reasonable. He 'dilutes' or 'demotes' the right of abode through a legal interpretation formulating it as an 'important right[127]' but not a constitutional one[128]. It is not 'in its nature so fundamental that the legislative powers of the Crown simply cannot touch it[129]'. In other words, the right of abode

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[119] Ibid: he notes how [the desire to return to one's homeland] however poor and barren conditions of life, is an enduring and strongly held human instinct.
[120] *R (On The Application of Bancoult) V Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 151.
[121] Ibid.
[122] Ibid, para 157.
[123] Ibid.
[124] Ibid.
[125] United Nations List of Non-Self Governing Territories, available at <www.un.org/en/decolonization/nonselfgovterritories.shtml> accessed 16 November 2016.
[126] As justification for the forced evictions, the UK government did not recognise that the Chagossians constitute a permanent population of the BIOT consequently denying that it is subject to obligations of a 'sacred-trust' under article 72 of the United Nations Charter to 'ensure… [the] economic, social and educational advancement' of the residents of which forced exile would be in clear legal contravention.
[127] *R (On The Application of Bancoult) V Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 45.
[128] Ibid.
[129] Ibid.

is capable of abrogation and consequently dis-applied through executive power, or as Hoffman authoritatively abrogates, the right of abode is a creature of the law. The law gives it and the law may take it away[130]. Since the 2008 Bancoult judgment, there has in the 2014 *HS2*[131] case, been intriguing Supreme Court debate over the potential normative 'hierarchy' within English law of specific 'fundamental' principles. Given the court's explicit reference to Magna Carta rights as fundamental principles, that decision might offer crucial precedent confirming an evolving legal practice recognising non-derogable rights under English law.

In light of the specific legal precedents setting out the scope in which powers can be validly used, the repetitive use of the power against a small population of persons lacking confirming legal precedent appears inconsistent and irrational. At a minimum, it requires further investigation to understand how and on what basis that legal conclusion was reached. What seems to emerge are strands of evidence which, as far as the majority legal opinions are concerned, harmonise with the political outcome of exiling an entire population from their traditional land for largely Imperialist reasons of politics, economics and military security. Whilst no direct or causal 'connectivity' is suggested between these legal outcomes and the executive dialogue, it is of interest that the legal result and narrative has shown close favour with Imperialist political and economic narrative as evidenced below.

The executive decision to use prerogative powers is not an anomaly but follows a consistent political practice with historical legal support. After Bancoult 1, Robin Cook announced that the immigration controls imposed by the 2000 Ordinance were to be revoked, and that the Government was to introduce a new BIOT Immigration Ordinance that theoretically permitted Chagos islanders to return to the outer islands[132]. Reneging on this promise, in 2004, the government again used a new 'Orders in Council' through royal prerogative with article 9 setting the territory aside for 'defence purposes' and stating that 'no person has the

[130] Ibid.

[131] See *R (HS2) Action Alliance Ltd) v. Secretary of State for Transport* [2014] UKSC 3 debating the possibility that all constitutional legislation might *not* be equal and that there might be an ordering of constitutional norms and statutes. As noted in that case, 'The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation'.

[132] *R (On The Application of Bancoult) V Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 140 per Lord Mance.

right of abode in the Territory[133]'. What followed was a legal challenge over whether Robin Cook's statements amounted to a legitimate expectation of Chagossian resettlement.

The leading case of *R v. North and East Devon Heath Authority, Ex p Coughlan*[134] clarified when public authorities will be required to honour their statements of policy or intention when their acts have created a legitimate expectation of some substantive ultimate benefit or procedural expectation. As Bingham noted in *R v Inland Revenue Commissioners ex p. MFK Underwriting*, legitimate expectation is rooted in the doctrine of fairness[135] thus requiring the courts to consider fairness when judging the adequacy of the reason advanced for the governmental change of policy that gave rise to the legitimate expectation[136]. Typically, legitimate expectations refer to the possible outcomes of substantive legitimate expectations as the claimant's interest in some *ultimate benefit*, not simply procedural expectations. The expectation arises not because the claimant asserts any specific right to a benefit but because his interest in it is one that the law holds protected by the requirements of procedural fairness. Examples of legitimate expectations of a substantive benefit include the promise of a home for life[137], a particular benefit or commodity such as a welfare benefit or licence. By contrast, procedural benefits typically relate to a promise of consultation.

For the minority judges in Bancoult 2 Cook's statements created a clear and substantive legitimate expectation of return[138]. For Mance, the legitimate expectation of return created by Robin Cook's press statement amounted to 'an unconditional recognition, coupled with an assurance that this would be given effect, of a legal right to enter and to be present, whether on a temporary or long-term basis[139]'. In an approach which resonates Bingham's rooting of legitimate expectations in fairness and echoes a morally thick rule of law based approach to legal interpretation Mance remarks that any questions of departing from this

[133] See British Indian Ocean Territory (Constitution) Order, dated 10 June 2004, article 9.
[134] [2001] QB 213, 57.
[135] See *R. v. Inland Revenue Commissioners ex p. MFK Underwriting*, legitimate expectation is rooted in the doctrine of fairness [19901 I W.L.R. 1545, 1570 per Bingham LJ.
[136] *R v North and East Devon Heath Authority, Ex p Coughlan* [2001] QB 213, para 57 and 62. Typically, legitimate expectations refer to the possible outcomes of substantive legitimate expectations recognised by modern authority as the claimant's interest in some *ultimate benefit*, not simply procedural expectations. The expectation arises not because the claimant asserts any specific right to a benefit but because his interest in it is one that the law holds protected by the requirements of procedural fairness. Legitimate expectations of a substantive benefit might include the promise of a home for life (para 62) or where the applicant seeks a particular benefit or commodity such as a welfare benefit or licence. By contrast, procedural benefits typically a promise of being heard or consulted: *see R v. North and East Devon Heath Authority, Ex p Coughlan [2001]* QB 213 57, 62.
[137] Ibid 62.
[138] Accepted by the House of Lords in *R (On The Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, 133.
[139] Ibid 176.

legitimate expectation of return is ultimately one of reasonableness and fairness[140], not to be automatically sacrificed to imperialist macro-political interests.

Contrastingly, Hoffman's positivist, morally neutral view was that Cook's statement was ambiguous and 'in my opinion it comes nowhere near a promise'. Moreover, even if it could be so construed, there was a 'sufficient public interest justification for the adoption of a new policy in 2004' because the 'rights withdrawn were not of practical value to the Chagossians[141]' and that the decision was very much concerned with the 'macro-political field[142]'. For Hoffman and Carswell[143], the changed macro-political field, which justified the 2004 order, specifically related to the Imperialist concerns such as changed security situation after 9/11, the prohibitive costs of resettlement, the ecological costs of resettlement in the atolls and the UK's continued co-operation with an important ally in maintaining an important and secure defence installation on Diego Garcia.

The above evidence demonstrates the sacrifice of public law legitimate expectations over political considerations and legal justification for that abrogation of rights through a parochial legal interpretation of legitimate expectations divorced from its basis in fairness and a 'thick' rule of law. The tone of Mance's dissent offers a damning critique of a current judicial movement to formulate territorial governance as unchecked power, devoid of fundamental rights and fairness. He is critical of Hoffman's recognition of the island as sites of purely monetary and military interests, stating how Hoffman is wrong to conflate these separate considerations[144] and to dismiss from consideration the legal freedom to return and all that it represents for the human spirit on the basis that return is impractical or uneconomic[145].

The suggestion of post-colonial thinking within the judicial narrative is further explored through the legal narrative contained in the *Bancoult 3*[146] case in which Olivier Bancoult appealed against the creation by the then Foreign Secretary David Miliband, of the 2009 MPA. Bancoult alleged the decision to declare the MPA in BIOT flawed by an improper motive (to prevent the return of Chagossians) evidenced by the leaked copy of the May 2009

[140] Ibid 177.
[141] Ibid, para 62 and 63
[142] Ibid, para 63
[143] Ibid, para 26, 27 per Hoffman and 132 per Carswell
[144] R (On The Application of Bancoult) V Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, para 172 per Lord Mance.
[145] Ibid, para 172 per Lord Mance.
[146] *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] EWCA Civ 708; [2014] WLR (D) para 237.

notes recording a meeting with BIOT officials[147]. Specifically the disclosure established that a marine park would prevent the resettlement claims of the archipelago's former residents[148]. The MPA consultation paper[149] itself contains only one reference to the Chagossians, is ambiguous as to what the MPA would practically entail and is not clear what legal authority, if any, it is based upon. The second ground for appeal revolved on Bancoult's argument that the MPA decision flawed by its failure to disclose that its creation would adversely affect the historical and traditional rights of Chagossians to fish in the waters of their homeland as Mauritian citizens and the native population of the Chagos Islands'[150]. The practical effect of the MPA was to sever the Chagossians last remaining cultural link with the islands on ecological grounds. The legal response to the appeal harmonised with the executive decision to create the MPA. Judges referred to the alleged 'benefits' of the MPA[151]. In particular, legal support extended to the government's position of numerous benefits of the MPA for conservation, climate change and development of the archipelago[152].

Arguably, these examples of legal interpretation evidence judicial support to Imperialist arguments forwarding the benefits of civilisation, modernity, developmental and private property[153], and now, environmental protectionism[154]. The objective of this interpretation is to justify a legal position in which Magna Carta protection is not extended to Chagossians through environmental policies, policies which Mance notes, treat the BIOT as 'bare land[155]' void territories, *terra nullius* and 'as if the people inhabiting BIOT were an insignificant inconvenience.[156]

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[147] Ibid, para 9.
[148] See Wikileaks Cable 'HMG Floats proposal for Marine Reserve Covering the Chagos Archpelago (British Indian Ocean Territory) dated 2009 May 15, 07:00 (Friday).
[149] See the FCO Consultation Document: Consultation on Whether to Establish a Marine Protected Area in the British Indian Ocean Territory, (date unknown) with the one reference at page 13 <http://chagos-trust.org/sites/default/files/images/FCO%20consultation%20document.pdf> accessed 18 November 2016.
[150] Bancoult, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs [2014] EWCA Civ 708 (23 May 2014) para 94.
[151] *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] EWCA Civ 708; [2014] WLR (D) is peppered with references relating to the overall environmental and climate change benefits resulting from the creation of the MPA: see paras 8,75,97, 98 and 99.
[152] Ibid, para 97.
[153] This is a key theme within TWAIL literature: Anghie in A Anghie, *Imperialism, Sovereignty, and the making of International Law* (CUP 2007).
[154] The tension here is also between modern ideas around conservation against colonially inherited modes of fortress conservation where forests need to be vacant spaces, conservation nullius, devoid of inhabitants in order for them to be pristine and saved'. With thanks to Lucy Claridge of Minority Rights Group International for these insights.
[155] *R (On The Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, para 157.
[156] Ibid.

Other examples of this *environmental nullius* policy include the displacement of the Indigenous *Ogiek* people from the Mau Forest Complex in Kenya to make way for the government's conservation plans and creation of a national park[157], leaving groups in poverty[158]. In an application before the African Commission[159], the Kenyan government justify the eviction based on actions by Colonial and Post-Independence Governments to protect the Mau Forest Complex in view of its importance to the country and the region's ecology, biodiversity, resources and economic activities[160]. Similarly, environmental agencies supported colonially inherited models of environmental protection in the *Endorois* case to bolster the case for dispossession of the Masai[161]. Within this narrative is encouragement provided to treat the economic value of biodiversity as the ultimate measure of the value of land, ecosystems and species[162]'. The economic message that rural lands must 'pay for themselves' has been devastating on Indigenous communities as thousands of hectares of prime wildlife habitat have been converted to wheat fields[163] and Indigenous groups resettled in the process. This economic narrative started in the 1980s when development agencies, through large influx of budgets to conservations groups rushed to put conservation into a developmental narrative such that conservation, biodiversity and development need not be antagonistic and could even be synergised. Arguably, these empirical examples echo a kind of *environmental nullius* resonate the continuation of the legal policy of *terra nullius*, which during the colonial period justified the double process of civilisation and cultivation[164].

[157] See the policy work of development scholar David Hulme in which he notes that 'almost everywhere conservation has had adverse effects on local livelihoods and not infrequently these have involved violence against people and property as at Lake Mburo National Park in Uganda and forced resettlement with associated long term deterioration of living standards, as at Mkomazi Game Reserve in Tanzania, in Hulme D & Murphree M, Policy Arena: Communities, Wildlife and the 'New Conservation' in Africa, Journal of International Development, Vol 2, pages 277-285 (1999).

[158] As the Brundtland Report, 'Our Common Future', (World Commission on Environment and Development, 1987) has cautioned `it is both futile and an insult to the poor to tell them that they must remain in poverty to protect the environment', cited in Hulme D & Murphree M, Policy Arena: Communities, Wildlife and the 'New Conservation' in Africa, Journal of International Development, Vol 2, pages 277-285 (1999).

[159] See African Commission on Human and Peoples' Rights v. Republic of Kenya, application no. 006/2012.

[160] Ibid, at para 8I (a).

[161] 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Humans and Peoples' Rights, 46th Ordinary Session, 25 November [2009], para 165.

[162] Young T, 'Declining Rural Populations and the Future of Biodiversity: Missing the Forest for the Trees?' (2006) 9 Journal of International Wildlife, Vol 9, 2006, page 324.

[163] Ibid, at page 324 referring to the Mara Triangle in South Western Kenya and the Masai Mara.

[164] Coulthard GS, *Red Skin, White Masks* (University of Minnesota Press 2014), page 33 making reference to Fanon's 'Black Skin, White Masks, (1991)

The most current iteration of Imperialist thinking lies in the UK Government's resettlement proposals. In August 2015,[165] the government embarked on a three-month resettlement exercise. Chagossians rejected all of the terms of those proposals which included a three-year pilot scheme has been proposed during which it is suggested, that Chagossians work as labourers at the military base with no formal right to abode, or right to private ownership of land[166]. The provisions have simply recast Chagossians from Tarzans, Man Fridays, sea gypsies, to contract labourers and now, cheap temporary labour for the military base[167].

As chapter 3 argues the political, cultural and economic ideas on private land, effective cultivation and European cultural superiority advanced specific transnational governance paradigms subverting Indigenous relations to land over private land usage as identified in chapter 3. This section argues through legal evidence that the Chagos case might provide a current legal example of the continuation of those transnational processes in legal and executive narratives. Evidence illustrates how the basic applicability of rights to abode are diluted and fragmented through for example, the legal construction of Magna Carta right to abode as 'important' rather than 'fundamental', the provision of domestic legal support to political use of domestic royal prerogative power without confirming legal precedent of use for exiling a settled population. Other examples include the provision of legal support to executive considerations of economy, military use and environmental protection as a political rationale for preventing return.

This final section explores how international courts, here, the European court, has interpreted and applied relevant international human rights law relating to Chagossian rights to land and property.

> 'What are human rights? The UK government has championed human rights but have refused to apply them to us Chagossians. Why have a small group of people been treated differently? We have a right to return'.[168]

On 11 December 2012 the court dismissed the application of the Chagossians in *Chagos Islanders v. United Kingdom*[169] creating the astonishing position that international law does

[165] British Indian Ocean Territory (BIOT) Policy Review of Resettlement Consultation with Interested Parties 2015 < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450997/BIOT_Policy_Review_of_Resettlement_Consultation_Document_Final.pdf> accessed 18 November 2016.
[166] Ibid, Page 5.
[167] During the APPG it was noted that these provisions are aimed at scaring the Chagossians with an insecure future and that none of the provisions address any of the real issues at stake: that of correcting wrongdoing and the ongoing subversion of rights and justice of an Indigenous population.
[168] Interview with Sabrina Jean, second generation Chagossian (Croydon, UK 29th July 2015).
[169] *Chagos Islanders v United Kingdom* [2012] No. 35622/04, ECHR 2012.

not apply to the subjects of BIOT, thus blocking access to international law and the possibility of legal recourse. Due to the Government's total control of BIOT, the applicants' argued for its consideration as part of metropolitan UK, thus opening the door for Member State liability for activities undertaken outside its metropolitan area.

The two territorial rules discussed were article 1[170] (the 'jurisdiction' clause) and the provisions under article 56 on specialised territories[171] (sometimes referred to as the 'colonial clause') of the ECHR. Applying these two rules, the argument extends on two fronts. First, that BIOT remained the same territory for whose foreign policy the UK was responsible and to which the notification under Article 56 continued to apply[172] after Mauritian independence, thus extending application of the HRA to BIOT subjects. Second, even if the Government have never formally extended the ECHR and right of individual petition to BIOT, this does not preclude jurisdiction arising under different grounds alternative to article 56, such as article 1[173]. Article 1 jurisdiction applied as the islands are completely constitutionally integrated[174] into the UK such that it holds authority and control over an individual who exercises effective control over an area[175]. The court[176] rejected both arguments. At issue was the question of the relationship between these two provisions. Specifically, whether article 1's jurisdiction principle of 'effective control' might provide legal satisfaction to claimants where no formal article 56 declaration is made.

As Frostad notes[177], the court still upholds the separate identity of articles 1 and 56 and that for article 1 to apply, the level of control over a territory would have to be different from that which is normally the case in territories specifically covered by article 56.

In *Bui Van Thanh,*[178] the applicants claimed that absent an article 56 declaration, the acts of Hong Kong authorities were based on UK policy with the consequence that the matters fell

[170] Article 1 of the ECHR provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention' the key term being the interpretation of 'jurisdiction'
[171] Article 56 of the ECHR provides as follows. 'Any state may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.'
[172] *Chagos Islanders v United Kingdom* [2012] No. 35622/04, ECHR 2012, para 47.
[173] Ibid, para 48 and 67.
[174] Ibid.
[175] See *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011 where the Grand Chamber confirmed that the UK Government's human rights obligations can only in exceptional circumstances extend overseas to situations in which British officials exercise 'control and authority' over foreign nationals.
[176] *Chagos Islanders v United Kingdom* [2012] No. 35622/04, ECHR 2012, para 64.
[177] Frostad M, 'The Colonial Clause' and Extraterritorial Application of Human Rights: the European Convention on Human Rights Article 56 and its Relationship to Article 1', (2013) Vol. 4 (1), Arctic Review on Law and Politics, page 35.
[178] *Bui Van Than and Others v. the United Kingdom*, Appl. 16137/90, 12 March 1990, Commission decision as to the admissibility, Vol. 65 European Commission of Human Rights Decisions July 1990 (1993).

within the jurisdiction of the UK for the purposes of article 1. The Commission held that no jurisdiction could arise and that the mere fact that the acts of the Hong Kong authorities under Hong Kong immigration law is based on United Kingdom policy was insufficient to amount to an exercise of the latter's Article 1 'jurisdiction'. In the *Yonghong,*[179] a similar position was taken regarding the acts of the Portuguese Governor of Macau.

The Chagos case[180] confirms this position when referring to *Al-Skeini,*[181] the European court highlighted the separateness of the two legal regimes of 'the 'effective control' principle of jurisdiction', which does not replace and is 'clearly separate and distinct from[182]' the 'system of declarations under Article 56 of the ECHR (formerly Article 63)[183]'. Moreover, the Chagos case emphasised that exceptional circumstances are required to trigger article 1 responsibility concluding that extraterritorial responsibility remains exceptional after *Al-Skeini*', highlighting the exceptional Iraqi 'security[184]' circumstances of the cases before the Grand Chamber, where the United Kingdom had assumed authority and responsibility[185]'.

In light of the above authorities, Frostad's argument is convincing when she suggests that the threshold of control required in cases where no declaration has been made would be high, requiring 'something close to an occupational authority[186]' and thus seldom used apart from independence movements necessitating metropolitan military presence[187]. Her opinion that a high level of control would be required is consistent with the *Tadic*[188] case in which the correct test for attributing state responsibility to internationally wrongful criminal acts of individuals or unorganised groups of individuals acting on behalf of a State was set as a high threshold of 'effective control'[189]. In *Tadic*, control required specific instructions or

[179] *Yonghong v. Portugal*, Appl. No. 50887/99, 25 November 1999, Decision as to the admissibility (English translation)
[180] *Chagos Islanders v United Kingdom* [2012] No. 35622/04, ECHR 2012, para 70
[181] *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011.
[182] Ibid, para 140 stating 'the situations covered by the 'effective control' principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible.
[183] *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, para 140 explaining how the separate system of declarations were decided by States when drafting the Convention, to apply to territories overseas for whose international relations they were responsible.
[184] *Chagos Islanders v United Kingdom* [2012] No. 35622/04, ECHR 2012, para 71 referring specifically to 'the maintenance of security in South East Iraq' and 'through its soldiers engaged in security operations in Basrah… and had exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.
[185] Ibid.
[186] Frostad M, 'The Colonial Clause' and Extraterritorial Application of Human Rights: The European Convention on Human Rights Article 56 and its Relationship to Article 1', (2013) Vol. 4 (1), Arctic Review on Law and Politics, page 35.
[187] Ibid.
[188] Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999.
[189] Ibid, para 124.

directives aimed at the commission of specific acts[190] and far more than a general level of control.

On balance, the court's view in Chagos does not show any substantive departure from legal precedents. Evidence suggests a judicial 'hardening' of the rules for article 1 application in cases where no declaration has been made and for article 56 solely to cases where declarations were expressly extended. In response to the applicants' contention that article 56 should be set aside as an 'objectionable colonial relic[191]', the court retorted that as 'anachronistic as colonial remnants may be, the meaning of Article 56….cannot be ignored merely because of a perceived need to right an injustice[192]', arguably suggesting legal acquiescence in the ongoing 'colonial project'.

The dis-application of human rights law has robbed Chagossian communities of the ability to access directly applicable international human rights law, stripping them bare of human rights protection. This would include useful legal precedents relating to violations of rights to property and as 'possessions' under Article 1 of the ECHR. For example, in *Dogan v Turkey*[193] the court ruled in favour of resettlement and damages to protect the customary property rights of villagers forcibly evicted by the Turkish government. The court noted that although villagers did not have registered property, they were 'land connected' as demonstrated by special ancestral rights to land. Legal evidence of their traditional land rights and 'unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land[194]' was derived from informal custom demonstrating how villagers constructed houses on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter'. This evidence allowed the court to rule that those traditional land relations qualified as 'possessions' under the ECHR[195] . Similarly, dis-application of international human rights law blocked the applicability of article 27 of the International Covenant on Civil and Political Rights protecting the rights of persons belonging to minorities[196]. Crucially, the Human Rights

[190] Ibid, para 132.
[191] *Chagos Islanders v United Kingdom* [2012] No. 35622/04, ECHR 2012, para 74.
[192] Ibid.
[193] *Dogan and Others v Turkey*, no. 8803 – 8811 1/02, 8813/02 and 8815-8819/02, ECHR 2004-VI.
[194] Ibid at para 139.
[195] Ibid.
[196] Article 27 of the ICCPR states that 'in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

Commission (HRC) has interpreted that article to protect Indigenous rights to land[197] thus bringing claims based on culturally distinct ways of life into international law.

Drawing on specific legal evidence this chapter has attempted to build a case which might answer the illusive question set out at the start of this chapter of why despite the strong merits of their case, the Chagossian people continue their struggle for legal recognition of their traditional right to land in the Chagos islands and remedy of return.

This study identifies evidence that Chagossian communities do have legal rights to land and related remedies of compensation and return through a number of legal methods. These methods include the possibility of applying the international legal definition of Indigenous, English Magna Carta right to abode and international human rights law.

The inability of those rights to be meaningfully applied to the Chagossians in any way: as 'fundamental' ownership rights or collateral legal rights to land is, it is suggested, constrained as a result of the manner in which those rights are legally interpreted. Based on the evidence, as currently applied the international legal definition of Indigenous is highly dispersed and Euro-centric, making it conceptually difficult for marginalised Indigenous actors to obtain legal recognition, access to the canon of Indigenous rights and protection under international law through a common legal standard. Evidence from the Chagos case and other comparative social contexts, reports and studies, suggest that the practical result of this legal fragmentation might create a space through which parochial and biased executive and legal interpretations of the definition dis-apply status to groups such as the Chagossians asserting Indigenous status but fail to satisfy racialised Euro-centric conditions.

Legal evidence also illustrates how the basic applicability of these rights is diluted and fragmented through for example, the provision of domestic legal support to political use of domestic royal prerogative power without confirming legal precedent of use for exiling a settled population. Other examples include the provision of legal support to executive considerations of economy, military use and environmental protection as a political rationale for preventing return. This support is demonstrable through the dilution and thinning out of Magna Carta rights of abode and related remedy of return from 'fundamental' legal rights to 'important' rights capable of extinguishment for economic, military and environmental

[197] *Chief Bernard Ominayak and Lubicon Lake Band v Canada* [1990] CCPR/C/38/D/167/1984, UN Human Rights Committee, 26 March 1990. In that case, the HRC recognised that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.

reasons. Legal support to the political policy of dispossession is further suggested through the parochial reading of the Chagossian's English public law right to rely on earlier executive statements creating a legitimate expectation of return. It is argued that this limited legal reading is divorced from the doctrine's fundamental basis in fairness. Finally, at the international level there is also evidence of confirming legal practice of a limited judicial interpretation of Article 56 of the ECHR which has denied Chagossians' access to international law and valuable supporting legal precedent and international instruments upon which a right to land and remedy of return could be developed. This legal policy position has denied access to justice for claimants based on claims of territoriality. Achieved through a hardening of territorial applicability rules that work to prevent potential claimants from accessing legal redress through the courts, the policy undermines the vision of a rule of law, which embraces human rights for all[198]. For Chagossians, the limited reading of the extra-territorial scope of the Convention has created a legal black hole for BIOT claimants thus assisting in the continued exclusion and dispossession of the Chagossians.

Together the legal arguments replicate colonial and neoliberal thinking on the superiority of Western culture, neoliberal political and market forces and private relations over land all of which have roots in the political and economic transnational governance paradigm of the 'agricultural argument' discussed in chapter 3 . The legal evidence presented here in relation to the Chagos case arguably presents a discursive example of what Paul O'Connell refers to as a modern judicial 'turn[199]' and tacit acceptance of the supremacy of neoliberal orthodoxy (and its version of human rights) to issues of public importance. In his work on socio-economic rights, he notes that despite the broad consensus that socio-economic rights are 'real rights'[200] and should be justiciable in the same way as civil and political rights, he argues the case of a judicial turn in the era of neo-liberal globalisation. This 'turn' sees socio-economic rights fundamentally undermined by a judicial movement involving both the discursive and material negation of the value of such rights, despite progress in their formal recognition and even constitutional entrenchment[201]. For O'Connell, neoliberalism, of necessity, carries with it very definite understandings of which rights merit respect in a market utopia and they are, fundamentally negative rights.[202] Drawing on international

[198] T Bingham, *The Rule of Law* (Penguin 2010) 67.
[199] O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 552.
[200] Kinley D, Civilising Globalisation: Human Rights and the Global Economy (CUP 2009); O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 532 and Salomon ME, 'Why should it matter that others have more? Poverty, inequality, and the potential of international human rights law' (2011) 37 Rev Int Stud 2137.
[201] O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 533.
[202] Ibid 537.

comparative studies, he argues that there is an expectation that national courts should 'harmonise' domestic constitutional provisions with the imperatives of neo-liberal principles.[203]

Examining constitutional precedents from India, Ireland, Canada and South Africa, he maps a trend in the judicial acceptance of neo-liberal orthodoxy through a dilution of socio-economic rights into market friendly and non-threatening norms that are 'purely formal, procedural guarantees rather than substantive entitlements to equality and fairness[204]'. So, in the Indian *Narmada* case[205] involving the relocation of tribal people to allow for the WB financed Sardar Sarovar dam project in Gujarat, O'Connell argues that the right to shelter entrenched in the Indian constitution was read 'thinly' such that it was were disregarded in favour of neo-liberalism, the state, rich and urban-middle classes[206]. Similarly, South African jurisprudence demonstrates a regression in socio-economic rights protection when the Constitutional Court upheld the installation of pre-paid water meters in the poor township of Phiri[207] despite claims that it was in breach of the Section 27 constitutional right to water.[208] Those cases demonstrate how tensions and fragmentation occur when globalisation and market forces, meet human rights leading to resulting state relegation due to the state's perceived inefficiency under neoliberalism[209], with a detrimental effect on economic, social and cultural rights.[210]

Applying O'Connell's critique, this chapter finds potential evidence of a regressive and deeply contested judicial turn or movement within English and to some extent, European courts in favour of Imperialist thinking. That Imperialist thinking is for example demonstrable through the continuation of a legal policy which fails to question the biased Eurocentric legal structures which control access to the definition of indigeneity[211] and legal

[203] Ibid 538.
[204] That is not to say that the recognition of formal entitlements is not a welcome advancement, but it is only that: a start to a process of redistribution and the correction of injustices but not the end.
[205] *Narmada Bachao Andolan v Union of India* (Unreported), October 18, 2000) (Sup Ct (Ind)).
[206] O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 548.
[207] Ibid, page 550 referring to Mazibuko v. City of Johannesburg [2009] ZACC 28 (8 October 2009).
[208] O'Connell maps similar regressions in Canada relating to the Supreme Courts' refusal to protect the rights of welfare claimants and autistic children through the provision of specific services. This is even though one year later it was ready to intervene on the grounds of individual autonomy and security in a case involving a provincial ban on private health care insurance. O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 533 referring to the disability case of Auton (Guardian ad item of) v British Colombia (Attorney General) [2004] 3 SCR 657 and the contrasting case of Chaouli v Quebec (Attorney General) [2005] 1 SCR 791.
[209] P O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 MLR 535.
[210] L Minkler, *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 63.
[211] See the Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009). Paragraph 8(b) specifically requires that substantive equality would require paying sufficient attention to groups of individuals, which suffer historical or

arguments against resettlement which align with political and economic processes overly concerned with the macro-political, financial and ecological costs of resettlement. These transnational legal processes have, it is argued, diluted and fragmented Chagossians' rights to land, ultimately, placing 'brakes' on the ability of Chagossians to advance Fairness, a 'thick' rule of law and substantive equality in the form of recognition of their traditional rights, appropriate compensation and ultimately, legal right to return. Consequently, understanding these processes might provide clues into why the Chagossian people continue their historic struggle emanating from colonial times, for legal rights to their traditional land.

Dis-applying Magna Carta which as Bingham noted is 'the rule of law in embryo[212] to the Chagossians demonstrates that a worrisome legal precedent in which a 'perfect storm' of political and economic imperatives can oust fundamental 'constitutional' rights to abode and human rights making a legal space in which basic Fairness and substantive equality is routinely compromised.

Continuing along the transnational continuum of land rights, the next chapter provides an example of rights to land and access for legally recognised Australian Aboriginal actors emerging from *plural* public and private norms. Those plural rights are located in the Native Title Act and *private contractual norms* entered into between traditional land owners and a commercial entity in the context of an iron ore project.

persistent prejudice and importantly, an engagement with, and transformation of the underlying structures of control that repeat this prejudice. In this thesis, one of those systems is the international definition of indigeneity.

[212] T Bingham, *The Rule of Law* (Penguin 2010) 12-13.

CHAPTER 7 – THE PILBARA CASE STUDY

This chapter identifies legal rights to land for Aboriginal groups within private governance arrangements[1] called Participation Agreements (PA)[2] entered into between Aboriginal Traditional Owners (TOs) and Rio Tinto (RT) in the Pilbara region of Western Australia.

Previous chapters focused on the effect of interpretation of rights through state centred legal processes such as judicial interpretation. The following two chapters identify legal norms in 'transnational' legal non-state centred contexts involving private entities. Those contexts locate rights to land within a globalised context in which private entities undertake for reasons of social responsibility, typically state associated functions relating to the design, decision-making, management and implementation of issues relating to the traditional land rights of TOs. In the following chapters, those specific norms are private governance arrangements and international policy based standards. The globalised contexts in which those norms are interpreted and understood are through the spaces of multi-stakeholder economic development projects in Australia and Mongolia.

The following two empirical studies identify legal norms on land rights and the scope of the norms. Having identified the scope of land rights, the studies explore the effects of the legal norms located therein on the Indigenous communities (TOs in this chapter) in the studies. Understanding the effects on TOs involves an examination of the specific *processes* through which rights are implemented and the affect those processes might have on the availability and effectiveness of legal norms and their ability to advance Fairness for TOs. This actor-focused perspective to the examination of law applies an approach in transnational legal theory[3] that as an alternative to state bound approaches to law, recognises that Indigenous

[1] Previous drafts of the chapter referred to the agreements as ad hoc arrangements. Comments from RT legal counsel advised suggested a change of wording on the basis that 'ad hoc implies that Rio Tinto has agreements with only some traditional owners. Rio Tinto has comprehensive commercial agreements with all Traditional Owners on the country in which it operates'.

[2] This study draws on the following empirical data. First, the RTIO and [identity is subject to confidentiality provisions] People Claim Wide Participation Agreement between Hamersley Iron Pty Limited, Robe River Mining, Hamersley HMS Pty Ltd, Hamersley Resources Ltd and the [identity is subject to confidentiality provisions] People (PA). Second, the Regional Framework Deed between Hamersley Iron Pty Limited, Puutu Kunti Kurrama & Pinikura, Kuruma Marthudunera, Ngarlawangga and Nyiyaparli and Ngarluma Aboriginal Corporation as agent for and on behalf of the [identity confidential people] dated 22 March 2011 (RFD). Finally, other information provided by RT in the form of emails, books and tables and interviews with key stakeholders including principal legal officer of the native title representative body for the Yamatji and Pilbara regions (YMAC), within RT business including legal counsel and senior managers on Indigenous agreement making.

[3] Transnational legal processes as it specifically speaks to law depart from Hart's idea of law that have come to frame dominant methodological paradigm of the Westphalian state-ordered model. That model presents the state as the ultimate point of reference for both domestic and international law and places law's ultimate identity and unity in its ability to be

groups such as TOs affected by economically motivated projects are recognised actors in the law-making process.

The direct contracting processes identified in this study and resettlement processes in chapter 8 provide empirical examples of globalisation processes exemplified within development projects, which for legal scholars operationalise the law's 'turn' away from state apparatus to non-state actors[4] in contemporary law-making influenced by globalisation. Literature from other transnational legal studies identified in chapter 1[5] acknowledge this conceptual 'turn' and seek to better understand the steady emergence of legal spaces within which private actors might affect issues of human rights and public policy.

This growing legal practice of private actor 'transnational' action, is not yet consistent with issues of legal liability demonstrating a fragmentation and non-uniformity between the social effects of transnational processes and legal ability to 'catch up' with growing economic and political processes. In this case, legal recourse could mean the availability of legal avenues through which communities adversely affected by development projects may claim direct legal recourse towards the state in the event that RT conducts its obligations towards the TOs inconsistently with the Australian Native Title Act 1993[6] (NTA) or the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (AHA)[7].

Based on legal analysis in chapter 5, it is difficult to see how either of the two 'heads' of possible state liability under the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 (ILC Draft Articles), and the legal 'duty to ensure' following from the *Velásquez-Rodríguez v. Honduras* case[8] might be tenable.

'recognised' by legal officials and dispensed by the state (HLA Hart, *The Concept of Law* (2nd edn, Oxford Clarendon Press 1994).

[4] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.

[5] Zumbansen P,'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 Indiana Journal of Global Legal Studies 29; S Leader & DM Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011); M Salomon A Tostensen A & W Vandenhole, *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007); David Kinley who argues that these hybrid public/private dynamics open up arguments of indirect responsibility of states under international law for the actions of private entities in Kinley D, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009).

[6] As amended in 1988.

[7] The obligations contained in the PA are consistent with provisions under the NTA and AHA.

[8] *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988 (Merits), Inter-American Court of Human Rights.

Article 5[9] of the ILC Draft Articles is not designed to capture the types of the commercially motivated private entities and development projects examined in this study and the next. Moreover, given the amount of time and cost spent in RT's due diligence evidenced in the PA (which extends beyond the requirements of domestic law), it would be difficult to see how the state could be held liable for not permitting impact studies and diligence prior to commercial development when the PA evidences legal measures surpassing national requirements. The legal result is that actors are, under international law itself, left legally unable to hold states *directly* accountable for the acts of private entities in circumstance of commercial agreements and ancillary land access or resettlement policies.[10]

Drawing on this approach, the following two studies explore whether and if so, how, specific transnational legal processes might affect the traditional land rights of the TOs in this study and the pastoralist herders in chapter 8. More specifically, it explores what, if any political and economic governance paradigms identified in chapter 3, bear on the implementation of land rights by the private actors involved in this study. In summary, the following two chapters explore whether and if so, *how* the engagement of non-state private actors in the topic of Indigenous rights to land through for example the development and implementation of Policy relating to land by private entities and private governance arrangements might affect the availability and effectiveness of those legal rights. More specifically whether the PA can go any further than the law in facilitating the idea of land as a 'shared space'[11] consisting of plural 'circuits' of socio-economic and cultural relations over land or a

[9] Article 5 (1) of the ILC Draft Articles intends to capture very specific and increasingly common phenomenon of *parastatal* entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatised but retain certain public or regulatory functions.

[10] Alternatively and whilst not the focus of this study, legal recourse could mean the ability of TOs to take legal action against RT due to breach of its private law obligations under the PA. For example, in the case of RT acting inconsistently with the terms of the PA or negligently with the later having potential legal consequences under tort law. It is however, difficult to see how this might arise given that the obligations under the PA are the subject of protracted and costly diligence and enhance domestic law relating to land access, compensation and other benefits such as training and employment. Comment from Rio Tinto legal counsel stating that 'commercial agreements and other ancillary agreements have normally been developed and agreed after protracted negotiations involving experts and legal professionals. Private commercial agreements do not necessary abrogate the ability for TO's to hold the State accountable for Private Entities actions. Normally however, there are provisions that pass this through (indemnity provisions) to the private entity'.

[11] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003) 6-7. These circuits include customary land and its regulation via traditional processes (its place is principally but not exclusively in rural society). A circuit consisting of an unofficial market in land regulated by custom and practice – its place is principally urban and peri-urban but it is growing in the rural society and the circuit of modern official land market regulated by statutory codes of law interpreted and applied by professional and state officials – its space is both urban and rural. Using Santos' terms, it could be said that the modern official land market is the upper circuit in both rural and urban sectors, customary land is the lower circuit in the rural, and unofficial markets the lower circuit in the urban sector and where customary and unofficial markets exist in the same space both are lower to the upper modern circuit.

'reconciliation space'[12], which better accommodate and empowers the TOs traditional land ties to promote Fairness and a 'thick' rule of law[13].

Understanding the taxonomy and constitution of the rights to land extended to TOs requires an understanding of their relationship, if any, with domestic law. Rights in the PA are legally plural in the sense that they consist of state laws conceived in a positivist sense[14] but are 'stretched' and 'developed' within the private contractual arrangements within the PA. Essentially the private rights within the PA subsume the 'minimum' national legal framework in Australia recognising Aboriginal rights. It then extends those requirements, subject to specific political and economic processes identified as we move through this chapter. In this way, the legal rights sit within and beyond the shadows of the law. Identifying and understanding the scope and effectiveness of the rights to land in the PA will require some examination of the 'background' domestic statutory rights contained in the NTA and AHA.

The core operational function of the PA is to interact with and assist the operation and thus satisfaction of domestic statutory minimum standards contained in the NTA and the AHA[15]. The AHA prescribes mandatory requirements and the PA sets out obligations to assist in meeting those requirements[16]. One of the fundamental legal rights provided in the NTA is one of consultation. Registered native title claimants and determined native title parties have the right to negotiate with mining companies[17] in good faith[18] and to enter into Indigenous land use agreements[19]. Ostensibly, this right is an elaboration of the international law

[12] Blomley N, 'Making Space for Property' (2014) 104 Annals of the Association of American Geographers 1291.
[13] In brief, the idea of Fairness used in this study is transnational in that it enjoys a minimum common denominator of based in Kantian inspired ideas of natural law based on common humanity and fairness between all humans. This approach resonates a 'thick' approach to the rule of law that applies equally to states, individual actors and private entities and private and crucially, requires for laws to be judged on their ability to deliver substantive fairness to all persons and thus advance the current developmental narrative on fairness and common humanity in the SDGs. See generally T Bingham, *The Rule of Law* (Penguin 2010).
[14] M Davies, 'Legal Pluralism' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012) 824.
[15] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015). Specific examples being found in clause 4.2 (Recognition) stating that 'RTIO and the [ ] People acknowledge and agree that….this document has been negotiated in good faith in a manner sufficient to comply with the Right to Negotiate Process..' being the right to negotiate (RTN) process under Subdivision P of Division 3 of Part 2 of the NTA and the completion and legal registration of an Indigenous Land Use Agreement in accordance with the NTA provisions under Clause 31 (Indigenous Land Use Agreements).
[16] RT legal counsel provided this clarification.
[17] Section 30 of the NTA states that registered native title parties and claiming parties who have applied to the Federal Court for determination are entitled to the right to negotiate.
[18] See section 31 of the NTA.
[19] This scheme allows for a wide number of matters from small land use and access rights to large production sharing arrangements. They may contain details of usage, profit sharing, if any, extinguishment provisions and compensation payments, as applicable.

standard of free, prior and informed consent[20]. In Australia, the right to negotiate is not a veto right[21] but imposes a legal obligation to consult[22] with, 'listen' to or 'compromise'[23], with TOs. The act provides TOs a seat at the negotiation table for a minimum period of 6 months.[24] If the parties do not reach agreement within that period, the company may continue with commercial activities[25]: a legal position similar to that of eminent domain,[26] compulsory purchase or expropriation[27] that appears to continue the historical policy of prioritising settled agriculture as more effective than Indigenous land relations further discussed in chapter 3.

One method in which this negotiation process is satisfied within the PA is through the requirements relating to rights reserved areas. The PA contains a process in which traditional rights to land have been 'reserved' in favour of TOs. The system of 'Rights Reserved Areas' (RRAs) are based on the AHA which was enacted to ensure that Aboriginal heritage could be appropriately preserved[28]. The spirit of the act is to protect and preserve sights of significant interest on the basis that they are of interest to the wider community[29]. Compliance with Aboriginal heritage issues under the AHA are subsumed under and extended within the RRA process.

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[20] The right of FPIC in relation to developments on their land is a growing standard in international law with its clearest elaboration contained in articles 19 and 32(2) of UNDRIP. Articles 19 requires states to 'consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'. Article 32(2) requires States to 'consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories...

[21] So, in the event of failure to reach an agreement with the TOs, it is the relevant government minister who makes a determination based on the procedures contained in section 36 of the NTA, for example requirements of national interest

[22] See Section 26 A of the NTA.

[23] See *Brownley v State of Western Australia* [1999] FCA 1139 at para 24. 'The intention of Parliament is that a Government party engage in negotiation with a native title claimant with an open mind, willingness to listen, and willingness to compromise, to reach an agreement under which the native title claimant will agree to Government doing the act it proposes'.

[24] Section 35 of the NTA.

[25] Note from RT legal counsel 'the Applicant still needs approval prior to the minimum consultation period expiring'.

[26] For a comprehensive review of the history of eminent domain see the Australian Public Administration and Finance Committee, 7th Report, Chapter 3 'The Acquisition of Land by the State: Concept and History' which traces back the concept of eminent domain to Article 52 of the Magna Carta 1215 which states that 'To any man whom we have deprived or disposed of lands, castles, liberties or rights, without the lawful judgment of his equals, we will at once restore these', although no provision for compensation was made.

[27] By way of example, the Fifth Amendment to United States Constitution recognises the power to take private property for public use 'nor shall private property be taken for public use, without just compensation.' In the United Kingdom, the Acquisition of Land Act 1981 provides for the compulsory purchase of land subject to the payment of compensation. A number of other jurisdictions provide for the compulsory purchase of land upon the payment of compensation for example, Section 4 of the Expropriation Act 1985 in Canada and Australia has compulsory land acquisition statutes at Commonwealth and state level in the Land Acquisitions Act 1989 and Land Acquisition and Compensation Act 1986 (VIC) and also see sections 66 and 40 of the Constitution of Kenya 2010.

[28] See the preamble to the AHA, which states that the act makes 'provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants'.

[29] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).

The basic principle behind the RRAs is that TOs will provide blanket support to RT's operations[30] if RT follows the procedures contained in the PA. Pursuant to the RRA regime, TOs will always support applications to the government as long as RT satisfies specific obligations. These include permitting the TOs to identify cultural sites, ensuring consultation and discussing ways in which a site, if the TO's designate a site as of significant cultural importance can be entirely avoided or if not, what mitigation action is acceptable to TOs such that when an AHA application is lodged it is done with the TO's consent. In the PA example, specific provisions relate to the modification of the project to accommodate sites of special significance[31]. If RT does not follow these processes, under the PA, TOs reserve their right to object to disturbances on traditional land, and as a result object to mining, in accordance with the legal procedures set out in the AHA.

During contract negotiations, TOs identified certain areas as being of high cultural importance to TOs.[32] Based on the information provided by TOs, it was decided what type of moratoriums could be placed on these specific areas such that TOs can retain access to specific sites. The PA includes[33] these specific mining restrictions in the form of several 'layers' depending on the type of land restriction agreed for an area. For example, RT manager of Indigenous Agreements, Kate Wilson[34] described that in some areas RT agreed to move boundaries back so that significant Aboriginal sites were not disturbed and to bend pipelines around significant areas with RT agreeing to 'differential treatment' of specific highly significant areas sitting on substantial iron ore reserves. For instance, one such prescribed area containing culturally significant land was excluded from the project site. In the PA, it is described as 'areas within the boundary X and that part of Y that is outside the boundary of explorations licence Z[35]'. RT's land information system or 'geographic information system[36]' embeds data relating to those restricted land access points so that any future mining tenements remain on notice to restrictive covenants over those specific

[30] See the provisions of Part 2 (Support for RTIO's Pilbara Iron Ore Business in the Pilbara) of the PA.
[31] Clause 12.4 (Modifications to the operation of this document for Rights Reserved Areas) of the PA.
[32] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).
[33] Note from RT legal counsel suggesting alternative use of work 'legalise' in previous draft, stating that 'the PA is a commercial agreement. It is not law'.
[34] Interview with Kate Wilson, Manager, Agreements and Shannara Sewell, Acting Manager Indigenous Employment, Business Development and Planning (Skype 18th November 2015).
[35] The precise location is subject to confidentiality provisions.
[36] Clause 6.6 of the RFD requires RTIO to will develop and provide training to Traditional Owner groups so they can access its heritage geographic information system data relating to Aboriginal Sites.

culturally significant land interests, ensuring TOs retain access over these sites under the terms of the PA.

In addition to the PA's non-financial RRA rights, which facilitate access to traditional land, the PA also contains a scheme for compensation payments. Legal counsel for Yamatji Marlpa Aboriginal Corporation (YMAC[37]) explained that it fought hard to obtain both forms of land access and financial compensation for TOs. The rationale for this legal approach involved 'looking at development as binary and saying TOs do not want anything or want only compensation misses the point. They [TOs] recognise that answers are not simple and it is not practical to turn away: they now live in two worlds where mining will go ahead but they also want some benefits and the ability to stay and protect their country. In reality they would want a bit of both: compensation and the ability to access and protect country'.[38]

The compensation payments (or Mining Benefit Payments as called under clause 15) are compensation for current mining operations. These payments are 'linked' to the TOs providing consent for mining operations on their land.[39] Conceptually they satisfy three plural public and private objectives. First, they '*may*' provide reparations for previous wrongs done by RT[40], second, part of a process to empower TOs[41] (their socio-economic abilities develop life skills rather than relying on RT for handouts[42] and to facilitate ongoing cultural life[43]) and third, to provide business certainty for RT[44].

Compensation provisions also plug a lacuna in domestic law's inability to compensate groups adequately for the cultural significance of land. Since the 1928 case of *Factory at Chorzow*[45], the payment of full restitution for legal violations and expropriation of property has been a bedrock principle of international law[46]. Yet when this principle is applied

[37] Yamatji Marlpa Aboriginal Corporation, the native title representative body for the Traditional Owners of the Pilbara, Murchison and Gascoyne regions of Western Australia.
[38] Interview with Michael Meegan, legal counsel for YMAC (Skype, 4 August 2015).
[39] Comment from RT legal counsel clarifying that 'the PA facilitates access to land for TO's where it is safe to do so. Compensation payments are linked to TOs providing consent for mining operations on their land'.
[40] For example, clause 4.2 recognises that mining companies and governments may have in the past used the Agreement Area to secure economic benefits for themselves, and may have obtained rights, potentially without compensation.
[41] The empowerment purpose was a key point stressed by interviewees.
[42] Interview with Kate Wilson, Manager, Agreements and Shannara Sewell, Acting Manager Indigenous Employment, Business Development and Planning (Skype 18th November 2015).
[43] Clause 4.2 (b) (ii) of the PA.
[44] Clause 14 states that the purpose of the financial payments is to provide certainty to RT that amounts paid constitute final compensation for everything RT has done previously and is allowed to do under the PA in future, with the obvious exceptions of negligent acts and contractual breach.
[45] Merits, Judgement No. 13, 1928, PCIJ Series A, No. 17.
[46] Ibid, at para 47 in which the court states that reparations must, as far as possible, wipe out all the consequences of an illegal act and re-establish the situation that would have existed if that act had not been committed. This can be achieved by restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.

nationally to compensation for Indigenous land, the sums have, until very recently, remained vague, inchoate and when quantified, disappointing. Case law attempting to value issues of compensation quantum for Indigenous land have been exceptionally slow to evolve into a discernible line of legal practice.

In Australia, section 17 of the NTA provides that native title holders are entitled to compensation for extinguishment with section 51 requiring such compensation to be on 'just terms', thus importing the constitutional requirement for 'just terms'[47] into the native title framework. Section 51A of the NTA places a restriction on the total amount of compensation payable for extinguishment of native title land or water rights as not exceeding the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters. This restricts compensation payments to an equivalent of Western freehold value: an inchoate approach that fails to recognise the special value of land to groups.

In Australia, a compensation determination for Aboriginal groups was made in *De Rose v State of South Australia* [2013] FCA 988, however the final award of compensation in this matter was settled between the parties and the quantum kept confidential, limiting its use as a precedent for other claims. It has not been until 24 August 2016 that the Federal Court of Australia gave the first ever assessment of compensation for the extinguishment or impairment of native title rights and interests in *Griffiths v Northern Territory of Australia.*[48] The court ordered the payment of approximately $3.3 million to the native titleholders, the Ngaliwurru and Nungali Peoples. $512,000 was awarded for economic loss, $1.488m in interest and $1.3m for solatium, or non-economic loss. This is however a federal decision only, subject to appeal and in light of the following evidence, does not mimic established legal practice.

Similarly, in another common law jurisdiction, Canada, in *Delgamuukw v British Colombia*[49] the SCC decided that issues of damages were to be severed from the principal action with the court concluding, 'in the circumstances, it is best that we leave those difficult questions to another day'.[50]

[47] Section 51(31) of the Australian Constitution 1990 states 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.
[48] (No 3) [2016] FCA 900 (Timber Creek). Thanks to RT legal counsel for referring me to this case.
[49] [1997] 3 SCR.
[50] Ibid at para 169S.

When awarded, amounts are small. In *Mayanga (Sumo) Awas Tingi Community v Nicaragua*[51], the court ruled that the State must invest, as reparation for the immaterial damages, in the course of 12 months, the total sum of US$ 50,000 in works or services of collective interest for the benefit of the *Awas Tingni* Community. In *Saramaka People v. Suriname*[52], the same court granted only $75,000 to the *Saramaka* community in compensation for timber valued in the millions. The Court, despite the petitioners' requests, submitted evidence, and international legal standards, ignored market value[53]. Yet only a few years later, the Court ordered the payment of nearly $19 million for a state's expropriation of private land[54]. In sum, international law's ability to compensate for Indigenous land appears punctuated by themes of non- recognition and general ambivalence towards issues of compensation for non-economic relations over land.

The specific quantum of compensation remain confidential within the PA however what is ascertainable is that payments under the PA are designed to work like a partnership model in which the parties to the PA share gains and losses. Whilst this partnering approach has positive empowerment benefits, there are problems: for example, the impact on TOs of the inevitable falls of commodity prices. Whilst some companies have 'buffers' through the provision of price 'floor' and 'ceiling' above and below which payments cannot move, RT does not contains such a process[55]. Instead, RT makes payments into charitable and direct trust structures set up under the PA pursuant to which funds can be invested according to a set formula. Wilson noted that given the law's ambiguity on how much compensation would be given for traditional land; the compensation regime set out in the PA would almost certainly exceed any amount awarded under the NTA[56].

However, this approach to compensation lacks uniformity in Australia with Wilson noting that not all companies have agreed to provide financial compensation and trust structures essentially leaving compensation to the state under the NTA[57]. Ironically, uncertainty of quantum within the law matches a similar uncertainty amongst companies. Meegan stated

[51] Judgment of 31 August 2001 (Inter-Am. Ct. H. R. (Ser. C) no. 79) (2001)).
[52] Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)).
[53] *Saramaka People v Suriname*, Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)) at para 192.
[54] Antkowiak T, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', (2014) 25 (1) Duke Journal of Comparative & International Law, page 3 2014 referring to *Salvador Chiriboga v. Ecuador*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 222, para 84 (Mar. 3, 2011).
[55] Interview with Kate Wilson, Manager, Agreements and Shannara Sewell, Acting Manager Indigenous Employment, Business Development and Planning (Skype 18th November 2015).
[56] Ibid.
[57] Ibid.

how companies such as Fortescue Metals Group only wish to provide jobs to groups and not financial royalties[58], thus contributing to a fragmented compensation policy amongst companies. The social effect of this is, as Meegan notes, to continue the master/slave dialect of dependence[59] that leaves groups vulnerable to inconsistent treatment and may create conflict between groups in similar situations. Meegan notes that this could easily be broken away from through the provision of a capital base of ongoing payments.[60]

In the specific case of compensation, RT's compensation processes provide TOs with a more certain and substantial compensation than currently offered under domestic law. Moreover, in principle, they might facilitate the advancement Fairness for TOs in terms of advancing development narratives on justice and fairness contained in the 2015 Sustainable Development Goals. However, this ability is constrained by a lack of overall agreed policy practice in Australia between private companies making the legal framework for compensation fragmented and uncertain for Aboriginal groups facing the threat of further commercial development on their traditional land.

Drawing on the above, there is clear evidence of a robust connectivity between the PA and the national legal framework. Although the PAs are commercial agreements[61] between RT and TOs, arguably, their creation signifies a growing accountability, albeit ethical and not legal, of private actors towards issues of public policy. For example, RT specifically acknowledges the TOs traditional responsibility for land and water within the agreement area[62] and under clause 4.3, RT voluntarily extends its obligations TOs groups stating that it understands the importance of those responsibilities even if they might not be recognised[63]

[58] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).
[59] Deploying the proverb, give a man a fish and you feed him for a day. Teach a man to fish and you feed him for a lifetime, Meegan justified YMAC's insistence on a capital base as TOs can chose whether he wants to fish, buy the lake or do something else entirely, thus discouraging a charity and dependency mentality (Reference is made to an interview with Michael Meegan legal counsel to YMAC dated 4th August 2015).
[60] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).
[61] Clause 8.2 referring to the arm's length arrangements, which create no trust or partnership relationship between RT and TOs.
[62] Clause 4.3 (Recognition of Native Title) of the PA.
[63] This corporate policy raises further questions posed during interview with the Department for International Development of what might happen if the same approach was applied to a project in which RT was in receipt of funding pursuant to which Equator or IFC Indigenous standards applied which contain authoritative criteria for determining Indigenous status. When asked, the World Bank's view was that it would follow the definition of Indigenous prescribed by international law. As previous chapters argue, there are procedural challenges inherent within the definition which has prevented it from being used in plural settings outside of a white settler colonial context. The possible tensions created by the operation of multiple governance frameworks within the same project space has yet to be addressed yet as DFID has posed this question, the likelihood of such a situation arising is always possible.

at law[64]. Moreover, an opening section of the PA, entitled 'recognition and reconciliation[65]' frames the PA in the manner of a collective response through which the parties can operate to work further on their relationship based on mutual respect and partnering and the promotion of inter-generational equity.

The corporate narrative for entering into the PAs attests to this hybrid socio-economic approach to project sites. According to RT, the purpose of the PA governance arrangements is to not only provide certainty to RT[66] but also give certainty that it is creating a long lasting positive impact in the area[67], evidencing a strong social driver. In the event of any future conflict between the parties over the terms of the contract, these types of legal provisions might provide grounds for a favourable legal interpretation for TOs to the extent they demonstrate legal recognition by RT of important public policy issues.

In contrast, the PA might exemplify the increasing informal and non-legal contracting out of public policy issues to the private sector as non-state actors take control of territory and populations[68]. Within this paradigm, the functions of the state are refashioned and actors (TOs, the state and RT) assume new roles towards each other. In this case RT's ostensible provision of public functions towards TOs, offers an empirical example of the increasing co-existence of usually separate public, private, economic, and socio-cultural power vectors within the same geographical space.[69] In this study, we find an example of the current global trend in which the private sector increasingly takes responsibility for issues of public policy when there is a commercial case to do so.

Therefore, the PA might extend an additional example of the growing[70] 'creep' or process of corporate self-regulation in which issues of socio-moral public policy become part of a corporate's corporate social responsibility objectives making the private sector a new 'socio-moral public' policy regulator. Analysed as 'new governance[71]' paradigm which is

[64] Stipulating that as reasonably practicable after the commencement of the contract it will work with groups towards an Approved Determination of Native Title which recognises and reflects the TO's native title at law within the agreement: see clause 4.3 (Recognition of Native Title) of the PA.
[65] See Clause 4 of the PA.
[66] TOs acknowledge the need for business certainty under the PA, clause 4.2.
[67] Interview with Kate Wilson, Manager, Agreements and Shannara Sewell, Acting Manager Indigenous Employment, Business Development and Planning (Skype 18th November 2015).
[68] See Philip Alston, the 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors? in Non-State Actors and Human Rights 3, 6 (Philip Alston ed., 2005) and S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).
[69] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) 371 which casts further doubt on the relevance of traditional private and public spheres of power in international law.
[70] J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009).
[71] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.

characterised by a marked shift in power and authority, forms of regulation and self-regulation from state to non-state actor, this trend sees the 'moralisation of the market'. Evidence of this market moralisation is found in the following statement made by RT's *Chief Executive from 1997 to 2000, Leon Davis, when discussing Aboriginal rights in Australia*

> 'I think there is one step further than just straight legality and that's 'right' – that 'right' should be done – and this is what makes us human beings. We set up laws to govern our existence so we can all rub along together in a civilised society, but it's in the enthusiastic adoption of those laws to fill in the gaps between the people pinnacles that 'right' comes into it. I think – and this is a legal term in the UK, but not so much here – let 'right' be done. That's something that I heard in the UK and has influenced me all my life, that everything you look at you say, 'it's legal but is 'right' being done[72]'.

A key feature of this new paradigm is that public policy issues become less about the policy issue itself and more about reducing the risk to corporates through specific processes and strategies[73] thus externalising the risk pushing it further away from the project. The economic history and rationale behind this approach is discussed in more detail in chapter 4. To summarise its key point is that a business- case approach to social policy remains fundamentally grounded in utilitarian and neo-liberal thinking on risk management[74] and is driven by a desire for business certainty and practical functionality.

There is however, no real 'answer' on how to categorise these agreements and much turns on one's own perspective on legal interpretation and view on these types of 'new governance' agreements.

Having identified the rights to compensation, consultation and land access provided under the PA, the following section explores specific legal, political and economic transnational processes through which the rights to land identified above are implemented and the effects of those processes on the implementation of rights to land within the PA.

The decision to delineate the transnational legal processes to issues of economy and politics was informed by interviews and reading of directly relevant legal literature relating to Indigenous rights identified in chapters 1 and 3 and directly relevant literature relating to this thesis and other commercial arrangements between mining companies and TOs in

[72] Holland-McNair Lisa, '*Breaking New Ground, stories of mining and the Aboriginal people in the Pilbara'*, (Rio Tinto, Melbourne, Vic: 2006) 48.
[73] Examples include the private sector Equator Principles, the IFC Environmental and Social Performance Standards: see Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.
[74] Ibid.

Australia. For example, in her study of forty-one negotiated agreements between mining companies and Aboriginal peoples in Australia, O' Faircheallaigh[75] notes the impact of substantial power imbalance[76] between sophisticated corporate actors used to commercial negotiation and decision-making and TOs who have little or no experience of Western styles of governance. This implies that conversations over the efficacy of the right to negotiate and its formulation within the PA should speak to hierarchies of power.

Interviewees highlight the economic importance of Western Pilbara operations as hugely valuable and providing the jewel in RT's crown[77]. RT's Pilbara operations include an integrated network of 15 iron ore mines, four independent port terminals, a 1,700-kilometre rail network and related infrastructure. Its website discloses the commercial success of the Pilbara operations that delivered record annual production and sales volumes in 2014 of 280.6 million tonnes (with RT's share being 224.9 million tonnes), despite the impact of a lower iron ore price that reduced underlying earnings for the iron ore group by 18%[78]. All current RT Pilbara operations and projects are covered by agreements with TOs. During 2005, RT Iron Ore determined that within its iron ore footprint in the Pilbara region it was necessary to negotiate native title agreements with all TO groups, replacing shorter binding initial agreements with each of the groups[79]. The economic value of the Pilbara site along with the domestic legal requirements of the NTA may have contributed to the commercial decision to enter into the suite of PAs in RT's Australian operations.

The following section explores what, if any, effects the specific economics and politics of the Pilbara project has on the implementation and effectiveness of rights to land in the PA and what implications, positive and negative, those processes have for the advancement of Fairness for TOs. The assumption is that identifying and understanding these processes might aid in making sense of the effectiveness of the rights to land identified above.

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[75] See Faircheallaigh C, 'Negotiating Cultural Heritage? Aboriginal– Mining Company Agreements in Australia' (2008) 39 Development and Change 25 arguing that negotiated agreements do have the potential to protect Indigenous cultural heritage, but only where underlying weaknesses in the bargaining position of Indigenous peoples are addressed. Her findings have wider implications given that negotiation and agreement making are increasingly being promoted as a means of addressing the structural disadvantages faced by Indigenous peoples and of resolving conflicts between them and dominant societies.

[76] This power imbalance means that corporate responses to agreement making maybe dependent on the changing nature of a company's internal corporate social responsibility standards making the process uncertain and fragmented for groups as standards vary both between companies and within companies over time.

[77] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).

[78] Rio Tinto fourth quarter production performance, 20 January 2015 <http://www.riotinto.com/documents/150120_RT_fourth_quarter_operations_review.pdf> accessed 18 November 2016.

[79] The groups are the Puutu Kunti Kurrama & Pinikura , Ngarluma, Kuruma Marthudunera, Ngarlawangga and Nyiyaparli , Yinhawangka , Yindjibarndi and the Banjima group.

Section 24 of the NTA states that upon the determination of native title, the NTA requires that a 'native title bodies corporate'[80] be set up to co-ordinate any future development exploration acts with Indigenous rights through the implementation of a voluntary registered Indigenous land use agreements. The PA is one such agreement in which the law and the policy behind it are operationalised. In other words, the PA is a direct product of domestic provisions and thus the political and economic processes relating to the creation of the NTA might, at a basic level, speak to and aid in understanding RT's private implementation processes evidenced later. When placed together, they might also provide insights into the creation and contemporary continuation of transnational governance paradigms identified in chapter 4.

In 1992, Eddie Koiki Mabo won his long legal battle in the High Court of Australia to overturn the fictional doctrine that Australia was *terra nullius* or 'vacant land' prior to European settlement. Previous attempts to recognise native title in the *Gove Land Rights Case*[81] failed with Judge Blackburn concluding that native title was not part of Australian law and even it was, was extinguished by virtue of European settlement. *Mabo v Queensland (No. 2)*[82] rejected the fiction of terra nullius on the grounds of racial discrimination holding that pre-existing rights in land survived colonisation and that those pre-existing interests burden the Crown's title to land[83]. An attempt in state pluralism and recognition, Mabo held that 'the common law can, by reference to the traditional laws and customs of an Indigenous people, identify and protect the native rights and interests to which they give rise', and that Australian law is able to protect 'the interests of members of an Indigenous clan or group, communally or individually'[84]. The practical effect of *Mabo v Queensland (No. 2)* [85] was the enactment of the NTA one year later in order to comply with the national 1975 Racial

[80] These are registered to look after all native title land pursuant to the procedures in Section 24BC.
[81] *Milirrpum v Nabalco Pty Ltd* [1971] 17 FLR 141.
[82] [1992] 175 CLR 1 (HCA).
[83] The point here, made in *Mabo v Queensland (No. 2*) at paras 50 and 51, was that the Crown was treated as having the radical title to all the land in the territory over which the Crown acquired sovereignty (the radical title being a postulate of the doctrine of tenure derived from feudal theories of a Paramount Lord). This was associated closely with sovereignty, which permitted the sovereign to enjoy supreme legal authority in, and over a territory with power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others. However, it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the Indigenous inhabitants. If the Indigenous inhabitants and their rights and interests in the land occupied the land are recognized by the common law, the radical title that is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land. Academic debate aside, the practical result of colonial discovery remains that upon discovery, sovereignty was conflated with absolute beneficial ownership in exclusion of all other claims, including pre-existing Indigenous rights which were then 'carved out' as limited use and occupation entitlements.
[84] *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA) 66.
[85] *Mabo v Queensland (No. 2)* [1992] 175 CLR 1 (HCA).

Discrimination Act (enacted to give effect to the International Convention on the Elimination of all Forms of Racial Discrimination).

When delivering the second reading of the NTA bill, the then Prime Minister, Paul Keating, stated that the political approach to the bill was similar to the spirit of his 1992 *Redfern speech*[86]. This meant the NTA would constitute an 'ungrudging and unambiguous recognition and protection of native title' but that a 'just and practical regime' governing future development that delivered 'justice and certainty' not only for Indigenous people but also for 'industry and the whole community[87]' was required.

Central to the NTA is a 'right to negotiate' (RTN) over areas where native title had been recognised under Australian law. As Keating noted, the RTN would be based on Indigenous people having 'a right to be asked about actions affecting their land but not a right to veto[88]'. So, the timeframes set for notification, negotiation and arbitration would be 'tight but fair[89]' and there would be provision for 'expedited processes where a grant would not involve major disturbance to land or interference with the life' of Indigenous communities. The overall policy position permitted the integrity of the Australian land management system to be maintained, 'but in a way which respects the profound Aboriginal connection to the land[90] and provides appropriate protections[91]'. Importantly, the legislation would not 'lock land away' or set up 'complicated barriers to mining exploration operations'.

After *Mabo,* traditional rights could be recognised either by seeking a declaration of common law rights from state or territory courts or, as more commonly used through an

[86] Redfern Speech (Year for the World's Indigenous People) delivered in Redfern Park by Prime Minister Paul Keating 10 December 1992.
[87] Commonwealth, Parliamentary Debates, House of Representatives, 16 Nov 1993, 2877 (Paul Keating, Prime Minister) as summarised by Christopher Sumner and Lisa Wright, 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries' (2009) 34 UWA Law Review 195, 196.
[88] As compared to the Canadian position in which some cases Aboriginal title may, in principle, constitute a veto right and at least, it is protected by a consultation right. See *Delgamuukw v British Colombia* [1997] 3 SCR at para 168 per Lamer CJ noted that even in rare cases of minor infringement, 'when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. *Some cases may even require the full consent of an Aboriginal nation*' (emphasis added).
[89] Commonwealth, Parliamentary Debates, House of Representatives, 16 Nov 1993, 2877 (Paul Keating, Prime Minister) as summarised by Christopher Sumner and Lisa Wright, 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries' (2009) 34 UWA Law Review 195, 196.
[90] In Aboriginal culture, the land was created by the journeys of the Sprit Ancestors during a period known as the 'Dreaming' or 'Dreamtime'. In song, story, poetry, art drama and dance the Dreamtime tells how the Spirit Ancestors (each symbolised by an animal, which is the totem of the clan) gave life to the land and laid down the rule of Law. it is important to understand that according to the Dreaming, Aboriginal people did not own the land in the European sense but rather belonged to the land.
[91] Commonwealth, Parliamentary Debates, House of Representatives, 16 Nov 1993, 2877 (Paul Keating, Prime Minister) as summarised by Christopher Sumner and Lisa Wright, 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries' (2009) 34 UWA Law Review 195, 196.

application for the determination of native title under the auspices of the NTA[92]. The resulting NTA is a long and complicated legislative scheme fleshing out Keating's policy narrative.

The preamble to the act sets out considerations taken into account by federal Parliament when enacting the NTA. These policy prescriptions include the protection of the rights of Indigenous people, the need to provide a special procedure for the just and proper ascertainment of native title rights and interests and the importance of providing certainty to the broader Australian community that future acts that affect native title are done validly.

The two[93] key concepts which lie at the core of the legislation are, what is native title and what does the Federal Court have to consider in making a finding (determination) that native title exists? The first issue is decided under section 223 of the NTA. Chapter 4 provides an analysis of those legal rights, their formulation and interpretation. Section 225 contains the processes by which the court makes a determination of native title[94]. Upon determination of native title, the NTA requires that a 'native title bodies corporate' be set up to co-ordinate any future development exploration acts with Indigenous rights through the implementation of a voluntary registered Indigenous land use agreements. The PA is an empirical example of one such agreement operationalising the law and policy behind it.

Legal counsel for YMAC noted[95] that the NTA is a very practical scheme providing for mining companies to obtain access to country further to a process of negotiation with TOs, thus highlighting the continued superior ranking of modern economies in political process. The following legal examples corroborate Meegan's suggestion that the NTA is a practical scheme providing a gateway for accessing land in a legal manner.

In 2007 the NTA was amended to include proposed 'future acts[96]' done after 1 January 1994 (the commencement date of the NTA) that affect native title and include the grant or renewal of mining licences and permits. Under Section 24GB (i) (d) future acts refer to any 'primary production activity' defined as 'cultivating land, maintaining breeding, forest operations and

[92] Clark G, 'Mediation Under the Native Title Act 1993 (Cth): Some Structural Considerations' [2002] JCU Law Rw 5
[93] Ibid.
[94] Central to the act is the National Native Title Tribunal (NNTT): being a public body constituted of 3 members of which at least one member has special knowledge of Aboriginal issues (Section 124 of the NTA). Section 108 sets out its functions which include the handling of applications, inquiries, help parties reach agreement over proposed activities or development projects (future acts) and make arbitral decisions about these matters, register native title claims, reconsider claims, conduct mediation and the conduct of historical or anthropological research to carry out these purposes.
[95] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).
[96] Section 24GC (2)(a) of the NTA.

leaving fallow or de-stocking any land. Section 24GC (2)(a) prioritises primary production activities over native rights and interests. Submissions to the Human Rights Commission critique the prioritisation of these far more intensive primary production activities over typically less intensive Indigenous activities such as grazing and gathering, noting how the prioritisation or 'upgrading of primary production' activities has the ability to severely reduce the extent of possible co-existence and partnering of pastoral leases with native title. This preference for cultivating land echoes the modern continuation of the 'agricultural argument': a theory asserting that the 'proper' or 'effective' occupation of land can only be reached through private agriculture, which was the only basis for a real land tenure system'[97].

In 2011, a Bill for the Native Title Amendment (Reform) Act 2011[98] was proposed. The aim of the bill was to bring the national NTA process in line with the United Nations Declaration on the Rights of Indigenous Peoples[99] ratified by Australia in 2009. Proposed amendments included the inclusion of trading and commercial rights within Section 223 rights, profit-sharing conditions[100] and disregard of any acts attempting to extinguish native title rights and interests[101]. Other valuable proposals aimed at recognising and protecting the special relationship groups have to land[102] as well as legal requirements for negotiation processes requiring good faith and the use of all reasonable efforts[103] to last for a minimum period of 6 months[104]. Conceptually these provisions may have promoted McAuslan's idea of land as a 'shared space' better accommodating plural land interests, advancing more meaningful rights to groups which would specifically accommodate their special relationship with land

[97] T Flannagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 (3) Canadian Journal of Political Science 589, 590; J Gilbert, 'Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights' (2007) 7 (4) Human Rights Law Review 681, 687.

[98] See Native Title Amendment (Reform) Act 2011 < https://www.legislation.gov.au/Details/C2011B00038> accessed 22 November 2016.

[99] Section 3A of the Bill refers to the UNDRIP and the rights of all peoples including Indigenous peoples to self-determination; full and direct consultation and participation, free, prior and informed consent of Indigenous peoples in matters affecting them; the right of Indigenous peoples to their traditional lands, territories and natural resources; and non-discrimination against the interests of Indigenous people.

[100] Section 10 of the Native Title Amendment (Reform) Act 2011.

[101] Section 11 of the Native Title Amendment (Reform) Act 2011.

[102] These included requirements of good faith in negotiations with the party asserting good faith having the onus of proving that it negotiated in good faith (section 7), provisions allowing for the presumption of native title interests with the concomitant assumption that those rights demonstrate a continuing connection to traditional land or water rights (section 12) and specific avoidance of doubt provision stating that it is not necessary for a connection with the land or waters to be a physical connection thus acknowledging within the law that the essence of Indigenous rights can lie in intangible spiritual or cultural connections to territory (section 13).

[103] Section 6 of the Native Title Amendment (Reform) Act 2011.

[104] Section 5 of the Native Title Amendment (Reform) Act 2011.

thus advocating a 'thick' rule of law and enhanced Fairness. The bill lapsed in parliament due to lack of political will.

Finally, despite procedural legal recognition of traditional rights under the NTA evidence of a structural political and economic bias towards formal and economic land usage might be demonstrable through the following legal practices. The Federal Court[105], with mediation assistance from the national native title tribunal (NNTT), if required determine formal applications for native title recognition.

Concerns over costs and time taken in making a determination appear prominently in debates over the effectiveness of the legal process. The NNTT reported that, between 1 January 1994 and 31 December 2011, the average time taken to reach a consent determination was six years and three months. For example, in 2012, Brian Wyatt, CEO of the National Native Title Council, said that 'we are tired and weary of our old people dying before decisions are made on the native title' as elders die and claims fritter away. Businesses too have also been critical of the time taken to reach determination[106]. As at 21st March 2016 there have been 274 positive consents granted out of 350 native title determination applications[107]. These remarkable time frames such as the astonishing 18 and 17 years it took to grant recognition over 34,000 square kilometres of land in South Australia belonging to the Kokatha and Gumbaynggirr[108] people suggest a structural ambivalence within the law towards issues of Aboriginal land recognition. These timing issues present serious concerns for the ability of the NTA process to advance and implement legal methods aiming to protect traditional rights to land.

The following section examines what, if any effect the NTA and the political and economic processes evidenced above have, in this specific case, had on RT.

Historically mining companies were adversarial to TOs and post *Mabo* had lobbied hard against the NTA[109]. In light of this, RT's 'turn' towards socio- cultural issues in the specific context of the Pilbara project evidenced by the considerable time which have and substantial

[105] See the procedural rule in part 4 of the NTA.
[106] See Australian Law Reform Commission, Review of the Native Title Act 1993 (Discussion Paper 82) 23 October 2014, Context for Reform Proposals, time frames and costs, para 3.33 <www.alrc.gov.au/publications/time-frames-and-cost.> accessed 15 November 2016.
[107] Drawn from information contained in the National Native Title Tribunal <www.nntt.gov.au/Pages/Home-Page.aspx.> accessed 15 November 2016.
[108] Ibid referring to *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851.
[109] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).

legal expense in negotiating and entering into the PAs[110] is, quite remarkable. Through the leadership of Leon Davies, RT came to a conclusion earlier than others in the industry that the hurdle of Aboriginal rights would not go away causing them to break away from their competitors and execute some of the earliest native title agreements such as the Yandi Land Use Agreement in March 1997 in the Central Pilbara region. One might speculate that had RT believed that Aboriginal claims would dissipate they would have joined the approach taken by other companies to lobby against statutory protection[111].

RT's global code on business conduct entitled '*The Way We Work[112]'* include Aboriginal communities as key part of project operations and extend RT's support to the United Nations Declaration of Human Rights[113] and the 'do no harm[114]' principle. As Wilson notes, 'Indigenous issues in Australia are no longer seen as the same kind of risk to the company as RT has these agreements, which provide some level of certainty to both parties and go beyond legal requirements, and there are similar kinds of agreements in other RT Australian operations'.[115] In this case, these [the PAs] are characterised as standards to be implemented as appropriate into a national setting: similar to very basic guiding principles[116]. Wilson notes that there are other projects within Australia where RT has agreed to grant TOs access rights within areas of site operations, however these agreements are subject to confidentiality provisions and not in the public domain due to the sensitive nature of the TO sites of significance[117].

These types of concessions are available during the course of commercial negotiations and upon the basis of specific legal conditions. Specific conditions include the advantage provided to TOs through the presence of a legal regime of the AHA and the NTA that, however imperfect gives legal and political recognition traditional land rights providing a *de minimis* level of legal protection. Other conditions include commercial considerations such as the effect of commodity prices on agreement making and the strategic value of the

[110] The Participation Agreements were negotiated and drafted by international law firm Blake Dawson on behalf of RT.
[111] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).
[112] See 'The Way We Work', June 2015, page 19 which states that 'it respects the diversity of Indigenous peoples and acknowledge their unique and important interests in lands, waters and environment as well as their history and traditions' and 'encouraging local communities to participate in the economic activity our operations create', <www.riotinto.com/documents/RT_The_way_we_work_ENG.pdf > accessed 15 November 2016.
[113] Ibid 9.
[114] Ibid stating it 'takes measures to prevent our involvement in human rights harm through our business relationships'.
[115] Interview with Kate Wilson, Manager, Agreements and Shannara Sewell, Acting Manager Indigenous Employment, Business Development and Planning (Skype 18th November 2015).
[116] Ibid.
[117] Ibid.

Pilbara area to RT (referred to as the jewel in the Crown of RT's operations.)[118] The immense sunken capital costs involved in mining activities, the exigencies of getting a commercial deal done and the desire to provide the company with the legal and commercial certainty of TO support in the region provide the motivation for the development of tangible legal arrangements through which to secure this certainty. The following quote expresses commercial exigencies well.

> 'My work at YMAC is driven by the price of iron ore. During the 2006-2010 mining boom when the price of ore dropped and China's appetite was immense, YMAC was courted by a number of companies including RT, Hancock Prospecting Pty and BHP Billiton looking to seek access to country….due to the low price of ore and massive Chinese demand companies may have been more willing to spend time and money on agreements'.[119]

As thus two quote evidences, in the Australian context RT has, as a result of a number of powerful economic and domestic 'pull factors' such as the price of ore and the availability of national legal framework recognising native rights to land, been compelled and incentivised to enter into the PAs. For example, the strength of the RTN is entirely dependent on the leverage that the group has in the specific case and at that time, making negotiation vulnerable to fluctuating external processes such as the costs and ramifications of failed agreement and market prices which will drive the urgency behind and scope of agreement making[120]. As Meegan's quote suggests there is no consistent minimum standard of what private agreement making should contain making legal processes amongst different communities and private entities fragmented, patchy and potentially conflictual.

The above evidence demonstrates a transnational 'continuum' of state and non-state legal relations between the NTA and PA sharing common economic and political parameters or processes through which Aboriginal land rights are implemented. The evidence suggests that in the Australian context, economic and political processes that prioritise private economic relations over land consistently compromise Aboriginal rights. This critique does *not* however suggest that state and non-state intervention in these legal and economic institutions is futile. For example, a former legal counsel to TOs comments on the tremendous practical advantage national legislation provides to TOs when engaging with

[118] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).
[119] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).
[120] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).

project developers[121], thus highlighting the 'collateral' benefits of national recognition of traditional land rights. Provisions of the AHA place strict duties of due diligence, mitigation and entire avoidance of traditional sites on prospective land developers[122] to comply with the provisions of the AHA[123] with failure to do so resulting in prosecution[124].

The practical ability of developers to build upon these existing minimum legal protections through private negotiations such as those evidenced in the PA, can and does provide a valuable springboard for enhancing state created legal rights. Pursuant to contract negotiation discussions in which high level of trust built with TOs such that they revealed those sites to RT[125], YMAC as legal counsel to TOs facilitated enhanced consultation processes over sights of special importance and in some cases, the complete restrictions on mining, thus obtaining better legal outcomes for TOs than those offered under minimum domestic law. Whilst, those enhanced rights are of course subject to the volatility of commodity prices, this does not render the entire process of agreement making futile. As evidenced in this case, with the support of legal counsel TOs have been able, in this case, to secure enhanced rights to land under the RRA and compensation frameworks explored in this study which move far beyond the minimum NTA and AHA requirements discussed above which contain no such restriction for special sites.

In addition to issues of politics and economics, matters of consent and group decision making relating to the PA was amongst the most difficult areas of agreement making.

Central to this difficulty was the multi-dimensional aspect of consent requiring input from legal, anthropological and sociological advisors that often ran against project schedules and time constraints. Whilst anthropological issues lie beyond the scope of this study in legal rights, some very limited sociological and anthropological insights might prove informative to the application and efficiency of legal rights in the PA.

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[121] Ibid.

[122] See Aboriginal Heritage Due Diligence Guidelines, Department of Aboriginal Affairs, Department of the Premier and Cabinet, Government of Western Australia, version 3.0, 30 April 2013.

[123] Those provisions include requirements stating that an Aboriginal site is on or close to an area where a developer proposes an activity which may damage, destroy or alter an Aboriginal site, the developer is required to avoid the site entirely or investigate strategies for limiting disturbance to the site.

[124] Section 17 of the AHA provides that it is an offence to excavate, destroy, damage, conceal or in any way alter an Aboriginal site and by default, a land user commits an offence unless he is acting with the authorisation of the Registrar under section 16 or the consent of the Minister under section 18.

[125] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).

YMAC counsel identified how traditional family protocols require the presence of certain elders when decisions are made on behalf of the group and that these traditional rules can be manipulated within families causing decision-making conflicts. Given the TOs lack of familiarity with decision making per se, they became easily distracted when attending meetings with RT making them hard to run. Moreover and challenging the theoretical sociological and anthropological paradigm within community based development of the notion of 'communities[126]' as homogenous and stable, was the on the ground reality that like non-traditional groups, opinions differ within families and communities causing conflicts to arise over the different types of relationship groups want with RT[127].

Furthermore, an interlocutor[128] noted how issues over group decision making proved challenging. By way of comparison, native Maori groups in New Zealand have more formally defined centralised authority such that control and decision-making structures typically vest within an agent type entity such as a chief. In contrast, Aboriginal groups typically do not cede authority to an agent type figure such as a chief or trustee[129] preferring more diffuse and lateral authority structures more closely defined by relation to place and ceremonial areas[130] making engagement and decision making with TOs challenging.

RT's response to the challenges of fragmented and changing authority structures and to the practical issue of contract implementation improve capacity was to introduce the concept of representative bodies. In this scenario, implementation takes place through the incorporation of these local representative bodies as corporate vehicles[131]. A former legal advisor to RT stated that corporate structures are the best model to provide for communal agency action but acknowledged the serious challenges[132] when implementing Western concepts of board meetings and shareholder decision making required under the agreements[133]. It is beyond the scope of this study to analyse the philosophical, sociological and anthropological merits and demerits of imposing Western structures onto groups and

[126] See Creed G, *The Seductions of Community, Reconsidering Community*, (School of American Research Press 2008).
[127] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).
[128] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).
[129] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).
[130] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).
[131] See clause 9.4 of the RFD stating that Membership of the Regional Aboriginal Corporation must be restricted to corporate membership only.
[132] Interview with Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).
[133] For examples, clauses 9.5 and 9.6 of the RFD require the appointment of directors and typical corporate governance processes of board meetings with required quorums etc.

the effects of such a process[134]. However, drawing on interviews, some general observations regarding the practical formation of plural types of 'Indigenous agency' emerge.

First, as TOs became more clearly focused on how to identify central decision makers, meetings with companies become spaces of high conflict and tension with companies becoming impatient, feeling that they are wasting their time as no consensus was being reached[135]. YMAC counsel noted that the conflict generated within these spaces could be seen as catalysts for social change as TOs themselves sort out issues of what they want and who should speak for their area of land. From these discussions TOs decided issues of representation and governance according to their own terms rather than an expedited process imposed on them that may unravel later on, as authority was not ceded according to their own internal conversations and processes[136]. Emerging from this are novel attempts at plural and practical methods for Aboriginal decision making which draw on both traditional and non-traditional norms and might add value to other cases of Indigenous involvement in development projects.

Finally, processes of labelling affect implementation of the PA and the rights to land identified therein. The social effects of labelling TOs remain a serious sociological debate with literature typically focusing on the power and processes of labelling people. *Eyben et al* find that 'labelling processes involve relationships of power …in which more powerful actors use frame and labels to influence how particular issues and categories of people are regarded and treated…they are valid principally for the creator[137]' and much has been said about the effects of labelling refugees in the context of public policy practice[138]. Refugee analogies have been extended to the labelling of new categories of 'development induced

[134] See Godden L and Tehan M, *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge 2010) 132 which contains a number of informative comparative case studies relating to the effectiveness of property law and tenure models developed around concepts of individual ownership, for achieving long-term environmental and economic sustainability for Indigenous peoples and local communities. Stephenson's study on the implementation of Western corporate governance models in Alaska and Australia concludes that governance models can be of a viable avenue for the future development of Indigenous lands only if traditional connections are respected in any model developed and specific deficits are seriously engaged with. Deficits include lack of Indigenous knowledge of corporate models, the large cost of corporate and legal compliance and basic omissions and misunderstandings around larger conceptual issues that native lands are more about heritage, community and native identity and not about land effectively privatized in corporations.

[135] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).

[136] Ibid.

[137] Eyben R, Kalungu-Banda M, Moncrieffe J (eds.) *The Power of Labelling: How People are Categorized and Why It Matters* (Routledge 2008).

[138] Zetter discusses how the imposition of the label makes the refugee vulnerable to institutionalised perceptions, an imposed crisis based identity and a prescriptive programme of needs'. See Zetter R, 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity' (1991) 4 J Refugee Stud, page 60 and Harrell Bond discusses how the label encourages a stereotype of charity and with humanitarians and policy implementers assuming the power to decide who is deserving. For Bond, such power is highly seductive and brings out the best or the worst in us, see Harrell-Bond B (2002) 24 Human Rights Quarterly 68.

displaces' or 'oustees' resettled through development projects in the Indian sub-continent, which also highlights the devaluing and stigmatising effect of these labels. In essence, labels compartmentalise and fragment those being labelled from others. Yet missing from these debates is an examination of how labels are used by corporates within globalised operations[139].

In this case, corporate responses to TOs appear 'as both stakeholders and community partners': illustrating a subtle acknowledgement of the hybrid and potential interchangeability of Indigenous identity: as stakeholders: 'arm's length[140]' parties and subjects of commercial relations as well as 'community partners'. Given the imbalance in resources and negotiation related experience[141] between TOs and RT, the PA include specific processes which attempt to compensate for this imbalance for example through the provision of separate legal advice to TOs and a legally documented approach to all engagement with TOs based on mutual respect. In this specific case, the legal practice of labelling TOs as stakeholders and partners moves towards a hybrid understanding of TOs as possessing a mixture of cultural and economic needs. It is however, beyond the parameters of this chapter to explore the specific sociological or legal effects of those sociological labelling processes within corporate contexts.

In conclusion, the PA adds to current transnational legal studies identifying and exploring the contribution and effects of globalisation practices and thus the presence of non-state actors in areas of typical state centred responsibility, in this case Aboriginal land rights. Debates on the inability of modern legal land relations to embrace non-economic relations over land are not new[142]. Borrowing from the conceptual framework of Brazilian geographer[143] Milton Santos, legal scholar Patrick McAuslan offers a plural and equitable model of land management that recognises land as a conceptual shared space consisting of

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[139] Eyben R, Kalungu-Banda M, Moncrieffe J (eds.) *The Power of Labelling: How People Are Categorized and Why It Matters, (*Routledge 2008).

[140] See Clause 8.2 of the PA that characterises these agreements as commercial arm's length transactions.

[141] Comment from RT legal counsel stating 'both parties had legal representation. Any imbalance would arguably have been perception'.

[142] See Shihata IF, Tschofen F and Parra AR, *The World Bank in a Changing World: Selected Essays* (M. Nijhoff Publishers 1991) 194 stating that vulnerable groups at particular risk are Indigenous people, the landless and semi-landless and female headed households who, though displaced, may not be protected through land compensation provisions with the rights of Indigenous peoples being particularly problematic.

[143] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003), page 6, referring to Santos M, *The Shared Space: The Two Circuits of the Urban Economy in Underdeveloped Economies* (Meuthen 1976) and the concept of two interrelated and overlapping circuits of the urban economy (the upper circuit represented by technological progress and the lower circuit consisting of small scale activities almost exclusively for the poor) each of which require legal and policy recognition in order to successfully tackle the problems of cities in developing countries.

overlapping 'circuits in shared space[144], applying it to the majority of states in Africa, the Pacific Asia, Latin America and the Caribbean. His interesting geographical schema is characterised by its ability to legally recognise and accommodate differing economic, cultural and social economies and land relations.

Taking the example of Australia, he convincingly argues that whilst land compulsorily acquired by the state may formally pass into the 'formal' circuit, in the eyes of the traditional occupiers of land in Australia, large parts of Australia remain in 'their' lower circuit if lower circuit rules and practices are not followed at the time of dispossession. This is notwithstanding that according to formal statutory Australian law, that land is owned and occupied in accordance with laws of the upper circuit[145].

This plural approach to land rights attempts to correct the hierarchical bias in today's society toward recognition of the modern and formally recognised 'circuit' which sees land as a 'purely monetary asset[146]'. For McAuslan, adjusting these hierarchies of power requires specific formal and informal interventions involving both public and private inputs and actors into the implementation of land policy[147]. For example, changes to simplify land recording and transfer systems[148] and land sharing projects with developers[149]. This collective approach is justified on the basis that overall equity[150] requires that all relations must be recognised in order to advance the stable and sustainable functioning of a land system for all its users.

Drawing on this approach, the PA offers an empirical example of how those competing 'circuits' of land relations existing in the same space might be practically accommodated.

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[144] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003) 6-7.

[145] See McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003) 8.
In which taking the example of Australia, he explains how the land revolution in Australia over the last decade or so testifies to this. It is vitally important to appreciate the at each circuit is, in the eyes of its users, legitimate; each circuit is an integral part of the whole society and one cannot make assumptions about the legality or illegality; legitimacy or illegitimacy of any circuit.

[146] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003).

[147] Ibid 26.

[148] Such as a land recoding and transfer system based on the Torrens system, as suggested by McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003), pages 346-347

[149] Ibid, referring to novel land sharing projects in Thailand which provide a solution to prevent the breaking-up and displacement of existing low income slum communities through eviction and typically require as a pre-condition for success that land-owners or developers do not want to taint their public image or who genuinely want humanitarian solution, but McAuslan notes that Thailand has never been colonised and consequently has always been able to select the most appropriate systems and laws without them being imposed from an outside authority

[150] Ibid, For McAuslan, overall equity is a sound goal for any land policy in its ability to secure no more than a fair and reasonable proportion of land to be made available to all members of society.

Arguably, the PAs extend an empirical example of growing transnational legal processes of concern to international law in their ability to shape new forms of legal rights to land for TOs that engage non-state actors in the advancement of a 'thick' rule of law and development narrative of the 2015 Sustainable Development Goals (SDGs). They might be viewed as a form of informal[151] 'contracting out' in which a commercial entity has entered into private law binding contractual arrangements with TOs which build upon the domestic NTA framework in Australia concerning traditional ties to land. Sitting within both state authority and its shadow they extend an operational example of the current global trends in transnational legal processes that contain diverse, overlapping and frequently colliding economies, circuits or vectors[152] of power and socio-economic and cultural relations to land. The legal arrangements contained within the PA attempt to accommodate normatively conflicting and sensitive sites of global governance relating to conflicting and overlapping rights to land of Aboriginal interests and natural resource project developers.

The existence of the PA is itself strong evidence of the importance and immense value of a *de minimis* national legal framework recognising Aboriginal rights as a legal 'springboard' upon which rights might be advanced. The specific legal rights to land in the PA include mechanisms relating to the continued access to land in specific highly sensitive areas of cultural significance. This provides TOs with a fundamental and exclusive ownership right to land for the duration of the PA and, may extend after the term of the PA, subject to agreement[153]. Traditional areas identified in consultation with TOs are delineated into land registration systems such that RT is on notice of those legal rights. The geographic information system might extend an example of McAuslan[154]'s mix of public and private inputs required to advance the conceptual idea of land as a shared space recognising plural relations over land. In this case, information systems embed signifiers of Indigenous recognition at grassroots 'living' project level.

The PA also contains compensation provisions augmenting typically vague and insignificant compensation provisions under national and international law. The PA actively engages with anthropological issues relating to consent requirements and provide evidence that corporate labelling processes might be used as a tool of legal empowerment for TOs. The consistent

[151] These are called 'informal, or non-legal because there is no express agreement between the state and the private entity delegating the task of resettlement.
[152] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) 371.
[153] Comment on possible extension after term of the PA taken from comments of RT legal counsel.
[154] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003).

usage of the term 'empowerment' begs the question of whether in this case the term is used instead of human rights. Consequently, it asks whether human rights must remain connected to a legal regime (linked to state obligations deriving from international law) thus embedded in the state rather than a concept that accommodates transnational law-making[155].

Conceptually, the PA provides an empirical example of how public and private interests and social, cultural and economic relations over land can conflate and survive within a shared space[156]. The agreements provide empirical evidence of legal scholarship disputing the continued relevance of 'the dualism between public and private spheres of activity…as a key feature of classical Western liberal thought'[157]. This advances the theoretical position that 'there is no reliable or constant basis for the distinction' and that 'concepts of the public and the private are complex, shifting and reflect political preferences with respect to the level and quality of governmental intrusion'[158].

This theme of conflating public and private legal relations draws broadly on empirical works of legal geographers such as Blomley which, through acts like placing a bathtub full of flowers in a street[159] alerts us to the power of the public/private divide in our thoughts and to appreciate that people live in more a complicated, overlapping and globalised context. Further examples of this public/private pluralism and its positive implications for enhancing Justice include Blomley's study in which he creates a new forms of legal property in which the Canadian Nisga'a First Nation can possess an Aboriginal fee simple through the fusing of Westerns and traditional property systems[160].

In the PA, we find a tangible space within which the project developer's private rights to land are, through compromise, negotiation and concession, able to co-exist with the

[155] This provides one empirical piece of evidence to answer Sarfaty's question of whether human rights must remain connected to a state backed legal regime and whether other terms like empowerment, might offer more flexible alternatives through which to engage with development of human rights and social justice initiatives: GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012) 132.

[156] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003), page 10: McAuslan's shared approach to land reform is entrenched within principles of universal equity which recognises different land relations regardless of formal state recognition and thus resonate Kantian ideas in cosmopolitanism and natural law between individuals.

[157] Chinkin C*, '*A Critique of the Public/Private Dimension', (1999) 10 (2) EJIL 389.

[158] Ibid. For example, this binary public/private relationship underpins the concept of compulsory purchase which, as noted, surrenders private property interests to the state in the name of public purpose. The dichotomy between public and private has a long history in the context of public planning laws in England. So, in *Stringer v Minister of Housing and Local Government and others* [1971] 1 All ER 65 at 77 noting this dichotomy Cooke J stated that 'the protection of the interests of individual occupiers is one aspect, and an important one, of the public interest as a whole. The distinction between public and private interests appears to me to be a false distinction in this context'.

[159] Blomley N, 'Flowers in the Bathtub: Boundary Crossings at the Public–Private Divide' (2005) 36 Geoforum 281.

[160] See Blomley N, 'Making Space for Property' (2014) 104 Annals of the Association of American Geographers 1291 Blomley's legal research contemplates a robust new forms of legal property for the Nisga'a following his historical research into the original treaty with the Crown which included a clause that the Nisga'a Aboriginal Title continues as modified.

traditional rights of TOs over areas of significant cultural significance. Similarly, economic compensation provisions have, through negotiation been quantified to include reparations for economic and cultural relations over land. These public/private processes provide a practical example of Krepchev's vision of legal pluralism[161] and McAuslan's geographical 'shared space' which, given the correct incentives, might offer enhanced accommodation of Aboriginal rights within development project spaces. The aim of this hybrid approach is to work towards enhancing Fairness for TOs through legal processes that identify and implement enhanced rights to land such that the project site might provide a practical example of a reconciliation space.

The ability of the PA to advance Fairness is however, constrained by the following transnational legal processes demonstrating the need for private involvement in issues of public policy to be carefully monitored or as Kinley states, 'civilised[162]'. First, the creation of the rights identified in this study are crafted as the specific need arises, are subject to economic imperatives and do not form part of a nationwide uniform private sector policy amongst corporates operating in Australia. The result is a patchy and fragmented national framework in which some communities have more robust land rights than others, with potential social conflict ramifications.

Second, the barriers to legal recognition discussed here suggest that the underlying economic and political policy narrative of the NTA discussed in the Redfern Speech are key to understanding the scope and limits of the legislation. Behind each of these policy statements are paradoxical ideologies. Whilst extending formal recognition towards traditional land relations grounded in fairness and equity are as the analysis demonstrate, ideologically wedded to embedding the hierarchy of the modern circuit of land relations through its the ideology of opening up land to cultivation and privatisation thus maintaining the supremacy of non-Indigenous forms of property.

As Trubek notes 'we cannot interpret laws and regulations without understanding the policies they are designed to 'implement' and the theories which led to these policies'[163].

[161] Krepchev M, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) Journal of International Dispute Settlement. His plural approach advocates the accommodation of Indigenous rights to land through a mixture of human rights and private law processes. This study offers an example of possible private methods which, in collaboration with national laws might offer enhanced accommodation of Aboriginal rights within development project spaces.

[162] Kinley D, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009).

[163] Trubek DM, 'Law, Planning and the Development of the Brazilian Capital Market: A Study of Law in Economic Change', (1971) 72-73 Bulletin Yale Law School Studies in Law and Modernisation 3,9.

When held up against the evidence of the policy narrative, the legal procedures relating to timing, legal lacunas in compensation quantum and the embedded assumptions within the NTA over productive land usage might suggest evidence of a legal bias towards harmonisation of statutory law with policy.

This analysis throws doubt on the ability of domestic law to deliver substantive equality and Fairness towards TOs and suggests a modern continuation of the agricultural argument governance paradigm in domestic legislation and through private actors. Given that the PA is shaped directly out of the provisions of the NTA, there is an obvious question of the continuity of those biases within the PA. This bias is justified through evidence that the decision for RT to enter into and apply the legal rights in the Pilbara Project are contingent and exposed to economic imperatives such as fluctuating commodity prices and the economic value and importance of the Pilbara project to RT. In this specific case, we can find evidence of new forms of non-state sovereignty that replace the state made colonial agricultural argument advancing state control and the prioritisation of private and settled land rights into new non-state forms of sovereignty. Through new concerns on economic *functionality and certainty* the private actors, norms and processes work to advance the same concerns of control and the prioritisation of private land rights into modern globalised contexts.

The specific conditions required to incentivise corporate actors to engage, for example, the catalyst of a sophisticated national legal framework the fact that the Pilbara operations are of immense financial significance to RT would make it difficult for advocates to promote replication of the private legal governance model of the PA in another jurisdiction. This specificity limits the applicability of this specific governance model on a transnational level. Nonetheless, basic principles and recommendations, not least the vital importance of a national legal framework upon which 'springboard' enhanced land access and compensation and decision making frameworks can be advocated can might advance a 'thick' rule of law for IPs. Chapter 9 explores specific recommendations distilled from this study on how to advance the legal and developmental narrative on Fairness within the SDGs and a 'thick' rule of law.

Having explored a plural type of right to land emerging from public and private norms, the final case study on Mongolian pastoralist herders claiming status as Indigenous actors and related rights to land in the context of a copper and gold mine in Mongolia. Those pastoralist

herders claim rights to land located in voluntary *soft law* policy norms or ‘standards’ on land resettlement and Indigenous persons developed and applied by private financial institutions and the following study explores the availability of those private rights as methods of legal protection in transnational law.

CHAPTER 8: THE MONGOLIAN CASE

This chapter identifies and 'tests' the availability and efficiency of legal rights to land of pastoralist herders in Mongolia resettled to make way for the Oyu Tolgoi copper and gold mine.[1] The legal rights and related remedies are identified within international policy standards, international law relating to the definition of Indigenous people and, human rights law on displacement.

This case study explores the ability of those rights to advance Fairness and a 'thick' rule of law[2] for pastoralist herders through an exploration of specific *processes* identified herein, through which rights are implemented. More specifically, it explores what, if any political and economic governance paradigms identified in chapter 3 might bear on the implementation of those rights by the private actors involved in these projects and related to this, what might be concluded about the continuation of the transnational governance paradigms into the private governance arrangements discussed herein.

Taking a transnational legal approach this study understands current normative legal problems through a context of globalisation[3]. Consequently, this approach applies a theoretical approach in transnational law[4], which as an alternative to state bound approaches to law, recognises that people and groups affected by economically motivated projects are recognised actors in the law-making process regardless of whether they enjoy national legal

[1] Oyu Tolgoi project is a $12 billion investment to develop a copper and gold mine at Oyu Tolgoi in the Southern Gobi region, Mongolia approximately 550 kilometres south of the capital, Ulaanbaatar and 80 kilometres north of the Mongolia-China border.

[2] In brief, the idea of Fairness used in this study is transnational in that it enjoys a minimum common denominator of being based in Kantian inspired ideas of natural law based on common humanity and fairness between all humans. This approach resonates a 'thick' approach to the rule of law that applies equally to states, individual actors and private entities and private and crucially, requires for laws to be judged on their ability to deliver substantive fairness to all persons and thus advance the current developmental narrative on fairness and common humanity in the SDGs. See generally T Bingham, *The Rule of Law* (Penguin 2010).

[3] There is no universally accepted definition or theory of globalisation. Instead, there is a preference in understanding globalisation as an abstract concept or process characterised as the growth of increasingly connected global processes such as trade, commerce and travel. As it relates to law, globalisation refers to a shift away from the paradigm that has dominated social and legal thought over the last two hundred years being methodological paradigm of the Westphalian Model. This is the idea that the state presents the ultimate point of reference for both domestic and international law and instead focuses on global legal convergence between laws (both formal and informal) and understandings of globalisation. This inter-connectivity sheds light on the power imbalances between powerful and less powerful countries in the context of colonialism and neoliberal ideologies and consequently develop critiques of law as neutral and objective: such as post-colonial globalism scholarship.

[4] Transnational legal processes as it specifically speaks to law depart from Hart's idea of law that have come to frame dominant methodological paradigm of the Westphalian state-ordered model. That model presents the state as the ultimate point of reference for both domestic and international law and places law's ultimate identity and unity in its ability to be 'recognised' by legal officials and dispensed by the state (HLA Hart, *The Concept of Law* (2nd edn, Oxford Clarendon Press 1994).

recognition. In the OT Project, the recognised actors are resettled herder groups who do not benefit from national recognition as an Indigenous group in Mongolia and have been the subject globalisation processes such as resettlement programmes.[5] That globalised context is as follows.

In 2004, after completing mineral exploration work and fencing off land for mine construction eleven herding households from the *Javhlant and Gavliut baghs of Khanbogd soum* were, following initial resistance and threats of forced eviction from the local government, relocated to make may for the project.[6] In 2012[7] and 2013[8], residents from the relocated *baghs* organised into the Gobi Soil NGO and submitted two complaints concerning the project to the International Finance Corporation (IFC) Complaints Advisory Ombudsman (CAO). The complaints detail how 89 herder households, reliant on traditional livestock systems like winter and summer camps[9] losing the ability to conduct their traditional livelihoods and how the diversion of Undai River for the project lost herders access to a sacred water source vital to herder livelihoods in terms of access to water and grazing land. Accepting both complaints, the CAO's Independent Experts Report[10] have asked the stakeholders to resolve the issues raised in the complaints using a collaborative approach. Herders are currently in negotiations with the OT Project relating to land and water access however, Indigenous status remains contested.

Starting with international human rights law, the study goes onto identify rights under policy and application of the international definition of Indigenous in the OT Project.

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[5] Previous chapters focused on the effect of interpretation of rights through state centred legal processes such as judicial interpretation. This chapter identifies legal norms in 'transnational' globalised non-state centred contexts in which private entities, through specific governance related processes of contracting out or 'non-legal' privatisation, undertake state associated functions relating to the design, decision-making, management and implementation of issues relating to the traditional land rights of IPs. Here, those specific legal norms are found in international policy based standards and the globalised contexts in which those norms are interpreted and understood through the spaces of multi-stakeholder economic development project in Mongolia. They are called non-legal or informal as there is no express agreement under which the state delegates responsibility to the private entity to conduct resettlement related tasks.

[6] See Oyu Tolgoi Complaint No. 1 dated 12th October 2012, <http://www.cao-ombudsman.org/cases/document-links/documents/OyuTolgoiCAOComplaint_Oct122012_Redacted.pdf.> accessed 18 November 2016.

[7] Ibid.

[8] See Oyu Tolgoi Complaint No. 2 dated 3 February 2013, page 2 <http://www.cao-ombudsman.org/cases/document-links/documents/UndaiRiverComplaint_Feb32013_ENG.pdf> accessed 18 November 2016.

[9] As stated in the 2012 complaint, for herders, winter camps have central significance given the length and severity of winter in Mongolia. Traditional livelihoods also rely on availability on pasture, reserve pastures and water wells which herders also lost access to: see Oyu Tolgoi Complaint No. 1 dated 12th October 2012.
Traditional livelihoods also rely on availability on pasture, reserve pastures and water wells which herders also lost access to

[10] CAO Assessment Report, Second Complaint (Oyu Tolgoi-02) Regarding the Oyu Tolgoi Project (IFC #29007 and MIGA #7041) <http://www.cao-ombudsman.org/cases/document-links/documents/OT-2_Assessment_Report_ENG.pdf> accessed 18 November 2016.

Rights under International Human Rights Law

The Government of Mongolia (GoM) has ratified a number of international instruments. These include the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) pursuant to which the state guarantees to right to an adequate standard of living and adequate food[11]. Mongolia is also one of very few states to have ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol) and consequently is subject to the UN Committee on Economic Social and Cultural Rights' recommendation processes. Article 10 of the 1992 Mongolian Constitution directly incorporates these treaties into domestic law[12]. Intriguingly, Mongolia has ratified the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) but does not recognise pastoralist groups as 'Indigenous' within the 1992 Mongolian constitution.

Having ratified the Optional Protocol, individuals can directly lodge complaints with the human rights committee thus permitting individuals or groups to lodge communications regarding violations of the ICESCR at the international level. Upon the lodging of a communication with the UN Committee on Economic Social and Cultural Rights to investigate potential rights infringements under the covenant and subject to the satisfaction of applicability procedures, the committee is able to draw on a significant body of international jurisprudence[13] relating to the socio-economic and livelihood effects of displacement from land. More specifically, violations to adequate living including food and clean water making directly relevant jurisprudence relating to violations of socio economic rights caused by displacement, is available to herders, for example that of the *Ogoni case*[14]

[11] Article 11 of the ICESCR protects the right to an adequate standard of living, as 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. In 2002 the CESCR made use of the convention's flexibility to establish a right to water within the series of socio-economic rights stating 'the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival': see the Committee on Economic, Social and Cultural Rights, General Comment 15, the right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002) [3].

[12] For example, article 10 states that Mongolia shall adhere to the universally recognized norms and principles of international law and pursue a peaceful foreign policy and it shall fulfil in good faith its obligations under international treaties to which it is a Party.

[13] See Rule 14.1 of the Procedures for the consideration of individual communications received under the Optional Protocol, adopted by the Committee at its forty-ninth session (12-30 November 2012).

: UN Doc: E/C.12/49/3, which states that the committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems that may assist in the examination of the communication.

[14]*Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, Comm no. 155/96 (2001) the African Commission found that the intentional destruction by Nigerian security forces of the land and homes of Ogoni communities in the Niger Delta violated the minimum core of the right to food.

and *Legal Consequences of the Construction of a Wall*[15]. Chapter 5 identifies other relevant international legal precedent evidencing possible collateral rights to land which herders could rely on claim at the international level and the quality of those legal rights.

Despite these potentially useful legal precedents and their ability to draw attention to the plight of herders, a resettled herder interviewed for this study was, unfortunately unaware of the availability of legal redress under the Optional Protocol mechanisms. The potential these legal channels have for raising awareness of their land related rights at the international and state level and the lack of knowledge amongst actors who might benefit from these legal avenues suggest a lack of publicity relating to the potential availability of legal remedies to herders with serious implications for access to justice and Fairness.

This evidence seems to harmonise with previous findings in chapter 5 suggesting a much wider legal ambivalence within the international legal framework towards promoting access to justice for Indigenous actors claiming non-discrimination and socio-economic rights. For example, article 14 of the ICERD[16] permits applications from groups of individuals who claim that any of the rights contained in the ICERD have been violated to submit written communications to the UN Committee on the Elimination of Racial Discrimination for consideration. Yet, to date, no Indigenous group has advanced a claim through the article 14 procedure. Writers[17] comment on the 'disappointing statistical record' and weakness of the petition system highlighted by its slow internal mechanism[18] and the modest number of communications received and the overall major impediment of the sheer lack of publicity and knowledge about the existence of article 14 as a possible recourse mechanism with serious implications for access to justice. Chapter 5 examines similar evidence from reporting mechanisms of the African Commission on Human and Peoples'[19] and the

[15] Advisory Opinion, ICJ Reports, 2004 in which the ICJ found violations of the right to an adequate standard of living (including food) in Israel's confiscation of fertile agricultural land, olive trees, wells, citrus grows and hothouses upon which thousands of Palestinians relied for their survival.

[16] Article 14 states that 'a State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention'.

[17] See generally T Van Boven, 'The Petition System under the ICERD: An Unfulfilled Promise', in Alfredsson et al (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller* (2nd edn., Martinus Nijhoff Publishers 2009); Bisaz C, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*, (Martinus Nijhoff Publishers 2012).

[18] Article 14(9) states that at least ten state parties to the convention have made the declaration in accordance with paragraph 1 of article 1 of the convention.

[19] See for example Bekker's thorough review of jurisprudence from the African Commission highlights inter alia, a serious lack of enforcement and follow-up in relation to is decisions. This 'severely undermines its credibility' and in which he points to a lack of political will on the part of many African countries to take human rights seriously that have translated into a complete disregard by states to implement the Commission's recommendations. See G Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations' Human Rights Law Review (2013) 13 (3) 524. For example, an appraisal of the submission of state reports reveals an astounding disregard for

European Committee on Social Rights[20], all of which demonstrate an empirical lack of development, use and publicity of those complaints and monitoring mechanisms perhaps suggests a systemic ambivalence and neglect to promote structural mechanisms for protecting socio-economic rights.

In sum, herders' ability to access international human rights instruments, in this case, is potentially compromised through evidence that lack of national publicity of possible avenues are a barrier to groups seeking advocacy at the international level.

Rights under Private Policy

The next corpus of legal rights to land is located within a non-legally binding norm on the land rights of Indigenous Persons (IPs) within specific policies. The policies examined in this case study are the policies analysed in this study are the International Financial Corporation's (IFC) 2012 and the European Bank of Reconstruction and Development's (EBRD) 2014 risk management safeguard policy 5 on land and involuntary resettlement policy and safeguard policy 7 on Indigenous peoples (Policies).

A transnational legal approach also justifies a strong case for including non-binding norms ('soft' law[21]) with justifications based on changes brought about with globalisation processes that may diminish the need to include all expectations between states in formal legal instruments and their speed and practicality as non-state actors can sign on[22] to modern standard setting. The Policies explored in this study relating to the OT Project provide an empirical example of these state alternative transnational legal sources and their legal effects. As Kingsbury discusses in relation to similar World Bank social and environmental regulations for development projects, safeguard policies are concerned with issues of immense public policy importance, they have significant normative impact on international

implementation with 7 out of the total number of 54 states never submitting a report and over half of all states being overdue with 2 or more reports and Kenya has 4 overdue reports. Figures taken from the website of the African Commission for Human and Peoples' Rights <www.achpr.org/states/> accessed 15 November 2016.

[20] De Schutter and Sant'Ana M, 'The European Committee of Social Rights' in De Beco G, *Human Rights Monitoring Mechanisms of the Council of Europe* (Routledge, 2012).

[21] As Shelton notes 'there is no accepted definition of 'soft law' but it usually refers to any international instrument other than a treaty that contains principles, norms, standards or other statement of expected behaviour' in Shelton D, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 319.

[22] Ibid 321-322.

standard setting[23] and on people but unfortunately remain an under-investigated area[24]. Kingsbury has called for further research and critical engagement with the working of World Bank Indigenous policy standards which examines the political, technical and organisational milieu in which the Bank's system of policy making is embedded to gauge whether they collectively represents an optimal arrangement[25]. To date there has been no analyses of either the underlying economic ideology embedded in the resettlement and Indigenous policies or the taxonomy of the policies to understand how these might affect the efficiency of the rights to land identified within those policies. Given the World Bank's statement for a more 'governance focused' approach that understands how transnational and globalised actors and interests can affect the legal rights of vulnerable groups[26], failure to understand and analyse these Policies 'in action' is an unfortunate gap in knowledge which this chapter hopes to fill.

The IFC and EBRD have developed policies evidencing a legal right to land for Indigenous (PS 7) and resettled persons (PS 5) in situations where either physical or economic displacement are unavoidable as a result of a development project. The objective of the resettlement policy is to actively incorporate affected communities into projects, make positive contributions to development[27] or, at a minimum, to do no harm to local communities. Land related rights for displaced non-Indigenous persons[28] include compensation for loss of assets at full replacement cost and other assistance to help them improve or at least restore their standards of living or livelihoods[29]. The standards take a wide berth to the concept of 'livelihood' stating that the term refers to the full range of means that individuals, families, and communities utilise to make a living, such as wage-based

[23] These policies have had a 'piggy back' effect on other institutions as the provide guiding principles for investment which are typically used even in projects in which international institutional policies are not directly applicable. Thus the argument runs that the corpus of such policies may set a benchmark in national or international tribunals or review bodies to determine what sufficient due diligence and thus play a key normative role in standard setting. I Brownlie GS Goodwin-Gill & S Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon 1999) 336.

[24] I Brownlie GS Goodwin-Gill & S Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon 1999) 1801.

[25] Ibid 332.

[26] Human Development Report 2014 (OUP 2014) 'Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience'.

[27] EBRD Performance Requirement 5 2014 on land and involuntary resettlement. Its objective is to mitigate adverse social and economic impacts from land acquisition and to restore, and where possible, potentially improve, their standards of living and/or livelihoods and IFC Performance Standards 2012 with a similar provision requiring that in addition to compensation for lost assets, if any, economically displaced persons whose livelihoods or income levels are adversely affected will also be provided opportunities to improve, or at least restore, their means of income-earning capacity, production levels and standards of living.

[28] IFC PS 5 states that displaced persons may be classified as persons (i) who have formal legal rights to the land or assets they occupy or use; (ii) who do not have formal legal rights to land or assets, but have a claim to land that is recognized or recognizable under national law; 19 or (iii) who have no recognizable legal right or claim to the land or assets they occupy or use.

[29] See IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement, para 9.

income, agriculture, fishing, foraging, other natural resource-based livelihoods, petty trade, and bartering. Other land related rights for non-Indigenous displaced groups include community engagement[30], and the preparation of a resettlement action plan to mitigate against the adverse impacts of resettlement.[31]

For Indigenous persons, IFC PS 7 on Indigenous people, largely similar to that of the EBRD, expands consideration of Indigenous peoples' specific circumstances in developing mitigation measures for the acquisition of land subject to traditional ownership or under customary use. For example, there is a preference for compensation as preferably land-based or compensation in kind in lieu of cash[32] and at best, rights to continued access to natural resources or as a last option, compensation and identification of alternative livelihoods if project development results in loss of land access.[33] Other rights include the fair and equitable sharing of benefits associated with the use of resources central to the identity and livelihood of affected groups[34] and development of a special Indigenous peoples plan to manage and monitor implementation of the policy rights within the specific project.

Crucially, the policy emphasises the need for free, prior and informed consent[35] (FPIC) in international policy, also an idea gaining currency in legal circles. The policy builds on this type of open, informed and free dialogue by, for example, providing groups with the special right to be involved and consulted within project decision making[36]. The right of Indigenous people to FPIC in relation to developments on their land is a growing standard in international law with its clearest elaboration contained in articles 19[37] and 32(2)[38] of UNDRIP. Whilst FPIC does not constitute a *veto right*[39] there is a well-defined legal

[30] Ibid, para 10.
[31] Ibid para 12.
[32] See for example IFC Performance Standard 7 on Indigenous Peoples which provides land based compensation or compensation in kind in lieu of cash compensation where feasible EBRD's Performance Requirement 7 which contains a similar provision.
[33] Ibid 14.
[34] Ibid.
[35] Interestingly the comparable World Bank standards to Indigenous persons: Operational Policy 4.12, uses the less stringent version of 'free, prior and informed consultation' leading to broad community support' demonstrating a fragmentation and inconsistency within the policies and international law-making.
[36] See Performance Standard 5 on involuntary resettlement, paragraph 1
[37] Article 19 requires states to 'consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.
[38] Article 32(2) requires States to 'consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
[39] See Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights.
Working Group on Indigenous Populations, 'Standard Setting: legal commentary on the concept of free, prior and informed consent (2005), UN Doc: E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005 47.

consensus that states have a minimum duty to *consult*[40] in good faith with groups with regard to any developments on their ancestral land. Incorporating these requirements into a standard designed to protect groups with a special relationship to land provides strong evidence of a policy practice which, on paper, aligns with emerging international legal practice on FPIC through specific policy provisions which harmonise with Article 30 of the UNDRIP.[41]

In conclusion to the examination so far, land related rights under the Policies include a wide spectrum of compensation, access, FPIC and benefit sharing provisions. Having identified these policy rights, the section turns now to examine the quality of the 'right to land' extended in performance standard 5 on land resettlement (PS5) and how it relates to standard 7 on the IPs (PS7) through an examination of implementation of PS 5 generally, and in the specific socio-historic context of application to Mongolian herders claiming Indigenous status.

The default position under land resettlement policies is that neither displaced nor Indigenous groups have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement. As a result, the project's right of way is prioritised and resettlement in both traditional and non-traditional contexts is considered involuntary: a position evidenced by the name of both land policies as relating to 'involuntary resettlement'. Furthermore, examination of policy language demonstrates a bias towards understanding land in terms of loss of land with *productive potential*[42] and relations to land

[40] See the Committee on Economic, Social and Cultural Rights which notes that evictions from homes and land in the name of development requires that states consult with affected groups to determine feasible alternatives to removal, legal remedies or procedures to those who are affected by eviction orders and ensure that all individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): (forced evictions) (1997), UN Doc: E/1998/22 at para 8 and 14. Legal cases stipulate the requirement to negotiate and consult with Indigenous groups with respect to impacts on their land, see *Delgamuukw v British Colombia* [1997] 3 SCR, in *Saramaka People v Suriname* [2007]. A recent study by a committee of several international law experts of the International Law Association, who held after an exhaustive survey of relevant state and international practice, found a wide range of customary international law norms concerning indigenous peoples, including 'the right to be consulted with respect to any project that may affect them.' ILA Committee on the Rights of Indigenous Peoples, Interim Report (2010), p. 51. In the context of balancing consultation rights with investors' rights however, the legal position is still emerging. See *Grand River Enterprises Six Nations Ltd et al v United States of America*, NAFTA (UNCITRAL) Award (12 January 2011) para 210 in which the tribunal engaged in obiter comments on the issue of whether such rules of customary international law exist but did not reach a specific conclusion on the issue.

[41] Article 30 of the UNDRIP recognises the right to free, prior and informed consent in international law.

[42] See for example, the World Bank OP 4.12 on involuntary resettlement that requires that displaced persons are provided with, inter alia, agricultural sites for which a combination of productive potential, locational advantages and other factors is at least equivalent to the advantages of the old site. IFC Performance Standard 5 on land and involuntary resettlement contains a similar provision requiring that those whose livelihoods are land based replacement land that has a combination of productive potential, locational advantages and other factors at least equivalent to that being lost should be offered as a matter of priority.

as 'enterprise based or wage-based'[43] with rates of compensation for agricultural land pinned to 'market value'[44]. This language assumes the priority of productive land, echoing remnants of Vattel and Locke's 'cultivation argument[45]'which privileges private economic relations over other social and cultural land relations. The privileging of these economic land relations arguably forces through McAuslan's 'replacement' paradigm to land rather than an 'adaption' one[46] which aims to replace all types of relations with land to house them in the private formal sector with serious implications for Fairness.

With regard to PS 7, surprisingly for a policy with important transnational reach, PS 7 contains no guidance on how to *quantify* compensation for the spiritual and cultural loss of land, a lacuna reflecting the continuing ambiguity of international law on the same point[47]. In the absence of legal and policy clarification, it might be inferred that international organisations[48] (IOs) might seek to fill this lacuna by falling back onto the default and ultimately quantifiable market value basis for calculating land for displaced persons identified above, failing to give IPs satisfactory compensation for their special land rights.

In the Mongolian context, Sneath's anthropological study on the period of land collectivisation in 1940s Mongolia observes how the pastoral sector was organised around centralised collective farms (*negdels*) providing a socio-technical system of mobile pastoral techniques that developed into part of a larger socio-political system[49] relying on portable housing, seasonable movements to fulfil domestic and commercial needs[50]. Following the collapse of state socialism in the 1990s and economic advice from the World Bank advancing the benefits of private land ownership by foreign entities[51], the GoM carried out political economy reforms embracing a broadly liberal and market orientated agenda[52].

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[43] IFC PS 5, page 1.
[44] So, IFC PS 5 page 1 defines replacement cost as the market value of the assets plus transaction costs and in applying this method of valuation, depreciation of structures and assets should not be taken into account.
[45] The 'cultivation argument' promoted the view that only cultivation of land can be regarded as a 'proper' or 'effective' regular occupation of land can be regarded as a basis of a real land tenure system'. The regular cultivation and use of land establishing greater rights to land than hunting or fishing classifying those rights as unsettled and inconsistent uses of land thus justifying dispossession based on a more productive colonial settled legal system.
[46] McAuslan P, *Bringing the Law Back in: Essays in Land, Law, and Development* (Ashgate 2003).
[47] Reference is made to informal conversations conducted in 2015 with senior members of an IO's environmental and social safeguards team which remains confidential.
[48] International organisations in this study means international finance institutions such as the European Bank for Reconstruction and Development and the International Finance Corporation.
[49] Sneath D, 'Land Use, the Environment and Development in Post-Socialist Mongolia' (2003) 31 Oxford Development Studies 441.
[50] Ibid, these techniques included portable housing (the *ger* or *yurt*), seasonal movements and *otor* (foraging forays) which fulfilled both domestic subsistence livelihood needs such as meat, dairy, winter clothing and transportation and yield focused or commercial needs.
[51] Ibid.
[52] Ibid.

Central to this advice is an Imperialist assumption that the market is the optimal way to release agricultural productive potential, thus encouraging the wholesale enclosure and fencing off common land as the best way to release Lockean value and protect common land from imminent environmental degradation and 'tragedy of the commons[53]'. In Mongolia, these Lockean privatisation policies focused on unlocking the vast mineral reserves, with the OT Project constituting one of these transnational land policies in action. Such has been the success of privatisation policies in Mongolia that the World Bank estimates that 54% of Mongolian revenues derive from mining development projects. Related legal reform followed and in 1992, a new constitution permitted land, for the first time, to be held privately[54] as well as a Land Law[55] codifying the constitutional principle into land laws that prioritised registration and titling of private land.

What followed were *asocial* policy recommendations advocating privatisation designed to free the economy from inefficient state control, unlock agricultural value and promote tenure security. For example, issuance of certificates of possession to individuals and companies extending long-term exclusive access to land, thus making land open to investment. Given the importance of winter pastures to herders in the long and harsh Mongolian winters[56], the government issued certificates of possession on these lands permitting herders to use winter sites for sixty years with a provision for extension.

From herders' perspective, these certificates are weak[57]. They do not recognise the historic land connection herders have traditionally maintained under customary law. Certificates prioritise intensive land use so that the issuance of private rights under a mining licence would take precedence over herders' rights. Whilst they provide herders the right to negotiate with developers on compensation and resettlement, failure to reach agreement results in operations going ahead[58]. In a country dominated by a history of public land access characterised by non-exclusive and co-operative mobile pastoralism, private certification

[53] Which would be caused by the inevitable overgrazing of common land in Sneath D, 'Land Use, the Environment and Development in Post-Socialist Mongolia' (2003) 31 Oxford Development Studies 441.
[54] See for example article 5 stating that the land, except that in private ownership of the citizens of Mongolia, as well as the land subsoil, forests, water resources, and fauna shall be the property of the State.
[55] Under article 30 of the 2002 Law of Mongolia on Land Law effective since 1994 and renewed in June 2002, Mongolian citizens, business entities and organizations may be granted the right to lease state-owned land for up to 60 years with the possibility of extensions for 40 years each.
[56] Reference to informal conversations with researchers from the University of Queensland's institute on natural resources specifically working on Indigenous issues in Mongolia. Winters can last anywhere up to six months.
[57] Ibid.
[58] Ibid.

policies have worked to limit and sedentarise the movement of nomadic pastoralists, with potentially catastrophic social and environmental consequences[59].

Remarkably, the IFC's ombudsman report does not contain any analysis of this socio-historic structure of land in Mongolia, the effect of economic policies on Mongolian social policy and related to this, how the legal norms contained in the resettlement policies might speak to the Mongolian context. This, gap perhaps resonates with Sarfaty's[60]' ethnographic observations of how the professional and economic incentives within the World Bank would not favour such a complex analysis which runs the risk of slowing down operations and professional success.

In sum, this analysis suggests an inherent bias within Policies in favour of land rights that generate '*productive potential'* echo the colonial agricultural argument and evidence that implementation of Policies occurs in an asocial manner reinforcing this transnational governance paradigm.

The Right to Indigenous Status

Access to those policy rights is contingent on availability of a crucial 'collateral' or ancillary right: that of legal recognition as Indigenous by the IFC or EBRD or the corporations or 'clients' to which they have extended development finance. Similarly, increased advocacy towards state recognition of groups as Indigenous is a crucial gateway towards accessing claiming applicability towards international legal precedents under the minority rights provision of article 27 of the ICCPR such as *Chief Bernard Ominayak and Lubicon Lake Band v Canada*[61].

The World Bank, IFC and EBRD recognise that there is no universally accepted definition of Indigenous peoples[62] yet both the IFC and EBRD present their own definitions. Common

[59] Sneath D, 'Land Use, the Environment and Development in Post-Socialist Mongolia' (2003) 31 Oxford Development Studies 441. He argues that the effects of reduced mobility and flexibility mean that the continuous grazing of the same pastures has been far more damaging to the thin steppe soils of Mongolia than traditional systems of pasture rotation eventually leading to reduced productivity and food insecurity. He also discusses the socio-economic consequences of restricting mobility, noting how privatisation practices completely fail to understand the nature of livestock production systems which, through migratory practice enabled communities to cope with harsh environments and periodic famines.
[60] GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012); Sarfaty GA, 'The World Bank and the Internalization of Indigenous Rights Norms' (2005) 114 The Yale Law Journal 1791.
[61] CCPR/C/38/D/167/1984, UN Human Rights Committee, 26 March 1990.
[62] Reference is made to World Bank webinar with which this research engaged and which took place on February 26 2015 at 3:00 pm on the subject of 'The Evolution of Safeguards: The Proposed Environmental and Social Framework'. World Bank participants comprised of Stefan Koeberle (Director of Operations Risk Management), Agi Kiss (Regional Safeguards Advisor for Europe and Central Asia), Una Meades (World Bank Senior Legal Counsel) and Glenn Morgan (Safeguards Advisor) and see IFC and EBRD PS 7 para 4.

to the IFC[63] and EBRD[64] is the use of the term in a generic sense to refer to a distinct social and cultural group possessing the following characteristics in varying degrees including self-identification and collective attachment to geographically distinct habitats[65]. Crucially for this study, the EBRD classifies as Indigenous, people with descent from populations who have traditionally pursued non-wage (and often nomadic/transhumant[66]) subsistence strategies and whose status was regulated by their own customs or traditions. The IFC policy contains no such provision demonstrating evidence of a disharmonised policy approach when for example, both the IFC and EBRD are involved in the same project, as is the case in the OT Project.

PS 7 makes Indigenous determination a matter for the IFC or EBRD's private client[67], who may seek input from competent professionals[68]. Previous studies on Indigenous rights in the context of World Bank policy conclude that in states where Indigenous groups are politically organised and familiar with World Bank policy, IOs are almost inevitably drawn into processes of social group self-identification and definition.[69] What follows then is a factual situation, such as that in the OT Project, where groups approach project developers and financiers typically headquartered in other jurisdictions for legal recognition as Indigenous and related to this, appropriate remedy.

Neither the IFC nor the EBRD consider Mongolian herders 'Indigenous' and consequently do not apply PS 7 to the OT Project. Remarkably, for the EBRD, this position appears to contradict its own policy, which as noted above, expressly includes nomadic groups who visit traditional lands on a seasonal basis.

Drawing on informal conversation with senior interlocutors, it emerges that the practice of applying the Indigenous definition, thus permitting access to the canon of related rights to

[63] IFC Performance Standard 7, para 5.
[64] EBRD Performance Requirements 7, para 3.
[65] Common to the standards of the IFC and EBRD are the following legal requirements on Indigenous status. (i) self-identification as members of a distinct Indigenous cultural group and recognition of this identity by others, (ii) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories, (iii) customary cultural, economic, social, or political institutions that are separate from those of the mainstream society or culture; and (iv) a distinct language or dialect, often different from the official language or languages of the country or region in which they reside.
[66] See EBRD Performance Requirement 7, para 4.
[67] IFC Performance Standard 7, para 8 stating that the client will identify, through an environmental and social risks and impacts assessment process, all communities of Indigenous Peoples within the project area of influence who may be affected by the project, as well as the nature and degree of the expected direct and indirect economic, social, cultural.
[68] IFC Performance Standard 7, para 6.
[69] See I Brownlie GS Goodwin-Gill & S Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon 1999) 328; B Kingsbury, 'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 AJIL 414.

consultation for example, remains uncertain. Both PS 7 policies contain the provision that IPs do not lose their status because of dispossession[70] or might live in mixed or urban communities visiting their land on a seasonal basis[71]. Yet, interlocutors expressed the view that the use of mobile phones by Indigenous people erodes Indigenous status. On a procedural level, this position clashes with the formal recognition that groups may still be Indigenous is they chose to live in mixed or urban areas of nomadic people under its policy. This interpretative approach also has substantive discriminatory effects to the extent it echoes the judicial interpretation of Aboriginal common rights in Canada and Australia explored in chapter 4 and suggests a 'continuum' within public and private entities of framing Indigenous identity repressively as backward facing rather than one which promotes a forward, active and development focused approach to Indigenous identity.

Understanding why these inconsistencies in policy praxis arise requires an enquiry into what legal, political and economic processes, tensions and interests might bear on policy implementation.

In determining Indigenous status, the World Bank follows the lead of international law when applying its policy on Indigenous people[72]. However, clarifying the legal position is, as private actors note[73], a complex process given the sheer number of definitions of Indigenous under international law and the differences within these definitional approaches leaves the scope for deciding which groups are Indigenous fragmented, inconsistent and arguably, open to manipulation. Moreover, international law, as suggested in previous chapter, has some very specific cultural biases towards which types of groups are Indigenous.

UN texts contain numerous other approaches to the issue of *who* is Indigenous. Chapter 6 summarises and analysis those definitions and their deficiencies through a comparative transnational legal approach. In sum, chapter 6 argues that the international definition of Indigenous is modelled on the 'blue water doctrine[74]' which only recognises one type of

[70] Ibid, para 6.
[71] See EBRD PS 7, para 4.
[72] Reference is made to World Bank webinar with which this research engaged and which took place on February 26 2015 at 3:00 pm on the subject of 'The Evolution of Safeguards: The Proposed Environmental and Social Framework'. World Bank participants comprised of Stefan Koeberle (Director of Operations Risk Management), Agi Kiss (Regional Safeguards Advisor for Europe and Central Asia), Una Meades (World Bank Senior Legal Counsel) and Glenn Morgan (Safeguards Advisor).
[73] Reference is made to informal conversations conducted in 2015 with senior members of an IO's environmental and social safeguards team which remains confidential.
[74] UN Sub-Commission on the Promotion and Protection of Human Rights, Prevention of discrimination against and the protection of minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, 19 July 2000, E/CN.4/Sub.2/2000/10, para 25.

transnational historical context in which Indigenous people are those people *beyond* Europe who lived in the territory first and *before* European colonization and settlement[75].

In the Mongolian context, these types of assumptions begin to unravel and preclude legal application of Indigenous status. In his anthropological studies on Mongolia, David Sneath notes that Mongolia has no history of European colonisation with its land systems. From the 16th until the 20th century Mongolia land use was primarily organised around a feudal system, which continued until socialist attempts at land collectivisation in the 1940s in which the pastoral sector was organised around centralised collective farms (*negdels*) and state farms each managing a pastoral rural district or *sum*[76]. The inability to 'square' Indigenous status in the Mongolian context with Western assumptions 'blue water doctrines[77]' which only recognise one type of transnational historical context in which Indigenous people are those people beyond Europe who lived in the territory first and before European colonization and settlement[78] might, it is suggested provide a legal barrier to application in Mongolia.

In Mongolia, traditional herders are primarily distinguished from non-herder households along the lines of social class rather than ideas of separate Indigenous ethnicity[79]. Local authorities accepted herders' traditional rights to land even though they were not formally registered with herders enjoying high social regard of their traditional animal husbandry

[75] In addition, the blue/salt water concept hold that that Indigenous people consist of those beyond Europe who lived in a territory before European colonization and settlement and who now form a non-dominant and culturally separate group in the territories settled primarily by Europeans and their descendants. It is profoundly relational to European settlement, see UN Sub-Commission on the Promotion and Protection of Human Rights, Prevention of discrimination against and the protection of minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, 19 July 2000, E/CN.4/Sub.2/2000/10, note 4. Also see Kingsbury's empirical studies on the failed application of the Indigenous definition in Asian contexts such as Indian, Myannamar and Bangladesh who either staved off Western colonialism or rid themselves of its most direct effects in their struggle for independence: Kingsbury B, 'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 AJIL 414.

[76] Sneath D, 'Land Use, the Environment and Development in Post-Socialist Mongolia' (2003) 31 Oxford Development Studies 441.

[77] UN Sub-Commission on the Promotion and Protection of Human Rights, Prevention of discrimination against and the protection of minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, 19 July 2000, E/CN.4/Sub.2/2000/10, para 25.

[78] In addition, the blue/salt water concept hold that that Indigenous people consist of those beyond Europe who lived in a territory before European colonization and settlement and who now form a non-dominant and culturally separate group in the territories settled primarily by Europeans and their descendants. It is relational to European settlement; see UN Sub-Commission on the Promotion and Protection of Human Rights, Prevention of discrimination against and the protection of minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, 19 July 2000, E/CN.4/Sub.2/2000/10, note 4.

[79] Reference is made to informal conversations with researchers from the University of Queensland's institute on natural resources specifically working on Indigenous issues in Mongolia and also see the 2013 complaint where herders state that their special identity is not based on ethnicity, as the project company contend, but on their special cultural relations to land. Herders state that they are Indigenous people...however 'the company does not accept it, yet it provided no justification to further their position. The company thinks we are not ethnic minorities so that we have no right to claim land access' Excerpts taken from Second Complaint of herder groups resettled in the Oyu Tolgoi Project dated February 11 2013.

work[80]. Explaining this social distinction further, a resettled herder discussed how prior to project operations as the main sources of business was pasture, herders enjoyed close, respectful and equal relations with non-herder communities and formed a significant section and politically represented section of Mongolian society[81].

The 2013 complaint to the IFC CAO evidences how herders self-identify as Indigenous[82] practising nomadic lifestyle and culture and with sacred relations with water sources like the Undai River and thus a right to claim land access. For herders, 'diversion of the river violates our human rights guaranteed by Mongolian and international legislation, specifically: water rights, pasture rights, livelihood rights…and historical and cultural heritage protection rights'[83].

That evidence demonstrates that herders claim, as traditional Indigenous legitimate owners, a fundamental ownership right to their traditional pastureland and related to this, collateral rights to livelihood, culture, pasture or food and water. This is regardless of ethnic assumptions over 'aboriginality', herders share the Indigenous commonality of having a special relationship to traditional land: a position which legal case law and authority has given affirmative recognition[84], thus evidencing a contradictor legal approach. It is on this basis of a special relationship to land and the economic and social effects of breaking those links, that herders lodge current complaints seeking Indigenous recognition.

For example, both complaints revolved around two mutually reinforcing concerns. First, loss of pastoral herders' traditional Indigenous lifestyle. Second, loss of access rights to

[80] Reference is made to interviews and conversations with resettled herders in October and November 2015 (translated from Mongolian to English).
[81] Reference is made to interviews and conversations with resettled herders in October and November 2015 (translated from Mongolian to English).
[82] The complaint states that 'we are Indigenous people who practice nomadic lifestyle and culture, and make livings from herding livestock that are heavily reliant on pastureland yields and capacity. We are legitimate owners of the pastureland with historical rights supported by traditional customs. However, the company does not accept it, yet it provided no justification to further their position. The company thinks we are not ethnic minorities so that we have no right to claim land access. Pasture rights are essential to support nomadic lifestyle and livelihoods infrastructure, but violations of pasture rights protection lead to collapse of traditional lifestyle based on pastoral nomadism', taken from Second Complaint of herder groups resettled in the Oyu Tolgoi Project dated February 11 2013.
[83] Excerpts taken from Second Complaint of herder groups resettled in the Oyu Tolgoi Project dated February 11 2013.
[84] See Kingsbury B, 'Indigenous Peoples', *Max Planck Encyclopaedia of Public International Law,* providing a detailed description of the law relating to 'Indigenous peoples', their distinctive claims for example to collective rights to land and policies relating to groups. See Siegfried Wiessner who discusses the 'specific ways of life and a view of the world characterised by their strong, often spiritual relationship with the land' in Weissner S, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', (2011) EJIL 22 (1) 127. Also *Mayanga (Sumo) Awas Tingi Community v Nicaragua,* judgement of 31 August 2001 (Inter-Am. Ct. H. R. (Ser. C) no. 79) (2001)) confirming special cultural relations to land at 144 and domestic law such as *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (HCA) and *Delgamuukw v British Colombia* [1997] 3 SCR at 190 supporting the cultural foundation of Aboriginal title acknowledging 'it is based on the continued occupation and use of the land as part of the Aboriginal peoples' traditional way of life, which makes it a *sui generis* interest.

traditional land and water sources and violations of human rights guaranteeing an adequate standard of living. Central to both complaints is the self-identification herders have to being Indigenous to Mongolia and related to this the loss of their distinctive nomadic identity of animal husbandry which necessitated a special relationship to land, mountains and water sources fractured by mine operations.

Herders cite their inability to access their traditional grazing land and water resources due to the mine as causing severe loss of livelihood and food insecurity. So, traditional and sustainable jobs have been replaced with employment support in the form of temporary jobs as road cleaners, watchmen or members of cleaning crews, with nothing offered in terms of professional or technical skills training: none of which provide herder households with long-term sustainable employment[85]. Herders complain about long-term insecurity given they are now entirely dependent on the mine, unsustainability and inadequate compensation[86]. Moreover, herders' resistance to the mine has led to them losing social status and leading to new forms of social discrimination between the herders, non-herder communities as their opposition to the mine understood as degrading the country's development leading to their labelling as 'anti-development'[87], anti-modernity and the impoverishing effects of resettlement impoverishing herders such that herders are labelled as 'poor[88]'.

Given their special Indigenous status, herders wish to obtain compensation for the loss of their traditional rights to land and to enjoy rights to FPIC before any land changing activities occur. To date, compensation has taken the form of livestock, temporary jobs as a road cleaner or a one-time monetary compensation with none provided for loss of their distinctive way of life and livelihood[89].

Based on the above, it is suggested that the OT case provides another potential example of how the cultural bias within the international definition would make it challenging to 'stretch' the Eurocentric understanding to a non-settler colonial or 'salt water' transnational social context to provide legal protection for Mongolian herders resettled in the OT Project. Empirical evidence found in herders' complaints demonstrate serious economic and social effects of this inability to access the Indigenous canon of legal protection in terms of lack of

[85] Interviews and conversations with resettled herders in October and November 2015 by Skype, translated from Mongolian to English.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

FPIC rights, satisfactory compensation and benefit sharing or access rights. Moreover, evidence suggests that these Eurocentric assumptions might detract from the heart of the Indigenous struggle, which as evidenced in the complaints, revolves around the special connection to land.

These legal assumptions or barriers are not the only processes hindering access to legal rights and appear compounded through political and economic dilemmas. Questions of Indigenous status pose a serious dilemma to political issues of member state sovereignty. Interviewees discussed how an IO would not interfere with sovereign issues of Indigenous social identification, preferring to follow the country's political stance.[90] A study of World Bank practices in Morocco, a country that does not recognise ethnic minorities within their borders as Indigenous[91] corroborates this position. In her study of the loan approval process for the Moroccan project, Sarfaty found that bank managers decided not to recognise the Berbers who self-identify as Indigenous and not to apply the policy on the basis that Morocco's legal and political situation influenced bank staff judgement about whether to label the Berbers as Indigenous people. Concerns amongst government officials that the use of the term Indigenous might lead to ethnic tensions, political mobilisation and the demand for special rights informed bank staff on their decision to dis-apply Indigenous policy in that case. In other development projects, IOs have justified the non-application of the policy based on sovereignty and lack of national recognition with evidence found in complaints from Africa and India pursuant to which ethnic populations have tried to claim Indigenous status[92] in states where groups are not formally recognised. Worryingly, the EBRD's potential future investments within Middle Eastern countries such as Jordan which have, similar to Morocco, communities self-identifying as nomadic and into which future investments are planned[93].

Related to these legal and political barriers is a recent trend amongst institutions, confirmed in interviews away from using the term Indigenous in favour of 'vulnerable[94]' persons to

[90] Reference is made to informal conversations conducted in 2015 with senior members of an IO's environmental and social safeguards team which remains confidential.
[91] Sarfaty GA, 'The World Bank and the Internalization of Indigenous Rights Norms' (2005) 114 The Yale Law Journal 1791 noting how the Moroccan legal system does not recognise the Berbers as Indigenous so the very use of the term 'Indigenous' was controversial for the Moroccan governed with government officials fearing that use of the term and policy would extend explicit recognition of the Berbers as Indigenous, possibly leading to internal ethnic tension or causing the Berbers to mobilise politically for additional rights.
[92] See the Bujugali hydroelectric project in Uganda, the Second Water Supply and Environmental Sanitation Project in Karnataka approved in 2001 affecting the Lambanis and Siddis, ethnic groups with distinctive cultural practices who could arguably qualify as Indigenous peoples under Bank policy and on Asia, see more broadly Kingsbury B, 'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 AJIL 414.
[93] Reference is made to informal conversations conducted in 2015 with senior members of an IO's environmental and social safeguards team that remains confidential.
[94] Interview with Iris Krebber, Senior Land Policy Lead, DFID (By telephone 18 February 2015).

whom special measures such as compensation apply. The EBRD reserves[95] the term vulnerable groups to those who, by virtue of gender, ethnicity, age, physical or mental disability, economic disadvantage, or social status are more adversely affected by displacement than others[96]. The institutional choice to use the alternate 'vulnerable' label over that of 'Indigenous' is typically justified through political processes designed to protect national sovereignty and avoid the legal fragmentation and non-uniformity contained within international legal definitions discussed above[97]. In light of the evidence gathered in interviews, categorising groups as 'vulnerable' might work to capture the economic disadvantage or social status experienced by groups in this case. However, this classification also carries significant adverse legal ramifications for herders. Arguably, the replacement of vulnerable for Indigenous erases the heart of Indigenous identity: the struggle for recognition of their special attachment to traditional land[98] and related to this, the unique type of discrimination and marginalisation they have experienced in ongoing processes of land dispossession. Consequently, the removal of the Indigenous label in favour of a homogenous vulnerability label erodes the specificity of their struggle and erases the building blocks upon which groups can claim legal recognition and build robust legal claims in discrimination and request rights such as free, prior and informed consent which reflect the special type of discrimination groups have historically experienced[99]. Future policy application for example within development projects in Middle Eastern countries, would in all likelihood categorise these groups as 'vulnerable' persons whose vulnerability can be addressed simply through compensation or development assistance rather than recognition of special land relations.

The triggering of PS 7 also has serious implications for timing[100], project planning, inclusion and consultation processes and project costs which clash with the IOs economic agenda and functional agenda of 'getting the project completed', making implementation of PS 7 a

[95] Performance standard 5, para 12.
[96] Ibid, in the context of displacement vulnerable people, include those living below the poverty line, the landless, the elderly, women- and children-headed households, ethnic minorities, natural resource dependent communities or other displaced persons who may not be protected through national land compensation or land titling legislation.
[97] Reference to an informal interview with an international financial institution.
[98] See for example Kingsbury B, 'Indigenous Peoples', *Max Planck Encyclopaedia of Public International Law,* providing a detailed description of the law relating to 'Indigenous peoples', their distinctive claims for example to collective rights to land and policies relating to groups. Weissner S, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', (2011) EJIL 22 (1) discussing the 'specific ways of life and a view of the world characterised by their strong, often spiritual relationship with the land'.
[99] It appears that IOs struggle with ideas around pluralism and how to accommodate different relations over land, managing processes for determining 'Indigenous' categorisation and whilst not discussed directly in this study: processes of consultation, compensation and participation.
[100] IFC PS 7 specifically allows for more time to be factored into project planning to ensure FPIC is achieved in line with community requirements.

serious cost and time liability[101] for developers which dis-incentivises its practical application.

This evidence of institutional dis-engagement with Indigenous policy has the effect of continuing the dispossession of land connected persons through policy praxis into an international space, who, to borrow Shamir's term remain continually 'suspended in space'[102]. The practical result of these legal, political and economic barriers is that bank staff tends to avoid operationalising and implementing these policies in an effort to avoid political tensions with governments that might impede project implementation: thus continuing to nurture a policy of dispossession and discrimination. Ultimately, the politics of sovereignty is deployed as a shield through which to protect the integrity of its economic mandate and dis-engage with numerous complex social settings that might have adverse impacts on project functionality and economics.

In sum, this section has provided evidence of specific rights to land and explored the legal availability, effectiveness and implementation of those rights in the context of the OT Project. Evidence suggests that the rights identified are compromised because of the following transnational governance processes. First, an inherent bias within Policies in favour of land rights which generate '*productive potential'*, resonating a basis in the colonial agricultural argument. More broadly the above section provides further empirical evidence that the international legal definition of Indigenous only extends legal recognition and protection to a historical situation in which IPs have experienced a specific encounter of settler colonialism involving Europeans who have made a transnational crossing over salt water to implement the agricultural argument in overseas territories. It has also found evidence of internal institutional practice within IOs of dis-applying international legal Indigenous status to herders which arguably, makes legal space for the prioritisation of a project's right of way, business certainty and economic functionality. The effect of these processes is to compromise the ability of Indigenous actors to access the legal rights identified above and canon of Indigenous rights and arguably blocks the availability of a thick rule of law and Fairness for resettled herders.

[101] See Sarfaty's study on implementation of Indigenous policy within the World Bank which reaches similar conclusion: Sarfaty GA, 'The World Bank and the Internalization of Indigenous Rights Norms' (2005) 114 The Yale Law Journal 1791.
[102] Drawing on Ronen Shamir's socio-legal study of Negev Bedouins in which he discusses the dispossessory effects of the legal and social categorisation of Bedouins as rootless, disorganised, wandering and anti-development, this study suggests that the fragmented and biased ways in which these international policies are implemented continue this dispossession on in a transnational space: se Shamir R, 'Suspended in Space: Bedouins under the Law of Israel' (1996) 30 Law & Society Review 231.

Having identified legal rights and potentially limiting legal processes, the following section explores further specific *political* and *economic* processes or barriers herders face when attempting to gain legal recourse to IOs such as EBRD and IFC. These governance processes contain common political and economic processes which suggest that the implementation of the policy rights in this chapter are compromised by an ambiguity in international law surrounding legal liability of commercially orientated IOs such as the World Bank, IFC and EBRD. Arguably, this legal ambiguity works to shield IOs from new transnational assertions of human rights violations towards those non-state actors evidenced within the study. Legal liability is further eroded compromised as a result of contracting out or privatisation processes and specific economic 'project finance' ordering structures through which the Policies are implemented and evidence of state erosion of human rights obligations towards herders as a result of transnational legal framework of the OT Project.

IOs such as the international financial institutions of the EBRD and IFC have emerged as significant actors in global governance[103]. They are international persons with separate legal personality. In the *WHO and Egypt* case[104] the International Court of Justice (ICJ) held that IOs are subjects and objects of international obligations and responsibilities. This confirmed its earlier position when in the 1949 *Reparation for Injuries* case the same court determined that the United Nations possesses a 'large measure of legal personality[105]'. The attribution of international legal personality simply means that the entity upon which it is conferred is a subject of fundamental international law and that it is capable of possessing international rights and duties[106]. Academics also take the position that 'IOs as subjects of international law with full juridical personality…should comply with it[107]'. As Sands argues, given that the IFC, is comprised of states, all of which have signed human rights treaties, a policy position maintaining that it has no duties under international law is legally untenable and deeply contradictory[108]. The 1992 Morse Report's opined that bank compliance is not only

[103] For critical legal debates on global governance and its fragmentary and eroding effects on international law and human rights see G De Búrca G and others, *Critical Legal Perspectives on Global Governance Liber Amicorum David Trubek* (Hart 2014) arguing that international law needs to be open to new normative mechanisms beyond the state if it is to remain relevant. Also see JL Goldsmith, *The Limits of International Law* (OUP 2007); O'Connell P, 'The Death of Socio-Economic Rights' (2011) 74 MLR 532. In contrast other scholars critique the increased growth of fragmented and piecemeal informal norms which compromise the development of new state centric international laws; OK Fauchald & A Nollkaemper, *The Practice of International and National Courts and the (De)Fragmentation of International Law* (Hart 2012) 218.
[104] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, Judgment, ICJ Reports 1980 73.
[105] ICJ Advisory Opinion on the Reparation for Injuries suffered in the Service of the United Nations [1949] ICJ Reps at 178.
[106] Schermers HG and Blokker N, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 1568; Sands P and Klein P, *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell 2009).
[107] Sands P and Klein P, *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell 2009).
[108] Ibid.

measured by compliance with its own policies and project documents but in its connection and application to the context of wider public international law standards to which they relate. That specific report related to the catastrophic Narmada resettlement, to the standards set out in ILO Convention 107 on tribal people to which India is a party[109] and more recently the IFC's own inspection panel confirming 'IFC's unique status as investment bank and development organisation[110]'.

IOs are not however directly party to any human rights treaty and whilst many argue for IOs to be indirectly responsible[111] given that their member states have widely ratified the UDHR[112], their human rights obligations under international law remain unclear[113] in law. The precise scope of those rights and duties will vary according to what may reasonably be seen as necessary in view of the purpose and functions of the organisation and to enable it to fulfil its tasks. As the ICJ held, an international person with separate legal personality, international organisations are subject to the rules of international law including conventional and customary rules as well as the rules of their constitutions[114].

Whilst the IFC, is a specialised agency of the UN with which it has a specific relationship agreement[115], it functions as an independent legal entity separate and distinct from the other parts of the World Bank Group[116] with its own articles of agreement, share capital,

[109] The report stated that 'concern for such [tribal] groups is an aspect of the world's increasing awareness of how isolated cultures have all too often paid an appalling price for development…. The Bank's principles with respect to tribal peoples arose from a concern for human rights. Failure to design or implement policies that put these principles into effect places these rights at risk', page 78. See Bradford Morse & Thomas R. Berger, Sardar Sarovar - Report of the Independent Review (Ottawa: Resource Futures International, 1992).

[110] See the Assessment Report Complaint filed to the CAO regarding the Zambia Konkola Copper Mine (KCM) Project November 2003 Office of the Compliance Advisor/Ombudsman of the International Finance Corporation and the Multilateral Investment Agency 17.

[111] See for example Kinley D, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009).

[112]Which includes general principles guaranteeing socio-economic rights such as food and non-discrimination

[113] J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009) arguing that international finance institutions have indirect legal responsibility. Some argue that regardless of legal responsibility, international financial institutions have a strong moral responsibility as duty bearers towards communities. See M Salomon A Tostensen A & W Vandenhole, *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007); Kinley D, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009) argues that these hybrid public/private dynamics open up arguments of indirect responsibility of states under international law for the actions of private entities.

[114] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, Judgment, ICJ Reports 1980 73 at 89-90.

[115] Article 57 of the UN Charter makes specific provision for the specialised agencies and for their relationship to the UN. The IBRD agreement was concluded with the United Nations in 1947, 16 UNTS 346. The UN-IFC Agreement was concluded by the IBRD on behalf of the IFC and simply adopts the UN-IBRD Agreement with a few amendments: 265 UNTS. 314. Articles 1 and 2 of the relationship agreements stress the independent character of these institutions.

[115] The UN-IFC Agreement was concluded by the IBRD on behalf of the IFC and simply adopts the UN-IBRD Agreement with a few amendments: 265 UNTS. 314.

[116] The group consists of five institutions of the International Bank for Reconstruction and Development, the International Development Association, the private sector arm of the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes. In this study, references to the World Bank Group include its affiliate, the IFC.

financial structure, management, and staff[117]. The UN, through the 'hands-off' clause within its relationship agreement, undertakes to respect the autonomy of the IFC in matters affecting their loan and financing policy, giving the IFC sole discretion to determine financing matters in accordance with its mandate and articles of agreement[118]. Therefore, the IFC's mandate shapes and justifies the scope of its separate legal personality and subsequently, liability under international law. That mandate gives the institution freedom to determine its own scope and terms of liability and responsibility within its constitutive mandates. For the IFC, this specifically means no interference in the political affairs of its members[119], thus prohibiting the bank from interfering with the internal sovereign affairs of its member states and related to this, ensure that all decisions are made on purely economic considerations.

The test of legal liability is, in this manner, a functional one. International law only applies to the extent that law helps the international organisation to function according to its mandate[120]. The separation of the Bank as an independent legal entity comprised of member states make it conceptually similar to a corporation made up of 188 member countries. A board of governors who are the Bank's ultimate policymakers represents these member countries or shareholders[121]. The Bank is formed as a corporate structure in which the members are states with public law obligations making them unique public private structures through which states can access international markets. These public law obligations are traded off through the relationship agreement with the UN to the Bank's mandate. For example, article 1 of the IFC's articles sets out its unique economic motivation to further economic development by encouraging the growth of productive private enterprise in

[117] IFC website: <http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/IFC+Governance> accessed 15 November 2016.

[118] Whilst the General Assembly and Security Council are permitted under article 62 of the UN Charter to make non-binding recommendations to its specialised agencies, for the IFC this power is much weaker. In addition to the 'hands off clause' article 4 of the relationship agreement states that the General Assembly can only make recommendation after prior consultation with the agency.

[119] Article 1 sets out the unique economic motivation of the IFC: 'The purpose of the Corporation is to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of the International Bank for Reconstruction and Development (hereinafter called the Bank)'.

[120] Sands P and Klein P, *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell 2009).

[121] World Bank website: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20147466~menuPK:344189~pagePK:98400~piPK:98424~theSitePK:95474,00.html> accessed 15 November 2016.

member countries, particularly in the less developed areas' and later refers to its non-political mandate[122] which *prima facie* excludes human rights[123].

Yet, obvious conflicts arise when the IFC's mandate is placed in conversation with the international involvement of the IFC in development financing, its membership of World Bank Group and corresponding institutional mandate to alleviate poverty[124]. This poverty mandate is facilitated through its policies such as the land and Indigenous policies discussed in this research. Article 1 of the IFC's articles sets out its unique economic motivation to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas' and later refers to its non-political mandate which, as with the World Bank *prima facie* excludes human rights. However, the IFC also has a core institutional mandate to alleviate poverty facilitated through its operational policies, making the IFC's overall legal framework relating to human rights fragmented and contradictory.

The EBRD was designed to move Eastern European countries[125] towards market economies[126]. Unlike the IFC, the EBRD has no political prohibition clause with its mandate's preamble[127] requiring it to take human rights into account in decision making, has no poverty reduction mandate[128] and does not provide aid or technical advice to governments making it largely commercially driven. Moreover, its operational procedures limits its focus on market economics focuses and to conversations primarily related to civil

[122] Article III, Section 9 of IFC's 2012 Articles of Agreement states that the Corporation and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes set forth in this agreement.

[123] For example, the European Bank for Reconstruction and Development in its founding mandate expressly recognises only civil and political rights as part of its institutional framework thus constraining the universe of rights recognised within the institution and privileging neoliberalism's preferred canon of human rights.

[124] Taken from the World Bank website:
<http://www.worldbank.org/en/news/feature/2013/04/17/ending_extreme_poverty_and_promoting_shared_prosperity>accessed 15 November 2016.

[125] The EBRD was set up in 1990 with separate legal personality at the end of the Cold War. The agreement establishing the EBRD was amended in 2004 to cover Central and Eastern European countries in order to include Mongolia.

[126] Article 1 of the 1990 Agreement establishing the EBRD states that 'the purpose of the Bank shall be to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in the Central and Eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics'.

[127] An extract from the preamble states 'the contracting parties, committed to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics.' It welcomes 'the intent of Central and Eastern European countries to further the practical implementation of multiparty democracy, strengthening democratic institutions, the rule of law and respect for human rights and their willingness to implement reforms in order to evolve towards market-oriented economies'.

[128] Article 1 of the EBRD's mandate is strictly limited to economic issues stating that the purpose of the Bank shall be to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in the Central and Eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics. The fact that the EBRD does not have a poverty alleviation goal was expressly referred to within informal conversations with bank staff.

and political rights[129] making the scope of human rights parochial and vacating it of its 'indivisible' nature. To add further ambiguity and contradiction to the legal framework, both the IFC and EBRD's operational policies explicitly refer to the protection of 'human rights' within project operations[130] . Remarkably, the EBRD expressly connects the application of PS 5 with the universal respect for, and observance of, human rights and freedoms and specifically the right to adequate housing and the continuous improvement of living conditions contained in the UDHR and the ICESCR[131]. Furthermore, within their Indigenous policy standards the IFC and EBRD present a minimum intention to 'do no harm' to people and to achieve positive development outcomes[132]. Given that the specific objectives of the Indigenous policy are to do no harm, ensure that the development process fosters full respect for the human rights, dignity, aspirations culture, and natural resource-based livelihoods of Indigenous people[133] it is surprising that no specific mention is made to the applicability of the UNDRIP within the policy.

It is now established policy that the political prohibitions within their articles and the fact that they have pursuant to that clause, not agreed to directly incorporate human rights into the policies[134] means that human rights are not part of the World Bank's agenda. However, contradictions and confusion still abound at the highest level. The former general counsel to the World Bank noted that the articles of agreement explicitly prohibit the World Bank Group from considering non-economic considerations in decision-making[135]. However, in the same book when discussing involuntary resettlement supports the concept of equity in development asserting the need to take positive measures aimed at restoring and improving

[129] See the 2012 Procedures on the Political Aspects of the Mandate of the EBRD stating that 'this drafting choice was deliberate. It does not exclude human rights from the scope of the political aspects of the Bank's mandate, but it indicates that only those rights which, in accordance with international standards, are essential elements of multiparty democracy, pluralism and market economics, should be considered when evaluating a country's progress. Such a reading of the Agreement focuses primarily on civil and political rights. Other rights, including economic and social rights that advance multiparty democracy, pluralism and market economics could be taken into account and fostered by the Bank in connection with its normal operations.

[130] In Performance Standard 1 of the IFC policy, para 4 states that a number of cross cutting topics such as climate change, gender, human rights and water are addressed across multiple performance standards.

[131] EBRD PR 5 para 3.

[132] See paragraph 9 of the 2012 IFC Environmental and Social Performance Standards.

[133] Referring to the objectives of IFC PS 7, page 8: with wording similar to the World Bank's operational policy on Indigenous peoples which aims to ensure that the 'development process fully respects the dignity, human rights, economies and cultures of Indigenous people.

[134] Reference is made to World Bank webinar with which this research engaged and which took place on February 26 2015 at 3:00 pm on the subject of 'The Evolution of Safeguards: The Proposed Environmental and Social Framework'. World Bank participants comprised of Stefan Koeberle (Director of Operations Risk Management), Agi Kiss (Regional Safeguards Advisor for Europe and Central Asia), Una Meades (World Bank Senior Legal Counsel) and Glenn Morgan (Safeguards Advisor).

[135] Shihata IF, Tschofen F and Parra AR, *The World Bank in a Changing World: Selected Essays* (M. Nijhoff Publishers: 1991) 99 in which ex-general council at the World Bank advises that the articles of agreement explicitly prohibit the World Bank Group from taking non-economic considerations into account in their decisions.

the livelihood of those adversely effected by certain projects[136], thus ostensibly seeking to promote collective or solidarity rights such as right to development[137]. Informal interviewees[138] affirm this paradoxical approach discussed how management remains aware of this ambiguity between promoting policies speaking to the full spectrum of human rights: civil, political, collective, cultural and green rights, and the practical reality that only civil and political rights directly relevant to the development of market economies will be actively promoted.

Discussions with bank staff reveal institutional tensions and a disorganised and somewhat incoherent approach to crucial questions over what constitutes human rights and poverty alleviation, justice, institutional and project governance and how these principles 'fit' or collide with institutional mandates. For example, decisions over policy operationalisation are typically based on ideas of rationale economic thinking. As one interviewee stated: decisions to enter into discussions over whether to make positive development contributions or simply do no harm will have a direct correlation with the amount the institution is investing in the project and its amount in relation to other lenders as a means of leveraging influence. This socio-economic trade-off is present within IFC Standards which clearly state that the level of IFC's engagement is determined by the nature and scope of the proposed investment or advisory activity, as well as the specific circumstances of the collaboration and relationship with the client[139]. This sentiment was echoed within discussions in which commitment to public policy issues were said to be dependent on project economics[140] and even the type of development project undertaken, with the understanding that road projects are more development friendly as communities can use roads with mines being 'dirtier' and thus requiring a higher level of social engagement. This approach makes the scope of social engagement inconsistent and arbitrary but always subject to questions of economy. So where policies are triggered levels of involvement will always be balanced against the economics of the project and the relative power the Bank has *vis a vis* the other lenders.

[136] Ibid 183.
[137] Article 1 of the UN General Assembly Declaration on the Right to Development, adopted in 1986 by the United Nations General Assembly (GA) in its resolution 41/128 states that the 'right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised'.
[138] Reference is made to informal conversations conducted in 2015 with senior members of an IO's environmental and social safeguards team that remains confidential.
[139] See paragraph 19 of the 2012 IFC Environmental and Social Performance Standards.
[140] Reference to informal conversations conducted in 2015 with senior members of an IO's environmental and social safeguards team.

This aspirational approach interplays with the superficial insistence by EBRD of policies referred to as 'requirements' as opposed to IFC's 'standards'. Arguably the policy idea is that the terminology of 'requirements' denotes a stronger or harder internal approach to public policies than a milder 'requirement', even though regardless of terminology, both policies are subjected to the same monitoring requirements and the breach of either by the client would have exactly the same remedial consequences. These include the imposition of a remedial action plan to correct the breach and the technical ability of the IOs to trigger an event of default under the loan agreement, subject to grace periods. Whilst these levers of monitoring and declaration of event of default might appear valuable recent external consultations focus on deficiencies on the approach to monitoring of social policy compliance and the need for changes to the project during implementation[141].

In light of this obvious contradictions and inconsistencies, it is not clear why, other than a mere exercise in window dressing[142], the EBRD has a policy promoting cultural and collective rights of Indigenous people and whether it would ever be implemented. Finally, even if international liability is found, it is uncertain how and whether legal responsibility could be attributed to those quasi-governmental institutions given that the ICJ cannot take jurisdiction over international organisations[143], making it difficult to hold institutions to account.

The functional and 'hands off' international legal position relating to the gap in institutional legal liability of IOs echo a wider structural inability or ambivalence within international law to cope with and offer satisfactory legal remedies for actors affected by transnational legal '*actors, norms and processes*'[144]. Other transnational governance scenarios include the delegation of public policy issues to private actors results in the potential application of new public management (NPM) processes through which private actors implement sensitive

[141] 'Issues for Phase 3 Consultation', dated 3 August 2015, available on the World Bank website at < https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies>accessed 15 November 2016.
[142] Kinley D, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009) 91 noting that the IFC's tendency is to say that it is learning lessons but then repeating them, leading to the conclusion that they are mere window dressing.
[143] The ICJ is only open to states under article 34 of the ICJ Statute. J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009) 181 stating how there is ambiguity over how IFIs could be held accountable even if the case for liability could be made.
[144] P Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 Indiana Journal of Global Legal Studies 29.

public policy issues are implemented into projects. For Ugur[145] and Hood[146] NPM a method of implementation which sees the export of rational market thinking to public policy welfare considerations, making the public sector business like and emphasise on the self-interested behaviour of bureaucrats means that conflicts of interests in task performance are a given[147]. The NPM doctrine contains a number of specific themes, visible within the Policies. For example, a shift towards greater disaggregation of public organisations into separately managed 'corporatized' units for each public sector issue and a strong move towards explicit and measurable (or checkable) performance indicators for public policy interventions[148]. As Sarfaty notes 'project managers have discretion regarding how to apply safeguard policies and balance them with other goals[149]': arguably NPM techniques provide the idea efficiency framework through which to accomplish this balancing encouraging the trading off of rights against project economics. The NPM approach might also be illustrated by the unitised structure of the performance standards which compartmentalises specific policies for a definite issue such as land, environment, Indigenous persons, labour, cultural heritage and biodiversity

The growing legal practice of private actor 'transnational' action, is not yet consistent with issues of legal liability for those actions, demonstrating a fragmentation and non-uniformity between the social effects of transnational processes and law's ability to 'catch up' with political and economic processes. In this case study, legal recourse to emerging transnational action could mean the availability of legal avenues through which affected communities can claim direct legal recourse towards the state in the event that private entities such as the IOs or the OT Project company conducting governmental public policy activities such as resettlement.

The approach represents the ultimate hollowed out state –the shift from the bureaucratic state to the hollow state or to third party actors, emphasising privatisation, contracting out, public-private partnerships, increasing legal fragmentation, and distancing of herders from legal rights and remedies. So, in some organisations public policy becomes a risk

[145] Ugur M and Sunderland D, *Does Economic Governance Matter? Governance Institutions and Outcomes* (Edward Elgar 2011).
[146] Hood C, 'The "New Public Management" in the 1980s: Variations on a Theme' (1995) 20 Accounting, Organizations and Society 93.
[147] In McLaughlin K, Osborne SP and Ferlie E, *New Public Management: Current Trends and Future Prospects* (Routledge 2002) 142.
[148] Hood C, 'The "New Public Management" in the 1980s: Variations on a Theme' (1995) 20 Accounting, Organizations and Society 93, 97.
[149] GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012) 85.

management 'box ticking[150]' exercise and a method of distancing and managing groups, keeping them at 'arms' length', increasingly dis-engaged from senior managers.

For example, the resettlement processes explored in this chapter provide empirical examples of globalisation processes which for legal scholars practically emphasises the law's 'turn' away from state apparatus to non-state actors[151] in contemporary law-making influenced by globalisation. Literature from other transnational legal studies identified in chapter 1[152] acknowledges this conceptual 'turn' and seek to understand the effects on communities of this steady emergence of legal spaces within which private actors might affect issues of human rights and public policy.

From the perspective of international law discussed in chapter 5, the private functions of the OT Project make it highly unlikely that herders would be able to hold the Mongolian government to account for loss of livelihood and access to traditional land caused by the activities of Rio Tinto (RT) or the IOs, when implementing resettlement for the OT Project. Chapter 5 fully describes the ILC Draft Article's 'functional' and similar 'hands-off' approach to considering issues of attributing state responsibility to the acts of private entities conducting commercial functions ancillary to which private actors might implement public policy resettlement related functions. Based on legal analysis in chapter 5, it is difficult to see how either of the two 'heads' of possible state liability under the ILC Draft Articles and the 'duty to ensure' following from the *Velásquez-Rodríguez v. Honduras* case[153] might be tenable.

Article 5 requires 'governmental activity and no other private or commercial activity in which the entity may engage[154]'. Given the overriding purpose and degree of commercial activity of the OT Project and the general recognition of corporate separateness in

[150] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371.
[151] Ibid.
[152] Zumbansen P,'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 Indiana Journal of Global Legal Studies 29; S Leader & DM Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011); M Salomon A Tostensen A & W Vandenhole, *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007); David Kinley who argues that these hybrid public/private dynamics open up arguments of indirect responsibility of states under international law for the actions of private entities in Kinley D, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009).
[153] *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988 (Merits), Inter-American Court of Human Rights
[154] See ILC Draft Articles, Article 5 (5).

international law since *Barcelona Traction*[155], it is difficult to see how international law relating to state liability for the acts of private entities would apply in this case.

Moreover, imposing the international legal duty to ensure which after the Ogoni case requires states to publicise environmental and social impact studies prior to any major industrial development and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities[156]' would also be challenging. In principle, there is for example, no reason why a similar argument of state liability could not be made relating to specific socio-economic food and livelihood rights violations claimed by resettled Indigenous herders. Such a claim would however, be subjected to legal evidence that the GoM has permitted social impact studies prior to major development and has provided meaningful opportunities for individuals to be heard and participate in decisions affected them. Given the amount of social and environmental impact assessment conducted for the project which included land use and displacement issues[157], legal evidence upon which state liability might be predicated is, in all likelihood, unavailable as the minimum state duty to ensure human rights compliance through impact assessment has been met.

In addition to legal issues, project management issues compromise the timely implementation of Policies. For example, IFC and EBRD require the borrower to honour the performance standards as a covenant in the loan agreement. Yet, the practical fact remains that these institutions often enter into the project after resettlement has occurred[158] and thus have limited conduct over the actions of the borrower, requiring it to conduct a gap analysis under section 35 against the standards and pay compensation to communities if gaps are found. In the context of resettlement, this gap analysis remedy is too late for uprooted communities who claim Indigenous status and even if it were triggered given its bias towards economic compensation, would have limited value to land connected groups. It is suggested that this gap analysis works to encourage a reactionary 'after the event' ideology of financial

[155] *Barcelona Traction Light and Power Company, Limited*, Judgment ICJ 1966, paras 56-59 except in those cases where the 'corporate veil' is a mere device or a vehicle for fraud or evasion. See Salomon v A Salomon and Co Ltd [1897] AC 22, where the legal separation between a company and its shareholders was established thus allowing separate legal personality and limited liability of shareholders and the primacy of the separation between personal and corporate liabilities can only be overcome in the case of fraud and typically as a matter of last resort: see *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34 (at [27] and [34]).

[156] Ibid, at para 53.

[157] The Oyu Tolgoi Environmental and Social Impact Assessment dated August 2012 available at Oyu Tolgoi's website: <http://ot.mn/environmental-social-impact-assessment.>accessed 15 November 2016.

[158] Informal conversations with members of IOs discussed how projects often come to IOs quite late in the project cycle and after commencement of construction.

compensation[159] rather than one which examines preventative measures discussed in this study: a process which is timely and complex for IOs.

Considering these management or governance gaps, the question was asked of whether either the IFC or the EBRD as designers of PS 5 and PS 7 provide their clients with a detailed governance framework or set of principles or standards through which their clients can use in operations. Remarkably, review of policy papers revealed that no governance plan or framework exists between the IO and the borrower through which the client can implement the policy. To verify this observation, two information requests were lodged with the IFC and the World Bank[160] pursuant to their own access to information procedures, both of which returned negative responses to the development and availability of such a framework within the World Bank and IFC. Sarfaty's work shines light on how the professional and economic incentives within the bank would not favour prioritisation and analysis of public policy issues, which runs the risk of slowing down operations and professional success, and shine a light on the internal assumptions within the Bank and its policy. Ostensibly, the absence of a governance framework perhaps suggests an institutional ambivalence to deal with costly and time-consuming issues.

Read together, these observations over policy implementation provide an example of what Sarfaty describes as the World Bank's current orientation lying somewhere between social liberalism and neoliberalism, here applied specifically to the IFC and EBRD. In this scenario, the IFC and EBRD make gestures towards a more liberal stance with respect to issues of equity and justice whilst reinforcing the dominant neoliberal ideology of civil and political rights[161]. The evidence also provides practical application of what Klakegg would define as poor governance: fraught with contradiction over policy scope and definition, which inevitably translate into poor transparency and accountability towards communities

[159] Therefore, the project company typically has special project reserve accounts set aside and detailed within project budgets for managing the risk of compensation claims that might have adverse effects on the project company's liquidity.
[160] Reference is made to information requests submitted to the World Bank and the IFC Request on 2nd January 2014 and repeated on 12/02/2014 asking for a copy of an Implementation Paper which is referred to in the World
Bank Group Strategy paper (The World Bank Group. 2014, the World Bank Group Strategy. Washington, DC: World Bank Group). The World Bank acknowledged the request for the 'Implementation Paper which is referred to in the World Bank Group Strategy paper 2013', going onto state the World Bank has searched its records and databases but has not identified in its possession the document that you have requested, because the Implementation Paper has not yet been produced. The response then referred to the involuntary resettlement standards.
[161] GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012).67 finding that the World Bank's current approach lies somewhere between social liberalism and neoliberalism – making gestures towards a more liberal stance while also reinforcing the still dominant neoliberal ideology.

and ultimate, project failure[162]. The professional, economic incentives within the bank would not favour prioritisation and analysis of public policy issues that risk slowing down operations and professional success. When these economic processes are viewed in conjunction with the political mandate it can be seen how they work together to shape a legal framework which through ambiguity vacates legal responsibility for these types of 'economic' or commercially driven IOs, giving legal support to policy praxis and insulates the IFC and EBRD from human rights liability. In conclusion, for herders, these complex legal relations and conflicting policy narratives pose real barriers to availability of legal remedy towards public/private entities such as the IFC and EBRD operating at a transnational project level.

This final section explores what barriers the *financing and stakeholder structure* might have for herders' ability to access remedies against either project operators such as the OT project company that include both the Mongolian state as both shareholder and subject of international law. Given the GoM's minority shareholding in the OT Project, the state is exposed to conflicts of interest between economic motivations for example in its desire to operationalise the project and beginning to declare dividends and on the other hand, the inevitably timely and costly processes of recognising the traditional rights of herders. These conflicts work to de-incentivising states from engaging in promoting and advancing recognition for herder groups.

For example, shareholders in the project (which include the GoM) benefit from a MIGA political risk insurance covering breach of contract, which like the IFC and EBRD, contain similar environmental and social standards. Notwithstanding the presence of these policy standards, insurance policies may create a moral hazard for the insured shareholders. So, knowing they are insulated against regulatory changes (such as the recognition of land connected persons), shareholders may decide not to take precautions against or engage with social issues which may trigger expensive project costs. This process effectively 'privatises' and packages issues of public policy into insurance risk thus encouraging the long term dis-engagement and ambivalence towards issues of public policy. Insurance policies have implications for governments who according to the insurance terms would be liable to compensate MIGA for a breach of contract caused by political risk, thus potentially dis-

[162] Tadege Shiferaw A, Jonny Klakegg O and Haavaldsen T, 'Governance of Public Investment Projects in Ethiopia' (2012) 43 Project Management Journal 52 and Klakegg OJ and others, 'Governance Frameworks for Public Project Development and estimation' (2008) 39 Project Management Journal S27.

incentivising the state to engage in issues of public policy that have the potential to trigger a breach of contract claim under the insurance policy.[163]

Furthermore, the IFC, given its composition of sovereign states, benefits from special lender of record or preferred creditor status[164], a financing privilege which would have applied to the IFC loan in the project. Through these techniques, private lenders financing under the 'IFC umbrella' benefit from preferred payments in the event of any public policy risks of state enforced debt moratorium. This was the case in Argentina's[165] 2001 financial crisis when the government imposed a moratorium on external debt but permitted and prioritising payments to IFC backed projects to continue despite a crippling local economy. Conceptually, this feature exposes the unique capacity for IOs to move fluidly between the realms of public and private spheres, cherry picking rights to suits economic mandates, in this case, allowing repayment to be 'preferred' to the IFC over socio-economic public policy related payment under national law. These transnational legal processes have the potential to extend a 'chilling effect' on issues of public policy blotting them out in favour of the furtherance of market forces and subverting Fairness.

Having discussed how the stakeholder structures and potential conflicts relating to state legal responsibilities and economic motivations, the final section explores how the project finance structure used in the OT Project might compromise the ability of herders to seek access and recourse to project sponsors or developers, in this case RT and other project shareholders.

Limited recourse special purpose vehicle govern project-financing structures. This process works to insulate projects from political, social, market and environmental risks, pushing them further away from the project. Within financial ownership structures, powerful shareholders and developers sit 'behind' the special purpose company, in this case, the OT Project. Pursuant to this structure, contracts for construction and operation are entered into

[163] See Cotula L, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development', (2009) in *OECD Investment Policy Perspectives 2008*, OECD Publishing, Paris, pages 10-11.

[164] For more information on preferred creditor status see the IFC's website < http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Syndications/Overview_Benefits_Structure/Syndications/Preferred+Creditor+Status/> accessed 18 November 2016.
An example of the paradoxical effects of separate legal personality in practice can be seen in the effect of the IFC's lender of record and preferred creditor status. It is this unique capacity for international institutions to move fluidly between the realms of public and private spheres: cherry picking rights that expose them to questions about the extent to which they might be duty bearers.

[165] See the IFC Website for more details. In brief, the 2001 crisis involved the Argentinian government imposing a moratorium on government foreign debt payments. On January 2, 2002, Argentina abandoned the peso's peg to the U.S. dollar. IFC requested the Argentine government to allow automatic convertibility and transfer of IFC loan payments, thus exempting IFC from new regulations requiring prior Central Bank approval for foreign exchange transfers. See < http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Syndications/Overview_Benefits_Structure/Syndications/Preferred+Creditor+Status/> accessed 18 November 2016.

with third parties with limitation of liability provisions designed to 'shield' the project company from excessive liability and ultimately bankruptcy: ensuring limited recourse to the company. This limited recourse to the company is a key protection in project financing structures as repayment of project debt to financiers is entirely dependent on the full operation and production of the facility and sale of revenues and timely project scheduling. Crucial to the ongoing financial viability of the structure is an approach to problem solving devoted to maintaining a certain level of liquidity within the project to ensure debt repayment. Consequently, a financially driven approach to problem solving if things go wrong is factored into the project through a pre-occupation with due diligence and risk management. As a governance structure, it is typified by a high degree of top down power in which financial operation, 'bankability', profitability and mitigation of risk of the special purpose vehicle is of crucial importance to financial investors.

Ensuring the timely construction of the project and its proper operation is crucial for lenders as it is fundamental to the success of the project and the ultimate repayment of the debt. However, the 'success' of a project is not only vulnerable to disturbances in private markets but is highly sensitive to 'public outcries because it bears directly on social and environmental issues[166]'. Project finance thus creates unique social spaces filled with plural vectors of power and competing motivations. Because of the visibility and contestability of mega-projects, the issues of project economics and feasibility and social responsibility are tightly intertwined[167]. The operations of a project site can cut across numerous nested layers of economic and social relations: formal and informal, recognised and unrecognised but nonetheless alive, making project sites dynamic and contested spaces. Baker[168] argues that as a discipline, project finance falls into law and development theory in its ability to create clear links between the social and the financial. Investors typically comprise of large international commercial banks, public/private development finance institutions such as the IFC, African Development Bank (AFDB) and the EBRD relevant governments, public/private export credit agencies and corporate shareholders making the discipline plural and pregnant with opportunities for conflict and tension.

[166] Shamir R, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) Theoretical Inquiries in Law 371, 384.
[167] Miller R and Hobbs B, Governance Regimes for Large Complex Projects (2005) 36 Project Management Journal, page 46.
[168] Baker SH, 'Unmasking Project Finance: Risk Mitigation, Risk Inducement, and an Invitation to Development Disaster' (2010) 6 Tex J Oil Gas & Energy L 273.

Contracts are typically subjected to tight completion deadlines and limited liability provisions to protect the liquidity of the company. So, construction contracts often contain liquidated damages provisions which work to compensate the borrower in the event of construction default, delays and the resulting inability to repay project debt to financiers according to repayment terms. These mechanisms work to incentivise the construction contractor to construct on time thus leaving little or no time to factor in engagement with communities who are claiming traditional connection to land[169]. In sum, the concept of drawing risks 'into' the project is entirely oppositional to the purpose of the financial structures.

Project finance structures themselves work to obfuscate legal relations such that affected communities remain unaware of the ultimate identity of the developers and how they might access those responsible for entering into contract, which has direct bearing on their ability to access land[170]. A 2015 report for the AFDB[171] reviews a number of issues within its own 2003 Involuntary Resettlement Policy. Each of these points demonstrate the ideological clash and difficulties that the AFDB and comparable institutions such as the IFC and EBRD have in incorporating these fundamentally conflicted social concerns into the economic ethos of their development operations[172]. The findings of these reports add to the picture or 'anthropology' of IOs all of which bear on Indigenous and land policies and can contribute to policy failure. The policy reports discussed the following specific barriers as compromising the implementation of land rights in development projects.

1. A lack of funding for resettlement programmes resulting in weak or no resettlement monitoring or supervision

2. A lack of effective framework operationalising legal free, prior and informed consent processes

[169] One possible solution would be to include an independently verified assessment within the Borrower's project construction completion certificate that affected land connected persons have been identified.
[170] One possible solution would be to make all developers disclose ownership structures and project party identities to host governments and local communities.
[171] Safeguards and Sustainability Series, Volume 1, Issue 3: Review of the implementation of the African Development Bank's 2003 Involuntary Resettlement Policy, 2015).
[172] See Trubek's observations that some departments have more power than others in in Trubek D, Santos A, *The New Law and Economic Development: A Critical Appraisal* (CUP 2006). See Likosky M, *Privatising Development : Transnational Law, Infrastructure and Human Rights* (M. Nijhoff Publishers 2005) containing observations of chief bank social adviser Cernea on how many economists within the bank had tried to introduce the concept of a social rate of return into project governance but arguments against it were strong focusing on methodological and implementation difficulty.

3. The typical involvement of numerous IOs involved in one project in the form of a syndicate or club of lenders and who bring their own Policies to bear on the project causing a fragmented and confusing legal landscape of norms. In this situation, the need to harmonise Policies amongst IOs is critical

4. The lack of legal national legal recognition of Indigenous persons;

5. The poor internal monitoring caused by a lack of incentives within the bank in monitoring the social aspects of the project with preference given to the monitoring of the project's physical progress

6. Institutional fear over expenses[173] in preparing and submitting resettlement plans

The recommendations chapter explores how those project structures might be designed to embed rights of Indigenous groups into project finance structures to advance participation of groups in decision making and advancing the development narrative of fairness contained in the 2015 Sustainable Development Goals (SDGs). Of course, these project interventions are wholly contingent on favourable political and economic incentives, which in practice might be challenging. However, given the EBRD and IFC's express support for the SDGs and their ability to move between public and private interests and project stakeholders, their ability to exert pressure on states to recognise the traditional rights to land of groups must not be underestimated.

In conclusion, this study finds evidence of possible rights to land within international law relating to human rights case law on displacement and the definition of Indigenous status and within the Policies of two international organisations, EBRD and IFC. The rights located in the Policies are not fundamental rights as the basic position under resettlement polices is that neither non-traditional nor Indigenous groups have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement. As a result, the project's right of way is prioritised and resettlement is, in both traditional and non-traditional lands, considered involuntary. Notwithstanding the 'voluntary' nature of the norms, in the light of the fragmented international and national legal framework on Indigenous rights

[173] One solution would be to make the client budget for resettlement as a line item within project costs: an approach being considered by the World Bank in current consultations but this also runs into the political and economic lack of appetite in paying for resettlement costs.

identified in previous chapters, these norms are an important part of international standard setting policy used by transnational private actors and arguably international law-making.

In the context of the OT Project, this chapter has found evidence that the availability, effectiveness and implementation of the rights to land are compromised due to the following legal, political and economic processes.

First, an inherent bias within Policies in favour of land rights which generate '*productive potential'*, resonating a basis in the colonial agricultural argument. Second, evidence of internal institutional practice within IOs which harmonises involvement in human rights issues with internal political mandates, economic cost and dis-applying international legal Indigenous status to herders. For example, the study demonstrates how narratives on state sovereignty in conjunction with non-political mandates and economic costs can be used as a shield to constrain the trigger of IP 7 and thus advance the progress of the project.

Next, the thesis explores the legal barriers herders face in seeking legal recourse to IOs due to their internal mandate political prohibitions and, to states indirectly for the acts of private entities or IOs conducting land and resettlement activities. For example, the inability of herders to access international human rights instruments, in this case, evidence that lack of national publicity of possible avenues are a barrier to groups seeking advocacy at the international level. Access to legal rights is also blocked through a parochial policy approach to Indigenous identity which denies resettled herder groups of Indigenous identity and related to that, claims to ownership of traditional land and collateral rights to land based on loss of livelihood and food security. Moreover, the conflation of sovereignty arguments by IOs with their non-political mandates works to limit issues of Indigenous rights and recognition and consequently to vacate the idea of sovereignty from the policy aspirations[174] of improved livelihoods and improved standards of living[175]. Hiding behind its seemingly apolitical image[176] the IFC and EBRD are thus able to translate important public policy norms on land and Indigenous identity into a context that harmonises issues of public policy to market logic. The legal ambiguity surrounding whether international law applies to those

[174] See EBRD Performance Requirement 5, 2014 on land and involuntary resettlement which its objective as mitigating adverse social and economic impacts from land acquisition and to restore, and where possible, potentially improve, their standards of living and/or livelihoods and IFC Performance Standards 2012 with a similar provision requiring that in addition to compensation for lost assets, if any, economically displaced persons whose livelihoods or income levels.
[175] This draws on the ideas of Sarfaty relating to the conflation of the World Bank's sovereignty dimensions with its prohibition against political activities contained in the articles of agreements GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012) 13.
[176] GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford UP 2012) 13.

economic IOs who extend tangible human rights obligations, creates serious deficits in herders' ability to seek legal recourse against those entities.

The result of these transnational governance processes is that commercially focused private entities through fragmented and diluted processes of resettlement conduct important public policy functions through risk management standards. The legal challenge these processes cause for affected communities are serious as they are unable to seek legal accountability from states who are themselves compromised by their economic participation in development projects. This study suggests that financial institutions such as the EBRD are simply not able to cope with the complexity of heterodox and plural socio-economic relations to land which diverge from the mainstream paradigm of productivity with transnational legal processes working to erase or extinguish the specific social context of land. The inherent deficiency within the land policies potentially lies in their emphasis on land rights as purely productive, agricultural and privately owned. This ignores the non-economic and 'survival' related special value of land to millions of land connected people who live in the forest, reside on communal land undesignated for agricultural purposes, practice nomadic or semi nomadic pastoralism but are not engaged in agricultural production[177].

These legal findings coalesce around spatio-legal studies exploring how the gentrification of native spaces in the city for more effective uses means that urban spaces are now void of Indigenous sovereign presence, stretching the historic legal concept of *terra nullius* into contemporary *urbs nullius*[178]. This study argues that a similar gentrification and Lockean productivity, with a shrinking identity space. This is tantamount to *development project nullius,* a project space devoid of Indigenous presence. That is why in the Mongolian study we ask whether the Policies move from a legal *terra nullius* to a new *policy nullius*. Deploying Coulthard's narrative, the question is whether there is a move from the colonial economic and cultural 'double process[179]', into a contemporary 'double process'. This process champions economic accumulation through a policy language focusing on land as only having *productive potential* and cultural superiority. This is achieved through evidence

[177] See 'Land Rights: An Essential Global Indicator for the Post 2015 SDGs' (2nd September 2015) produced by a broad coalition of global and national organizations, civil society, and experts, including the United Nations Environment Program, the Women's Major Group, the International Union for Conservation of Nature, and the UN Sustainable Development Solutions Network.
available at < http://www.iass-potsdam.de/sites/default/files/files/land-rights-an-essential-global-indicator-sep-2-2015-endorsed.pdf> accessed 18 November 2016.
[178] Blomley N, 'Making Space for Property' (2014) 104 Annals of the Association of American Geographers 1291.
[179] Coulthard GS, *Red Skin, White Masks* (University of Minnesota Press 2014).

of policies narrowing, fragmenting and confusing the praxis of applying Indigenous identity into smaller spaces for recognition. For example, the fragmented nomenclature of 'displaced persons', 'indigenous' or 'vulnerable' persons appearing within Policies and practice and the policy of using 'vulnerable' in lieu of Indigeneity confuse the legal landscape denying groups a consistent and intelligible legal basis upon which to claim rights. Moreover, the use of project finance processes to 'blot out' and make legal connectivity between Indigenous actors and private entities challenging. The use of insulating project finance structures by which affected communities are kept at arm's length adds to the fragmentation of rights and remedies and promotes the distancing of Indigenous actors as valid law-making participants in the project thus legally dispossessing groups in an 'international' space.

The overall analysis suggests comprehensive reasons for why PS 5 and PS 7 inevitably fail to achieve their objectives of promoting development and doing no harm. Consequently the findings practically evidence the World Bank's view of human rights aimed at positive poverty reduction mechanisms and 'important issues such as access to health, education and employment' or in this case, land rights, as merely 'aspirational'[180] and the dangerous effects of this 'aspirational' legal approach on Indigenous groups. The recommendations chapter suggests how those policies and project finance frameworks might be amended to better promote the interests of IPs given the right political and economic pressure.

Drawing on this evidence it is argued that the methods of transnational legal governance through which those rights are interpreted demonstrates the continuation on an international level of the political and economic transnational governance paradigms identified in chapter 3. The study provides evidence of new forms of state sovereignty continue post-colonial practices of control and prioritisation of private property on a transnational level for the core purposes of functionality and business certainty that replace colonial concerns over territory. The studies demonstrate how specific concerns over certainty and functionality through the specific processes discussed in each chapter and explained above might compromise the ability of Indigenous groups to access rights to land and related remedies thus 'braking' advancement of a thick rule of law as elaborated in the SDGs.

[180] Reference is made to World Bank webinar with which this research engaged and which took place on February 26 2015 at 3:00 pm on 'The Evolution of Safeguards: The Proposed Environmental and Social Framework'. World Bank participants comprised of Stefan Koeberle (Director of Operations Risk Management), Agi Kiss (Regional Safeguards Advisor for Europe and Central Asia), Una Meades (World Bank Senior Legal Counsel) and Glenn Morgan (Safeguards Advisor).

This later point is important as the IFC, EBRD[181] and in 2015 the Mongolian government[182] pledged their formal support to the SDGs, thus making the actors, norms and processes discussed here of direct concern to the international development community. Moreover, applying a spatio-legal approach in which different development sites in which the same corporate entity (RT) is involved exposes how an entirely different policy towards the common issue of Indigenous land rights can be used and is therefore of concern to the transnational approach of the SDGs which is applicable to private entities. As Delaney[183] notes such an approach may demonstrate the uneven application of law and policies in different settings and as such raise questions about the advancement of Fairness to Indigenous groups in different spatial settings. Such comparative evidence also confirms a salient conclusion of this thesis of the vital importance of a national legal framework recognising Indigenous rights as a minimum legal standard.

The Mongolian study completes the thesis's exploration of Indigenous land rights in a transnational legal context. We now turn to a concluding chapter that drawing on the study's core findings, brings together the thesis's new contributions to knowledge in the form of its key conclusions, and some novel recommendations.

[181] See <www.ebrd.com/news/2015/ifis-back-new-global-development-agenda-.html> accessed 15 November 2016.
[182] See Statement by his Excellency Elbegdork Tsakhia, President of Mongolia at the United Nations Summit for the adoption of the post 2015 development agenda, dated 25 September 2015, available at https://sustainabledevelopment.un.org/content/documents/20329mongolia.pdf stating its commitment through a 'revitalised global partnership[182]' and a 'global good' which involves synergy with governments, civil society and the private sector.
[183] Delaney D, *The Spatial, the Legal and the Pragmatics of World Making: Nomospheric Investigations* (Routledge 2010); Delaney D, 'Legal geography I' (2015) 39 Progress in Human Geography 96.

CHAPTER 9: CONCLUDING REMARKS AND RECOMMENDATIONS

This chapter concludes the thesis with a brief summary of transnational legal theory (TLT), how it has contributed to the thesis's approach and understanding of the right to land and the new contributions, this thesis offers to the study of the rights to land. The contributions offered here are informed by preceding studies and their relevance is tested in the light of the empirical findings in the case studies presented in chapters 4 through 8. Closing this chapter are some 'transnational special measures', which include suggestions of public and private legal institutional reform that have been distilled from the research findings and seek to offer new contributions to TLT and more broadly, the study of Indigenous rights to land.

This thesis has examined what *legal* evidence exists of a right to land and related remedies for Indigenous actors in the context of specific 'globalised' economic, political and legal processes such as natural resource development projects. It examines *how* those processes might affect the availability and effectiveness of land *rights and remedies* for affected Indigenous actors and the resulting impact of those processes on fairness and justice as understood by a 'thick' international rule of law and within the global Sustainable Development Goals.

It has fulfilled that objective through a legal approach in TLT which provides suitable building blocks through which the thesis's objectives are understood and satisfied. Those building blocks offer a novel legal approach unbounded to the state that focuses on *actors, norms and processes* as methodological tools through which to examine contemporary law-making. Transnational legal scholars continue to acknowledge the important role still played by state institutions in law-making. Yet they contest the monopoly states have on law-making in the light of increasing political and economic globalisation. This approach immediately makes TLT a suitable lens through which to analyse law-making in a globalised context such as resource development projects.

TLT's inclusion of unbounded state *actors* to the law-making process means that the legal 'participants' and 'sources' from which evidence is gathered for the thesis can take a 'globalised' perspective. The thesis includes the state-centric view of law as rules created by a state authority and adds actors claiming Indigenous status (regardless of formal legal status as Indigenous) as well as private actors as valid participants in law-making. This

theoretical approach thus legitimises available 'sources' of legal *norms* as not necessarily bounded to the state and its actors as the primary subjects of international law. Thus, legal norms or 'rights' to land might emanate from a number of legal sources and thus exist along a legal 'continuum' which includes state made laws as well as 'soft', non-legally binding rules, standards and contracts in which private actors such as corporates and international institutions play an active legal role. Finally, TLT's approach to rights takes a contextual approach in that crucial to the evaluation of rights in terms of availability and effectiveness, is an understanding of the political, economic, historical and, cultural context within which rights and remedies exist and the weight those processes have on legal rights. The practical result of this approach is that a purely 'black letter' positivist approach to legal sources would not thoroughly capture modern processes of globalisation and its effects on rights and remedies.

Using this theoretical approach as a springboard to this thesis's appraisal of land rights and remedies, the thesis makes the following new law and policy related research contributions to the field of transnational legal studies. What follows is a presentation of the *general* and *specific* findings drawn from the legal examples and case studies. Those findings are modelled around TLT's approach in legal *actors, norms and processes*. Last, distilled from those empirical findings, some 'transnational special measures', being suggestions of public and private legal institutional reform are offered. First, I offer some key general findings.

Through empirical case studies and legal examples, this thesis demonstrates that political and economic policies grounded in individualism and market forces have consistently subverted Indigenous land rights over a startling temporal and spatial continuum. The law has reified legal protection for Indigenous groups and communal land rights in favour of the utmost freedom and protection for private economic rights for example those relating to mining rights. Through legal principles of eminent domain private, settled and individual rights to land title have been crystallised into superior, clear and predictable legal rights. For land-connected persons or advocates promoting their land rights, the legal consequences of this position mean that there is an urgent need to advocate from the ground up and a more basic level of community, common humanity and universal freedom. This thesis has shown repeatedly that freedom as a political concept has been conflated with property rights, economic freedom and neoliberalism and that the law has coalesced in this project.

As a core human right, freedom or liberty is an instrumental right, a springboard upon which we can achieve the things we care for: economy, community, culture, religion, the self. When placed in conversation with advancing Indigenous land rights this legal, political and economic context means understanding that the idea of community is, for groups, valuable and as a minimum, as valuable as the basic and common need for freedom, if not more so. Forging this basic connectivity requires exposure of the inherent biases within existing legal, political and economic institutions which read freedom as a Lockean individualistic right to accumulate and based on this, advocate for re-conceptualising freedom as equal to community and rights enabling Indigenous communities to advance what is important to them as a group, in this case, land rights. Given the remarkable lack of legal development of land rights as evidenced herein and in the light of current legal and developmental narratives on a 'thick' rule of law and Fairness in the 2015 Sustainable Development Goals (SDGs), advocacy which places Indigenous actors as core players in the law-making process becomes an important current legal problem.

General 'signifiers' of legal reification are evidenced throughout the case studies in the intriguing global fragmentation in legal methods used to frame issues of land rights in the following ways. There is a lack of consistent transnational legal practice of labelling groups with studies demonstrating use of the term 'vulnerable', 'Indigenous', 'Aboriginal' 'development displaces', 'displaced persons', 'resettled' under resettlement Policies, or Traditional Owners under private arrangements. At a basic level this lack of consistent legal terminology denies groups uniform legal visibility, adds further hurdles in accessing legal rights and potentially distracts attention away from the primary legal basis of Indigenous status as one embedded in a common denominator of discrimination based on a special relationship to land. Sources of legal rights affecting Indigenous actors are varied and derived from plural sources: aboriginal title statutory and constitutional protection, international human rights, socio-economic rights, civil and political rights, right to abode, policy rights on resettlement and country specific access rights under private contract, demonstrating a legally fragmented and confusing framework for Indigenous actors to negotiate.

With respect to state made law, the rich body of legal cases presented in this thesis indicate a staggering lack of legal development and attention to issues of Indigenous persons and legal recognition of their land rights spanning time and space. Indeed, it was not until the 2000s that the international community took seriously the Indigenous special relationship to

land and in 2007 produced the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which provides legal evidence of an aspiration to elaborate Indigenous land rights as closely as possible to a fundamental 'ownership' right to land. The UNDRIP is not, however, legally binding and its possibility of a fundamental ownership right to land is only recognised in a handful of legal cases coming from regional Latin American and African human rights bodies however that practice is not as chapter 5 explores, well developed. There are however, emerging legal rules, for example 'collateral' rights and consultation rights which are discussed later in this conclusion.

The legal landscape on compensation quantum for extinguishment of traditional ties to land have, until very recently, remained vague, inchoate and when quantified, disappointing. At best, courts tend to value ties to land through a parochial lens of market value and damages typically awarded at a low quantum, as illustrated in *Mayanga*[1] and *Saramaka*[2]. Moreover, the law has demonstrated a remarkable ambivalence to the question of valuing traditional ties to land. As this thesis identifies, it has not been until 24 August 2016 that a domestic court gave the first ever detailed formula by which to assess compensation for the extinguishment or impairment of native title rights and interests in *Griffiths v Northern Territory of Australia*[3] to award the Ngaliwurru and Nungali Peoples substantial payments for economic and solatium costs. This is however a federal decision only and subject to appeal. Gathering evidence of compensation determinations is further challenged through the increasing practice of out of court settlements in which quantum is kept confidential, thus denying Aboriginal groups and legal advocates legal precedent to use for advancing awards in other claims. This is exactly the position in chapter 7, where, whilst the quantum is generous, remains strictly confidential.

When put together, the analysis of case law from numerous disparate jurisdictions with no uniform legal basis appear to be legally 'bunched' together in a homogenous body of use and occupation rights which are consistently vulnerable to compulsory acquisition as discussed in chapter 4. Arguably, this speaks to a universal project of homogenisation of heterogeneous cultural groups and their heterodox relations to land to a legal common denominator of 'use and occupation' or a worrisome legal project of disregard or ambivalence to develop rights.

[1] Judgment of 31 August 2001 (Inter-Am. Ct. H. R. (Ser. C) no. 79) (2001)).
[2] Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)).
[3] (No 3) [2016] FCA 900 (Timber Creek).

The following are *specific* contributions of this thesis to the theoretical field of TLT examined through the building blocks of *actors, norms and processes*.

The thesis finds that *legal actors* include those hailing from more 'recognised' Indigenous rights jurisdictions and from jurisdictions not usually associated with Indigenous persons, thus challenging general assumptions over 'Indigenous' legal status. It brings to the fore the rights of *Aboriginal groups* legally recognised under the Australian Native Title Act 1993[4] (NTA) in Australia and Section 35 of the Canadian Constitution Act, *displaced Indigenous and non-Indigenous communities* recognised under international human rights law and *displaced Chagossian communities* who do not enjoy formal legal recognition but strongly assert Indigenous actor status. It engages '*Traditional Owners'* in the Pilbara Project who are legally recognised under the state made Native Title Act and private legal norms in the Participation Agreement and *pastoralist herder*s in Mongolia who, like the Chagossians do not enjoy formal legal recognition but strongly assert Indigenous actor status.

The basic ability of the *actors* identified in this study who self-identify as Indigenous to obtain legal recognition, access to rights and protection identified in this thesis, for example, in terms of resettlement and compensation, is limited by a parochial understanding and biased application of 'Indigenous' actor status. Through comparative studies, chapters 6 and 8 provide evidence of legal dis-application of the international legal definition of Indigenous over plural international contexts. chapter 6 explores the fundamental link of the definition and its applicability to specific 'salt water' European settler colonial contexts and consequently, the worrisome 'transnational' dispossession resulting from the non-application of Indigenous status for a number of reasons, including lack of contextual suitability to non-saltwater contexts in which groups have not experienced European encounter involving the crossing of salt water. Chapter 8 for example identifies how when carried into 'international' spaces through the International Finance Corporation (IFC) and the European Bank for Reconstruction and Development's (EBRD) resettlement and Indigenous policies as interpreted by private actors, the Euro-centric conceptualisation of 'Indigenous' can lead to social spaces devoid of Indigenous identity. This might evidence a policy of creating development *project nullius*, a project space devoid of Indigenous presence, echoing historical legal *terra nullius.*

[4] As amended in 1998.

Next, a transnational approach in public and private actors legitimises a complimentary study of legal rights existing along a broad continuum of legal rights to land that includes public and private legal sources. The thesis has located novel sources of legal rights and remedies in the following transnational *legal norms*.

Chapter 4 identifies two sources of Aboriginal rights to land in Canada and Australia emanating from constitutional and statutory legal sources which, as follows common law tradition, are interpreted through judge made law. Chapter 5 provides evidence of a growing international legal practice in which the rights to land and property of displaced Indigenous and non-Indigenous persons are protected through a body of 'collateral' human rights norms on property, family life, non-discrimination and the rights to an adequate standard of living including rights to food. There is evidence of a growing body of international legal instruments protecting Indigenous Persons (IPs), and displaced persons such as the UNDRIP however that international legal practice is relatively recent and has not matured beyond a soft 'voluntary' legal approach.

Chapter 6 identifies evidence of a right to land under English domestic law and related remedies of compensation and return/resettlement through application of the English Magna Carta right to abode and under international human rights law. Moving along the transnational 'continuum' of legal sources, chapter 7 identifies legal rights to land for Aboriginal groups within a set of *private* governance arrangements entered into between Traditional Owners in the Pilbara region of Western Australia and Rio Tinto (RT). These types of PA are part of a countrywide corporate policy in which RT enters into land agreements with all Aboriginal groups affected by its Australian operations. They offer a novel type of legal pluralism in their fusion of private agreements with state NTA requirements. Chapter 8 identifies a 'voluntary' legal right to land for Indigenous groups within private policy standards on resettlement and Indigenous persons.

We can take from these rights, the following common legal qualities. First and to re-state, there is no legally binding international legal practice harmonising the special type of land related discrimination experienced by IPs in a pre-emptory, non-derogable manner.

Instead, there is *international* legal practice of framing the rights of displaced persons not expressly as land rights but to derogable collateral human rights to property, privacy, freedom of movement, culture and food. Domestic Aboriginal rights in Canada and Australia reflect this position recognising common law Aboriginal rights to land, as discussed in

chapter 4, as 'use and occupation' site-specific rights to fish or hunt for example which are derogable to eminent domain laws extinguishing native rights in favour of public interest development projects.

Drawing from the studies in chapters 4 and 5, and pertinent to this study on land is strong legal practice and a maturing principle of customary international law confirming that *states* have a minimum *duty to consult* in good faith with groups with regard to any developments on their ancestral land.[5] For example, the growing international legal standard of free prior and informed consent (FPIC) has its clearest elaboration in articles 19[6] and 32(2)[7] of the UNDRIP. Although FPIC does not constitute a veto right for groups against the expropriation of land, international law experts have found a range of customary international law norms relevant to IPs[8], the most relevant to this thesis being the duty to consult. This evidences an emerging 'collateral' right to land under which IPs can advocate for consultation rights with respect to projects affecting ancestral land.

The thesis suggests that the uniform growth of the consultation rule into a potentially non-derogable rule of customary international law that is readily available to IPs, is, however, vulnerable to the type of inconsistent national legal practice demonstrated in Canada's inconsistent objections and approvals of the UNDRIP discussed in chapter 4. That rule on consultation *may* mature into a consultation rule that is *directly applicable to private actors* but at present confirming legal norm on this is very sparse and when available, moot, evidenced through the *Grand Rivers* case and not corroborated by a firm state centric practice.

[5] A number of cases stipulate the requirement consult with to negotiate and consult with Indigenous groups with respect to impacts on their land, see *Delgamuukw v British Colombia* [1997] 3 SCR, in *Saramaka People v Suriname* [2007]. See also the Committee on Economic, Social and Cultural Rights. The committee notes that victions from homes and land for development requires that states consult with affected groups to determine feasible alternatives to removal, legal remedies or procedures to those who are affected by eviction orders and confirmation that all individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected. See UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): (forced evictions) (1997), UN Doc: E/1998/22 at para 8 and 14.

[6] Article 19 requires states to 'consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.

[7] Article 32(2) requires States to 'consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

[8] ILA Committee on the Rights of Indigenous Peoples, Interim Report (2010) 51; Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, 'Standard-Setting: legal commentary on the concept of free, prior and informed consent (2005), UN Doc: E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005 at para 47.

On the other hand, chapter 5 provides evidence of a potentially promising and nascent international legal rule requiring *states* to ensure private entities undertaking major development on their territory to comply with an international 'duty to ensure' respect for relevant international human rights emerging from ratified legal instruments. Failure to do so might leave states exposed to international legal liability for violations caused by private entities. As a minimum standard, states must require private entities to conduct environmental and social impact studies prior to any major industrial development and of critical importance, provide meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities. This type of indirect rule could afford groups with a potential avenue for legal accountability against states through which private actors are required to consult with IPs. Moreover, it could form supporting evidence of a customary legal norm to consult with affected communities, of use to IPs.

The following conclusions from each study on the quality, availability and efficiency of the relevant legal rights and remedies contributes to the field of transnational legal studies through a review of those legal findings in the light of political and economic globalisation *processes* and their potential effects on contemporary law-making.

Chapter 4 suggests that the legal parameters and narratives through which Aboriginal rights in Canada and Australia are judicially developed and implemented is characterised by fragmentation through for example, the shaping of rights as unbundled and 'site specific' rights to specific land. Moreover, rights are only legally recognised through satisfaction of onerous legal requirements steeped in judicial Originalism, for example, relating to European narrative on 'prior occupation' and legal evidence of ongoing 'authentic' connection to traditional culture. Characterised by fragmentation and legal construction which over emphasises the importance of authenticity and Originalist legal thinking, it is suggested that those legal processes have worked to continue a restrictive canon of rights as comprised of limited 'use and occupation'.

Chapter 5 provides evidence that rights under international legal instruments are typically characterised through a structurally piecemeal, fragmented and soft 'voluntary' legal approach. For example, neither the UN Guiding Principles on Internal Displacement nor the UNDRIP are legally binding documents. Moreover, there is within international law, a substantial structural inability drawn along historical Westphalian state centric public and

private lines blocking the ability of Indigenous actors to hold states responsible for the acts of commercial entities. This is even if private entities are undertaking public policy related functions such as land resettlement through processes that echo 'privatisation' techniques. Legally, this fragmented arm's length process means that affected communities sit 'in the shadow of the law' leaving affected communities with little legal visibility unable to hold states to account through structures of international law and arguably demonstrates international law's inability to cope with increasingly fragmented processes of globalisation such as 'contracting out' or privatisation.

There is evidence within international law of a general ambivalence or reluctance towards displaced groups and Indigenous persons evidenced through the significant time barriers in the implementation and enforcement of international law judgements relating to Indigenous land rights cases. Chapter 5 suggests a judicial and general legal hesitancy towards supporting the availability of socio-economic rights. This is evidenced through a judicial policy of categorising rights as civil and political property rights rather than socio-economic, a justice system which protects socio-economic rights violations through non-judicial forums relying on weak reporting and non-binding legal monitoring mechanisms with no legal aid scheme.

Using the Chagos study as example, chapter 6 argues that any fundamental or collateral legal rights to land is constrained because of the manner of legal interpretation. Fragmentation and dilution of legal protection is evidenced through domestic legal support confirming the political use of royal prerogative power without confirming legal precedent for exiling a settled population. Further evidence is located within the judicial thinning out of Magna Carta rights of abode and related remedy of return from 'fundamental' legal rights to 'important' rights capable of extinguishment for economic, military and environmental reasons. Other examples of legal fragmentation of rights include a parochial reading of the Chagossian's English public law right to rely on earlier executive statements creating a legitimate expectation of return divorced from the doctrine's fundamental basis in fairness. At the international level evidence is found of legal policy within the European Court of Human Rights of a limited and piecemeal judicial interpretation of article 56 of the conventions which has denied Chagossians' access to international law and valuable supporting legal precedent and international instruments upon which a right to land and remedy of return could be developed.

Chapters 7 and 8 provide empirical examples of informal 'contracting out' or privatisation processes in which private actors manage issues of traditional land access rights and resettlement of groups in the context of development projects. Chapter 7 gives an empirical example of how traditional rights to land might be merged within the project developer's private rights to land and through compromise, negotiation and concession, are able to legally co-exist with the traditional rights of Traditional Owners (TOs) over areas of significant cultural significance. As the Pilbara Project demonstrates, it is possible in this specific situation for TOs to improve upon the national NTA framework on Aboriginal rights through private contractual arrangements. Those private measures encourage redistributive arrangements and processes for empowerment. For example, special measures which permit access to sites of significant cultural importance, provide compensation for loss of traditional land, ongoing compensatory 'benefit sharing' arrangements, provide for local employment and training and include IPs within project decision making relating to traditional land. Financial and access provisions evidenced in the Pilbara Project build upon the domestic NTA framework to provide enhanced private rights and remedies in the form of land access over sites of significant cultural importance and compensation provisions[9].

However, the ability of this vision of legal pluralism or 'shared space' in which plural relations can co-exist is conditioned on some highly specific criteria making it difficult for advocates to replicate the private legal governance model of the Participation Agreement (PA) outside Australia. This conditionality renders these types of arrangements country specific concessions constructed on the legal requirements of the specific jurisdiction in which commercial operations take place. We can see the limitations of this approach when compared with the Mongolian study also involving RT in which no countrywide policy of agreement making with Indigenous actors is available.

Moreover, they are subject to *economic imperatives* and do not form part of a nationwide uniform private sector policy amongst all corporates operating in Australia. The presence of a national framework is a good starting point. It is not however, a certain basis upon which TOs can negotiate *enhanced* rights as the negotiation of rights such as those in the PA is a balanced process of power and negotiation that is, as this study demonstrates, consistently vulnerable to commercial imperative. This means that any enhanced compensation or access

[9] Whilst not of direct relevance to this study, there may also be opportunity for local employment, business training and the building of socio-economic services for example schools and health centres for neighbouring communities through special contractual arrangements.

rights granted by private entities which are over and above minimum national standards are continuously weighed and harmonised against project economics such that should profits decrease enhanced legal protection might slide downwards towards minimum domestic legal requirements.

The result is a patchy and fragmented national framework in Australia, in which some Aboriginal communities have more robust land rights than others depending on the contract counterparty, with potential social conflict ramifications.

Chapter 8 explores how access to rights and remedies to land fragment due to processes of resettlement conducted by commercially focused private entities such as international organisations[10] (IOs) conducting public policy functions. Those processes include a parochial policy approach to Indigenous identity which denies resettled herder groups Indigenous identity and related to that, claims to ownership of traditional land and collateral rights to land based on loss of livelihood and food security. Fragmentation of rights and remedies also results from the legal uncertainty over the political prohibition mandate of IOs and its tense relationship with the spirit of resettlement policies. Further legal dispersal of rights results from the use of risk management standards implemented through internal processes resonating the 'tick box' new public management approach to public policy which encourages market 'cost-benefit' analysis and a 'trade off' solution to issues of public good and equity. Finally, the use of insulating project finance structures by which affected communities kept at arm's length adds to the fragmentation of rights and remedies and promotes the distancing of Indigenous actors as valid law-making stakeholders in the project.

In sum, the above transnational legal snapshot of rights presents a legally fragmented and ambivalent approach compromises the effectiveness of Indigenous rights in terms of denying groups a clear, developed and consistent basis upon which to claim rights and remedies in contemporary globalisation processes. Arguably, the non-uniform, piecemeal and hesitant legal approach to the topic of Indigenous land rights is itself reflective of the lack of legal evidence extending discrimination against Indigenous special relationship to land within the parameters of *erga omnes* peremptory status. This lacuna is unfortunate for

[10] International organisations in this study means international finance institutions such as the European Bank for Reconstruction and Development and the International Finance Corporation.

groups as a good reason for enhancing domestic laws on land rights is evidence of any higher international legal status on the subject.

Legal methods of understanding this patchy legal framework takes a cue from transnational legal studies approach to rights in the context of globalisation processes, thus contributing to the scholarly field as follows.

Each of the chapters suggests that legal fragmentation and ambivalence broadly serves Imperialist thinking and more specifically the continuation of transnational governance processes identified in chapter 3. Those governance processes coalesce around a governance paradigm stretching across public and private actors to prioritise private settled rights to land. The objective of this paradigm was as chapter 3 described a historic method and rationale for advancing control of territory. This has now morphed into new forms of non-state sovereignty replacing the state made colonial agricultural argument positing the superiority of settled European cultivation, to a similar private sector paradigm concerned with control to forward economic functionality and certainty rather than territory.

The continuation of that paradigm is evidenced in each study. Therefore, we might understand the parochial and Euro-centric legal processes of judicial interpretation in Canada and Australia as working to continue the agricultural argument starting from the days of Vattel and resulting in ongoing Imperialist thinking which has limited Indigenous rights to 'use and occupation'. Chapter 5 argues that the judicial tendency to frame rights in terms of property and possessions for example, suggests a judicial subversion of socio-economic rights to more market friendly human rights. Furthermore, the legal barriers relating to time, cost, liability and legal redress create a legal space in which states can impress and prioritise neoliberal political and economic motivations to the detriment of socio-economic relations over land. The conclusion is that these legal lacunas support a continuing transnational governance processes resonating the agricultural argument, with it, the prioritisation of private, settled, and land relations that are easily opened to market forces.

Chapter 6 finds pieces of evidence demonstrating a regressive and deeply contested judicial turn or movement within English and to some extent, European courts in favour of Imperialist thinking. That Imperialist thinking is for example demonstrable through the continuation of a legal policy which fails to question the biased Eurocentric legal structures which control access to the definition of indigeneity and legal arguments against

resettlement which align with the macro-political, financial and ecological costs of resettlement. Together the legal arguments replicate colonial and neoliberal thinking on the superiority of Western culture, neoliberal political and market forces and private relations over land all of which have roots in the political and economic transnational governance paradigm of the 'agricultural argument'.

Chapter 7 provides some evidence of the use of the cultivation argument and the prioritisation of private land rights by private actors operating in modern globalised contexts. Given that the PA is shaped out of the provisions of the NTA, there is an obvious question of the continuity of those biases within the PA. This conclusion is justified through evidence that the decision for RT to enter into and apply the legal rights in the Pilbara Project are contingent on economic imperatives such as fluctuating commodity prices and the economic value and importance of the Pilbara project to RT as well as concerns over economic functionality and business certainty.

Chapter 8 argues that the availability, effectiveness and implementation of the policy-based rights to land are compromised because of an inherent bias within Policies in favour of land rights that generate '*productive potential'*, resonating a basis in the colonial agricultural argument. Moreover, evidence of internal institutional practice within IOs of harmonising involvement in human rights issues with internal political mandates, economic cost and political sovereignty continues the legal policies of dispossession used in the agricultural argument. Modern policies of narrowing Indigenous identity into smaller spaces for recognition using a contemporary vocabulary of vulnerability in lieu of Indigeneity and of using 'tick-box' policy and project finance implementation techniques also work to distance Indigenous actors from the project and at worst, entirely dispossess them through dis-application of Indigenous status. Chapter 8 provides an empirical example of the stretching of the historic legal concept of *terra nullius or urbs nullius*[11] into contemporary *development project nullius* to make spaces devoid of Indigenous presence. The study concludes that IFIs such as the EBRD and IFC are simply not able to cope with the complexity of heterodox and plural socio-economic relations to land which diverge from the mainstream paradigm of productivity.

[11] Blomley N, 'Making Space for Property' (2014) 104 Annals of the Association of American Geographers 1291in which Blomley demonstrates how the gentrification of native spaces in the city for more effective uses means that urban spaces are now void of Indigenous sovereign presence.

In conclusion, the thesis suggests that for Indigenous groups, basic Fairness is consistently constrained by the transnational legal governance processes of private property, territorial control and economic certainty. The transnational legal processes identified in chapter 3 have, it is argued, diluted and fragmented the ability of groups to access and enjoy rights to traditional land, ultimately, placing 'brakes' on the advancement of Fairness, a 'thick' rule of law and substantive equality for Indigenous actors.

The following section distils from the empirical findings, some 'transnational special measures', being suggestions of public and private legal institutional reform that might advance Fairness grounded in a 'thick' rule of law and advancement of the SDGs. Those measures speak directly to the transnational approach of this thesis as they place at the centre, the interests of Indigenous actors as valid participants in the law-making process and include non-state actors and norms as directly engaged in and part of transnational legal processes.

The empirical data demonstrates that it is difficult to identify a uniform and legally binding international legal standard conceptualising Indigenous rights to land. Furthermore, it is also challenging to identify a clear and confirming legal practice of defining *who* enjoys Indigenous legal status. Because of the piecemeal legal landscape of rights, the suggestion made here is that Fairness ought to be applied in a *project specific* and thus *nation specific* context, thus departing from a set homogenous formula for perfect justice to include the transformative potential of public and private governance arrangements to promote justice[12].

The level, quality and consistency with which transnational legal actors might engage with Indigenous land issues is typically a reflection of domestic and international legal norms on the topic. Quite simply a lack of legally binding international or domestic law means that missing from the debate are proverbial 'carrots' and 'sticks' which give a minimum level of legal order and consistency to the issue and incentivise transnational legal compliance. Consequently, the empirical findings support the position that as a minimum requirement, importance must be given to elaboration and development *of a national legal framework* that gives equal, non-discriminatory recognition to Indigenous rights to land at the domestic grassroots level.

[12] Sen A, *The Idea of Justice* (Harvard UP 2009). Drawing on Sen's approach to justice as not comprised as a set homogenous formula for perfect justice but encourages the free academic study of the transformative potential of public and private governance arrangements to promote a social or as more relevant to this study, national and 'project' specific idea of justice.

The legal form of those rights as statutory or constitutional is of secondary importance to the primary need of having domestic legal recognition of rights in any legal form. The ability of national law to be used as a tool by groups to explicitly articulate their 'minimum' legal rights and for Indigenous actors to then use those rights in cases of development projects to practically negotiate 'enhanced' legal rights to land is evidenced in the Pilbara study. Continued legal advocacy and reform in this area is vital. Legal commentary gives credit to the statutory protection afforded by native title in its ability to provide a firm foundation for the recognition of specific rights and its ability to put Aboriginal people at the negotiating table, and thus, speak to the powerful processes of global governance in some, albeit limited manner. Counsel to the TOs in Australia interviewed for the purpose of this thesis, have also discussed the real benefits of a legal framework in its ability to provide leverage for groups in negotiations with the state and private companies.

At the same time, methods through which *common law judges interpret rights* requires careful attention and potentially, a process of judicial review which might compare how judges are domestically implementing Indigenous rights in comparison to other public policy rights or human rights issues protected under national non-discrimination provisions to shine light on any bias.

The advancement of an international legal practice is needed that understands displaced Indigenous persons rights to land as equal to non-Indigenous rights through *collateral* socio-economic and cultural human rights to food, adequate livelihoods and culture *on an equal basis* as rights to property and private life. The benefit of such an approach is its ability to use existing human rights to advance legal protection of the special relationship to land and its symbiotic relationship with rights to food for example. In practice, this means judicial translation of displacement violations into a body of legal precedents framing Indigenous rights to land as fundamentally grounded in equal treatment and legally protected through a plural range of socio-economic, cultural as well as civil and political human rights. This type of legal practice might, in time, crystallise into a body of law in which land rights might be protected by the emergence of a non-derogatory non-discrimination approach to Indigenous land rights as a means of respecting their special land relationship through associated 'survival' human rights.

As an alternative to using the terminology of 'land' and 'land usage', national courts might shape rights to land in terms of 'tenure security'. At the international level,there is a nascent

policy practice encouraging such usage under voluntary 'soft' law legal instruments. The Voluntary Guidelines on the Responsible Governance of Tenure[13] presents rights within a schema in which no tenure rights, including private ownership, is absolute as all tenure rights are limited by the rights of others.[14] The concept of tenure security moves away from the reductionist ideas of land, (demonstrated in this thesis) as a purely productive assets and livelihoods as purely determined on an income basis, to conceptually recognise plural socio-economic and cultural relations. For Indigenous communities seeking to assert the socio-economic and cultural importance of land and the direct applicability of human rights protection to those relations, an approach based on 'tenure security' might better advance a thick rule of law for groups and forward current SDG development narratives founded in common good and universal fairness.

The following two points throw doubt on the SDG's ability to make good on its promise of collective inclusion. First, the goals lack specificity in that they contain only two references to Indigenous persons relating to the secure and equal access to land and other productive resources and the equal provision of education: a disproportionate level of attention given that recent UN statistics demonstrate that Indigenous groups make up five per cent of the World's population.[15] Related to this is the inability of the goals to measure poverty as anything other than a 'dollar value'[16]: a policy which has serious exclusionary effects for Indigenous groups who recognise land as a special cultural and economic heterodox unit with value in terms other than an exclusively value producing asset.

The next recommendation relates to the definition of Indigenous. The suggestions made here apply 'transnationally' to international and domestic legal systems, public, and private actors whose projects increasingly put them into contact with groups. The thesis has found that current definitions of Indigenous status are highly fragmented appearing within international

[13] Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (2012) Food and Agriculture Organisation of the UN.
[14] Ibid, clause 4.
[15] Background Paper to the World Conference on Indigenous Peoples: <http://www.un.org/en/ga/69/meetings/Indigenous/background.shtml> accessed 18 November 2016. The conference was held on 22 September 2014 under the auspices of the UN under Resolution adopted by the General Assembly on 21 December 2010, UN Doc: A/RES/65/198
[16] An example of this is the continued measurement of poverty, which is tied to daily dollar amounts and is thus blind to issues of welfare and poverty for Indigenous groups which are linked to dispossession from land of special cultural and spiritual significance, regardless of agricultural and economic value. See Goal 1 of the 2030 Agenda for Sustainable Development that By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than $1.25 a day.

legal instruments, UN commentaries, amongst numerous individual Policies of IOs and are further disjointed through the praxis of those institutions.

Drawing on the findings, it can be concluded that existing processes of categorisation contained in the legal and policy understandings of 'Indigenous' are inherently biased. International legal attention in terms of a UN backed statement addressed to transnational actors involved with determining categorisation is required. At the same time, attention must be given to harmonise or remove the differing definitions within the policies of IOs such that they do not confuse the transnational legal landscape with adverse dispossessory effects on groups. Legal understandings of Indigenous identity must move away from the parochial and backward looking legal practice requiring evidence of proper occupancy and continued traditional land connection and European settler colonial 'encounter'. Instead, the focus must be on re-conceptualising Indigenous status based on a fluid movement of people showing two salient criteria. First, those who *self-identify* as having a psychological connection to land evidenced by a unique and dynamic culture attached to land. Second and related to the first criteria, experience of a unique type of *racial discrimination* and marginalisation they have experienced in processes of land dispossession due to their *special relationship*.

Frequently overlooked in making the case for a broader and more sensitive approach to Indigenous status are some valuable legal precedents demonstrating that the law has recognised legal ties to land for land connected communities in heterodox social and cultural, non 'blue-water' settler colonial contexts. Examples discussed include *Western Sahara*[17], *Pedra Branca*[18], *Saramaka v Suriname*[19] and the *Endorois*[20] cases, involving nomadic and post-colonial tribal groups. Moreover, although in a settler colonial context, the seminal *Mabo v Queensland (No.2)* gave a socially unbounded context to the legal application of native title stating how the 'nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs'[21]. Thus, the basic

[17] *Western Sahara*, Advisory Opinion, Judgement, ICJ Reports 1975 recognising legal ties of nomadic tribes of Western Sahara: the Bilad Shinguitti.
[18] Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Pedra Branca case), Advisory Opinion, Judgement, ICJ Reports 2008 12 involving the rights of the Orang Laut people of the sea evidencing ties to the Malaysian Sultan of Johor.
[19] Judgement of November 28 2007 (Inter-Am. Ct. H. R. (Ser. C) no. 172) (2007)) involving a post-colonial tribal group descended from African slaves.
[20] 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Humans and Peoples' Rights, 46th Ordinary Session, 25 November [2009] involving pastoralist communities in Kenya.
[21] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (HCA) at 64 per Brennan J.

legal rule in *Mabo* does not seem to preclude purposive application. Arguably, since Mabo the definition has been understood and applied in a socially restrictive context of settler-colonialism, which whilst an excellent starting point, presents a legal lacuna for groups from wider social contexts.

Drawing on the above, this section proposes an articulation of Indigenous status through a substantively different method: the dynamic principle of free prior and informed consent (FPIC) in relation to developments on their land. This section argues that FPIC is far more than a 'light' standard of mere procedural consultation but when thoroughly understood strikes to the core of Indigenous claims. Indeed, the UN's approach to FPIC is dynamic. Fundamentally grounded in the rights of all people to self-determination, the concept is not only tied to independence but moves beyond the moment of decolonisation to include the right of peoples to freely choose their political and economic future within the existing boundaries of the state[22].

Conceptually, the syntax of free, prior and informed speaks directly to the experience of land connected persons in its representation of all of the issues that groups suffered under both colonial, non-colonial systems and modern governments[23]: coercion (not 'free'), excluded (never 'prior') and voiceless (no 'consent'), making it a valuable modern tool for enunciating Indigenous claims in the following ways. The concept is not historically limited to first occupants and the 'governance of the prior' and is detached from a pre-invasion colonial history embraces land connected groups that do not share a settler colonial history.

Thus, FPIC does not associate itself with one specific encounter in which Indigenous people experienced discrimination, typically colonialism. It is able to capture new forms of discrimination experienced by groups used as pretexts for dispossession such as the environmental arguments advanced in the Chagos and Mongolia cases. It can also counter discrimination based on biased development paradigms which aim at fracturing the special relationship with land by labelling the ways of life of Indigenous peoples have to change because they are 'primitive', 'backward', preventing progress and modernity, 'unproductive' and degrading to the environment,[24] as seen in the Mongolian case.

[22] See Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, 'Standard-Setting: legal commentary on the concept of free, prior and informed consent (2005), UN Doc: E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005 at para 34.
[23] Thanks to Clive Baldwin in an interview dated 19th June 2015.
[24] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) 29.

The concept also moves away from the exercise of defining *'who'* is Indigenous by virtue of a *historic* backward looking connection to land, which a potential to result in ridiculous questions of whether groups have been oppressed enough. A FPIC approach directly articulates the distinctive core of the Indigenous movement as a fluid movement for rights and justice for those left at the margins of development, who are perceived negatively by mainstream society and whose culture and distinctive land connected way of life has been met with discrimination and contempt[25]. FPIC is also alive to the practical point that people are more likely to collectively identify and form a shared historic cultural narrative *when they are historically oppressed* and this can happen at any point in time regardless of 'who came first' and presence since 'time immemorial'.

To conclude, the attraction of FPIC lies in its non-specificity in time and space and its stead-fastness to the truth behind Indigenous claims: marginalisation and discrimination stemming from a communities special relationship with land.

Further international legal recommendations include the availability of (a) a legally binding instrument on displaced persons and Indigenous groups, (b) international legal aid schemes, (c) judicial monitoring mechanisms for infringement of socio-economic and cultural rights, and (d) enhanced publicity on how affected actors might access Optional Protocol mechanisms of the International Covenant on Economic, Social and Cultural Rights. In all likelihood, each of these state centric processes will take substantial time, if ever implemented, and so in parallel, the following *private measures* drawn from the case studies, might prove more expedient and practical for IPs.

These recommendations coalesce around institutional reform to consider interventions permitting the inclusion of communities into the financial structures of development projects, thus providing a possible 'brake' in market forces.

Given that land resettlement would occur *prior to* construction, it is illogical that the legal obligation to monitor works as formulated in loan covenants for many development projects, only kicks in *after* construction. Moreover, as most clients come to IOs for financing *after* construction has taken place a focus on preventative *front-end* design processes is more suitable for issues regarding resettlement planning and the protection of land rights.

[25] African Commission on Human and Peoples' Rights, 'Indigenous Peoples in Africa: The Forgotten Peoples?' (2006) 11.

Applying Klakegg et al's[26] front-end governance approach is therefore highly relevant in the specific case of resettlement. In his investigation of why complex projects fail Williams et al[27], conclude that assessments occur too late and at a stage where real options for alternatives are not possible, a point mirrored within this research. They advocate for a critical approach to risks at the front end in a project life cycle[28], which when applied to this thesis on land rights suggests consideration of resettlement issues at the front end of a project life cycle particularly relevant and important. What follows are practical legal methods through which front-end consideration might be brought into project design.

Starting from first principles, interviewees discussed the importance of building trust with communities through the preparation of agreed 'heads of terms' document, agreed in accordance with Indigenous and non-Indigenous formalities. This would set out commonly agreed intentions, purpose and agreed course of action according to which groups agree to work with the state or private entities[29]. The framework should expressly operate on the basis of a relationship based on a spirit of shared partnership, mutual respect and recognition, contain statements acknowledging the importance of traditional responsibilities for land, the importance of those rights and responsibilities even if not formally recognised by law [national and provincial, or both] and for business certainty. The basic premise is that groups will provide their support to project operations if the principles and processes in the framework are followed.[30] This type of heads of terms could apply to projects financed by IOs or directly by corporate entities or both.

In addition to a 'heads of terms' containing pre-agreed principles, IOs could require their clients to include information on resettlement within preliminary information memorandums sent out to potential investors thus facilitating early attention to this issue. These documents prompt early discussion of project design and salient issues with investors. Initial conditions precedent preceding disbursement of a project loan might require that resettlement or access rights and FPIC, where applicable, are undertaken and verified by an independent third party advisor. Certification that those processes have been undertaken is vital as first disbursement

[26] Williams T and others, 'Identifying and Acting on Early Warning Signs in Complex Projects' (2012) 43 Project Management Journal 37 and see Klakegg OJ and others, 'Governance frameworks for public project development and estimation' (2008) 39 Project Management Journal S27.
[27] Williams T and others, 'Identifying and Acting on Early Warning Signs in Complex Projects' (2012) 43 Project Management Journal 37, page 47.
[28] Ibid, page 39.
[29] Interview with Michael Meegan, legal counsel to YMAC (Skype, 4 August 2015).
[30] The framework should recognise the power imbalance between groups and private parties and ensure groups have their own separate legal counsel.

of funds are typically required to finance construction and thus adding requirements at this gateway are essential for accommodating land claims. The later certification (which includes FPIC if applicable) is best included within the suite of project completion reports delivered by the borrower to the funders. In that way liability is passed to the construction contractor upon payment of a premium, and away from the project company and importantly, finds a place within the project structure. A review of the AFDB resettlement policy[31] picks up this gap noting how completion reports required project impact assessments, but do not require the reporting of resettlement impacts. Finally, constructing these types of legal obligations would not be difficult as loan contract are already peppered with the borrower to satisfy numerous environmental and social monitoring requirements at various stages of project design and operation. A final suggestion requires that project budgets to include resettlement costs as a line item in construction costs thus ensuring resettlement issues be financially costed into initial project design.[32]

The findings of this thesis help to understand and inform the lack of visibility and generally 'patchy' success of Indigenous actors in accessing rights and remedies in other transnational legal contexts. On the issue of legal visibility of land rights, confidentiality and transparency issues strain the collation of evidence of the availability of private remedies. The Pilbara project shows what remedies might look like in one case. Some databases compiled by policy and academic research organisations[33] evidence law and practice relating to private resource concession contracts, a few of which discuss land rights issues. For example, in the Philippines[34], a country with domestic recognition of land rights, private resource contracts appear to provide groups with a percentage of gross project revenue rather than land access rights. Next, evidence of successful legal cases tends to be patchy and largely reliant on state legal decisions. In South Africa, the Indigenous *Richtersveld* community obtained restitution of traditional land from which state owned company Alexkor evicted them to make way for a diamond mine.[35] In India, the *Dongriah Kondh* group, with the help of Survival

[31] Safeguards and Sustainability Series, Volume 1, Issue 3: Review of the implementation of the African Development Bank's 2003 Involuntary Resettlement Policy, 2015).
[32] This was a recommendation of the African Development Bank and it seems that the World Bank has accepted this intervention within its current consultation process; however, the final draft of its environmental and social policies has not yet been agreed.
[33] See Resource Contracts database, supported by the UK Department for International Development, Natural Resource Institute amongst others, <www.resourcecontracts.org/> accessed 15 November 2016.
[34] The Philippines has strong domestic legal recognition of groups that includes the right to retain and access ceremonial and cultural sites, which are excluded only through the gaining of free, prior, and informed consent of affected groups. See section 33 of the 1997 Republic Act No. 8371, an act to recognise, protect and promote the rights of indigenous cultural communities/indigenous peoples, creating a national commission on indigenous peoples, establishing implementing mechanisms, appropriating funds therefore and for other purposes.
[35] *Alexkor Ltd and Another v Richtersveld Community and Others* Constitutional Court of South Africa, [2003] ZACC 18

International and the English national contact point, successfully appealed to the Indian Supreme Court against a lower court's decision to allow mine developer Vedanta to operate within traditional land.[36] Recently, following a decision of the Swedish Superior Environmental court and with assistance from the Swiss and Norwegian national contact points, an agreement was reached between a state owned windfarm developer and Saami communities providing for the accommodation of their land rights within the project, the details of which are confidential.[37]

Those outcomes along with the *Endorois*, *Mayanga* and *Sawhoyamaxa* decisions discussed in this thesis provide examples of successful legal claims. In *all* of those cases it is the domestic or a regional legal framework and related purposive judicial interpretation that is the common denominator of all the studies. This suggests that the law is the primary 'catalyst' for successful outcomes, in addition to the support of inter-governmental organisations and NGOs. This re-emphasises the thesis's findings on the importance of national legal recognition as a minimum standard, which by its nature offers transparency.

On balance, this appraisal of cases when placed in the context of this thesis's findings support the conclusion of a fragmented and patchy landscape of rights and remedies, resulting in mixed legal success, the routine compromise of basic Fairness for Indigenous actors, as well as the importance of national legal recognition as a catalyst for legal protection.

[36] *Orissa Mining Corporation. v MoEF & Ors* Indian Supreme Court Judgment dated 18/04/2013 in WPC No. 180/2011.
[37] See Östersund District Court, the Environmental Court, Case M 145-10, Court decision of 21 Dec. 2010 referred to in 'Final Statement Jijnjevaerie Saami village – Statkraft SCA Vind AB (SSVAB)', National Contact Point Sweden, available at < http://www.regeringen.se/contentassets/843883f261b14e7ebe50b4c3f38fb181/statkraft-finalstatement.pdf> accessed 15 November 2016.

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ANNEX OF INTERVIEW PARTICIPANTS

The following stakeholders were formally interviewed during the thesis:

Clive Baldwin, Senior Legal Advisor, Human Rights Watch (London, UK, 19 June 2015).

Lucy Claridge, Head of Law, Minority Rights Group (London, UK, 17 June 2015).

Sabrina Jean, second generation Chagossian (Croydon, UK 29th July 2015).

Iris Krebber, Senior Land Policy Lead, Department for International Development (by telephone 18 February 2015).

Battsengel Lkhamdoorov resettled herder in (October and November 2015, translated from Mongolian to English).

Michael Meegan, legal counsel to Yamatji Marlpa Aboriginal Corporation (Skype, 4 August 2016).

Bernard Nourice, first generation Chagossian deported aged 5 years (Croydon, UK 5 September 2015).

Shannara Sewell, Acting Manager Indigenous Employment, Business Development and Planning, Rio Tinto (Skype 18th November 2015).

Anne Maryse de Soyza former legal counsel to Rio Tinto (RT) on Aboriginal agreement making (Skype, 16 March 2015).

Clifford Volfrin, first generation deported Chagossian (Croydon, UK 29th July 2015).

Kate Wilson, Manager, Agreements, Rio Tinto (Skype 18th November 2015).

Informal conversations took place with the following participants:

Professor Ole Klakegg at the Norwegian University of Science and Technology (20th February 2015).

World Bank staff Stefan Koeberle (Director of Operations Risk Management), Agi Kiss (Regional Safeguards Advisor for Europe and Central Asia), Una Meades (World Bank Senior Legal Counsel) and Glenn Morgan (Safeguards Advisor). Conversations took place through a World Bank consultation webinar on February 26 2015 at 3:00 pm on 'The Evolution of Safeguards: The Proposed Environmental and Social Framework'.

Senior members of an international finance organisation's environmental and social safeguards team in 2015 that remain confidential.

Dr. Byambajav Dalaibuyan, Sustainable Mining Institute at the University of Queensland.