WYOMING LAW REVIEW

VOLUME 12 *2012* NUMBER 1

ALL NECESSARY MEANS: THE STRUGGLE TO PROTECT COMMUNAL PROPERTY IN BELIZE

*Noah B. Novogrodsky**

INTRODUCTION

The town of San Pedro Columbia[1] (SPC) is one of thirty-eight Maya villages in the south of Belize.[2] The road from the district capital of Punta Gorda becomes a dirt path about five miles from the town. There is no cell phone reception and men with machetes, on their way to the fields, are more likely to be on foot than traveling by car. Small wooden signs near the village point the way to the Maya ruins of Lubantuun, "the place of fallen rocks," a heritage site that stands as a shining example of the Mayan civilization that flourished in the region from 700 to 900 A.D., a half millennium before European contact.

In the early Twentieth Century, British colonial authorities designated the land around Lubantuun an "Indian" reserve; it has since doubled in size and now stretches from Lubantuun to within fifteen miles of the Guatemala border. The village of SPC lies in the heart of the San Antonio and San Miguel/Rio Grande Indian reserve and is home to approximately 1000 people, including five farmers: Marcello Cho, Ascencion Choc, Pedro Chi, Pastor Chen, and Sylvestre Cal.

All five men are Q'eqchi speaking Maya residents of San Pedro Columbia who have worked village lands for decades in conformity with traditional Maya

* Associate Professor, University of Wyoming College of Law. From 2003 to 2008, the author was the Founding Director of the International Human Rights Clinic at the University of Toronto Faculty of Law. In that period, the author traveled to the Toledo district of Belize eight times for consultations with affected communities and worked with local counsel to file the *Cho* action referred to in this article. An earlier version of this piece was delivered at the 2008 SELA Conference in Buenos Aires and published in Spanish by Libraria S.A. (Buenos Aires, 2009).

[1] Unless otherwise indicated, "San Pedro Columbia" is referred to as SPC for the remainder of this article.

[2] Belize, formerly British Honduras, lies between Guatemala and Mexico on the Gulf of Honduras and it is the only predominantly English-speaking country in Central America.

farming practices and the customary and communal system of land management that governs the area. In 2001, Belize's Ministry of Natural Resources and Environment, working with the Commissioner of Lands and Surveys, began surveying and dividing parcels into individual plots of land that had been used communally for generations. To initiate this work, Belize relied on a grant from the Inter-American Development Bank that purported to promote security of tenure.[3] The parcelization of communal lands was accompanied by a governmental attempt to register surveyed plots and a plan to issue leases and grants of those lands to individuals from SPC as well as to outsiders. Although the lands in question lie entirely within a designated Indian reservation, at no point did Belizean officials attempt to de-reserve the surveyed and registered interests.

The proposed land disposition in SPC threatened to evict all five individuals from lands they traditionally farmed or sought to keep fallow. Four of the farmers have lived in SPC their entire lives; Marcello Cho, the relative newcomer, married a Maya woman from SPC and moved to the village in 1969. In SPC, as in virtually all of the Maya villages, lands are managed communally, but individuals and families own the crops they grow (mainly cacao) and the thatched roof houses they build.[4] Traditionally, an *alcalde*, an elected elder, governs the village, dictates a system of crop rotation, and organizes *fajina*, a kind of communal labor. The *alcalde* also coordinates the allocation of farming plots; older residents of the village work lands closer to the village center; the younger generation farms lands farther out, sometimes as far as six miles from the cluster of churches and the elementary school that mark the village center.

Marcello Cho was the *alcalde* of SPC when the surveyors first arrived. The surveyor and his agents, as well as the government agents traveling with the surveyor's crew, told the villagers to identify "their" lands. This was a peculiar

---

[3] Affidavit of Darlene Johnston, ¶ 120, Cho v. Att'y Gen. of Belize (Mar. 22, 2007) (on file with author) (discussing Section 4.33 of the Land Management Program (LMP) funded by the Inter-American Development Bank that expresses "concern that the LMP not interfere or undermine ongoing efforts to secure Maya land rights . . . ."). Professor Johnston also quotes a letter between Prime Minister Manuel Esquivel and Mr. Enrique Iglesias, President of the Inter-American Development Bank, in which it is confirmed that "[t]he arrangements for this will take into account the wishes and priority of the members of communities who live on the reservations." *Id.* ¶ 96.

[4] Affidavit of Elizabeth Mara Grandia, *Cho*, ¶ 26 (2007) (on file with author). According to Professor Elizabeth Grandia:

> Families can claim and retain agricultural plots over long periods of time. Each family is responsible for its own agricultural work and reaps its own harvests. Other farmers may provide assistance, especially for the tasks of burning and planting, but the family or household is usually the central organizing unit within the Maya land management system. The collective aspect of this system is the community decision making regarding how land is distributed among households. Maya communities strive to distribute farmland equitably. They also seek to ensure that all members of a village have access to communal or shared forest areas that are used for hunting, fishing, collecting water and gathering various resources.

Id.

concept to most denizens of SPC who were not familiar with the notion of private ownership of village or reserve lands; nonetheless, government officials told the farmers to "[l]ease it or lose it." The same government authorities then instructed the farmers that in order to lease the land, they would need to pay 500 Belizean dollars (U.S. $300) for the privilege of surveying their own lands as thirty acre plots—money they did not have and too little land to feed most families.[5] The surveyors were followed by individuals from outside the village who claimed to have purchased or registered leasehold interests in the farmlands surrounding SPC, including the lands that Marcello and his neighbors had traditionally worked.[6] When Marcello and his friends questioned the purported landholders' claims to outlying lands that included cacao trees they were planning to harvest, strangers appeared with guns, maps, and government surveyors to drive the farmers of SPC back to the village. The government then advised the people of SPC to travel to Belmopan (the Belizean capital) to register their surveyed squares.

Marcello Cho was never consulted and he would not have approved of the individuation of land parcels in the village; he was well aware of the stories of Maya people living in nearby communities who had claimed individual title to communally-owned lands through a grant, borrowed against that grant, and later defaulted on their payment.[7] The predictable outcome was that individually mortgaged lands soon wound up in the hands of the bank or non-Maya outsiders; Marcello worried that SPC would be unrecognizably checker boarded like so many U.S. and Guatemalan indigenous communities before it.

With the help of a Canadian human rights clinic,[8] the five farmers of SPC filed suit in 2007 in the Supreme Court of Belize to block the parcelization, individuation, and threatened destruction of the communal land ownership structure that is central to their identity and village life as a whole.[9] Their claim is to legal recognition of a particular form of aboriginal title, one that encompasses their traditional use, occupancy and property interests in SPC. Rather than demanding protection for indigenous difference—a separate sphere of aboriginal life governed by distinct norms and rooted in autonomous sources of law—the SPC case insists on judicial notice of multiple realities. For at least four generations,

---

[5] *Id.* ¶¶ 61, 69.

[6] One of the ironies in Belize is that North American eco-tourist operators and environmental NGOs are among the purported leaseholders to lands near SPC.

[7] *See* Affidavit of Elizabeth Mara Grandia, *supra* note 4, ¶ 61.

[8] The background work of the *Cho* filing was aided by active collaboration with the Indian Law Resource Center (based in Helena, Montana) and the University of Arizona Indigenous Law and People's Program.

[9] Statement of Claim, *Cho* (2007) (on file with author). The statement of claim in this case was filed by Hubert Elrington, a lawyer in Belize City, working in coordination with the International Human Rights Clinic (IHRC) of the University of Toronto Faculty of Law and Paul Schabas of Blakes LLP, a Toronto-based law firm.

the people of SPC have adopted private property rules for the cultivation and sale of certain crops but the village has maintained communal property norms for the underlying lands.

In a nearly perfect illustration of usufructuary rights, the men of the village hunt, fish, and cut wood in surrounding territories on lands they have never sought to own. Accordingly, the plaintiffs have an interest in demarcating their village's lands from adjacent communities, and they crave security of title, but not individual and alienable parcels. Marcello and the others consider themselves both Mayan and Belizean. They vote in *alcalde* and Belizean elections. The people of SPC communicate with one another in Q'eqtchi but speak to government officials in English. While village level identity is strong, each SPC farmer develops an independent strategy for timing the cultivation of his or her cacao crop to maximize gain.

The story of Maya resistance in SPC is a tale characterized by the use of unconventional tools, including some of the very same legal doctrines that were once used to dispossess indigenous communities of their land and cultural identity. In the process, the struggle to protect communal lands in SPC reveals a world of intercultural legal exchange comprised of both insider and outsider dimensions. This article addresses three elements of the heterodox approach to the contest over land in SPC. The first section describes Belize's dominant development doctrine and the ways in which communal interests are threatened by seemingly neutral attempts to promote security of tenure. The second section situates the Belizean challenges within the regional human rights framework and development of an emerging international indigenous rights praxis. The final section explores the legal pluralism at work in this case and unpacks a litigation strategy that consciously draws from diverse sources, including some of the language and principles of a property regime that has historically operated against the collective interests of aboriginal communities. Because these claims have been raised within a common law English-speaking system replete with established property rules, Belize may serve as a bell-weather for the equitable resolution of indigenous property demands elsewhere. At a minimum, it is a legal drama that could prove instructive for land claims and rights to development in and near Indian reservations in North America and for indigenous communities in Commonwealth states that are looking to elaborate and supplement the doctrine of aboriginal title.[10]

DE SOTO UNDONE

The Inter-American Development Bank and the Belizean Commissioner of Lands and Surveys' attempt to title SPC within a system of individuated plots

[10] *See, e.g.*, Memorandum from Inter-Am. Comm'n H.R. for Hul'qumi'num Treaty Group Case 12.734 Canada (Nov. 23, 2009) (on file with author).

reflects the prevailing development wisdom with respect to land registration. The field of development economics tends to emphasize the benefits of standardized, formalized, fully marketized, and tradable property rights, all of which are assumed correlates of productive and secure land tenure. Belize has embraced property law and land policy reform, underwritten by loans from multilateral development agencies and banks, purportedly to foster this vision of development-friendly property rights.[11] Compulsory registration, standardization of registrable interests, and formal individualization of holdings are common features of the new regime. The Government of Belize has moved to enlarge "compulsory registration areas," including one that now encompasses Blue Creek, a traditionally Maya town in the Toledo district that lies outside of the Indian reserves.[12] This system aims to convert the land holdings to a stable, transparent, and effective registration system. Although Maya communities in these designated areas have traditionally suffered from a land adjudication process that largely ignored their interests or failed to register those interests that were recognized, the government characterizes Maya communal lands as "Crown," or national, territory and is moving quickly to treat these lands as it does other real property interests.

Belize, like so many poor countries, has been heavily influenced by a new development orthodoxy best exemplified by the scholarship of Peruvian economist Hernando de Soto and his acolytes. De Soto argues that an important characteristic of capitalism is state-sponsored protection of property rights in a formal system where ownership and transactions are clearly recorded.[13] Where property is associated with rights to alienability, title, and exclusion, norms of commodification and commensurability prevail. De Soto observes that in such conditions, individuals are empowered to protect their assets from local pressures or unwarranted government takings. Systems of this nature then promote many positive ownership rights including: (i) clear and demonstrable ownership; (ii) standardization and integration of property rules and property information in the country as a whole; (iii) increased trust arising from a greater certainty of punishment for cheating in economic transactions; (iv) greater availability of loans for new projects, since more things may be used as collateral; and (v) easier access

---

[11] *See* Affidavit of Darlene Johnston, *supra* note 3, ¶ 101.

[12] *Id.* ¶ 124.

[13] *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 1–14 (2000) [hereinafter THE MYSTERY OF CAPITAL] (arguing that the major hurdle preventing much of the world from benefiting from capitalism is the inability to access capital by leveraging their land due to inadequate property rights systems); HERNANDO DE SOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM 3–11 (1989) (discussing Peru under the Fujimori government and arguing: (1) poverty can be the breeding ground for terrorism, which keeps people dependent on informal economies; and (2) promoting property rights can bring people out of poverty and defeat terrorist movements).

to reliable information regarding the worth of assets and increased fungibility, standardization, and transferability of statements documenting the ownership of property.[14]

In the absence of integrated formal property systems, de Soto argues, the poor majorities in developing countries are driven to an economy characterized by informal ownership of land and goods.[15] The lack of American or Japanese systems of property rights in today's developing nations makes it onerous for the poor to leverage their informal ownership interests into capital that can be used as collateral for credit, which de Soto claims lays the foundation for healthy entrepreneurship.[16] As a prescription, de Soto suggests that informal ownership should be formalized by giving squatters in shantytowns title to the land they occupy where practicable. The 1975 World Bank policy on land reform was wholly consistent with this view and recommended that communal tenure and usufructuary rights be abandoned in favor of freehold title and subdivision of the commons.[17] More recently, Professor Carol Rose, among others, has offered a more subtle defense of individual property rights.[18] Her contention is that an individual's ability to exclude others and to readily sell property encourages commerce and self-governance, not due to individualism alone, but due to the blend of individualism and cooperation.[19]

Regrettably, when applied to the Maya of SPC, de Soto's theory equates sophisticated local farmers with squatters and opportunistic newcomers. To the extent customary interests and communal land tenure systems are recognized in de Soto's analysis, these phenomena are viewed as quaint practices or transitional challenges, necessarily accommodated because of practical problems of institutional failure, lack of governmental capacity, or particular cultural preferences.[20] Worse

---

[14] Hernando de Soto, *The Mystery of Capital*, FIN. & DEV.: A Q. MAG. OF THE IMF (Mar. 2001), http://www.imf.org/external/pubs/ft/fandd/2001/03/desoto.htm; *see also* THE MYSTERY OF CAPITAL, *supra* note 13, at 1–14.

[15] THE MYSTERY OF CAPITAL, *supra* note 13, at 12–14.

[16] The same financing difficulties exist on North American Indian Reservations where it is virtually impossible to obtain a mortgage for a home built on land that is not held in fee simple. *See generally* Yair Listokin, *Confronting the Barriers to Native American Homeownership on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433 (2001).

[17] *See Land Reform: Sector Policy Paper*, WORLD BANK (May 1975), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/11/04/000178830_98101911122064/Rendered/PDF/multi_page.pdf. The most recent World Bank research report on this issue, by contrast, suggests a more nuanced and pragmatic approach, accepting the logic of communal title in some circumstances, for practical, second-best reasons. *See* KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION: A WORLD BANK RESEARCH REPORT 30 (2003), *available at* http://siteresources.worldbank.org/EXTARD/Resources/336681-1295878311276/26384.pdf.

[18] *See, e.g.*, Carol M. Rose, *Property as the Keystone Right*, 71 NOTRE DAME L. REV. 329 (1996).

[19] *Id.* at 364–65.

[20] *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA 48–49 (2005).

still, communal property operates as a barrier to the registration of ownership in fee simple—a form of control underpinned by a panoply of common law private law rules of contract-based exchange. From this perspective, possession in fee simple represents the pinnacle of efficient allocation for the protection of valued commodities and is derived apolitically from a structure that rewards clarity, transparency, and signaling through public registration of private interests.[21]

Customary property interests and tenure systems of the kind that exist in SPC pose a fundamental, theoretical challenge to de Soto's development narrative.[22] In other Belizean communities, the individual titling of lands that were once held collectively has beggared the occupants. Mortgaging the land yielded little capital and those funds that were generated ("freed" in de Soto's parlance) could not be leveraged into other economically viable alternatives. The men of SPC all know people in nearby communities who have squandered loans and suffered foreclosure of family and village lands. In many respects, the commodification of land in SPC is the embodiment of Professor Margaret Jane Radin's concern that this vision of property crowds out alternative conceptions of personhood while reproducing existing hierarchies of wealth and privilege.[23]

Yet, it is not the idea of titling or the instrumental action of demarcating lands that is anathema to the people of SPC. The registration of communal lands and the clear delineation of community boundaries would be welcomed by Marcello and the others. Security of tenure may well be a universal desire, but the *form*

---

[21] Jessica Orkin, Property, *Narrative and Ideology: A Critique of Land Registration Development Policy* (2005) (unpublished student paper) (on file with author). In her paper, Jessica Orkin noted:

> As a result, a determinate initial property rights allocation can be deduced, that presumptively can be revealed at the outset of the registration exercise, through careful observation of the distribution and use of factor endowments and application of dispassionate legal reasoning. This assumption, in turn, permits the land registration exercise—in contrast to patently regulatory or redistributive initiatives like land reform—to appear neutral and uncontroversial, so long as the systemic goal of allocative efficiency is accepted: registration is merely formalizing existing property rights, according to received property law wisdom, with obvious and incontrovertible beneficial consequences.

Id.

[22] *See* MIKE DAVIS, PLANET OF SLUMS 80 (2007). Most critiques of de Soto's work posit that individual titling and land registration does little for the most marginalized squatters who cannot afford incorporation into the fully commodified formal economy. *Id.* These views appear inapposite for indigenous communities with deep security interests in particular lands and historic connections and uses derived from longstanding relationships to distinct territories. *See, e.g.*, Robert J. Samuelson, *The Spirit of Capitalism*, FOREIGN AFF., Jan./Feb. 2001, at 205, *available at* http://www.foreignaffairs.com/articles/56674/robert-j-samuelson/the-spirit-of-capitalism (arguing that de Soto offers a "single bullet" theory of development when cultures respond to development differently).

[23] *See* JENNIFER NEDELSKY, PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 45 (1990) (noting James Madison's concern that, while inequality is inevitable in a republican government, property rights should not reinforce existing division in wealth); MARGARET JANE RADIN, CONTESTED COMMODITIES 8–15 (1996).

of ownership *within* registered borders is actively contested. In the Statement of Claim filed on behalf of Marcello Cho and four others in April 2007 as *Cho v. Attorney General of Belize*, the claimants sought declaratory relief, withdrawal of all surveys and lease applications within the reservations, and security of collective tenure, that is, customary law enforced by the clean lines and positivist power of the modern state.[24]

TRANSNATIONAL LEGAL PROCESS AND THE FIGHT FOR MAYA LANDS

Neither the *Cho* action nor the similar case of *Cal et al. v. Attorney General of Belize* is the first legal claim for the preservation of communal lands in Toledo. Nine years before the domestic cases were filed, several Maya groups petitioned the Inter-American Commission for Human Rights to stop the issuance of large scale logging concessions to timber companies for rights to the forests of Southern Belize. The petitioners argued that the issuance of concessions contravened their rights under the American Declaration on the Rights and Duties of Man.[25] The claim, brought by the Indian Law Resource Center on behalf of the Toledo Maya Cultural Council and the Mayan Leaders Association, asserted that Belize's actions violated rights derived from the petitioners' long standing use and occupancy of the lands subject to the logging concessions granted by the government.[26]

In 2004, the Commission's final report found that the Maya people of Toledo have a communal property right to the lands they currently inhabit based on their long-standing traditional use and occupancy. The Commission announced that the petitioners' rights had been systematically violated by Belize's failure to take effective measures "to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their rights exist."[27] The Commission interpreted the Declaration in light of international

---

[24] Statement of Claim, Cho v. Atty Gen. of Belize (2007) (on file with author). The *Cho* action was filed approximately three weeks after *Cal v. Att'y Gen. of Belize* was filed by Antoinette Moore, a lawyer working with Professor S. James Anaya and the University of Arizona James E. Rogers College of Law Indigenous Peoples Law and Policy Program, on behalf of individuals and the *alcaldes* of the Toledo Maya villages of Santa Cruz and Conejo.

[25] Significantly, there are no applicable treaties between Belize (or Britain or Spain, which constitute the former colonial authority) and the indigenous people of the country. *See, e.g.*, Organization of American States, *American Declaration on the Rights and Duties of Man* (Apr. 1948), *available at* http://www.oas.org/DIL/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf.

[26] The archeology of these cases reveals that a similar claim was filed with the Government of Belize as an action for Constitutional Redress in 1996, but it was stayed by the Court pending the Inter-American Commission proceedings. *See, e.g.*, S. James Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize*, 1 YALE HUM. RTS. & DEV. L.J. 17 (1998).

[27] Maya Indigenous Cmtys. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Preliminary Report No. 96/03, ¶ 134 (Oct. 24 2003), *available at* http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/Belize2003-12prelimrpt1.pdf.

law applicable to indigenous peoples and expressly held that the Maya people's communal property right has "autonomous meaning and foundation under international law."[28] The Commission also recommended that, until the Maya communities' territory is properly delimited, demarcated, and titled, the State abstain from any acts that might lead its agents, or third parties acting with the State's acquiescence or tolerance, to affect the existence, value, use, or enjoyment of the property located in the geographic area occupied and used by the Maya people.[29]

In addition to the Belize case, the Commission has considered or is considering several claims from landless or land poor indigenous communities, including the Enxet People of Paraguay. In the *Yakye Axa* case,[30] for example, the Commission found the State of Paraguay responsible for violating, to the detriment of the members of the Yakye Axa indigenous community, the rights to a dignified life, to communal property, and to judicial protection under Articles 4, 21 and 25 of the American Convention.[31] During the ten years in which their land claim had formally been in administrative process, the members of the Yakye Axa community lived in deplorable conditions on the edge of a highway adjacent to their ancestral territory. Meanwhile, a local judge issued an injunction prohibiting them from entering their ancestral territory to engage in traditional hunting, fishing, and gathering activities or from accessing a nearby water source.[32] The community, prevented by state acts from accessing their subsistence needs on their own, was thereby rendered dependent on state aid for their survival. Based on these facts, the Commission found the State responsible on three intersecting grounds: (i) the State's dilatory administrative processing of the community's bid to recover their ancestral lands; (ii) the State's prohibition on community members' entry into their ancestral habitat to engage in traditional subsistence economic activities during that administrative processing; and (iii) the State's concurrent failure to provide them with adequate medical and nutritional assistance while community members were prevented from accessing their ancestral territory to provide such goods on their own.[33] Since then, the Sawhoyamaxa and Xakmok Kasek indigenous communities of the Enxet Peoples have filed similar claims.[34]

---

[28] *Id.* ¶ 130.

[29] *Id.* ¶ 6.

[30] Yakye Axa Indigenous Cmty. of the Enxet-Lengua People v. Paraguay, Case 12.313, Inter-Am. Comm'n H.R., Report No. 2/02, OEA/Ser.L/V/II.117, doc. 1 rev. ¶ 1 (2003).

[31] *Id.* ¶ 242.

[32] Tara Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW 372, 390 (Cambridge Univ. Press, M. Langford, ed. 2007).

[33] *Yakye Axa Indigenous Cmty.*, Case 12.313, Report No. 2/02, Inter-Am. Comm'n H.R., ¶¶ 211–27.

[34] Sawhoyamaxa Indigenous Cmty. v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 46 (Mar. 29, 2006); Xákmok Kásek Indigenous Cmty. of the Enxet-Lengua People v. Paraguay, Case 0326/01, Inter-Am. Comm'n H.R., Report No. 11/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 390 (2003).

The Commission has found the claims of both communities admissible against the State of Paraguay for unreasonable administrative delay in processing their land claims.

The Commission's Belize report also reinforces the Inter-American Court of Human Right's decision in *Awas Tingi*.[35] There, the Court found that Nicaragua had violated the American Convention's Article 21 right "to the use and enjoyment of property" through the issuance of timber concessions on undemarcated and untitled land that included areas ancestrally occupied by the Mayagna (Sumo) Community of Awas Tingi.[36] The Court held such conduct had created a "climate of constant uncertainty" among the members of the Awas Tingi, "insofar as they do not know for certain how far their communal property extends geographically and, therefore, they not know until where they can freely use and enjoy their respective property."[37] Recognizing that Article 21 includes the right to collective or communal property and the value of titling, the Court ordered Nicaragua to:

> [C]arry out the delimitation, demarcation, and titling of the territory belonging to the Community; and . . . abstain from carrying out, until the delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.[38]

Cho differs from the Inter-American Court and Commission cases insofar as it addresses titling and land registration work sponsored by an international financial institution rather than private logging or mineral exploration concessions. At base, however, the question remains the same: Whether indigenous communities may use property norms to preserve access to lands they have traditionally used and occupied.

The common thread in all of these cases is the doctrine of aboriginal title, which, in its many iterations, provides an additional layer of authority related to land claims and resource rights premised on historical occupancy and ongoing

---

[35] *See generally* Mayagna (Sumo) Indigenous Cmty. of Awas Tingi v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001). Since Belize is not a party to the Inter-American Court, neither the Commission nor the petitioners have recourse to the Court. Accordingly, the Commission will be the only regional authority to opine on Belize's actions.

[36] *Id.* ¶ 153.

[37] *Id.*

[38] *Id.* ¶¶ 153, 173. *See also* Melish, *supra* note 32, at 390 (issuing an injunction prohibiting the people from entering the land to engage in hunting, fishing, and gathering or from accessing a nearby water source).

customary tenure. While judicial interpretations of this doctrine vary slightly across jurisdictions, all forms of aboriginal title provide that uninterrupted use and occupancy by indigenous communities of non-treaty lands grants a usufructuary right to the community, subject to legal extinguishment. The standard for aboriginal title is found in a long series of cases culminating in the 1992 Australian High Court case of *Mabo v. Queensland (No. 2)*[39] and the 1997 Canadian Supreme Court case of *Delgamuukw v. British Columbia*.[40] In these cases, aboriginal title refers to preexisting rights that attach to: (i) a culturally distinctive community with historical origins on the land in question that predate the effective exercise of sovereignty by the state or its colonial precursor; and (ii) a discernible system of traditional land tenure or resource use that can be identified as a part of the cultural life of the community of society.[41] Apart from legal entitlements in the nature of exclusive ownership, aboriginal rights may also take the form of freestanding rights to fish, hunt, gather or otherwise use resources or gain access to lands and waters. In general, courts have considered aboriginal rights to be held collectively by the groups within which they arise, while the nature and distribution of the rights among individuals associated with indigenous groups is a matter for the community to determine.

An anthropologist in the *Cal* case offered the following assessment of the character of customary law:

> Maya villagers in Conejo continue to use and occupy their land in accordance with long-standing customs, traditions and norms concerning land management. These norms include collective control over land use; equitable distribution of individual use rights based on need and family labour capacity; ecologically sound rotating and permanent agriculture, animal husbandry, hunting, and gathering; and reciprocal obligations of land and community stewardship. These land tenure norms are central to the cultural worldview and social cohesion of the Maya people and Conejo village. The resulting system manifests in flexible but consistent land-use patterns involving residential areas, wet-season *milpas* and dry-season *saqiwaj* or *matahambre* areas, long fallow areas and high forest areas. Maya land tenure practices are sufficiently hegemonic and stable that people living in Maya communities in Toledo, including Conejo, have been able to

---

[39] (1992) 175 CLR 1, 42 (Austl.).

[40] [1997] 3 S.C.R. 1010 (Can.). In its purest form, most Maya communities face difficulty in meeting the evidentiary burdens underpinning common law tests for aboriginal title. In particular, the required evidence of continuous Maya occupation dating back to the period prior to the assertion of British sovereignty is nearly impossible to provide given the history of settlement and land occupation by the Maya of Toledo.

[41] *See* Anaya, *supra* note 26, at 21–22.

> make long-term economic investments in the form of annual and permanent crops, yet flexible enough to allow Maya farmers to respond to market opportunities to the extent that, through the history of Belize, Toledo has often been the primary source of national foodstuffs.[42]

Marcello Cho's claim to farm—but not own—the land of SPC thus triggers a body of common law jurisprudence buttressed by international law that upholds his right to maintain customary land practices. His claim, an individual's attempt to preserve a communal practice,[43] is both local and international and, in some sense, had already been litigated in several fora. In this manner, the *Cho* case implicates notions of legal pluralism—by inviting an elaboration of aboriginal title drawn from international, common law and local practices—and a definition of property that pivots on stewardship and shared obligations rather than individual ownership.[44]

SECURING COMMUNAL TENURE

Notwithstanding the multiplicity of legal sources and convergence of principles at work in SPC, there is no single formula for securing communal tenure. Articles 3 and 17 of the Belize Constitution uphold property rights in general terms but provide little guidance to lawyers fighting to protect collective interests that may not be shared by every member of the community.

Simply implementing the Commission's decision was not an option since Belize is not a party to the Inter-American Court and the Commission is largely powerless to enforce its recommendations. Following the release of the decision in October 2004, the Government of Belize announced that the Commission's Final Report was not binding and would not control the State's actions.[45] In the *Cal* case, the government went further and argued that the Commission's report ought to be ignored, asserting "[i]f the court were to simply adopt the findings

---

[42] Affidavit of Elizabeth Mara Grandia, *supra* note 4, ¶ 79.

[43] Neither Marcello Cho nor any of the other claimants in the case are in strict privity of contract with the government per the Ten-Points Agreement.

[44] *See generally* Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009) (arguing that a more expansive notion of property informed by peoplehood and stewardship is better suited for explaining and pursuing indigenous cultural property claims).

[45] *See* Urgent Appeal to the U.N. Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People, in Regards to Human Rights Violations by Belize, Submitted by the Maya Leaders Alliance, Prepared by the U. of Ariz. Indigenous Peoples Law and Policy Program (Jan. 2006) [hereinafter *Urgent Appeal*] (on file with author).

of the Commission without nothing more [sic] that would result in the court enforcing an international treaty and would clearly fall within the bounds of non-justicability [sic]."[46]

Belize's refusal to implement the recommendations of the Commission and the continuing threat to Maya lands led the Indian Law Resources Center and University of Arizona lawyers to submit an urgent appeal to the UN Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People on behalf of the Maya Leaders Alliance (MLA).[47] The communication, submitted in January 2006, requested the support of the Special Rapporteur in bringing international attention to the past and continued violations of the human rights of Maya people by the state of Belize and the failure of the government to implement the recommendations of the Commission.[48] The Special Rapporteur responded with letters to the government of Belize in April and November of 2006 expressing concern with ongoing resource development, privatization, lack of consultation, and the failure to delimitate and demarcate Maya territory; the Special Rapporteur called upon the government to implement the recommendations of the Commission. The MLA also wrote to the UN Committee on the Elimination of Racial Discrimination in October 2006 addressing concerns similar to those expressed to the Special Rapporteur. After considering the communication at its seventieth session in March 2007, the Committee wrote to the government of Belize stressing the urgency of the situation and the need for immediate attention. None of the international communications influenced Belize, and the government did nothing to implement the Final Report.[49]

Moreover, in the nine years since the petition was filed with the Commission, the nature of the land threat changed demonstrably. Many of the logging concessions were rendered useless by a 2001 hurricane that disrupted timber operations. In the interim, the Inter-American Development Bank supported leasing scheme and government-sanctioned oil exploration had replaced logging as the primary concern.

---

[46] Cal v. Att'y Gen., Consolidated Claims Nos. 171 and 172 (Belize 2007), *available at* http://www.belizelaw.org/supreme_court/judgements/2007/Claims%20Nos.%20171%20and%20172%20of%202007%20%28Consolidated%29%20re%20Maya%20land%20rights.pdf.

[47] *See Urgent Appeal*, *supra* note 45.

[48] *Id.*

[49] Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* ¶ 26, Human Rights Council, U.N. Doc. A/HRC/4/32/Add.1 (Mar. 19, 2007), *available at* http://www2.ohchr.org/english/bodies/chr/special/sp_reportshrc_4th.htm (locate "A/HRC/4/32/Add.1" in the "Symbol Number" column; then follow "E" hyperlink in the "Languages" column).

Given the general lack of enforcement in international law, it was not surprising that the *Cho* plaintiffs would eventually turn to domestic law, an arena fraught with its own difficulties. Belize is a heterogeneous state and asking the Court to acknowledge a special category of Maya rights was likely to engender a political backlash. Likewise, using the doctrine of aboriginal title alone risked proving too much; the goal of the *Cho* plaintiffs was to arrest the surveying and parcelization of SPC, not to prohibit all development on Maya land or to assert complete sovereignty over the area. At the same time, several familiar and potentially applicable domestic remedies threatened to undermine the very purpose of the action. For example, the doctrine of adverse possession, which pivots on a thirty-year test that the plaintiffs met, requires reference to a wholly objectionable construct and potentially conflicts with the broader claims to aboriginal title. Similarly, invoking the principle of promissory estoppel, which applied to those villagers like Marcello Cho who relocated to SPC in reliance on state promises, would have amounted to an admission that the government had unfettered power to dictate land use. Instead, the *Cho* case rests on the fruits of exhaustive research conducted in the Belmopan Land Registry Office. In the yellowing records of a sweltering Central American government office lies evidence that leasing and the issuance of grants constitutes a violation of settled domestic law, a corpus of authority informed by the common law and international human rights obligations that are fully enforceable by the Supreme Court of Belize.[50]

The first claim seeks recognition of reserve lands as protected territory subject to controlling administrative law. Reserve lands, referred to as "Indian Reservations" in Belize's legislation, were so designated by the colonial administration under various Crown Lands Ordinances dating back to 1872.[51] British authorities created the first reserve in 1897, and reserve designation and enlargement continued sporadically until the 1960s. Government officials ultimately designated more than 77,000 acres in the Toledo district as Indian reservation lands. Colonial-era reservation declarations exempted these areas from sale, reserving the land for Maya communal use according to traditional tenure rules, subject to the Crown's purported ultimate title.[52] Although Toledo Indian Reserve Rules recognize a limited and potentially insecure Maya interest of occupation of reserve land, they prohibit individualized alienable tenure. In

---

[50] The incorporation of international human rights law from a regional body to aid in the interpretation of domestic Constitutional law is significant in a state such as Belize that has previously relied exclusively on the application of Privy Council or Commonwealth common law jurisprudence. *But cf.* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 1–17 (2010) (observing that the constitutions of Argentina and Colombia seek to achieve convergence between the interpretation of constitutional rights and international human rights law; Argentina does so directly by incorporating human rights treaties into the Constitution).

[51] Affidavit of Darlene Johnston, *supra* note 3, ¶ 103.

[52] *Id.* ¶ 77.

the absence of properly published notices of "dereservation," the Maya reserves of Toledo continue to exist and shape agricultural, residential, and other land uses.[53] Reserve lands, which encompass roughly half of the Maya villages in Toledo, provide occupation-based statutory rights.

Cho also contends that the government's actions violated the *Village Councils Act*—the national legislation of general application controlling village jurisdictions and governance matters in Belize.[54] The Act provides village councils with a right of consultation regarding Government of Belize activities on their lands. The government of Belize has never performed its statutory duty of declaring the boundaries of SPC, making it difficult for community members to enforce their rights to information and consultation. Accordingly, the *Cho* claimants and other Toledo Maya communities attempted to define and secure the village boundaries on their own to avoid potentially inconsistent or overlapping claims between SPC and its neighboring communities. In the months before *Cho* was filed, most of the general registry villages in Southern Toledo completed consultations with their neighbors and formalized their boundaries by cutting the lines through the forest with the aide of GPS technology. The claimants found that boundary demarcation gave them a greater awareness of activities on their lands, and emboldened them to insist that the government engage in meaningful consultation and information sharing. It also served to co-opt the boundary issue and mobilized communities to work collectively.

The third claim is for recognition of customary land use as a form of property threatened by the roll out of the leasing regime. This contention was buttressed by a fifty-seven page affidavit from a professor who conducted extensive research in local Land Registry Offices, searching titles and purported grants and leases.[55] The affidavit exposes inconsistent and *ad hoc* decision making by the Registry as well as the systemic incursion into the traditional use and occupancy of village lands.[56]

The fourth recognizable request for relief is premised on binding contract law. On October 12, 2000, several groups of Maya leaders including the Toledo Maya Cultural Council, the Toledo Alcaldes' Association, the Kekchi Council of Belize, the Toledo Maya Women's Council, and the Association of Village Council Chairpersons, entered into a Ten-Point Agreement with the Prime Minister of Belize concerning land use, consultation, and the extension of roads through

---

[53] The Belizean term for the publication of laws in an official register is "to gazette."

[54] For reasons related to the claim form in a Belizean civil action, *Cho* did not specifically plead the *Village Council Act* violation, the influence of the Commission decision, or the doctrine of aboriginal title in the initial filing but is prepared to do so if and when the case proceeds.

[55] *See generally* Affidavit of Darlene Johnston, *supra* note 3.

[56] *Id.*

Maya territory.[57] Clause 6 of the Agreement states: "The [Government of Belize] recognizes that the Maya People have rights to land and resources in southern Belize based on their longstanding use and occupancy."[58] In sum, an agreement exists between the Government of Belize and umbrella groups acting for the Maya (including the plaintiffs from SPC) which echoes the core principle of relevant customary law, aboriginal title, and the Commission's findings: historic use of otherwise untitled lands matters.[59]

The result is a claim for declaratory relief premised on select property law doctrines, buttressed by international human rights law, and the evolving standard for aboriginal title. Significantly, the claim does not threaten self-determination and is firmly rooted in readily recognized common law principles rather than evolving standards of customary international law.[60]

Despite filing their claim in April 2007, Marcello Cho and the other farmers of SPC are still awaiting resolution of their claim. The leasing program has been suspended to permit negotiations between the government and representatives of the Maya community in SPC and other Toledo villages. On October 18, 2007, however, the Supreme Court of Belize ruled in favor of the plaintiffs in the companion case of *Cal v. Attorney General of Belize*.[61] In that case, the Court explicitly recognized that the Maya plaintiffs hold communal and individual customary rights that are protected from Crown grants to third parties by the Belizean Constitution.[62] The Court also held that Maya customary title exists even in communities that were established after Belizean sovereignty.[63] The Court held that the State's failure to recognize Maya customary title violated constitutional rights to property, equality, and the right to "life liberty, security of the person and protection of the law."[64] Addressing the Government's "justified infringement" argument, the Supreme Court of Belize determined that the actions of the state amounted to "substantial impairment and infringement" of *Maya* property rights resulting in a violation of "the protection the Constitution affords to property

---

[57] Ten Points of Agreement Between the Government of Belize and the Maya Peoples of Southern Belize, (Oct. 20, 2000) (on file with author).

[58] *Id.* at cl. 6.

[59] *Id.* at cl. 1–10.

[60] *See generally* KAREN ENGLE, INDIGENOUS ROADS TO DEVELOPMENT: SELF-DETERMINATION, CULTURE AND HUMAN RIGHTS (2008) (contending that indigenous claims to land or development rights based in traditional practices or indigenous customary law can restrict communities' autonomy and impinge self-determination).

[61] Cal v. Att'y Gen., Consolidated Claims Nos. 171 and 172 (Belize 2007), *available at* http://www.belizelaw.org/supreme_court/judgements/2007/Claims%20Nos.%20171%20and%20172%20of%202007%20%28Consolidated%29%20re%20Maya%20land%20rights.pdf.

[62] *Id.* ¶ 136.

[63] *Id.* ¶ 92.

[64] *Id.* ¶¶ 7, 117.

in that they have granted concessions to third parties to utilize the property and resources located on lands belonging to the claimants."[65] As relief, the Court ordered that the Government of Belize cease to interfere with Maya interests in land, including the granting or registering of any further leases, concessions, or other interests in land, or "issuing any regulations concerning land resources or use."[66]

The decision of Chief Justice Conteh found that the legal test for Maya tenure existed on, what he characterized as, the "overwhelming" evidence of Maya affiants, historians and anthropologists.[67] In addition, the Court recognized the persuasive authority of the Commission decision, cited to *Delgamuukw* for the proposition that Maya title is *sui generis*, and referenced Australian case law as a guide to statutory interpretation issues. In a first for the high court of any country, the Supreme Court of Belize invoked Article 26 of the recently adopted United Nations Declaration on the Rights of Indigenous Peoples for a definition of customary practices.[68] In finding that the rights of the Maya plaintiffs are protected not only by domestic law, but by "the growing consensus of international law," the *Cal* Court concluded that Belize is bound by domestic and international law "to respect the rights to and interests of the claimants as members of the indigenous Maya community, to their lands and resources which are the subject of this case."[69]

CONCLUSION

Cal and the Commission decisions have revitalized the doctrine of aboriginal title. *Cho* has the potential to add the joinder of international human rights claims with well-settled domestic law.[70] When international law falters—even where it tilts in favor of the requested resolution—domestic claims, and the creative use of grounded and readily recognizable doctrines may offer an alternative path to an equitable resolution. In this respect, domestic property law can be a tool used for the advancement of indigenous land claims.

Equally important, the embrace of property and contract norms by the *Cho* plaintiffs to support fundamental human rights facilitates a reappropriation of the concepts of titling and land security. Marcello Cho and the other Maya farmers

---

[65] *Id.* ¶ 110.

[66] *Id.* ¶ 136.

[67] *Id.* ¶ 40.

[68] *Id.* ¶ 131; *see also* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/68, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

[69] *Cal*, Consolidated Claims Nos. 171 and 172, ¶¶ 131, 134.

[70] *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 206 (1996) (observing that as transnational actors interact, they create patterns of behavior and generate norms of external conduct which in turn become part of domestic law).

in these cases have exposed the dogma of the Inter-American Development Bank while claiming for themselves the language of land security necessary to mount a defense of communal ownership. By employing international and domestic strategies in partnership with local and foreign organizations, Belize's Maya population is developing a unique hybrid form of legal resistance to the influence of economic globalization and the organization of property interests.

Indigenous peoples around the world are confronted by similar problems of encroachment onto their ancestral lands and the rollout of seemingly apolitical titling regimes. The Belizean illustration may thus provide lessons for the assertion of indigenous interests and collective land ownership in the language of legal entitlements and protected property rights. As such, the actions of Marcello Cho and the other farmers of SPC demonstrate how the legal institutions of the very state apparatus they are challenging can be used to promote indigenous rights and the preservation of communal property. It is a story of law as a spur to justice and it is worth sharing, particularly in common law jurisdictions engaged in the resolution of contested aboriginal land claims.