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SYMPOSIUM ON THE IMPACT OF INDIGENOUS PEOPLES ON INTERNATIONAL LAW

THE LAND OF NATIONS: INDIGENOUS STRUGGLES FOR PROPERTY AND TERRITORY IN INTERNATIONAL LAW

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Key studies have highlighted how Western law was central to the civilizing mission of colonialism, legitimizing conquest while presenting itself as a colonizer's gift for overcoming barbarism.[1] But law was not just an imposition to dispossess resources and accumulate labor; it was also transformed by the contestations of First Nations and the new practices deployed in settler societies.[2] In this context, the first international legal theories were aimed at subordinating third world societies and, at the same time, provided the foundations of Western legal apparatus, shaping racially the modern concepts of sovereignty, territory, and property.

Recent studies explain this process of subordination when settlers appropriated new lands in North America on behalf of Queen Elizabeth at the end of the sixteenth century.[3] Emerging practices of private property and colonial territory both ordered space and territory and operated through the idea of sovereignty. The foundation of the international system of states under the Treaty of Westphalia triggered the decoupling of property from territory, meaning that territory was conceived as the spatial and political extent of a sovereign state whereas individuals only could hold property over cultivated and improved lands.[4] As processes of coupling and decoupling of property and territory have been less studied in the context of Spanish colonization, this essay focuses on colonial and post-colonial indigenous struggles in South America to be recognized as nations with territorial rights over lands formally owned by state authorities. These struggles have impacted—and impact today—the making of international law. Different ways of ordering and managing territory are a central theme and a site of struggle for Indigenous Peoples.

Colonial Territories, Neocolonial Properties

First encounters between Spanish and Indigenous nations were legally framed through doctrines of discovery and conquest, aimed at providing territorial titles by assuming that rightless natives could be "conquered" and their lands occupied.[5] Although land ownership was central to the imperial project, private property did not determine

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[1] Peter Fitzpatrick, The Mythology of Modern Law (1992); Sally Merry, *Law and Colonialism*, Law & Soc'y Rev. 889 (1991); John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, Law & Soc. Inq. 305 (2001); Ugo Mattei & Laura Nader, Plunder: When the Rule of Law Is Illegal (2008).

[2] Brenna Bhandar, Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership (2018).

[3] Henry Jones, *Property, Territory, and Colonialism: An International Legal History of Enclosure*, 39 J. Leg. 187 (2019).

[4] *Id.*

[5] Jeff Corntassel & Tomas Hopkins, *Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"*, 13 Hum. Rts. Q. 343 (1995).

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the Spanish approach towards land in the sixteenth century.[6] Spaniards (similar to Indigenous Peoples) lived within a variety of forms of tenure, including communal ones.[7] Moreover, Spanish claims were based symbolically on papal donations and—as was common for imperial powers—the Crown asserted eminent domain over the whole of the discovered lands. Under this authority, the Crown granted *ecomiendas*, a reward that assigned native labor but not land to conquistadors.[8]

From the 1530s, the Crown granted land ownership under conditions of living, working, and building on the land.[9] However, Spaniards' titles coexisted with those of the Indigenous Peoples, whose rights were recognized thanks to the influence of Francisco de Vitoria, who in *De Indis et De Iure Belli Relectiones* (1532), rejected "discovery" and considered Indigenous Peoples as human beings with land rights. These rights could be extinguished by "just war" if the Indigenous Peoples opposed Christianity or impeded colonial trade and land exploitation.[10] In colonial Peru—the center of Spanish colonization— the "just war" idea justified the appropriation of the Incan aristocracy's lands by considering the Inca as tyrannical and non-Christian. Nonetheless, the lands of many ayllus—territorial units formed by non-Inca people—were left to their own dominium if they accepted Spanish rule.[11] Therefore, colonial authorities considered the society as divided into two republics: the Spanish and the Indian Republic, although the latter was subjected to the civilizing purpose of Christian indoctrination and the economic goal of labor exploitation.

With the *Leyes Nuevas* (1542), Indigenous Peoples were legally protected as self-governed under the supervision of colonial authorities.[12] Nevertheless, land tensions continued. By the mid-1500s, the growing Spanish population that had no *encomiendas* purchased plots from Indigenous nobles or claimed some areas as ownerless. To acquire these lands, they needed the testimony of Indigenous elites, which generated disputes between Inca-descendant noblemen and local chiefs trying to defend their communities' land. The legal debate thus turned on Indigenous history and knowledge over lands.[13] This fact, along with the need to further centralize labor accumulation and the imposition of Christianity, led Viceroy Francisco de Toledo in the 1570s to reorganize and relocate dispersed communities into new territorial units called *reducciones*.[14]

British colonization at the end of the sixteenth century also relied on the doctrine of Crown tenure, so the Crown granted land ownership to settlers and, at the same time, claimed sovereign dominium over these lands.[15] With the modern system of nation-states inaugurated by the Treaty of Westphalia (1648), the nation-state became the only subject of international law, so Indigenous Peoples could only be treated as nation-states or as inhabitants to be assimilated into or excluded from nation-states. Another effect was the distinction between territorial sovereignty and title to land, the first as an issue of international law pertaining to states, and the second as a matter of property rights and individuals.[16]

[6] David Vassberg, Land and Society in Golden Age Castile (1984).

[7] Karen B. Graubart, *Shifting Landscapes. Heterogeneous Conceptions of Land Use and Tenure in the Lima Valley*, 26 Colonial Latin Am. Rev. 62, 84 (2017).

[8] *Id.*

[9] Matthew Mirrow, Latin American Law: A History of Private Law and Institutions in Spanish America (2004).

[10] Jeremy Gilbert, Indigenous Peoples' Land Rights Under International Law: From Victims to Actors (2006).

[11] Graubart, *supra* note 7.

[12] Mark Thurner, *"Republicanos" y "la Comunidad de Peruanos": Comunidades Políticas Inimaginadas en el Peru Postcolonial*, Historica 93 (1996).

[13] Alan Covey, Inca Apocalypse: The Spanish Conquest and the Transformation of the Andean World (2020).

[14] *Id.*

[15] Jones, *supra* note 3; Nicholas Blomley, *The Territory of Property*, 40 Progress in Hum. Geogr. 593 (2016).

[16] Gilbert, *supra* note 10.

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The doctrine of *terra nullius*—stating that native lands were legally considered to be unoccupied and appropriable—must be understood in this context. In his *Two Treatises of Government* (1689), John Locke proposed that property in land originated from cultivation and improvement, activities allegedly absent in native societies, so settlers considered themselves free to settle and acquire property by "improving the land."[17] Private property expansion, conceived as the result of European enlightment thinking and industrial development,[18] denied land rights to both North American natives and the English commoner for not producing maximum value for their property.[19]

However, tensions between settlers and the Crown led the latter to recognize some autonomy for Indigenous nations. An English Royal Commission had already rejected *terra nullius* in 1665, asserting that North American land belonged to Indigenous Peoples under the Crown imperium.[20] The Royal Declaration of 1763 reaffirmed this decision by establishing that the Crown was the only authority able to negotiate with Indigenous nations and secure property for settlers. The celebration of treaties with Indigenous nations, who had their own treaty-making traditions, was also a way to recognize Indigenous sovereignty and land, although under unequal bargaining power reflected in disproportionate benefits to settlers over natives.[21]

Both Spanish and British colonizations recognized some degree of Indigenous sovereignty, combining ideas of collective property with self-government. But when colonial territories gained independence, national elites faced challenges as to how to deal legally and spatially with Indigenous nations. The new nation-states denied nationhood and territoriality to Indigenous Peoples and rather focused on recognizing individual property rights. In Peru, the Constitution of 1826 dismantled the system of communities with the goal of transforming Indigenous Peoples into free citizens and small landlords.[22] However, in most of the national territory, the abolition of communal lands allowed systematic dispossession and the emergence of new feudalists, converting Indigenous Peoples into servants of large landowners.[23] In the United States, Supreme Court decisions starting in the 1820s reinstalled colonial doctrines and reaffirmed the imperium of the Federal government over Indigenous reservations.[24] This imperium allowed land fragmentation through the General Allotment Act (1887), creating private property for Indigenous Peoples, with the balance of reserved territories declared surplus and made available to non-Indigenous settlers.[25]

With independence bringing the total decoupling of property and territory, Indigenous Peoples were denied both their character as nations and their communal land. They became ethnic minorities that might become only individual owners of land. Decoupling of property and territory meant legal and material dispossession.

Multicultural Properties, Neoliberal Territories

During the first half of the twentieth century, nation-states deployed contradictory mechanisms of rights recognition and Indigenous assimilation. In North America, to repair past injustices, official commissions assessed

[17] James Tully, *Aboriginal Property and Western Theory: Recovering a Middle Ground*, 11 Soc. Philos. & Pol'y 153 (1994).

[18] Barbara Arneil, *Trade, Plantations, and Property: John Locke and the Economic Defense of Colonialism.* 55 J. Hist. Ideas 591, 609 (1994).

[19] Jones, *supra* note 3.

[20] Tully, *supra* note 17.

[21] John Borrows, *Indigenous Legal Traditions in Canada*, 39 Wash. Univ. L. Rev. 167, 223 (2005).

[22] Laureano del Castillo, *¿Tienen Futuro las Comunidades Campesinas?*, 14 Debate Agrario 39 (1992).

[23] Fernando Fuenzalida, Estructura de la Comunidad de Indígenas Tradicional: Una Hipótesis de Trabajo, Comunidades Indígenas del Área Andina. Hacienda, Comunidad y Campesinado en el Perú (1976).

[24] Seth Korman, *Indigenous Ancestral Lands and Customary International Law*, 39 U. Haw. L. Rev. 391, 462 (2010).

[25] Ward Churchill, Struggle for the Land: Native North American Resistance to Genocide, Ecocide, and Colonization 460 (2d ed. 2002).

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the legality of treaties created under unequal bargaining power[26] and new laws recognized collective property, such as the Indian Reorganization Act (1934). These actions, however, were accompanied by assimilation policies—such as relocation programs for Indigenous families to be moved close to white neighborhoods—aimed at integrating Indigenous Peoples into "modern society." In South America, political constitutions and laws reincorporated colonial notions of autonomous communities but this autonomy was limited by the already consolidated system of *haciendas*. The communities were economically dependent on—and politically subordinated to—the owners of huge extensions of lands. This oppressive system led to revolts contained by land reforms in the 1950s/60s. Those reforms also consolidated Indigenous assimilation by granting rights not to Indigenous Peoples with ethnic identities, but to peasants or rural proletarians as a homogenous group. Internationally, International Labor Organization (ILO) Convention 107 (1957) contributed to this trend, establishing that social inclusion of Indigenous Peoples required education, technical training, and economic assistance.

Latin American constitutions of the 1990s engaged with the multicultural turn reflected in ILO Convention 169 (1989) and its emphasis on collective rights, such as free, prior, and informed consent and collective property. These constitutions recognize land rights, customary law, language rights, and some autonomy (limited territorial control and Indigenous systems of justice). Internationally, the Inter-American Court of Human Rights reinterpreted and indigenized the right to private property to "accommodate" the protection of communal lands and established the state obligation of titling Indigenous land.

Multicultural policies, however, relied on formal cartographic practices of mapping and titling that remained embedded in modern/colonial ideas of territory.[27] For example, in Bolivia, Law 1715 (1996) created "Ancestral Communal Lands" as an archipelago of agrarian lands without Indigenous political authority.[28] In Peru, the Constitution of 1993 recognized the autonomy and collective property of peasant and native communities. However, that recognition does not include the forests, rivers, and natural resources of those properties, even if they have been ancestrally used and occupied by Indigenous Peoples. In general, territorial autonomy remained trapped between formal notions of "one national territory" belonging to the nation-state and neoliberal World Bank reforms based on private property.[29]

Common law countries followed a similar path. The doctrine "native title," which was established in the high courts of Canada and Australia,[30] relies on the legal assumption that the Crown holds an underlying title to all of a country's lands. Indigenous Peoples must prove they have a continuing traditional connection using the common law property regimen and its rules of burden of proof.[31] For Sanderson, this fiction in the application of the native title doctrine reduces Indigenous Peoples' claims for self-government on their own territories to the right to merely negotiate or litigate for their property.[32]

[26] Damien Short, *Reconciliation, Assimilation, and the Indigenous Peoples of Australia*, 24 Int'l Pol. Sci. Rev. 491 (2003).

[27] Joel Wainwright & Joe Bryan, *Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize*, 16 Cult. Geogr. 153, 178 (2009).

[28] Bret Gustafsson, *Manipulating Cartographies: Plurinationalism, Autonomy and Indigenous Resurgence in Bolivia*, 82 Anthropological Q. 985 (2009).

[29] Joe Bryan, *Rethinking Territory: Social Justice and Neoliberalism in Latin America's Territorial Turn*, 6 Geogr. Compass 215, 226 (2012).

[30] Jeremie Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 Int'l J. Minority & Group Rts. 207 (2007).

[31] Angela Pratt, *Treaties vs. Terra Nullius: "Reconciliation," Treaty-Making and Indigenous Sovereignty in Australia and Canada*, 3 Indigenous L.J. 43, 60 (2004).

[32] Douglas Sanderson, *The Residue of Imperium: Property and Sovereignty on Indigenous Lands*, 68 Univ. Toronto L.J. 319 (2018).

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Is it possible to reverse the decoupling of property and territory from Indigenous sovereignties? By bringing the concept of territory back to the right of property, Blomey[33] highlights that a state's territory is not only constituted internationally, but also domestically through property. Property produces territory, polices its borders, frames its identities. By assisting the state in producing territories, property, in turn, is materialized in the sociospatial dimension, as well as the legal.[34]

In this view, property is not simply a space of absolute exclusion, since it might have individualistic and collective ends such as public accommodations or native title.[35] The problem is that while land struggles have resulted in the recognition of collective rights, they have been entangled with modern/colonial territorial logics of measuring and controlling land for state control and capital accumulation.[36] By being embedded in these logics, collective properties cannot completely express the political dimension of Indigenous territories and sovereignty. The attempt to appropriate and modify property regimens towards social justice cannot be accommodated within current theory. It requires a rethinking of the system, its concepts, and underlying logic.[37]

Reinventing Territory and Sovereignty

In a milestone investigation, Stuart Elden defines territory as a bundle of political technologies (such as property) concerned with the measuring of land and the control of terrain.[38] This approach, crucial to understanding power dynamics in the everyday construction of territory, needs to be complemented by subaltern perspectives. Halversen shows how emerging decolonial approaches in Latin America understand territory from the positionality of struggle. Territory takes on multiple forms across scales, such as state-centered strategies to exercise control and bottom-up attempts to appropriate space in less hierarchal forms. The multiple protagonists of territorial struggles, thus, produce overlapping and entangled territories.[39]

Since the 1970s, these struggles have located territory at the center of struggles for social and state transformations. For example, the 1990 "March for Dignity and Territory" in Bolivia and the 1992 march for "Territory and a Plurinational State" in Ecuador built the path towards the Ecuadorian Constitution of 2008 and the Bolivian Constitution of 2009. Both constitutions have attempted to re-build the nation-state and transform it into a plurinational state where Indigenous Peoples are not mere ethnic minorities with proprietary entitlements but nations with territorial rights.

In Bolivia, Article 1 of the Constitution defines the Bolivian state as social and plurinational, which for Indigenous Peoples means the right to self-governance through the creation of "Indigenous Autonomies" (Article 289). Instead of the multiculturalism of the 1990s, territorial autonomies are not simply administrative delimitations for economic purposes but are political components of a state's multilevel governance.[40] In Ecuador, Article 1 of the Constitution establishes plurinationality as the foundation of the state and as a principle of political and territorial organization that allows the creation of Indigenous autonomous governments (Article 257).

[33] Blomley, *supra* note 15.

[34] *Id.*

[35] *Id.*

[36] Wainwright & Bryan, *supra* note 27, at 168; Bryan, *supra* note 29; Sam Halvorsen, *Decolonising Territory: Dialogues with Latin American Knowledges and Grassroots Strategies*, 43 Progress in Hum. Geog. 790, 814 (2019).

[37] A.J. van der Walt, Property in the Margins (2009).

[38] Stuart Elden, The Birth of Territory (2013).

[39] Halvorsen, *supra* note 36.

[40] Roger Merino, *Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America*. 31 Leiden J. Int. Law 4, 773 (2018).

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These plurinational proclamations, however, coexist with constitutional developmentalist provisions that justify the exploitation of fragile ecological areas and Indigenous territories. Several studies show how the permanence of legal institutions that assist in the massive exploitation of nature, such as the state ownership of natural resources and the possibility of exploiting any area "on behalf of the national interest," restricts the scope of decolonial projects.[41] Moreover, in Bolivia and Ecuador, the creation of autonomous areas must fit within with the formal system of municipalities rather than expressing ancestral territorial boundaries. By denying effective plurinational mechanisms, Indigenous territories are not completely decoupled from the property logic of improvement: the colonial nation-state has the authority to define how to better exploit the land, even overcoming the will of Indigenous nations who ancestrally possess the land.

Plurinationalism is struggling to further decouple territory from property under Indigenous sovereignties. This entails the reshaping of sovereign arrangements, where power is shared and decisions over land cannot overrule Indigenous priorities. This also implies the reform of the international system. Today, Indigenous Peoples participate in international climate negotiations, such as COP 21 in Paris, in international forums, such as the Inuit Circumpolar Council, and in the making of specific treaties and declarations on Indigenous rights. But the time has come for Indigenous nations to have a permanent seat in international global institutions not as invited participants, but as nations on their own terms with voice and decision-power over the design of global policies that impact their territories and their lives.

[41] *Id.*

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